

Tort Claims Against Tribal Casinos

Consider this scenario. A casino patron slips and falls on a wet floor outside the restroom of the casino, sustaining injuries. The casino patron consults a personal injury lawyer about representing the casino patron in a lawsuit against the casino. The casino is owned and operated by a federally recognized Indian tribe. The personal injury lawyer is not familiar with Indian law and hasn't practiced in tribal court before, but initially thinks it can't be that much different from Oregon law. The case seems relatively straightforward, so the lawyer considers taking the case. What issues should the lawyer consider before accepting the case?

A number of lawyers have encountered situations similar to this scenario and have made some common erroneous assumptions about lawsuits, in particular personal injury claims involving Indian tribes located within Oregon.

Common Misconceptions

The first common misconception is that Oregon law will apply to the claim and that it will be heard in Oregon state court. Customers who step into tribal casinos are usually unaware that they have entered a jurisdiction where Oregon law does not generally apply. Most tribes post a notice at the entrance to tribal lands and casinos stating that all persons who enter the premises are expressly consenting to tribal jurisdiction for all matters arising out of their presence there. Federally recognized Indian tribes – which are separate sovereigns under the U.S. Constitution – operate tribal casinos in Oregon. Thus, tribal courts –

not state courts – have jurisdiction over injuries occurring on tribal lands. And tribal law – both substantive and procedural – governs tort claims arising in a tribal casino instead of state law.¹

There are nine federally recognized Indian tribes in Oregon, each with its own tribal laws and tribal courts that operate according to the tribe's tribal laws and ordinances. In some instances, tribes have adopted a tribal tort claim law that provides a limited waiver of immunity for certain types of claims, including negligence claims against tribal casinos and other tribally owned businesses.²

Another common misconception is that tribal tort claim law has the same procedural and technical requirements as Oregon's tort claim statute. Personal injury lawyers may know that their clients must give the appropriate tribal entity or authority a tort claim notice that complies with tribal law. However, they may not be familiar with the particular tribal tort claim notice requirements of each tribe, and will be surprised to learn that there are substantial differences from Oregon's tort claim notice requirements. Tribal law generally interprets such requirements narrowly and strictly. For example, an attorney might find that the tribal tort claim notice requirements are different from Oregon's tort claim notice requirements – the tribe may have adopted a shorter time for the notice or the claim to be filed than Oregon or federal tort claim notices, and the notice or the claim must be filed with a specific person or position. Substantial compliance and/or actual notice may not suffice. Additionally,

DISCLAIMER

This material is provided for informational purposes only and does not establish, report, or create the standard of care for attorneys in Oregon, nor does it represent a complete analysis of the topics presented. Readers should conduct their own appropriate legal research. The information presented does not represent legal advice. This information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund except that permission is granted for Oregon lawyers to use and modify these materials in their own practices. © 2014 OSB Professional Liability Fund.

not all tribes may have their laws and ordinances published and accessible online, or have them available at county or law school law libraries. Thus, by the time the customer or lawyer is able to find a tribe's notice requirements, it may be too late.

It is impossible to generalize from one tribe to another. Each tribe is a separate sovereign and operates independently from other tribes – much like the laws of each state. There may be some federal laws, such as the Indian Civil Rights Act, 25 U.S.C. §1302, that apply generally to all tribes. You may be surprised to learn that being licensed to practice law in Oregon does not necessarily authorize you to practice in tribal court without first becoming a member of the tribe's bar or seeking permission to appear *pro hac vice* – just as you would have to gain admission to practice in other states' courts. At least one tribe in Oregon requires individuals to pass a tribal bar exam and be a member of the tribal bar before they will be permitted to practice in the tribal court. Many tribes allow non-attorney, but licensed, spokespersons to practice in tribal court. Most tribal courts have a roster available of persons authorized to appear in that tribal court.

Issues to Consider in Tort Claims

Since tribal laws and courts are all distinct entities, you should carefully consider whether or not you have the time and interest in learning tribal law and court procedures in order to handle a tort claim case against a tribal casino. In addition to the usual inquiries at the outset of a personal injury case, you should consider the following:

Where do you find the tort claim code? All the tribes in Oregon except the Cow Creek Band of Umpqua Indians and the Burns Paiute Tribe have made their tribal ordinances available online. See the sidebar accompanying this article for the websites. You should contact the Cow Creek Band of Umpqua Indians' tribal office to obtain its ordinances. You can contact Linda Beaver, Tribal Court Clerk for Burns Paiute Tribal Court, about obtaining copies of the Burns Paiute Tribe's ordinances.

How do you gain admission to practice in the tribal court? Do you need to be admitted before you even file the tort claim notice? How do you find out? You must review the applicable tribal law to determine whether you must be a member of a tribal court bar in order to file a tort claim notice. Or you may need to associate with a person licensed to practice in that court.

Whom do you sue? Indian tribes in Oregon operate a variety of businesses, including casinos, under different business structures created under tribal law. Each tribal

tort claim law is different. Some, like the Federal Tort Claims Act, require suit against the tribe. Others only allow the tribal entity to be sued directly.

How much can you sue for? Generally, the tort claim limit for lawsuits against tribal casinos in Oregon varies; you must consult the tribe's tort claim statute. In many cases, the limit is the amount of insurance the tribe may have. Normally only the sovereign immunity of the entity, and not the tribe itself, is waived from suit under the ordinance.

To whom do you give the tort claim notice? Do you need to give notice to the tribal board secretary? the tribal chairperson? the casino corporation's CEO? the board chairperson? You must read the tribe's ordinances to determine whom to serve, how to serve, the exact language that must be in the notice, and the timeline for service.

Can you appeal? All of the tribes in Oregon have established some sort of appellate process. Most panels have some Oregon lawyers as members, as well as specially trained tribal court judges. Usually, an exhaustion-of-remedies requirement will apply to tribal lawsuits, so you will need to pursue the claim as far as you can in tribal court before seeking other recourse. Appeal is generally not available in state or federal court.

This list is not exhaustive and is offered as examples of issues a careful practitioner should consider prior to agreeing to accept a client with a claim against a tribally owned entity. At a minimum, a lawyer must become familiar with the laws of the particular tribe before accepting a case against a tribal-owned-and-operated entity, including a tribal casino. Below are several resources available to the lawyer trying to make a decision whether to accept a tribal personal injury case.

- Oregon State Bar's Indian Law Section
- Tribes' in-house counsel
- Experienced local counsel

CRAIG DORSAY
LEA ANN EASTON
DORSAY & EASTON, LLP

¹ This article addresses potential lawsuits against Indian tribes or tribal enterprises, such as tribal casinos, that share the tribe's general sovereign immunity from suit in state court. See *Chance v. Coquille Indian Tribe*, 327 Or. 318, 963 P.2d 638 (1998). Suits between individuals arising on Indian lands where one of the parties is Indian – not including tribal or casino employees acting within the scope of their authority – can be more complicated. A federal law enacted in 1953, known as Public Law 280, vested concurrent jurisdiction (along with preexisting tribal jurisdiction) in the state courts over such cases in some instances. See 28 U.S.C. §1360; *Bryan v. Itasca County*, 426 U.S. 373 (1976). But not all tribes or reservations in Oregon are subject to P.L. 280. See *N. Pac. Ins. Co. v. Switzler*, 143 Or.App. 223, 924 P.2d 839 (1996).

² Indian tribes operate tribal casinos pursuant to their inherent authority. Congress limited that authority by passing the Indian Gaming Regulatory Act (IGRA) in 1988, in which it required that tribes that wish to offer full casino gaming (known as “Class III” gaming) must enter into a Gaming Compact with the State in which they are located. Congress authorized certain topics to be included in such compacts, including jurisdiction over tort claims. The compacts between Indian tribes in Oregon and the State all contain a provision requiring the tribe to have a dispute resolution system for personal injury lawsuits, but do not specify what that system must be. All of the tribes in Oregon authorize jurisdiction over personal injury claims only in their own courts or systems.

Websites of Federally Recognized Indian Tribes in Oregon

Nine federally recognized Indian tribes exist in Oregon at this time, and most of these tribes have posted their tribal laws online:

- 1 Burns Paiute Tribe, www.burnspaiute-nsn.gov (click on “Documents” to see the Tribal Code and Constitution)
- 2 Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, <http://ctclusi.org> (click on “Tribal Code,” see Title 2, Chapter 2-7, regarding tort claims)
- 3 Coquille Indian Tribe, www.coquilletribe.org; www.coquilletribe.org/docbin/624TortClaimsOrdinance.pdf (Chapter 624, Tort Claims Ordinance)
- 4 Cow Creek Band of Umpqua Tribe of Indians, <http://cowcreek.com>
- 5 Confederated Tribes of Grand Ronde, www.grandronde.org (click on “Departments,” and then on “Tribal Court”)
- 6 Klamath Tribes, <http://klamathtribes.org> (click on “Tribal Links,” then on “Tribal Courts,” and then on “Tribal Laws”)
- 7 Confederated Tribes of Siletz Indians, www.ctsi.nsn.us (click on “Government Listings,” then on “Tribal Ordinances,” and then on “Torts & Indian Civil Rights Act”)
- 8 Confederated Tribes of the Umatilla Indian Reservation, <http://ctuir.org> (click on “About Us,” then on “CTUIR Codes/Statutes/Laws,” and then on “Tort Claims Code”)
- 9 Confederated Tribes of Warm Springs, <http://warmsprings.com> (click on “Tribal Community,” then on “Tribal Government,” then on “Tribal Code Book,” and then on “Chapter 205 Tort Claims”)

Counsel is encouraged in every case to contact the tribal court for each tribe to obtain copies of all current applicable tribal laws, including the tort claim ordinance if applicable, and to learn the requirements to appear in tribal court. For example, most tribes have general statutes of limitations that apply to regular civil actions, but that may be different for tort claims against the tribal government.