CABAZON RESERVATION COURT OF APPEALS

CABAZON BAND OF MISSION INDIANS Appellee,	)	
v.	)	NO: CBMI 2020-0103
LEXINGTON INSURANCE COMPANY Appellant,	)	

Fletcher, **J**., for the court.

ORDER AND OPINION

The trial court order of March 11, 2021 is **AFFIRMED**. This matter is remanded to the trial court for proceedings consistent with this opinion.

We hold that the Cabazon Band of Mission Indians Tribal Court possesses jurisdiction under the Cabazon Band Code over the Appellant.

Governing Law

Section 9-102(d) of the Code of the Cabazon Band of Mission Indians provides:

> In deciding all cases before it, the Cabazon Reservation Court and the Cabazon Reservation Court of Appeals shall apply (i)

> the Articles of Association, this Code and the ordinances, regulations, resolutions and other laws of the Cabazon Band, and (ii) applicable federal law. In the absence of persuasive tribal or federal law, the Cabazon Reservation Court and the Cabazon Reservation Court of Appeals may look to the laws of the State of California, or any other state or jurisdiction, for guidance.

We presume for purposes of this appeal that "applicable federal law" includes federal laws that explicitly bind this court. In the absence of controlling federal law and where relevant, we treat federal law as persuasive authority. In general, the parties have presented federal authority as the primary source of law in this case.

Additionally, we note that where we may be assessing the "extraterritorial jurisdiction" of the court, the tribal code provides that federal law is, indeed, governing. Cabazon Code § 9-102(a) ("The Reservation Court shall also exercise such extraterritorial jurisdiction *as may be authorized under federal law*.") (emphasis added).

Standard of Review

The standard of review of an appeal from the denial of a motion to dismiss is *de novo*. The Cabazon Code is silent as to the standard of review. We adopt and apply federal law that employs a *de novo* standard of review. *E.g.*, *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) ("A decision regarding tribal court jurisdiction is reviewed *de novo*, and factual findings are reviewed for clear error.").

We must also view the facts alleged in the light most favorable to the plaintiff. *E.g.*, *Burlington Northern & Santa Fe R. Co. v. Vaughn*, 509 F.3d 1085, 1088 (9th Cir. 2007) (viewing the facts "in the light most

favorable to [the plaintiff], as required on a motion to dismiss. . .."). Again, since the tribal code is silent, we follow federal law on this point.

Facts

We turn to the alleged facts most relevant to the issue before us, which is the jurisdiction of the court over this matter.

Plaintiff, the Cabazon Band of Mission Indians (Cabazon), brought suit in the trial court alleging that Defendant, Lexington Insurance Company (Lexington), unreasonably and in bad faith denied coverage obligations to Cabazon connected to business interruption losses incurred as a result of the COVID-19 pandemic. Complaint ¶¶ 1-2, at 2.

Lexington is organized under the laws of Delaware and is physically located in Massachusetts. *Id.* ¶ 5, at 3. Lexington is owned by American International Group, Inc. *Id.* Lexington insures Cabazon's property:

> Subject to the terms, conditions and exclusions hereinafter contained, this Policy insures all property of every description both real and personal (including improvements, betterments and remodeling), of the Named Insured, or property of others in the care, custody or control of the Named Insured, for which the Named Insured is liable, or under the obligation to insure.

Id. ¶ 12, at 5 (quoting the insurance policy). Lexington also insures Cabazon against business interruption losses:

> Against loss resulting directly from interruption of business, services or rental value caused by direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy, occurring during the term of this Policy.

> In the event of such loss or damage the Company shall be liable for the actual loss sustained by the Named Insured for gross earnings as defined herein and rental value as defined herein resulting from such interruption of business, services, or rental value; less all charges and expenses which do not necessarily continue during the period or restoration. Due consideration shall be given to the continuation of normal charges and expenses including ordinary payroll expenses to the extent necessary to resume operations of the Named Insured with the same quality of service which existed immediately preceding the loss.

Id. ¶ 13, at 5 (quoting the insurance policy). The policy includes additional relevant provisions we need not discuss here. *Id.* ¶¶ 14-18, at 5-7. An agent of Lexington, Tribal First Alliant Underwriting Solutions, issued the insurance policy to Cabazon. *Id.* ¶ 9, at 4.

Fantasy Springs Resort (Resort) is Cabazon's insured property and business insured by Lexington. *Id.* ¶ 4, at 2-3. Cabazon's property is located, and its business is conducted, on lands owned by the United States and held in trust for Cabazon's benefit. *Id.* Lexington accepted premiums sent from the reservation to Lexington. Respondent's Brief at 4. Lexington agreed to insure property and business activity conducted exclusively on the reservation. *Id.* During the investigation following the losses alleged by Cabazon, Lexington's agent "engaged in conference calls with Cabazon representatives while such representatives were on Reservation land." *Id.* Lexington also corresponded with Cabazon through the mail, which was sent by Lexington to Cabazon officials on reservation lands. *Id.*

Because of the COVID-19 pandemic, Cabazon closed operations at the Resort on March 17, 2020. Complaint, ¶ 30, at 8-9. In the months leading up to the closing of the Resort, it hosted more than 4000 guests per day; Cabazon expected more than 5000 guests per day in late March due to a professional tennis tournament occurring nearby. *Id.* ¶ 31, at 9.

Cabazon alleges significant losses. *Id.* ¶ 40, at 11. After Cabazon sought coverage from Lexington, a Lexington agent investigated by phone. *Id.* ¶ 44, at 12. Lexington denied coverage. *Id.* ¶ 42, at 12.

On November 24, 2020, Cabazon brought suit against Lexington in the tribal court pleading several causes of action. Cabazon sought a declaratory order that Lexington has a duty to provide coverage. *Id.* ¶ 53, at 14. Cabazon also sought consequential damages from breach of contract. *Id.* ¶ 62, at 16. Cabazon next sought consequential damages, attorney fees, and punitive damages for bad faith. *Id.* ¶¶ 70-72, at 18-19.

After Lexington moved to dismiss the action, the Cabazon Reservation Court denied the motion. Ruling on Motion to Dismiss, *Cabazon Band of Mission Indians v. Lexington Insurance Company*, No. CBMI 2020-0103 (March 11, 2021).

Lexington appealed. We accepted that appeal on May 18, 2021.

ANALYSIS

We hold that, under Cabazon law, the court possesses personal jurisdiction over Lexington, an entity that purposefully availed itself to the benefits and protections of Cabazon law. We further hold that, under relevant federal law, Cabazon possess subject matter jurisdiction over this case involving Lexington, a nonmember. We take these matters in turn.

I. Personal Jurisdiction over Lexington

We hold the court possesses personal jurisdiction over Lexington. The personal jurisdiction inquiry is a two-step determination. The first step is to determine whether the tribal code provides for jurisdiction over

Lexington in this court. The second step is to determine whether the exercise of this court's jurisdiction is consistent with due process.

A. Cabazon Long-Arm Statute

We first hold that the tribal code allows for jurisdiction over Lexington. Section 9-102(b)(2) of Cabazon code provides that the court has jurisdiction over:

> All civil causes of action arising within the exterior boundaries of the Cabazon Indian Reservation in which . . . c. [t]he defendant has entered onto or transacted business within the Cabazon Indian Reservation and the cause of action arises out of activities or events which have occurred within the Reservation boundaries. . . ."

Cabazon argues that "Lexington accepted insurance premiums from Cabazon in exchange for its agreement to insure tribal property against perils which occur within the Reservation boundaries." Respondent's Brief at 3. Lexington argues that "Cabazon tribal law . . . establishes a geographical limit on subject matter jurisdiction. . . ." Appellant's Brief at 16. Lexington adds that no Lexington agent has ever set foot on Cabazon lands; that in fact, Lexington is merely the successor in interest to another entity, "Tribal First Alliant Underwriting Solutions," that conducted business with Cabazon. *Id*. at 3-4. Lexington's argument on the scope of the Cabazon long-arm statute rests on whether the statute limits this court's jurisdiction to the physical boundaries of the reservation.

Lexington's argument has a modicum of superficial force, but is unpersuasive after a closer look. Cabazon's code is the kind of long-arm statute sometimes referred to as a "laundry list." *Green v. Wilson*, 565 N.W.2d 813, 815 (Mich. 1997). "Laundry list" long-arm statutes "enumerate specific acts that give rise to personal jurisdiction." *Id*. Conversely, a "self-adjusting" long-arm statute is one that "stretches automatically to extend jurisdiction wherever the Due Process Clause

permits." *Id*. Section 9-102(b)(2) lists the kinds of activities by Lexington over which this court would have jurisdiction. The provision certainly includes a geographic limitation, but physical, geographic entry is not the only activity that is contemplated under the Cabazon long-arm statute.

Lexington did, in fact, transact business on the Cabazon reservation. As the Respondent points out, Lexington agreed to insure reservation property and business activity. Respondent's Brief at 4. Lexington accepted premiums. *Id*. Lexington's agent "engaged in conference calls with Cabazon representatives." *Id*. Lexington also corresponded with Cabazon through the mail. *Id*. In short, by entering into a contract to insure reservation property and business operations, Lexington transacted business on Cabazon territory. One would be hard-pressed to find any state or federal court that would reach a contrary conclusion. *E.g.*, *Nova Biomedical Corp. v. Moller*, 629 F.2d 190, 194 (1st Cir. 1980) (interpreting Mass. Gen. Laws ch. 223A, § 3(a)) and finding foreign defendant transacted business by sending demand letter to in-state party); *Commodigy OG Vegas Holdings LLC v. AMD Labs*, 417 F. Supp. 3d 912, 919-20 (N.D. Ohio 2019) (interpreting Ohio Rev. Code. § 2307.382(A)(1) and finding that foreign company that communicated via email, received money, and phoned in-state business did transact business in the state); *Fischbarg v. Doucet*, 880 N.E.2d 22, 29 (N.Y. 2007) (interpreting N.Y. CPLP § 302 and finding personal jurisdiction where foreign defendant retaining a lawyer in the state). Lexington's repeated and forceful claims that no Lexington agent ever set foot on Cabazon land does not refute the reality that Lexington successfully transacted business there.

B. Federal Due Process Rights

We next hold that this court's exercise of jurisdiction over Lexington does not run afoul of our obligations to guarantee due process to litigants. The Indian Civil Rights Act (ICRA) compels this court to guarantee "due process" to "any person within its jurisdiction." 25 U.S.C. § 1302(a)(8). In accordance with Cabazon's governing law statute, we apply federal law.

We hold that ICRA's due process clause is coterminous with the Fourteenth Amendment's Due Process Clause for purposes of analyzing the personal jurisdiction of this court over Lexington.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Referencing *International Shoe* as the "canonical" case, the Supreme Court stated this year that "[a] tribunal's authority depends on the defendant's having such 'contacts' with the forum . . . that 'the maintenance of the suit' is 'reasonable, in the context of our federal system of government,' and 'does not offend traditional notions of fair play and substantial justice.'" *Ford Motor Company v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1024 (2021) (quoting *International Shoe*, 326 U.S. at 316-17). "By requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' [citation,] the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit[.]'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), other citation omitted).

In this case, where Lexington is not "essentially at home," *Ford Motor*, 141 S. Ct. at 1024, we must determine whether this court possess "specific jurisdiction" over Lexington. *Id.* "The contacts needed for [special] jurisdiction often go by the name 'purposeful availment.'" *Id.* (quoting *Burger King*, 471 U.S. at 475). The out-of-forum defendant must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The defendant's contacts "must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Ford Motor*, 141 S.

Ct. at 1025 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). The contacts "must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there." *Ford Motor*, 141 S. Ct. at 1025 (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)).

The Supreme Court has identified "two sets of values—treating defendants fairly and protecting 'interstate federalism.'" *Burger King*, 141 S. Ct. at 1025 (quoting *Worldwide Volkwagen*, 444 U.S. at 293). *International Shoe* reflects the value of "reciprocity between a defendant and a State: When (but only when) a company 'exercises the privilege of conducting activities within a state—thus 'enjoy[ing] the benefits and protection of [its] laws'—the State may hold the company to account for related misconduct." *Ford Motor*, 141 S. Ct. at 1025 (quoting *International Shoe*, 326 U.S. at 319)). *Burger King* reflects the value of providing "defendants with 'fair warning'—knowledge that 'a particular activity may subject [it] to the jurisdiction of a foreign sovereign.'" *Ford Motor*, 141 S. Ct. at 1025 (quoting *Burger King*, 471 U.S. at 472). Finally, *World-Wide Volkswagen* points out that a defendant "can thus 'structure [its] primary conduct' to lessen or avoid exposure to a given State's courts." *Ford Motor*, 141 S. Ct. at 1025 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).[1]

We begin by noting what the Eleventh Circuit recognized not so long ago: "Since the Supreme Court's decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 . . . (1957), it has been the law that a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts." *Mutual Service Ins. Co. v. Frit Industries, Inc.*, 358 F.3d 1312, 1320-21 (11th Cir. 2004). In short, a fairly strong presumption exists in federal law that out-of-forum insurance companies who insure property or business activity

[1] While federalism principles may or may not be perfectly on point here, we find that no harm is done to Lexington by replacing the interests of states with the interests of tribes in this analysis.

in another forum can be said to have purposefully availed themselves of the forum.

Lexington's argument repeats its earlier claims about the long-arm statute, that Lexington "has no presence, or contacts with, Cabazon tribal land. It has never entered Cabazon tribal land, conducted any business on Cabazon tribal land, or invoked the protections of tribal law." Appellant's Brief at 18. Further, Lexington argues (again) that it merely "contracted with Alliant (a California corporation), which contracted with [Cabazon]." *Id*. Lexington further claims the insurance policy "itself does not name any insurers . . . [or] name the insured. . . ." *Id*. at 4. Cabazon responds by explaining that "Lexington is the party to the insurance contract, the primary recipient of the premium, and the entity that will issue a check paying out the claim. . . ." Respondent's Brief at 20. Cabazon notes that the Policy Declarations, incorporated into the policy by reference, include the names and insured and insurer. *Id*. at 20 n. 10.

Lexington's arguments are unpersuasive. First, Lexington knew that it was doing business with an Indian tribe regarding tribal property and business activities. The in-forum activity is insuring the Cabazon property and business activities, which occurred entirely on the reservation. But for the reservation activity, there would be nothing to insure. Lexington's promise to insure reservation property and business activities in exchange for the payment of premiums is purposeful availment of that reservation activity. Lexington makes no claim (nor could it) that it had no fair warning that property and business activity it insures was located outside of tribal jurisdiction. Lexington acquired the obligations of the policy from a company called *Tribal* First. The policy documents noted that the insured was Cabazon. Cabazon is a federally-recognized tribal nation and has been listed as such as long as the United States has formally published an annual list. *See* Department of the Interior, Indian Tribal Entities that have a Government to Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 4, 1979). Lexington accepted the premium payments from Cabazon,

paid with funds that apparently came from the reservation activity. Lexington's agents knew it was talking to Cabazon representatives about reservation property and business activity when the tribe called the insurance company about its COVID-related losses. Finally, Lexington has in numerous instances entered into business relationships with Indian tribes. *E.g.*, *Port Gamble S'Klallam Tribe v. Lexington Insurance Co.*, No. POR-AP-2021-0001 (Port Gamble S'Klallam Court of Appeals Sept. 29, 2021), *reprinted in* Respondent's Notice of Significant New Authority at 4-19; *Suquamish Indian Tribe v. Lexington Insurance Co.*, No. 200601-C (Suquamish Tribal Court of Appeals Sept. 29, 2021), *reprinted in* Respondent's Notice of Significant New Authority at 21-40; *Red Earth Casino v. Lexington Insurance Co.*, No. CVTM-2021-0001-GC (Intertribal Court of Southern California for the Torres Martinez Cahuilla Indians Sept. 23, 2021), Respondent's Notice of Significant New Authority at 43-57. In short, Lexington had "fair warning" it could be subject to tribal jurisdiction. *Burger King*, 471 U.S. at 472. For Lexington to prevail on this point, it would have to demonstrate its surprise that the Cabazon Band's casino was not on reservation lands or that it had no notice that the insured was an Indian tribe.

Lexington further availed itself of the tribe's regulatory structure, which in this case does not provide for the regulation of insurance companies. Lexington is aware that Cabazon does not regulate the insurance industry within its lands. Appellant's Brief at 11. In a colloquy with Justice Washburn at oral argument, Lexington acknowledged that it was not licensed in the State of California. Later, in a colloquy with Justice Fletcher, Cabazon acknowledged that it could but does not regulate insurance companies within its jurisdiction. The import here is that Lexington likely received an advantage by conducting business on the Cabazon reservation, which does not license or regulate insurance companies. California, it would seem, does. *See generally* Cal. Insurance Code § 12919 et seq. (describing the regulatory powers of the Insurance Commissioner). Even if California's regulation of insurance providers is minimal, Lexington is hardly prejudiced by accessing Cabazon's

jurisdiction because Cabazon imposes no regulatory burden. In the language of the Supreme Court, Lexington "enjoyed the benefits" of the tribal forum. *International Shoe*, 326 U.S. at 319.

Lexington next claims that since the forum selection clause, which provides for disputes to be adjudicated by a "court of competent jurisdiction," Lexington did not consent to tribal jurisdiction, nor presumably could it have predicted it would be haled into tribal court. Appellant's Brief at 18. Cabazon responds by arguing that a tribal court is a court of competent jurisdiction. Respondent's Brief at 20. In the United States, it is not unusual for a contract dispute with a sovereign to be litigated in the sovereign's own courts. Cabazon points out that if Lexington wanted to prevent the possibility of tribal court jurisdiction, it could have negotiated for that right to be included in the policy. *Id.* at 20-21. Cabazon further points out that Lexington had previously litigated this very question with a different Indian tribe more than a decade ago in *Confederated Tribes of the Chehalis Reservation d/b/a Lucky Eagle Casino v. Lexington Insurance Co.*, No. CHE-CIV-11/08-262 (April 21, 2010), reproduced in Appendix to Certain Authorities in Support of Respondent's Brief at 53-59. In sum, this issue was predictable when the insurance contract was written and when it was adopted by Lexington.

We agree with Cabazon. Lexington knew from its purchase of the insurance policy from Tribal First and from the Policy Declarations that it was insuring an Indian tribe's reservation property. Lexington also knew from its prior litigation experience involving insuring tribal gaming entities that a tribal court could very well find that the forum selection clause would be interpreted to provide jurisdiction in a tribal court:

> In our facts, the dispute is directly related to the Lexington policy providing insurance coverage to the Lucky Eagle Casino. The language of Lexington's policy states that "[i]n the event of a failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of

> the insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States. . . ."

Chehalis, at 6-7, Appendix at 58-59. The language in the Chehalis policy, adjudicated more than a decade ago, tracks the language in Cabazon's policy. Given its experience in the Chehalis tribal court, Lexington's claim at oral argument here that it understood the "court of competent jurisdiction" language to mean any American court *except* tribal courts rings hollow.

Finally, Lexington claims the relevant test for personal jurisdiction is whether the defendant "targeted" the forum. Appellant's Brief at 18 (quoting *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011)). Lexington further cites *World-Wide Volkswagen* and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

All three cases are distinguishable. In *Nicastro*, the plaintiff sued the foreign manufacturer of a metal-shearing machine used in New Jersey. 564 U.S. at 878. The accident occurred in New Jersey but the machine was manufactured in England. *Id*. The company marketed its product in the United States, but not specifically in New Jersey. *Id.* at 866. A third-party distributor, not the manufacturer, sold the machine to operators in New Jersey. *Id*. *Bristol-Myers* is similar. There, the plaintiffs sued a New York pharmaceutical company incorporated in Delaware that made a drug called Plavix. *Id.* at 1777-78. The plaintiffs sued in California but "were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." *Id*. at 1781. The same is true for Lexington's last case, *World-Wide Volkswagen*. In that case, plaintiffs sued a foreign car company in Oklahoma. 444 U.S. at 288. The plaintiffs bought the car in New York and passed briefly through Oklahoma, where the accident occurred. *Id*.

Here, Lexington specifically and intentionally undertook to provide insurance to Cabazon, an Indian tribe, for property and business

activities conducted on the reservation. Lexington knew this to be the case when it made that undertaking. For *Nicastro*, *Bristol-Myers*, or *World-Wide Volkswagen* to be relevant, Lexington's insurance product would have had to be a tangible item that Cabazon would have purchased and physically brought to the reservation without Lexington's knowledge or expectation.

McGee v. International Life Ins. Co., 355 U.S. 220 (1957), is a far more relevant case. There, a plaintiff seeking to enforce a life insurance policy brought suit in California against the insurance company, which was based in Texas. *Id.* at 221. The insurance company had never solicited or done any business in California. *Id*. at 222. Even so, the Supreme Court found personal jurisdiction in California courts. *Id*. at 223-24. The Court found, "The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id*. at 223. In all relevant ways, Lexington's conduct is the same.

It is true *McGee* is an older case, but the courts have not undone the general principle that insurance companies are subject to suit in the forum where the property or activities they insure is located. If an insurance policy describes the territory where the insurance coverage extends, the large majority of courts hold that the insurance company may be sued there. *See generally* Douglas R. Richmond, *Mapping Territorial Limitations on Insurance Coverage*, 55 San Diego L. Rev. 853, 877 & n. 189 (2018) ("Where an insurance policy includes a state within its coverage territory, courts frequently hold that the insurer purposely availed itself of the benefits and privileges of conducting business in the state and thus established the minimum contacts necessary for specific personal jurisdiction"; and collecting cases).

Cabazon also cites a relevant case, *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392 (9th Cir. 1986). There, the court assessed whether a California court could exercise personal jurisdiction and assert California law against an insurance company

located in the Cayman Islands. *Id.* at 1395. The defendant was an insurance fund located in the Caymans, organized under Cayman Islands law, all designed to avoid California insurance law. *Id.* The Ninth Circuit concluded that California law should apply to claims against the Cayman Islands defendant, noting that:

> [F]unding for reimbursement made by the Fund is generated exclusively from premiums paid by the members of the Grass Valley Medical Quality Association who are insured by the Fund and the earnings from such premiums. The Fund, then, provides a self-contained plan, whereby premiums from California physicians are disbursed to California physicians who suffer loss due to malpractice liability. Moreover, the district court found that the reason for the Fund's existence was "for the benefit of California residents; to wit, California doctors."

Id. at 1398. The court added that the insured doctors resided and worked exclusively in California. *Id.* The court concluded: "Thus, the effect in California was not only foreseeable, it was contemplated and bargained for. A defendant who enters into an obligation which she knows will have effect in the forum state purposely avails herself of the privilege of acting in the forum state." *Id.*

We conclude that the court possesses personal jurisdiction over Lexington. We turn next to principles of federal law to which both parties dedicate the bulk of their briefing.

II. Subject Matter Jurisdiction

We hold that the tribe's inherent powers vest this court with subject matter jurisdiction over Lexington. Whether the tribal court possesses subject matter jurisdiction over Lexington, a nonmember entity, is dependent on whether the tribe can show either that Lexington has

consented to tribal jurisdiction by entering into an insurance contract with the Tribe or whether Lexington's conduct impacts the political integrity, economic security, or health and welfare of the tribe or its members. This analysis originated in *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Alternatively, Cabazon's power over Lexington may also derive from the tribe's inherent power to exclude nonmembers. This analysis originated in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-48 (1982), and *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811-17 (9th Cr. 2011).

A. Montana's Consensual Relations Exception

Lexington's promise to insure Cabazon's reservation-based property and business activities is a consensual relationship sufficient to indicate consent to tribal jurisdiction under *Montana*.

Under default interpretative principles of federal Indian law, the scope and extent of the powers of Indian tribes are governed by treaties, Acts of Congress, and the federal duty of protection, usually known as the trust relationship. The Constitution vests Congress with the power to manage Indian affairs. *See* Restatement of the Law of American Indians, Proposed Final Draft § 7 (March 30, 2021) (Restatement).[2] The powers of Indian tribes normally can be limited or divested only by tribal agreement or by an Act of Congress. *See id.* § 15. The Supreme Court long ago held that where a tribe has not agreed to a limitation on its powers, an Act of Congress purporting to limit tribal powers "requires a clear expression of the intention of Congress." *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883). *See also Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016) ("[U]nless and until Congress withdraws a tribal power . . . the Indian community retains that authority in its earliest form[.]"); Restatement, § 15, comment *a* ("Although the United States has plenary authority over tribes, . . . courts will not lightly assume that Congress in

[2] The American Law Institute approved the final draft of the restatement on May 17, 2021.

fact intends to restrict Indian self-government. The legislative intent to abrogate tribal authority must be clear.").

In assessing tribal powers over nonmembers like Lexington, however, the Supreme Court departed from those default interpretative rules. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes do not possess the power to prosecute non-Indian lawbreakers. *Id.* at 195. There, the Court concluded that there was a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians. . . ." *Id.* at 206. *See also id.* at 203 (noting that Congress held an "unspoken assumption" that tribes could not prosecute non-Indians). The Court found no Act of Congress or treaty provision that divested tribes of the power to prosecute.

Two years later, in *Montana*, the Court extended that analysis to the civil jurisdiction realm. There, the Court acknowledged "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565 (citing *Oliphant*). The Court described two exceptions to this general rule. The first exception (and the only exception that we need to consider today) is commonly called the consensual relations 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." *Montana*, 450 U.S. at 565 (citations omitted).

The Supreme Court itself has analyzed cases in which nonmembers have consented to tribal jurisdiction. For example, tribes may tax nonmembers who purchase products from tribal or Indian retailers. *E.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–154 (1980) ("At the outset, the State argues that the Colville, Makah, and Lummi Tribes have no power to impose their cigarette taxes on nontribal purchasers. We disagree."). Tribes may regulate nonmember hunting and fishing on tribal lands, certainly where

those nonmembers purchase tribal hunting and fishing licenses, but even when they do not. *E.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330 (1983) ("[O]n the reservation the Tribe exercises exclusive jurisdiction over hunting and fishing by members of the Tribe and *may also regulate the hunting and fishing by nonmembers*.") (emphasis added).

Given the rise of tribal governmental capacity and tribal economic activity in the last half century, nonmember consent to tribal powers to regulate and tax is the norm, not the exception. In Cabazon's experience, at least 4000 nonmembers enter tribal properties daily, presumably paying tribal taxes and other fees, subjecting themselves to tribal civil laws, and engaging in commercial activities. Complaint, ¶ 31, at 9. Nonmembers throughout Indian country consent in numerous ways to tribal jurisdiction. *E.g.*, *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 904 (9th Cir.) (nonmember consented to tribal jurisdiction through an employment relationship with tribal government), *cert. denied*, 140 S. Ct. 513 (2019); *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 173-74 (5th Cir. 2014) (nonmember consented to tribal jurisdiction when it executed agreement with tribe agreeing to comply with tribal laws), *aff'd by equally divided Court*, 136 S. Ct. 2159 (2016); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1136 (9th Cir. 2006) (en banc) (nonmember consented to tribal jurisdiction over counterclaims against nonmember by initiating suit in tribal court); *Fox Drywall & Plastering, Inc. v. Sioux Falls Const. Co.*, 2012 WL 1457183, at *11 (D.S.D. Apr. 26, 2021) ("[P]laintiffs have consented to the Tribal Court's jurisdiction because plaintiffs knew their work was for the Tribe, the job site was the Tribally-owned motel, the Tribe's law governed because they were working on Tribal land, and any legal action would be decided by the same tribunal."); *Guggolz v. Farmer's Union Oil Co.*, 2007 WL 7274883, at *2 (Standing Rock Sioux Tribal Court Feb. 8, 2007) (nonmember consented to tribal jurisdiction over tort claim by operating grocery store and maintaining parking lot where tort occurred). In light of all of this

authority, we are inclined to find that Lexington consented to tribal jurisdiction when it endeavored to insure commercial properties and activity on tribal lands and accepted payment for this privilege.

We wish, however, to address Lexington's other objections to this conclusion. Initially, Lexington argues that consent-based jurisdiction under *Montana* rests on whether Lexington engaged in any conduct on Cabazon land. Appellant's Brief at 11-13. Lexington claims that the fact that property and business activity that Lexington insured was located on tribal property is not relevant. We have already rejected Lexington's arguments about whether its lack of *physical* presence on tribal lands is dispositive in the personal jurisdiction context. To repeat our holding, Lexington specifically and intentionally endeavored to insure tribal property in a policy it acquired through Tribal First, and it was aware that the property was held by Cabazon, an Indian tribe, and located on the reservation. Additionally, state and federal courts usually hold that insurance companies may be sued in the forum where insured property is located. *See* Richmond, 55 San Diego L. Rev. at 877 & n. 189.

Lexington cites numerous cases arising on reservation lands in an attempt to support its proposition that its consensual conduct must occur on lands located within a reservation. Appellant's Brief at 12-13 (citing *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008); *Montana*, 450 U.S. 544; *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014)). Cabazon responds by noting that "[n]o Supreme Court case has ever required non-Indians to physically enter tribal land to establish jurisdiction under *Montana*'s consensual relationship exception. While some cases applying *Montana* certainly do involve a physical presence on tribal land, this does not signify physical presence is a requirement." Respondent's Brief at 15. We agree with Cabazon. We find no language in any Supreme Court opinion barring tribal jurisdiction over nonmembers who knowingly and purposefully conduct business activities with Indian tribes, for example, from afar.

Lexington argues further that we should focus on where Lexington was located when it acted as an insurer denying Cabazon's claim. *Id*. at 14. Lexington cites several cases to support its proposition that "[i]n insurance law, particularly when analyzing choice-of-law issues over denial-of-coverage claims, like here, these two locations are distinct-the place where the decision to withhold benefits was made (the conduct) is separate and distinct from the place where the purported damage occurred (the insured property)." *Id*. Assuming for the sake of argument here that choice-of-law analysis is useful in assessing the consensual relations analysis under *Montana*, we address these cases individually.

The first case, *Cannon v. Wells Fargo N.A.*, 917 F. Supp. 2d 1025 (N.D. Cal. 2013), involved a suit brought in California against a California defendant for tort claims arising from a dispute over real estate in Florida. *Id*. at 1050-51. The court noted that there was an underlying mortgage that established Florida law as the governing law over any contract claims, leading the court to conclude that it made sense to apply Florida law to the tort claims as well. *Id*. at 1051. Plaintiffs brought an additional claim for unfair competition under California law. *Id*. at 1055. The California defendant might have engaged in conduct in California that would have given rise to the claim under California law, but the court held that the plaintiff did not allege any California acts in its complaint, leading it to dismiss the claim. *Id*. at 1055-56. On one hand, *Cannon* is distinguishable because the case was driven by a clear contract provision establishing Florida law as the governing law. On the other hand, *Cannon* also tends to support Cabazon's position. The real estate that was the subject of the dispute was located in Florida, prompting the court again to point to Florida law. Here, the property and activities that give rise to the claim are located in Cabazon.

The next case, *Continental Casualty Co. v. Diversified Industries, Inc.*, 884 F. Supp. 937 (E.D. Pa. 1995), was brought by an Illinois insurance company for a declaration that it owed no coverage to its insured, a Delaware-organized company located in Missouri doing

business (and allegedly committing torts) in Pennsylvania. *Id.* at 941. One defendant argued that since the insurance company's claim to deny coverage occurred in Illinois, establishing a state interest in the matter, then Illinois law should apply. *Id.* at 950. The court acknowledged that there were some cases that gave "considerable weight" to the location of the insurance company's acts, *id.* at 950-51, but ultimately the court chose to apply Pennsylvania law because the alleged tortious acts underlying the claim occurred there, *id.* at 952; *see also id.* (prioritizing "the place where the relationship of the parties is centered") (citing Restatement (Second) of Contracts § 145(2)). At best, *Continental Casualty* identifies some conflict in the cases about the importance of the location of the insurance company, but the location where the insurance company makes a decision to deny coverage is far less important than the locus of the parties' dealings.

The third case, *Keene Corp. v. Insurance Co. of North America*, 597 F. Supp. 934 (D.D.C. 1984), involved a suit against a Pennsylvania insurance company in the federal district court for the District of Columbia for nationwide claims arising from asbestos contamination. *Id.* at 937, 939. The plaintiff sought punitive damages, alleging that the insurance company engaged in fraudulent misrepresentation about its insurance product. *Id.* at 937. The plaintiff objected to the application of Pennsylvania law, insisting instead that because the insurer sold policies to the plaintiff in New Jersey that New Jersey law should apply instead. *Id.* at 939. The court disagreed, holding that a punitive damages claim arising from fraudulent misrepresentation about an insurance product implicated the interest of the state where the insurance company was located, that is, Pennsylvania. *Id.* at 938-39. Additionally, the insurance policy was executed in Pennsylvania, sold by a Pennsylvania broker, and provided that the "'principal state' of operations for computing general liability and product liability premiums was Pennsylvania." *Id.* Since Cabazon does seek punitive damages as part of its prayer, Complaint, Prayer For Relief, ¶ 3(c), at 20, there could be a state interest in the possible relief granted against Lexington. But *Keene* is still

distinguishable in that a significant portion of the court's analysis focused on contract terms that repeatedly pointed to Pennsylvania. Here, the contract documents merely point to a "court of competent jurisdiction." Cabazon's claims for a declaratory judgment, compensatory damages, and attorney fees do not implicate a state interest. We leave it to the trial court on remand to determine liability in the first instance, whether punitive damages are justified, and for an initial determination of the jurisdictional implications of any potential punitive damages award. We note that punitive damages are exceedingly rare in contract cases and it would be folly to use the remote possibility of punitive damages to govern the answer to the jurisdictional question.

The fourth case, *Edgewood Manor Apartment Homes LLC v. RSUI Indemnity Co.*, 2010 WL 11492420 (E.D. Wis. Mar. 8, 2010), involved a claim by a Wisconsin plaintiff against a Georgia insurance company. *Id.* at *5. The case arose from the destruction of property by Hurricane Katrina in Mississippi. *Id.* at *3. The insurance company rejected the plaintiff's insurance claim in its Georgia offices. *Id.* Contrary to the facts in this case, the defendant insurance company argued *against* the application of Georgia law, insisting that either Wisconsin or Mississippi law applied, where there were limitations periods advantageous to the insurance company. *Id.* at *4. Further deviating from the facts of this case, the Wisconsin federal court was required to apply the State of Wisconsin's "borrowing statute," Wis. Stat. § 893.07(1). *Id.* at *2. The borrowing statute required the court to determine where the "final significant event giving rise to a suable claim" occurred. *Id.* at *3. The court concluded that the final significant event was the place where "the rejection determination is made and communicated from." *Id.* As such, the court chose to apply Georgia law. *Id.* The application of Wisconsin's "borrowing statute" requiring the court to look to a particular moment in a series of transactions undercuts the utility of the case to this set of facts, where there is no such requirement.

The final case Lexington cites is no more compelling. There, a North Carolina life insurance policy beneficiary brought a claim against the Pennsylvania insurer. *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Ins. Co.*, 319 F.2d 469, 470-72 (4th Cir. 1963). The court held that Pennsylvania law applied because the insurance company was located there and the denial of the insurance claim occurred there, giving Pennsylvania the most significant relationship. *Id*. at 474. The court further reasoned that the state of North Carolina, as the plaintiff's domicile, had comparatively little interest in the matter: "It would seem to make no difference in this case if Buchan had died elsewhere." *Id*. Importantly for our purposes, the court noted, "It cannot be said that there existed between the present parties an established relationship *having a particular location*. . . ." *Id*. (emphasis added). The case is distinguishable on the ground that Cabazon's property and business activities, indisputably linked to Cabazon's land, *do* establish a relationship between the parties to a particular location.

In short, as we held on the question of personal jurisdiction, Lexington has consented to tribal jurisdiction by virtue of agreeing to insure tribal property and business activities.

Lexington also argues that tribal court jurisdiction involving contracts indicating a consensual relation must also be necessary for tribal self-government. To be sure, after observing that *Montana* and its progeny permit tribal regulations of nonmember conduct implicating the tribe's sovereign interests, the Supreme Court in *Plains Commerce Bank v. Long Family Land and Cattle Co.* stated "*Montana* expressly limits its first exception to the activities of nonmembers, allowing these to be regulated to the extent necessary to protect tribal self-government and to control internal relations." 554 U.S. 316, 332 (2008).

Although Lexington argued that disputes regarding the insurance contract at issue here did not impact tribal self-government because the tribe is not regulating such contracts, this argument misunderstands the scope of the first *Montana* exception. After remarking that the four cases

cited in *Montana* to justify the first exception each involved regulation of non-Indian activities that had a discernable effect on the tribe and its members, the *Plains Commerce* Court mentioned that *Williams v. Lee*, 358 U.S. 217 (1959), "concerned a tribal court's jurisdiction over a contract dispute from the sale of merchandise by a non-Indian to an Indian on the reservation." 554 U.S. at 332.

The reference in *Plains Commerce* to *Williams v. Lee* as justifying the first exception is meaningful to the case before us. Although *Williams* was primarily a case about whether a reservation Indian could be sued in state court over a debt contracted on the reservation, the Court held that the state courts did not have jurisdiction because such cases should be adjudicated in tribal court. Thus, the *Williams* Court concluded, "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 220. In other words, the Court recognized that contractual disputes are "reservation affairs" and tribal court jurisdiction over them is necessary in order for Indians to be able to make their own laws and be ruled by them. *See id.* ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

We believe that even if we were to concede for the purpose of the argument that tribal jurisdiction established through consensual relations in contracts also must be necessary to tribal self-government, implicit in *Montana*'s reliance on *Williams* for its first exception is that tribal court jurisdiction over such contracts is necessary to self-government. The facts of the present case confirm the soundness of this position. Tribal counsel at oral argument vehemently denied that interference with tribal self-government was a requirement under the first *Montana* exception. However, when pushed by this Court to indicate why jurisdiction over the contract dispute in this case might be necessary

to tribal self-government, tribal counsel mentioned that through this insurance contract the tribe was insuring its most important source of tribal revenues: revenues necessary to fund programs essential to tribal self-government.

B. The Power to Exclude

Though not necessary to the court's conclusions, we further hold that Cabazon possesses jurisdiction over Lexington by virtue of the tribe's inherent power to exclude nonmembers, power to control economic activity on the reservation, and the concomitant power to condition entry of nonmembers.

The Supreme Court has acknowledged the inherent power of Indian tribes to exclude nonmembers from tribally owned or controlled lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1983) ("a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands"). The *Merrion* Court also acknowledged the inherent power of tribes to tax, partly due to "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." *Id*. at 137. *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983) ("tribes have the power to manage the use of its territory and resources by both members and nonmembers [and] to undertake and regulate economic activity within the reservation") (citations omitted). Following *Merrion* and *Mescalero*, the Ninth Circuit has concluded that where "activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*." *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011).

The line of analysis under the tribal exclusion power is similar to the line of analyses under the personal jurisdiction regime and the consensual relations regime. In all three issues, the fundamental

question is whether Lexington engages in activities on Cabazon reservation lands. As we concluded, Lexington definitively conducts business on Cabazon lands by insuring Cabazon property located on and business activities occurring on Cabazon lands.

On this issue, Cabazon argues "If Cabazon so chose, it could bar Lexington from insuring any and all tribal property, or alternatively, limit the types of tribal property to be insured or the amounts of such coverage." Respondent's Brief at 6. Lexington restates its same position all along: "Lexington has never entered into, sent employees to, or engaged in any commercial transactions within the exterior borders of tribal land. Nor is there any allegation that Lexington has 'interfered directly' with the Tribe's inherent powers to exclude or manage its own lands." Appellant's Brief at 8.

Lexington cites *Employers Mutual Casualty Co. v. Branch*, 381 F. Supp. 3d 1144 (D. Ariz. 2019), *aff'd sub nom.*, 804 Fed. Appx/ 756 (9th Cir. May 11, 2020). *Branch* involves a tort claim brought by the Navajo Nation against an Arizona business insured by an Iowa insurance company. *Id.* at 1146-47. The district court asserted, "This case involves an attempt by a tribal court to assert jurisdiction over a party that never set foot within the tribe's reservation, never contracted with any tribal members or organizations, and never expressly directed any activity within the reservation's confines." *Id.* at 1145. The insurance company there, like Lexington, "never set foot" on tribal lands. There, the insurance company was "selling insurance policies to non-member corporations at off-reservation locations." *Id.* at 1149. But that court acknowledged that "it may be possible to sue an insurance company in tribal court despite the absence of any physical presence on tribal land." *Id.* The court cited two cases in which the insurance company "contracted directly with a tribal member when selling the policy and thereafter engaged in conduct directed toward the reservation." *Id.* at 1149-50 (citing *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1075 (9th Cir. 1999); *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, 2014 WL

1883633 (D.N.D. 2014)). The *Branch* court noted that a tribe *could* exercise jurisdiction over an insurance company that issued a policy to a reservation entity or individual, if premium statements were mailed to the reservation, and if the insurance company agents communicated with a reservation-based entity or individual. *Id*. at 1150 ("Here, in contrast, the insurance policies at issue were general liability policies issued to non-Indian corporations, there are no facts suggesting that monthly premium statements were mailed to the reservation, and there are no facts suggesting that EMC's agents communicated with any tribal members after the spill.").

Branch supports Cabazon's position far more than it supports Lexington's. Lexington insured reservation property and business activities. Lexington received premiums from Cabazon. Lexington's agents talked to Cabazon's agents. But like all incorporated businesses, Lexington's feet are figurative. "Setting foot" on the reservation can involve more than a mere physical presence in this era of long-distance business activities. We find Cabazon possess the power to exclude Lexington, the power to regulate Lexington (if it sees fit to do so), and the power to adjudicate civil disputes that arise from Lexington's reservation-based activities.

For all of the reasons discussed herein, the tribal court's order of March 11, 2021, is AFFIRMED.

Dated: November 12, 2021

Matthew L.M. Fletcher and Alex Skibine, Associate Judges *pro tem*

Kevin K. Washburn, Presiding Judge *pro tem*