

## Legal Sidebar

# Supreme Court to Decide Case with Important Implications for Tribal Authority Over Nonmembers

12/04/2015

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As a general rule, Indian tribes do not have jurisdiction over nonmembers. However, for civil regulatory jurisdiction there are two exceptions, recognized by the Supreme Court in *Montana v. U.S.* A tribe may exercise jurisdiction over a nonmember when: he or she has entered a “consensual relationship” with the tribe and the regulated conduct is related to that relationship; or when doing so is necessary to protect the security and integrity of the tribe. The Court has assumed that tribal courts have adjudicatory jurisdiction (jurisdiction to hear civil cases) over nonmembers, but it has never upheld an exercise of such jurisdiction or indicated what its limits are. *Dollar General v. Mississippi Band of Choctaw Indians*, which the Supreme Court will hear December 7, 2015, presents an opportunity for the Court to determine whether tribes, in fact, have adjudicatory jurisdiction over nonmembers.

Dollar General owns a store, licensed under the tribal code, located on trust land that it leases from the Mississippi Band of Choctaw Indians (Tribe). Dollar General participated in a tribal program under which it agreed to “hire” tribal youth as interns. One of these interns accused the Dollar General manager of sexual assault and sued Dollar General and the manager in tribal court under the Tribe’s tort law. The defendants challenged the tribal court’s jurisdiction in tribal and federal courts, claiming that the first *Montana* exception did not apply. The second *Montana* exception was not discussed. Every court rejected that argument. The U.S. Court of Appeals for the [Fifth Circuit](#) held that the plaintiff’s claims fell within the first *Montana* exception, because Dollar General consented to participate in the youth employment program and the conduct at issue had a direct connection to that consensual relationship.

Now at the Supreme Court, Dollar General argues that, just as tribes lost their authority to try nonmembers for crimes committed by nonmembers, they have lost the authority to adjudicate civil claims against nonmembers. Because the Constitution does not apply to tribes, the Court cited concern for the rights of the nonmember accused when it held in *Oliphant v. Suquamish Indian Tribe* that tribes lack the authority to criminally prosecute nonmembers. Dollar General argues that there is a similar concern for nonmembers’ rights with respect to their property that should cause the Court to conclude that tribes cannot adjudicate civil claims against nonmembers. In addition, Dollar General argues, nonmembers cannot consent to tribal tort claims in particular because tribal tort law generally is unwritten and cannot be determined by nonmembers – in other words, a nonmember would not know what he or she was consenting to. Finally, Dollar General argues that this is a matter for Congress.

In response, the Tribe attempts to refute the argument that tribal courts have no adjudicative jurisdiction over nonmembers by pointing out that the Court already indicated that the *Montana* exceptions apply to adjudicatory jurisdiction over nonmembers. That makes sense, the Tribe asserts, because in order to regulate, a tribe must have authority to adjudicate. The Tribe next turns its efforts to demonstrating that this case falls within the first *Montana* exception. Additionally, the Tribe addresses what it perceives as errors in Dollar General’s brief. The Tribe argues that: the Court has already determined that tribes retain their civil adjudicatory authority over nonmembers; Dollar General cites treaties with other Choctaw tribes to which the Tribe was not party; the Court has considered and rejected the argument that civil jurisdiction raises the same concern about nonmember rights as criminal jurisdiction; and given that Congress has altered tribal criminal jurisdiction two times, Congress’s failure to act regarding tribal civil adjudicatory jurisdiction suggests that Congress is satisfied with the way things are. As to Dollar General’s argument that it is not possible to consent to the application of tribal tort law because it is not possible to know it, the Tribe

responds that, under Supreme Court precedent, nonmembers who enter consensual relationships are only subject to liability that they can reasonably anticipate. Therefore, the Tribe argues, nonmembers will not incur liability that they could not anticipate.

This case has important implications for tribal jurisdiction over nonmembers. If the Court concludes that tribes do not have civil adjudicatory jurisdiction over nonmembers, it could significantly undermine tribal sovereignty and authority.

Under Supreme Court precedent, tribes may exercise regulatory jurisdiction over nonmembers within the *Montana* exceptions, but if the Court rules for Dollar General, tribes may not be able to enforce those regulations in tribal court. A ruling for Dollar General could undermine the reach of tribal law because tribal members with civil claims against nonmembers would likely have to resort to state courts, which would apply state law, not tribal law. Such an extension of state law to disputes arising on reservations could run counter to the general rule that state law does not apply to Indians on reservations. A decision by the Court upholding the Tribe's adjudicatory jurisdiction over Dollar General could reaffirm the authority that many tribes and tribal members assume tribes possess. It could strengthen tribes as governments with territorial reach by acknowledging the tribes' authority over civil claims against all persons within their jurisdictions, subject to the *Montana* exceptions. Such a decision could allow tribal members to invoke tribal law for protection and maintain the general rule that state law does not apply to Indians on reservations.

Posted at 12/04/2015 10:01 AM