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

MARILYNN G. VANDEVER and CHARLES VANDEVER,	)	
Plaintiffs,	)	**Case No.: 06-CV-380-TCK-SAJ**
v.	)	
OSAGE NATION ENTERPRISE INC. and OSAGE NATION,	)	**ATTORNEY LIEN CLAIMED FOR THE FIRM JURY TRIAL DEMANDED**
Defendants.	)	

OBJECTION TO MAGISTRATES REPORT AND RECOMMENDATION AND BRIEF IN SUPPORT

COMES NOW, the Plaintiff by and through her attorney of record and for her Objection to the Magistrate's Report and Recommendation shows the Court as follows:

1. That the Plaintiffs filed a complaint against the Defendant claiming that the Defendant violated ERISA as it relates to the employment of Marilynn Vandever with the Defendant.

2. The Defendant filed a Motion to Dismiss alleging that tribal sovereign immunity precluded the application of ERISA against the Defendants and the Court did not have jurisdiction in this case.

3. The Magistrate engaged in a two step analysis to reach it's conclusion.

4. In the Report and Recommendation the Magistrate holds that ERISA does apply to the Defendant, but that the Congress did not strip the tribe of its immunity and provide a private cause of action to the Plaintiffs to enforce their claim in a federal forum.

5. The Plaintiff specifically objects to the Magistrate's conclusions found in the second part of his analysis.

6. The Plaintiffs' position is that the controlling law relied upon found in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* is misconstrued and the teachings of that case should be applied only in instances where the enforcement of state law is at issue.

7. However, if the Magistrate correctly analyzed the holding of *Kiowa* to apply in this case, it should be incumbent on the Court to reverse it's position concerning tribal immunity in that there is no further justification for the law as it is currently applied.

Arguments & Authorities

A. The Report's Reliance on *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* is Misplaced.

The Magistrate's Recommendation is correct to point out that some courts have held that federal laws of general applicability do not necessarily strip the tribes of their immunity. Nor do the Plaintiffs disagree with the Report and Recommendation as to its interpretation of previous rulings on this issue from this Court in *Multimedia Games Inc. v. WLGC Acquisition Corp.* 214 F.Supp 2d 1131. However, the Plaintiffs are of the opinion that these various lower courts have misconstrued the holding of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 US 751, 118 S.Ct. 1700 (1998) which is the foundation of holdings in the lower court cases.

The court in *Kiowa* was dealing with an allegation of whether state law applied to commercial actions of a tribal government. In this case, the Plaintiff had sued the Kiowa tribe for an unpaid promissary note in state court. The Court held that while a State law may apply to certain tribal actions, it did not axiomatically give a person the right to enforce such action in state court. The court stated that for suit to be authorized in state court Congress must authorize suit or the tribe must waive its immunity. The court stated that there is difference between one having the right to demand

compliance and with the means to enforce such law.

In this case, the Court is dealing with the application of federal law to an Indian tribe and the waiver of immunity. The Magistrate's Recommendation utilized the *Tuscarora* rule to posit that federal law did apply to the tribal Defendant, but held that there needed to be additional Congressional action to actually allow the enforcement of the federal statute. Unlike the situation in K*iowa* where there was no Congressional action, Congress has already enacted legislation that impinges on the freedom of tribal governments as it relates to ERISA. There is no dispute that ERISA provides for a private cause of action generally. Further, the preemptive aspects of ERISA divests all but federal courts from hearing cases brought pursuant to that statute. As a result, Congress has manifested a clear intent that ERISA should apply to the tribe. This would include all aspects of the Act. Given ERISA's preemption provision, to apply ERISA to the tribe without allowing the Plaintiff access to the federal court would leave Vandever with rights but no remedy. Clearly a ridiculous outcome.

B. The Court Should Exclude Any Tribal Commercial Activity From the Rubric of Sovereign Immunity.

The Court should reverse or at least modify the holding of *Kiowa,* The doctrine of *stare* decisis is not an inexorable command, *Dickerson v. United States.,* 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000), but the doctrine carries such persuasive force, that departure from precedent must be supported by some special justification. *U.S. v. International Business Machines Corp.,* 517 U.S. 843, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996).

When the Supreme Court re-examines a prior holding, its judgment is customarily informed by a series of considerations designed to test the consistency of overruling a prior decision with the

ideal of the rule of law; to gauge the respective cost of reaffirming and overruling a prior case, the Court should examine:

- whether the rule has proved to be intolerable simply in defying practical workability.
- whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.
- whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.
- whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

It is clear that the facts and circumstances have changed that make the current interpretation of the rule of tribal sovereign immunity without further justification. The concept of Indian tribal immunity is not founded on an act of Congress. In fact, as pointed out in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* the doctrine developed quite by accident. The immunity has been held to apply when state's attempt to assert jurisdiction over tribal activities. However, tribal sovereign immunity has begun to draw fire from learned jurists who understand that a doctrine that began in order to protect the viability of small dependant governments is now simply used to strip American citizens from the protections that they have been afforded by the Congress and other legislative bodies.

In the case of *Oklahoma Tax Commission v. Citizen Band of Potawatomi,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112, 59 USLW 4137, the court was discussing the states ability to enforce a tribe's obligation to collect sales taxes for the sales of cigarettes that occur off the reservation. The court did affirm in part a tribe's immunity from suit in relation to a state law, however Justice Stevens did note his misgivings about the continued viability of the doctrine of sovereign immunity for

commercial activities of Indian tribes; "The doctrine of sovereign immunity is founded upon an anachronistic fiction." Id. 912. Morever, Steven notes that Congress has taken action to limit immunity for foreign governments that engaging in commercial activities.[1] By implication such limitations should apply to the tribe.

The dissenting opinion in *Kiowa* outlines reasons it believes the doctrine of trial immunity should be revised. In addition to observing the injustice in the current state of the law, the court pointed out the absurd anomaly of tribunal immunity in relation to the immunity of foreign governments and other sovereigns.

> Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort immunity and from liability arising out of its commercial activities. See, 28 U.S.C. §§§§ 1346(b), 2674 (Federal Tort Claims Act); §§§§ 1346(a)(2), 1491 (Tucker Act). Congress has also decided in the Foreign Sovereign Immunities Act of 1976, that foreign states may be sued in the federal and state courts for claims based upon commercial activities carried on in the United States, or such activities elsewhere that have a "direct effect in the United States." §§ 1605(a)(2). And a State may be sued in the courts of another State. *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

The doctrine of sovereign immunity was created by judicial action. Given the fact that tribes engage in a wide range of commercial activities that did not exist at the time of the formulation of the doctrine; and the fact that Congress has limited such immunity for foreign governments it is only proper that the courts revisit doctrine of sovereign immunity for the tribes and preclude such protections from actions that are commercial in nature.

WHEREFORE, the Plaintiff prays for an Order modifying the Report and Recommendation

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[1]28 U.S.C. §§ 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case...(2) in which the action is based upon a commercial activity carried on in the United States by a foreign state...")

to the extent that it finds that it has jurisdiction in that ERISA not only applies to the Defendant, but that immunity does not protect the Defendant from enforcement thereunder.

Respectfully submitted,

s/David R. Blades
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on 16th day of August, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for Filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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