IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

LIFE INSURANCE COMPANY OF NORTH AMERICA, a foreign corporation, Plaintiff, vs. CORA SUE BERRYHILL, an individual; ANDERSON BERRYHILL III, an individual; And HUDSON INSURANCE GROUP, a foreign corporation, Defendants.	)	Case No. 6:15-CV-00064-RAW

DEFENDANT HUDSON INSURANCE GROUP'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Hudson Insurance Company, referred to as "Hudson Insurance Group" by the Plaintiff, moves to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

I. INTRODUCTION AND SUMMARY

On February 2, 2015, Hudson Insurance Company ("Hudson") filed an action[1] in Muscogee (Creek) Nation District Court against Cigna Health & Life Insurance Company ("Cigna") and others to recover life insurance benefits Hudson paid to the estate of Gino Berryhill.[2] Through its subsidiary, Life Insurance Company of North America ("LINA"), Cigna insured Berryhill's life through a group policy covering tribal employees. Berryhill was an employee of Muskogee (Creek) Nation Casinos, a tribal business, from 2002 until his death on

[1] *Hudson Insurance Company v. Cigna Health & Life Insurance Company, et al.* Case No. CV-2015-03 GB.

[2] For purposes of this pleading, Gino Berryhill's estate consists of Defendants Cora and Anderson Beryhill, Gino's mother and brother.

September 2, 2012. When he died, Hudson paid on the claim because Cigna and LINA denied coverage for failure to determine insurability. Cigna has answered the tribal court action and now brings this declaratory judgment action through LINA without first exhausting tribal court remedies.

The factual background of this case is as follows: In or around July 2010,[3] the Gaming Operations Authority Board ("GOAB") for Muscogee (Creek) Nation Casinos hired Cigna/LINA[4] to provide insurance benefits for all casino employees. In December 2010, Berryhill enrolled in voluntary life insurance coverage with Cigna/LINA in the amount of $70,000.00. Under the terms of the policy, as an employee of Muscogee (Creek) Nation Casinos Berryhill could elect to receive voluntary life insurance coverage so long as he satisfied Cigna/LINA's insurability requirements. For over two years, Cigna/LINA accepted monthly premiums deducted from Berryhill's wages. Notwithstanding, neither Cigna nor LINA ever verified Berryhill's insurability status.

Defendants Cora and Anderson Berryhill ("the Berryhills") are presumably the beneficiaries of the Gino's life insurance policy.[5] Upon Gino's death, Cigna/LINA declined to make payment to the Berryhills alleging that the insurability requirements were not met. Cigna/LINA's denial of the claim necessitated Hudson to step in and cover the $70,000.00 loss sustained by the Berryhills pursuant to the "Employee Benefits Liability" provision of the Hudson policy.

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[3] The exact date when the GOAB hired LINA is not known at this time. The group policy became effective July 1, 2010.

[4] The term "Cigna/LINA" is used because LINA is Cigna's subsidiary and while LINA may have issued the policy Cigna made certain determinations also.

[5] The Berryhills were joined as party-defendants to this action by LINA for unknown reasons. They are not now nor were they ever parties to the pending litigation in Creek Nation Court concerning this matter.

As a result, Hudson filed the aforementioned action in the Muscogee (Creek) Nation District Court against Cigna and others, not including LINA.[6] Cigna responded by denying any involvement whatsoever with the Berryhill policy, and proposed rather that LINA was the proper party.

Now, presumably in an effort to preempt the case pending in Creek Nation Court, LINA has filed a declaratory judgment action in this Court. However, LINA is required to bring these claims in Creek Nation Court for reasons explained below, and therefore we ask this Court to dismiss LINA's complaint.

II. ARGUMENTS AND AUTHORITIES

This Case Should Be Dismissed Because Plaintiff Failed to Exhaust Tribal Remedies

LINA argues that the District Court should assume federal question jurisdiction over this case based on the theory that the federal Employment Retirement Income Security Act ("ERISA") governs the insurance policy at issue. Complaint, ¶32. However, this argument is irrelevant—LINA is bound by federal law to first allow the case pending in tribal court to be decided before proceeding to federal District Court, regardless of the applicable law at issue.

When a non-Indian voluntarily decides to conduct business with a Native American tribe he subjects himself to being haled into that Indian Nation's courts. Specifically, the Muscogee (Creek) Nation Code defines the jurisdiction of its courts:

> Personal jurisdiction [...] exist[s] over all defendants, regardless of the Indian or non-Indian status of said defendants, in cases arising from any action or event within the Muscogee Nation Indian country and in any other cases in which the defendant has established contacts with Muscogee Nation Indian country sufficient to establish personal jurisdiction over said defendant. Personal

[6] LINA was not added at the time because they were not a known party. Hudson does not agree that LINA is the real party in interest. Notwithstanding, as of the filing date of this Motion to Dismiss Hudson is in the process of making LINA a party to the action pending in the Creek court.

> jurisdiction [...] also exist[s] over all persons consenting to such jurisdiction. Residing, *conducting business*, using roadways or engaging in any other activity within the Muscogee Nation Indian country is deemed consent to Muscogee Nation jurisdiction. *All contracts between the Nation or its citizens and any other party entered into within the Muscogee Nation Indian country is deemed as consent to Muscogee Nation jurisdiction by the parties.*

27 MCNC § 1-102(B) (emphasis added). General jurisdiction of Tribal Courts over civil matters involving non-Indians has been recognized by the Supreme Court as well:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. *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* [...] A tribe may also retain inherent power to exercise civil authority 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.

Montana v. United States, 450 U.S. 544, 565-66 (1981) (emphasis added). "Tribal authority over the activities of non-Indians on the reservation is an important part of tribal sovereignty [...] Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 18 (1987) (emphasis added). Here, LINA chose to provide insurance benefits to all Muscogee (Creek) Nation Casino employees through an agreement it made with the GOAB. This act alone gives the Creek Nation Court personal jurisdiction over LINA, which would compel the organization to submit to the tribal forum. However, this argument is immaterial—the question of whether the Tribe has personal jurisdiction is of no consequence in this case because LINA is *required* to file its claim in Tribal Court before it can seek recourse in the District Court.[7]

[7] To be clear, just because a non-Indian does business with a tribe does not *automatically* confer personal jurisdiction upon the tribe. However, it *does* require the non-Indian to file his claim in

In *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, the Supreme Court promulgated a rule requiring exhaustion of Tribal Court remedies before a plaintiff could file his claim in federal District Court. 471 U.S. 845 (1985). Two years later, the Court employed the rule again in *Iowa Mutual Insurance Company v. LaPlante*, thereby establishing a legal doctrine which has been used in countless subsequent court opinions. 480 U.S. 9 (1987). As a result of these decisions, the tribal exhaustion doctrine has served to essentially eliminate a litigant's route for avoiding tribal court.

In order to exhaust tribal remedies, any plaintiff who has affiliated with a tribe must first file the matter in that tribe's court system, regardless of whether he is a tribal member.

> A business that has contracted with a tribe that is sued in tribal court and wants to challenge the tribal court's jurisdiction must exhaust its remedies in the tribal court [...] before seeking jurisdictional review in federal court. A federal court will likely refuse to hear the case until the tribal court has had a chance to determine whether it has jurisdiction over the case. If the tribal court determines it has jurisdiction, the matter must be litigated in tribal court. If the nonnative company thereafter wishes to have the matter reviewed by a federal court, the only question that can be litigated in federal court is whether the tribal court had the authority to adjudicate the case. If the tribal court had jurisdiction, the nonnative business cannot relitigate the merits of the case in federal court. The business must accept the decision of the tribal court.

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that tribe's court system in the event a dispute arises. As the Supreme Court has explained, "[n]either [*National Farmers Union* nor *LaPlante*] establishes that tribes presumptively retain adjudicatory authority over claims against nonmembers arising from occurrences anywhere within a reservation. Rather, these cases prescribe a prudential, nonjurisdictional exhaustion rule requiring a federal court in which tribal-court jurisdiction is challenged to stay its hand, as a matter of comity, until after the tribal court has had an initial and full opportunity to determine its own jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 439 (1997). Under this rationale, the Court is essentially saying that the tribal exhaustion doctrine precedes any questions of personal jurisdiction, and therefore an investigation as to whether personal jurisdiction has been established is unnecessary.

Weathers, *Encouraging Business with Indians: A Brief Discussion of the Tribal Exhaustion Doctrine*, 18 Business Law Today (A.B.A. 2008).[8] Moreover, the Supreme Court has explained that the exhaustion rule applies irrespective of jurisdictional bases:

> Regardless of the basis for jurisdiction, federal policy supporting tribal self-government requires federal courts, as a matter of comity, to stay their hands in order to give tribal courts a full opportunity to first determine their own jurisdiction [...] In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs.

LaPlante at 16. Essentially what the Court is saying here is that the federal courts should "stay their hands" until the tribal courts have had an opportunity to look at the issue. There are rare exceptions when a litigant has the ability to bypass tribal court and proceed directly to federal court, however none of them apply to this case.[9] Here, LINA argues that this Court should assume federal question jurisdiction based on the theory that ERISA governs the insurance policy at issue. Complaint, ¶32. Upon this theory, LINA claims that the doctrine of tribal exhaustion does not apply, and therefore the District Court can automatically exercise jurisdiction over this case. What LINA fails to recognize is that whether ERISA applies or not is irrelevant, because tribal exhaustion is mandatory. Unless an exception applies, tribal exhaustion is *always* required before a District Court can hear a case involving a Native American tribe. The question of which law applies has no place in this determination.

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[8] http://www.americanbar.org/publications/blt/2008/11/02_weathers.html

[9] Tribal exhaustion is not required "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union* at 856 n.21 (citations omitted). None of these exceptions apply to the case at hand.

The idea behind permitting individual tribes to act as sovereign entities has crept its way into this procedural system. The Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *LePlante* at 13.

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination [...] Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.

National Farmers Union at 856. The Tenth Circuit has followed suit in recognizing the importance of tribal sovereignty in the wake of *National Farmers Union* and *LaPlante*, stating:

> As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal civil jurisdiction arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, however, Congress has expressed an additional interest in promoting the development of tribal sovereignty. The Supreme Court has recognized this congressional intent and assiduously advocated federal abstention in favor of tribal courts.

Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991). The judicial system's desire to promote cooperation between Federal, State, and Tribal Courts by giving Indian Nation courts the first opportunity to examine cases involved with tribal activity has been unwavering since *National Farmers Union* was decided 30 years ago.

Unlike what LINA suggests, it is irrelevant whether ERISA applies to this case—regardless of the applicable law, LINA must first exhaust its tribal remedies in Creek Nation Court.[10] Until the Creek Nation Court has resolved the issue in its own sovereign forum, LINA

[10] It should be noted that Hudson has not conceded that ERISA governs the issues in either this case or the related litigation currently pending in Creek Nation Court. Nevertheless, the Creek Nation Court may exercise jurisdiction over these cases even if it determines that ERISA applies. "Exclusive original jurisdiction over all matters described in Title 27, § 1-102 and not otherwise limited by tribal law is vested in the District Court of the Muscogee Nation, Okmulgee District." 27 Muscogee (Creek) Nation Code § 1-101(B). Moreover, Oklahoma state courts have exercised

is bound to litigate there. "Until petitioners have exhausted the available remedies in the Tribal Court, it would be premature for the District Court to consider any relief." *National Farmers Union* at 845-46. Therefore, we respectfully ask this Court to dismiss LINA's action, and compel the Plaintiff to adjudicate its claims in Creek Nation Court prior to bringing them to this forum.

III. CONCLUSION

LINA should not be permitted to escape the unknown, unfamiliar tribal forum just because it perceives the comfortable realm of federal court as a more favorable arena to adjudicate its claims. Cigna and its subsidiary LINA chose to do business with Muscogee (Creek) Nation Casinos, and therefore it is obligated to first file its claims in Creek Nation Court under the tribal exhaustion doctrine. Therefore, this Court should dismiss Plaintiff's claims in their entirety under Rules 12(b)(1) and 12(b)(6) for failure to exhaust its tribal remedies.

Respectfully submitted,

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jurisdiction over cases involving ERISA, thereby indicating that ERISA-based litigation is not within the exclusive jurisdiction of federal courts. See *Reeds v. Walker*, 2006 OK 43.

CERTIFICATE OF SERVICE

I certify that on March 5th, 2015, the above was sent via U.S. Mail to the below counsel of record:

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