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

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| **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 THE DEFENDANTS' MOTION TO DISMISS**

**COMES NOW,** the Plaintiffs, by and through their attorney of record, David R. Blades and for their objection to the Defendants' Motion to Dismiss shows the Court as follows:

**Statement of the Case**

Marilynn Vandever was employed with the Osage Nation Enterprise Inc. until October, 2004. She was entitled to health insurance coverage that was provided by her employer. Charles Vandever is her husband and was also a covered individual under the Defendant's insurance. Marilynn Vandever began to suffer from a serious medical condition. She sought treatment and was denied access to her health benefits because the Defendant wrongfully informed the health care provider that she was no longer an employee and should be denied coverage. Also, when Vandever's employment terminated, neither she nor her husband were provided notice as required under COBRA regulations.

**Standard of Review**

In determining whether to grant a motion brought pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(6), the Court must consider the allegations set forth in the Complaint.

For the purposes of a motion to dismiss, the allegations are construed in a light most favorable to the plaintiff and taken as true. *Scheuer v Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In the context of FRCP 12 (b)(6), the Court should accept the plaintiff's description of what happened along with any reasonable conclusions drawn therefrom. *United States v. Van Raalte Co.*, 328 F. Supp. 827 (S.D.N.Y. 1971). However, the Court should not accept as true conclusory allegations concerning the legal effect of the events described by the plaintiff if the allegations do not reasonably follow from the description of what happened. *Griffin v. United States*, 537 F.2d 1130 n.21 (1976). A motion to dismiss for failure to state a claim is viewed with disfavor and should be rarely granted. *Hall v. City of Santa Barbara*, 813 F.2d 198, 201 (9th Cir. 1986). A motion to dismiss should only be granted when the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

## Argument and Authorities

### This Court is Vested with Jurisdiction in That Any Sovereignty Enjoyed by the Tribe Can Be Limited by the Actions and Intent of the United States Congress. Tribal Immunity is Not Operative in This Matter.

The doctrine of tribal immunity seeks to preserve their autonomy and protect them from suits in state and federal court. *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 771 (D.C. Cir 1986). The Supreme Court has held that tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martintez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 56 L.Ed.2d 106 (1987). This immunity can however, be waived by actions of the tribe or obviated by an act of Congress. *Id.* at 1677.

Tribal sovereignty is not absolute. Indian tribes are distinct independent political

communities that retain rights in matters of local self-government. *Santa Clara Pueblo v. Martinez* 436 U.S. 49, 55, 98 S.Ct. 1670, 1675, 56 L.Ed. 106 (1978). Tribes still retain the authority to govern their internal affairs through the enactment of substantive law, however sovereignty is not complete. The United States Congress has plenary powers of self-governance which the tribes may have traditionally possessed. *Id.* at 56. Tribes posses limited sovereignty which can be circumscribed by the will of Congress. *Rice v. Rehner,* 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983).

A general statute that is to be applied to all persons will, under some circumstances, limit the tribe's sovereign immunity. The case of *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 116, 80 S.Ct. 543, 553, 4 L.Ed.2d 584 (1960), established in *dicta* that general statutes that apply to all persons include Indian tribes. While this general rule has not been overturned, the last forty years has seen it modified. Currently, the rule is in effect but with this *caveat*: "General statutes... whose concerns are widely inclusive and do not affect traditional Indian or Tribal rights are typically applied to Indians." *Smart v. State Farm Insurance* Co.,868 F.2d 929 (7th Cir. 1989).

The Ninth Circuit has modified the *Tuscarora* rule in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) when it provided that when a statute of general applicability is silent on the issue of its applicability to Indian tribes it will not apply if:

1. the law touches "exclusive rights of self-governance in purely intramural matters,"

2. the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties,"

3. there is proof "by legislative history or some other means that Congress intended [the law] not apply Indians on their reservations. . . ."

In other words, if a statute of general applicability does not fall into one of these three categories it

will apply to Indian tribes regardless of any claim of sovereignty.[1]

The Employment Retirement Income Security Act ("ERISA") is a statute of general applicability that is a comprehensive statute that protects employees rights under welfare benefit plans established or maintained by an employer "engaged in commerce or industy effecting interstate commerce." 29 U.S.C. § 1003(a)(1). ERISA has a few exceptions for churches and governmental plans. Additionally, ERISA preempts all state law establishing it as the exclusive remedy for a covered individual seeking to exercising his rights under a benefit plan. Since ERISA contemplates inclusion as the norm and its exceptions are specific and well defined, it is a statute of general applicability. *Smart v. State Farm Ins. Co*, 868 F.2d. 929, 933 (7th Cir. 1989). Since it is easily determined that the ERISA statute is one of general applicability, one must then apply the facts of this case to the test set forth in *Donovan* to determine whether the tribe will be protected from a claim based on a violation of ERISA.

ERISA does not impinge on the tribe's right to self-governance. In *Smart*, the Chippewa tribe argued that ERISA affected the tribe's right to regulate the employer/employee relationship and, therefore, it improperly interfered with the tribe's right to govern its own internal affairs. The court in *Smart* disagreed. In that case, the court analogized the tribal compliance with federal employee withholding tax to any obligations the tribe would have under ERISA. The court noted that ERISA does not broadly and completely define the employee/employer relationship. Indeed, ERISA only comes into play if the employer decides to offer a benefit a plan as defined under the

[1] The Tenth Circuit has adopted this reasoning. In *Nero v. The Cherokee Nation of Oklahoma*, 892 F.2d. 1457 (10th Cir. 1989), the court used the test in *Donovan* concerning a statute of general applicability and its effect on tribal sovereignty, but found in that case that the statute impermissibly interfered with a matter of internal governance.

statute. As a result, the tribe should receive no protection based on its sovereignty.

The statutory scheme of ERISA does not evidence any Congressional intent to exempt the tribe from its obligations under these statutes. In *Smart*, the tribe argued that the exemption for state governments was evidence of Congress' intent to exempt all sovereigns from the operation of ERISA. Therefore, the tribe being a sovereign, it was argued, it should be excerpted. The court disagreed. It relied on th decisions of *Confederated Tribes of Warm Springs Reservation of Oregon, v. Kurtz*, 691 F.2d 878 (9th Cir. 1982) and *United States v. Barquin*, 799 F.2d 619 (10th Cir. 1986) for the proposition that state governments as contemplated in the ERISA scheme were not synonymous tribal governments. The *Smart* court went on to say: "Federalism uniquely concerns States; there simply is no Tribe counterpart, Smart is unable to point to any evidence of congressional intent that ERISA is no applicable to tribal employers." Since there is no evidence of an express intent to protect tribes from the obligations of ERISA, the Defendants fail to satisfy another prong of the *Donovan* test.

At this stage in the litigation there is no means of determining whether the remaining prong of *Donovan* can be satisfied or not. A motion to dismiss based on FRCP 12(b)(6) is to be decided based on the face of the pleadings. The remaining prong in *Donovan* would require an examination of any treaty language that the Defendants believed exempt it from their obligations under ERISA. As a result, the Defendants' Motion to Dismiss should properly be converted to a Motion for Summary Judgment. In any event, the Defendants' Motion to Dismiss should be overruled.

**The Plaintiff Is Not Required to Exhaust Her Remedies in Tribal Court Prior to Invoking the Jurisdiction of the Tribal Court.**

When enacting a statutory scheme, if Congress expresses a unmistakable preference for a federal forum then there is no requirement to exhaust tribal remedies. The Defendants cite to

*National Farmers Union Ins. Co. v. Crow Tribes of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 14 (1987) for the proposition that this Court should abstain from hearing this matter in order for the Plaintiff to litigate her claims in tribal court. The Defendants fail to mention the case of *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999), which modifies the rule in *National Farmers Union Ins. Co.* and *Iowa Mutual Ins. Co.* The rule as modified stands for the proposition that if Congress prefers a federal forum as evidenced by the excercise of its preemption power, then there is no need for a plaintiff to exhaust any tribal remedy.

The *El Paso* case involved uranium mining corporations seeking to enjoin tribal courts from exercising jurisdiction over personal injury and wrongful death claims filed by the Navajo Nation. The court in *El Paso* distinguished this situation from previous instances where exhaustion of tribal remedies seemed appropriate. The court noted the pre-emption provision of the Price-Anderson Act, 42 U.S.C. 2014(hh) expressed a unmistakable preference for a federal forum. In examining the Price-Anderson Act preemption provision, the court emphasized that Congress provided the district court not only with original jurisdiction, but allowed for removal if an action was brought in state court. The removal allowed the district to adjudicate the merits as well as the applicability of the Price-Anderson Act, thereby the court reasoned that Congress expressed an unmistakable desire for a federal forum in these matters. The court was concerned that to allow a tribal review would defeat the purposes of the Price-Anderson Act. Particularly, the court believed it was the intent of Congress to avoid a patchwork of rules regarding nuclear incidents or inconsistent rulings further confusing the litigation. Therefore, Congress demonstrated a desire that any actions regarding nuclear incidents be brought in federal court.

Any preemption of state action equally applies to tribal court jurisdiction. In *El Paso*, the court dealt with the issue of whether a statute that preempted state action would have the same effect on tribal courts. Although, in *El Paso* the court observed that the Price-Anderson Act was silent as to its effect on tribal courts, it did not stop the court from determining that there was no exhaustion requirement for tribal courts. The court stated:

> We are at a loss to think of any reason that Congress wold have favored tribal exhaustion . Any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle deference. The apparent reasons for this congressional policy of immediate access to federal forums are as mushc applicable to tribal as to state court litigation.

*Id.* at 485. In analyzing the preemption provision of the Price-Anderson Act, the Court noted that Congress was attempting to avoid duplicative determinations, consequent inefficiencies, and undue delay in addressing the issues involving nuclear power. To allow tribal action while precluding state action would defeat Congress' intent, and therefore, the *El Paso* court stated that no exhaustion of tribal remedies was required.

As with the Price-Anderson Act, ERISA's preemption provision is expansive. Congress drafted ERISA with the express intention that it would preempt state regulation of employee benefit plans and that the civil enforcement provisions of ERISA would be the exclusive method to resolve benefits disputes. *See Aetna Health Inc. v. Davila,* 542 U.S. 200, 207 (2004). ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.). In *Felix v. Lucent Technologies Inc.* 387 F.3d 1146, 1156 (10th Cir. 2004), the court said that ERISA's preemption is so extraordinary that it converts a state claim for the purposes of removal. Generally speaking, ERISA preempts any action that relates to a qualified plan and the defendant has the right to remove

from state court any action they may fit that criteria. Upon removal it would be incumbent on the district court to determine the applicability of ERISA regulation.

The similarities between the preemption provisions of the Price-Anderson Act and ERISA demonstrate that Congress has expressed a unequivocal intention for a federal forum as to actions that relate to employee welfare benefits. As described in *El Paso*, the removal provisions of the Price-Anderson Act are also present in ERISA. *See Felix v. Lucent Technologies Inc.* Also, Congress, by enacting ERISA, sought to avoid a patchwork of state regulations that could be inconsistent. *Shaw v. Delta Airlines Inc.*, 463 U.S. 85, 103 S.Ct 2890, 77 L.Ed. 409 (1983). Consistent with *El Paso*, it is not dispositive that ERISA is silent as to tribal jurisdiction or exhaustion. Indeed, as the court stated in *El Paso* concerning the Price-Anderson Act, there is no reason to believe that Congress would have favored tribal exhaustion.

**Conclusion**

This Court clearly has jurisdiction over this case. A stature of general application ususally applies to tribal entities. The only exceptions to this rule are if the statutory scheme interferes with tribal government; is an area of tribal concern protected by treaty; or if there is evidence that Congress intended for the act not to apply to tribal entities. As set forth in the *Smart* case, ERISA does not interfere with tribal government any more than requirements for federal withholding taxation. Also, *Smart* shows that there is no Congressional intent that ERISA not apply to tribal entities. There is currently nothing in the record that would demonstrate any treaty that would allow the tribes to avoid federal litigation regarding its obligations under ERISA.

The strong Congressional preference for a federal forum precludes the necessity to exhaust tribal remedies. The rule in *El Paso* teaches that a preemption provision that is sweeping in nature

and allows for the removal of state claims that may fall within its ambit is a clear expression that Congress intended that such claims be brought in a federal forum. Just as the court in *El Paso* found that claims brought under the Price-Anderson Act should be brought in a federal forum, so should claims under ERISA be subject to the same analysis. From the extraordinary preemption provisions of ERISA it, like the Price-Anderson Act, should not require exhaustion of tribal remedies.

Respectfully submitted,

s/David R. Blades
David R. Blades, OBA #15187
**ARMSTRONG & LOWE, P.C.**
1401 South Cheyenne
Tulsa, Oklahoma 74119
(918) 582-2500 Telephone
(918) 583-1755 Fax
email: dblades@armstronglowe.com

**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

I hereby certify that on 16th day of October, 2006, 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:

Gary Pitchlynn, Esq.
O. Joseph Williams, Esq.
**PITCHLYNN & ASSOCIATES, P.A.**
P.O. Box 427
124 E. Main St.
Norman, OK 73070

s/David R. Blades