

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

**MARILYNN G. VANDEVER and
CHARLES VANDEVER,**

Plaintiffs,

V.

**OSAGE NATION ENTERPRISE INC.
and OSAGE NATION,**

Defendants.

Case No.: 06-CV-380-TCK-SAJ

ATTORNEY LIEN CLAIMED FOR THE FIRM JURY TRIAL DEMANDED

**PLAINTIFFS' SUPPLEMENTAL BRIEF TO HER RESPONSE TO THE
DEFENDANT'S MOTION TO DISMISS**

COME NOW, the Plaintiffs and provides the following supplementation to their Response to the Defendants' Motion to Dismiss:

1. The Plaintiffs filed a Complaint alleging certain violation of the ERISA against the Defendants in this action
2. The Defendants filed its Motion to Dismiss alleging this Court lacked jurisdiction as a result of tribal sovereignty and, in the alternative, asserted that the Plaintiffs should be required to exhaust their tribal remedies prior to seeking intervention by this Court.
3. The Plaintiffs filed a Response to the Defendants' Motion and subsequently the Defendant filed its Reply.
4. In Defendants' Reply the Defendants raised a new issue asserting that the Plaintiffs

consented to tribal jurisdiction and therefore the Plaintiffs are precluded from bringing this action in federal court.

5. The Defendants' reliance on consent to divest this Court of subject matter jurisdiction and bestow it on the tribe must fail because the general rule provides that jurisdiction of the court cannot be created or destroyed by any action of the parties.

Arguments & Authorities

Subject matter jurisdiction cannot be affected by the consent of the parties. The issue of jurisdiction in this case is one of subject matter jurisdiction. Subject matter jurisdiction deals with the issue of whether a court has the power to hear a dispute. It has long been established that a court can neither be vested or divested of jurisdiction by the consent of the parties, *See, Neirbro Co. v. Bethlehem Shipbuilding Corp.*, 380 US 165, 60 S.Ct. 153, 84 L.Ed 167 (1939) *Wright & Miller Federal Practice and Procedure Civil 2d. § 1350.*

The general rule preventing a parties consent from having any effect on subject matter jurisdiction is just as valid when dealing with tribal governments. In *Stock West Inc. v. Confederated Tribes of the Colville Reservation* 873 F2d 1221 (9th cir 1989), the tribe stated that the consent of the parities vested the tribal courts with jurisdiction in their particular dispute. The court disagreed, and noted that the while a party may consent to personal jurisdiction, subject matter jurisdiction cannot be resolved in such a manner.

...On the other hand, a party cannot waive by consent or contract a court's lack of *subject matter* jurisdiction. *Securities & Exchange Comm'n v. Blazon Corp.*, 609 F.2d 960, 965 (9th Cir.1979). Thus, even if the consent of Stock West was adequate to confer personal jurisdiction onto the tribal court, the question of whether the tribal court has subject matter jurisdiction over the case would still not be resolved.

In the instant matter, as is *Stock West Inc.*, the Defendants appear to have confused the notions of

personal and subject matter jurisdiction.

If it is determined that this Court has jurisdiction to hear this matter, the Plaintiffs' purported consent to tribal jurisdiction should have no effect in this case. In their Response to the Defendants' Motion to Dismiss, the Plaintiffs set forth their argument on why this Court has exclusive jurisdiction to hear matters involving a violation of ERISA. If the Court is persuaded Congress intended apply ERISA to tribal governments, then it is well settled that the Plaintiffs cannot divest this Court of jurisdiction by consent or contract.

WHEREFORE, for the reasons stated above, the Defendants' Motion to Dismiss should be overruled.

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 13th day of November, 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