

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 2011-CV-00050 REB-CBS

JORGINA HERRERA,

Plaintiff,

v.

ALLIANT SPECIALTY INSURANCE SERVICES, INC. and  
HUDSON INSURANCE COMPANY,

Defendants.

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**PLAINTIFF'S RESPONSE TO MOTION TO DISMISS**

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Plaintiff, Jorgina Herrera, submits the following response to the Motion to Dismiss filed by Defendants Alliant Specialty Insurance Services, Inc., (hereafter referred to as "Alliant") and Hudson Insurance Company (hereafter referred to as "Hudson").

**I. INTRODUCTION**

Plaintiff is a resident of LaPlata County, in the State of Colorado. She was an employee of the Southern Ute Tribe. She is not a tribal member, and not of Native American descent. She does not presently reside on the Southern Ute Reservation, nor did she reside on the reservation during the term of her employment with the Tribe.

Defendant Alliant is a corporation licensed in the State of California. Defendant Hudson Insurance Company is a corporation licensed in the State of Delaware. Both corporations are doing business in the State of Colorado. Both corporations operate under the name "Tribal First Insurance," to issue policies of workers' compensation

coverage for Native American tribes in the State of Colorado, and throughout the United States.

Plaintiff Herrera was an employee of the Southern Ute Tribe. Plaintiff brought this action originally in District Court for LaPlata County, Colorado, against Defendants Alliant and Hudson for the bad faith adjustment of her industrial injuries to both upper extremities, caused by her employment with the Southern Ute Tribe. Pursuant to the policy of insurance issued by Defendants herein, Defendants had obligations to pay Plaintiff workers' compensation benefits comparably with benefits provided by the Colorado Workers' Compensation Act.

Defendants assert that this claim must be brought in the Southern Ute Tribal Court, and that benefits need be paid only to the extent authorized by tribal ordinance. Defendants are incorrect. Moreover, Defendants' arguments are based in part on misapprehensions of fact and law.

Finally, Defendants have already filed a Motion to Dismiss to which Plaintiff has responded in previous pleadings. Defendants' incorporate by reference all previous arguments asserted by Defendants. To serve brevity, Plaintiff incorporates by reference the Plaintiff's previous responsive pleadings to Defendants' previous Motion to Dismiss, as well as the attached exhibits and affidavits.

## **LEGAL DISCUSSION**

### **SUBJECT MATTER JURISDICTION**

Defendants argue that this court lacks subject matter jurisdiction in this case. Plaintiff is not Native American. She does not reside on the Southern Ute reservation.

The corporate Defendants are not members of the Southern Ute Tribe. The conduct of the insurance claims adjuster occurred in the State of California. The injuries occurred in the State of Colorado. Plaintiff has no access to the Southern Ute Tribal court. In fact, the Constitution of the Southern Ute Tribe is by its explicit terms only applicable and limited to "enrolled members." Defendants rely on the terms of the carrier's workers' compensation policy as a mechanism for divesting this court of jurisdiction. First and foremost, Plaintiff does not bring this action pursuant to the policy. This action is brought pursuant to the bad faith adjustment of the claim. The Southern Ute Tribe has no ordinance or rule of procedure regarding the provision of workers' compensation benefits, no ordinance or provision in the tribal code for contractual jurisdiction, and the non-native status of the parties to this action precludes the parties from having access to the Southern Ute Tribal Courts. Further, tribal courts are not courts of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353 (2001).

Further, it is well established in Colorado that a claim for bad faith adjustment of a worker's compensation claim is grounded in tort. *Travelers Insurance Company v. Savio*, 706 P. 2d 1258 (Colo. 1985). The act causing the injuries is not an injury arising out of and in the course of employment, such as an industrial injury, but rather a malicious act by the adjuster in depriving an injured worker of benefits when the carrier knows the injured worker is entitled to those benefits. The cause of action is recognized in the State of Colorado as an action independent of the underlying workers' compensation claim. *Travelers Insurance Company v. Savio*, 706 P. 2d 1258 (Colo. 1985); *Scott Wetzel Services v. Johnson*, 821 P.2d 804 (Colo. 1991); *Vaughan v. McMinn*, 945 P.2d 404 (Colo. 1997).

The Defendants herein regularly conducted and are engaged in business in the State of Colorado. The policy of insurance was issued in the State of Colorado. Plaintiff Herrera is, and has been at all times pertinent hereto, a resident of the State of Colorado. Plaintiff was employed in the State of Colorado. The injuries caused by Defendants' conduct occurred in the State of Colorado. Defendants have failed to present credible argument, allegation, or authority why insurance companies should be cloaked with the sovereign immunity of the tribe for a bad faith denial of benefits.

Finally, a tribe's jurisdiction over a non-member is limited, and governed by the principles established in *Montana v. United States*, 450 U. S. 544 (1981), which the United States Supreme Court has referred to as the "pathmarking case" on the subject. *Strate v. A-1 Contractors*, 520 U. S. 438, 453 (1997). Although sovereignty allows the tribes to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules of inheritance for members, the exercise of tribal power beyond what is necessary to protect tribal self-government must have the support of congressional authority. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 ; *Williams v. Lee*, 358 U.S. 217, 219 -220; *United States v. Kagama*, 118 U.S. 375, 381 -382; see *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171. In *Montana*, the Supreme Court held that because the regulation of hunting and fishing by non-members of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of Indian sovereignty did not authorize the Crow Tribe to regulate the conduct of non-members off the reservation. Clearly, the Southern Ute Tribal court does not have exclusive subject matter jurisdiction in this case.

This is not a workers' compensation case. This is a bad faith claim asserted by Plaintiff Herrera against two insurance companies who have underwritten policies of workers' compensation insurance for Native American tribes across the United States. Plaintiff, as an employee of the Southern Ute Tribe, is an intended third party beneficiary of the policy. The Defendant insurance companies have uniformly failed to acknowledge or adopt any standard of benefits whatsoever for employees of the Southern Ute Tribe, and refuse to provide or pay workers' compensation benefits with alacrity. When a claim is asserted for workers' compensation benefits, the Defendants, as they have done in this case, routinely assert that they are cloaked with the tribe's sovereign immunity and are, therefore, not liable for the provision of any benefits beyond what they wish to pay. The policy is illusory. In this case, as well as others, the Defendants' denial of benefits has been wilfull and malicious, and has caused substantial injuries to injured workers, including Plaintiff Herrera. The argument that tribal sovereignty somehow immunizes private insurance carriers from liability in the context of bad faith litigation is ludicrous. If, hypothetically, the Defendants herein were cloaked with sovereign immunity, Plaintiff would agree that this court lacks subject matter jurisdiction. They are not. And the causes of action asserted by Plaintiff do not create liability for the carriers because of any liability of the tribe. Defendants' liability does not arise vicariously through the sovereign tribe; it arises by virtue of the Defendants voluntarily assumption of the obligation to pay workers' compensation benefits comparably to the State of Colorado, in exchange for valuable consideration paid by the tribe. Defendants' Motion to Dismiss for lack of subject matter jurisdiction should be denied.

### **EQUITABLE ESTOPPEL**

Defendants argue that the doctrine of equitable estoppels can only be used as a shield, not a sword. Plaintiff agrees with this argument. However, inasmuch as Defendants have served notice that they intend to rely upon the doctrine of sovereign immunity as a defense to this action, it becomes necessary for Plaintiff to plead equitable estoppels as a bar to any assertion of the affirmative defense of sovereign immunity.

### **FRAUD AND STANDING**

Defendant alleges that Plaintiff has not provided sufficient factual background to support a claim for relief for fraud. The purpose of the requirement that fraud be pleaded with specificity is to give adequate notice to the Defendants what the cause of action is based upon.

Defendants attached as an exhibit to the original Motion to Dismiss a copy of the alleged policy of insurance. Defendants, through this policy of insurance, promised the Southern Ute Tribe that it would provide benefits to the tribal employees who sustained injuries as a consequence of their employment with the tribe. Defendants never intended to provide those benefits, as evinced by the fact that Defendants have never adopted a schedule or standard for payment. The date of the misrepresentation is the date the policy was issued. The consequences or injuries have been specified in the complaint. Defendants have the requisite notice to defend against a claim of fraud. Moreover, Defendants have not presented any legal authority whatsoever to support their position that Plaintiff, as an *intended* third party beneficiary of the insurance policy,

cannot pursue a cause of action against a carrier who issues a policy of insurance, while intending to deprive injured workers of benefits promised under the policy.

## V. CONCLUSION

The Defendants herein operate under the name "Tribal First Insurance" to market the sales of workers' compensation insurance policies to Native American tribes across the United States. However, these carriers have routinely and unjustifiably denied benefits when due. When the aggrieved party seeks access to the courts, these carriers attempt to shield themselves with sovereign immunity as if they *were* the Native American Tribes. The only course of action or remedy to the aggrieved party is to pursue an action in state or federal court. The Tribe lacks subject matter and personal jurisdiction over the parties.

Wherefore, Plaintiff Herrera respectfully petitions the Court for an order denying Defendants' Motion to Dismiss, and for all other relief to which she may be justly entitled.

Respectfully submitted,

/s/ Tim Guill  
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**CERTIFICATE OF SERVICE**

The Undersigned hereby certifies that a true and correct copy of the above and foregoing was electronically filed with the Clerk of the United States District Court using CM/ECF system which will send notification to all counsel referenced below, this 27th day of April, 2011:

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