IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN DOBBS and NAOMI DOBBS	)	
	)	
Plaintiffs-Appellants-Cross-Appellees,	)	
	)	
vs.	)	Case Nos. 07-1398 & 07-1402
	)	
ANTHEM BLUE CROSS AND BLUE SHIELD,	)	
	)	
Defendant-Appellee-Cross-Appellant.	)	

BRIEF OF THE APPELLEE AND OPENING BRIEF OF THE CROSS-APPELLANT

Appeal from the United States District Court
for the District of Colorado
Civil Action No. 04-B-2283
Honorable Lewis T. Babcock. Judge

ORAL ARGUMENT NOT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED.R.APP.P. 26.1, Anthem Blue Cross and Blue Shield states that its parent corporation, Wellpoint, Inc., is a publicly-traded company and owns more than 10% of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

COURT RULES

STATUTES

TABLE OF AUTHORITIES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

LIST OF PRIOR OR RELATED APPEALS

Dobbs v. Anthem Blue Cross & Blue Shield, 475 F.3d 1176 (10th Cir.2007)

JURISDICTIONAL STATEMENT

Subject matter jurisdiction in the district court was premised on federal question jurisdiction under 28 U.S.C. § 1331. Plaintiffs filed their notice of appeal on September 24, 2007 (Doc.69; Supp.App.411). Defendant filed its notice of cross-appeal on September 26, 2007(Doc.73; Supp.App.413). Jurisdiction in this Court is pursuant to 28 U.S.C. § 1291.

QUESTIONS PRESENTED

I. Did the district court correctly determine that the 2006 amendments to 29 U.S.C. § 1002(32) were not retroactive?

II. Did the district court correctly determine that, under the pre-2006 version of § 1002(32), Plaintiffs' employee benefit plan was not a "governmental plan" exempt from ERISA, such that their state law claims are preempted by 29 U.S.C. § 1144?

III. Was Plaintiffs' Fourth Claim for Relief properly dismissed as preempted by ERISA because it arose from the administration of an employee benefit plan?

IV. Did the district court err in holding that Plaintiffs' employee benefit plan meets the definition of "governmental plan" under the 2006 amendments to § 1002(32) without conducting a fact-specific analysis?

STATEMENT OF THE CASE

I. Nature of the case.

This is an action by Plaintiffs Steven Dobbs and Naomi Dobbs against Defendant Anthem Blue Cross and Blue Shield (Anthem) seeking extra-contractual damages for Anthem's alleged failure to pay health insurance benefits that Plaintiffs claim were wrongfully denied under an benefit plan that Anthem provided for employees of an Indian tribe. In its initial judgment entered in 2005, the district court held that Plaintiffs' state law claims were preempted by ERISA. This case comes before the Court on appeal from the decision entered by the district court following remand by this Court in *Dobbs v. Anthem Blue Cross & Blue Shield*, 475 F.3d 1176 (10th Cir.2007), in which the district court held that the 2006 amendments to ERISA were not retroactive, and consequently reaffirmed its initial ruling that Plaintiffs' state law claims are preempted by ERISA.

II. Course of proceedings and disposition below.

Plaintiffs filed their initial Complaint in Colorado state court (Doc.1; Supp. App.15-23). They asserted five state law claims for relief: bad faith breach of insurance contract; outrageous conduct; violation of the Colorado Consumer Protection

Act, COLO. REV. STAT. § 6-1-101 *et seq.*; fraud as to policy terms and benefits; and fraudulent inducement as to letter of promised correction (*id.*).

Anthem removed the action to the U.S. District Court for the District of Colorado based on federal question jurisdiction under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*. (Doc.1; Supp.App.9-13), and also moved to dismiss the Complaint based on ERISA preemption under 29 U.S.C. § 1144 (Doc.2; Supp.App.24-41). Anthem showed that dismissal was appropriate because Plaintiffs' health insurance benefits were part of an "employee welfare benefit plan" as that term is defined in ERISA, such that all their state law claims were preempted (Doc.2 at 2-14; Supp.App.27-39).

After Plaintiffs filed an Amended Complaint containing the same five claims for relief (Doc.9; Supp.App.42-53), Anthem moved to dismiss the Amended Complaint based on ERISA preemption (Doc.12; Supp.App.54-77). In response, Plaintiffs argued that ERISA did not preempt their state claims because the statute does not apply to employee benefit plans established or maintained by Indian tribes (Doc.17; Supp.App.176-99).

The district court initially held that ERISA applied to Plaintiffs' health insurance plan notwithstanding its sponsorship by an Indian tribe, the Southern Ute

Indians (Doc.22; Supp.App.230-40). In its March 14, 2005 Order, the court determined from the allegations in the Amended Complaint that Anthem's group health plan for the tribe was an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1), and that it was not a "governmental plan" exempt from ERISA under 29 U.S.C. § 1002(32) (Doc.22 at 3-10; Supp.App.232-39). The court rejected Plaintiffs' contention that tribal sovereignty precluded the tribe's plan from being subject to ERISA (*id.* at 6-8; Supp.App.235-37), and followed *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir.1989) and *Lumber Industry Pension Fund v. Warm Springs Forest Prods.*, 939 F.2d 683 (9th Cir.1991) to hold that ERISA applies to employee benefit plans established or maintained by Indian tribes (Doc.22 at 6; Supp.App.235). The court also rejected Plaintiffs' argument that an Indian tribe is an "agency or instrumentality" of the federal government exempt from ERISA under § 1002(32) (Doc.22 at 8-10; Supp.App.237-39).

The district court thus dismissed all of Plaintiffs' claims as preempted by ERISA, except for their Fourth Claim for Relief, denominated "Fraudulent Inducement as to Policy Terms and Promotional Literature" (Doc.9, ¶¶ 81-86; Supp.App. 52). Citing *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co*, 170 F.3d 985 (10th Cir.1999), the district court initially declined to dismiss this claim insofar as it

was predicated on Anthem's alleged pre-contractual misrepresentations, which the court determined were not subject to ERISA because they were allegedly made as an inducement to Plaintiffs before the Anthem plan existed (Doc.22 at 10-11; Supp.App. 239-40).

On Anthem's motion for reconsideration (Doc.24; Supp.App.271-72), the district court held that Plaintiffs' Fourth Claim for Relief was also preempted by ERISA (Doc. 29; Supp.App.289-93), because their application for enrollment established that they enrolled in the Anthem plan more than a year after the tribe began participating in it. Because Anthem had already assumed its role as administrator of the plan before Plaintiffs elected to participate in it, their fraud claim arose from the administration of the plan and was therefore preempted by ERISA (Doc.29 at 4-5; Supp.App. 291-92). Accordingly, the district court dismissed Plaintiffs' Fourth Claim for Relief (Doc.29 at 6; Supp.App.293) and entered final judgment for Anthem (Doc.30; Supp. App.294-95). Plaintiffs' motion for reconsideration (Doc.32; Supp.App.296-98) was denied (Doc.33; Supp.App.299).

On appeal, this Court vacated the district court's order and remanded for further consideration in light of the amended definition of "governmental plan" in the 2006 amendments to§ 1002(32). *Dobbs*, 475 F.3d at 1178-79.

This Court noted that because the amended provision makes a distinction between "essential governmental functions" and "commercial activities," not all plans established and maintained by Indian tribes fall under the amended governmental plan exemption. *Id.*, 475 F.3d at 1178. The Court further noted that the determination of whether a tribal plan qualifies as a" governmental plan" under the new statutory definition "requires a fact-specific analysis of the plan at issue and the nature of its participants' activities." *Id.* The Court concluded that "If the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." *Id.* at 1179.

Finally, the Court commented that the legislative history "suggests" that the amendment may be merely a clarification of "the legal ambiguity regarding the status of employee benefit plans established and maintained by tribal governments," despite the fact that the Seventh and Ninth Circuits had previously concluded that ERISA applies to plans established and maintained by Indian tribes. *Id.* However, this Court did not address the effect of § 906(c) of the 2006 amendments, which specifically provides for prospective application only.

On remand, Anthem renewed its motion to dismiss (Doc.49-1; Supp.App.310-30). The district court granted the motion and again dismissed the Amended Com-

plaint. The court held that the new definition of "governmental plan" in the 2006 amendments to § 1002(32) does not apply retroactively to Plaintiffs' benefit plan because Congress expressly intended the amendment to be applied prospectively only (Doc.67; Supp.App.400-08). Citing § 906(c) of the Pension Protection Act of 2006, the court determined that "This explicit language reflects the statute should not be applied retroactively and would seem to settle the matter of Defendant's behalf" (Doc.67 at 6; Supp.App.405).

The court rejected Plaintiffs' argument that this Court's mandate required a different result, holding that it "does not dictate the outcome of this case because the 2006 amendments are not retroactive" (Doc.67 at 7; Supp.App.406). The court further rejected Plaintiffs' argument that "the law of the case" doctrine dictated a finding that their employee plan was exempt from ERISA, ruling that the issue had not been decided either explicitly or by necessary implication in this Court's prior opinion, since the opinion did not actually resolve the issue but merely framed it. "As the effective date of the § 1002(32) amendment, prospective in its application, was August 17, 2006, the September 3, 2004, claims arising under the Dobbses' plan are not covered under the amendment and are preempted by ERISA" (Doc.67 at 8; Supp. App.407). The court concluded that the 2006 amendments had no effect on the

ERISA preemption of Plaintiffs' state law claims and ordered them dismissed for failure to state a claim (*id*. at 9; Supp.App.408). Judgment was again entered for Anthem on all of Plaintiffs' claims for relief (Doc.68; Supp.App.409-10).

Although the district court concluded that the 2006 amendments were not retroactive and therefore could not be retroactively applied, it nonetheless held that Plaintiffs' plan was a "governmental plan" under the amended definition:

> The benefit plan at issue here is established an maintained by an Indian tribal government. The plan states the "Nature of Business" is "Tribal Government." Mr. Dobbs claims he assists to manage the Tribal treasury in order to provide financial security for tribal functions, a position he believes is "a core function of sovereign government." [Citations omitted]. For the purposes of Defendant's Motion to Dismiss, I must accept the factual assertion that Mr. Dobbs assists to manage the Tribal treasury as true.
>
> Management of the treasury is a vital element of self-governance that enables a government "to perform its most essential functions." THE FEDERALIST NO. 30 (Alexander Hamilton). The ability to procure a regular and adequate supply of money is "an indispensable ingredient" in every government. *Id.* Because there is no indication that Mr. Dobbs was engaged in "commercial activities (whether or not an essential government function)," 29 U.S.C. § 1002(32), the Dobbses' plan meets the new definition of a governmental plan under ERISA, as amended (Doc.67 at 4; Supp.App.403).

Plaintiffs now appeal the judgment dismissing their Amended Complaint, and specifically appeal the ruling that the 2006 amendments to § 1002(32) are not retroactive. Anthem cross-appeals the district court's ruling that Plaintiffs' plan was a

"governmental plan" under the 2006 amendments to § 1002(32). However, there is no need to reach the issue on cross-appeal if the judgment is affirmed.

III. Statement of facts relevant to issues on appeal.

Defendant rejects Plaintiffs' statement of facts as biased, inaccurate, and unsupported by references to the record as required by FED.R.APP.P. 28(a)(7) and 28(e).

Plaintiffs enrolled in a group health insurance policy sold and underwritten by Anthem, which was offered through Steven Dobbs's employer, the Southern Ute Indian Tribe (Doc.9, ¶¶ 6, 9; Supp.App.43; Doc. 23, Ex.A; Supp.App.256-70). Mr. Dobbs is not an Indian or a member of the tribe. By the time Plaintiffs enrolled, the plan had already been established and had been in effect with Anthem since February 2000; Plaintiffs, however, did not enroll until July 2001 (Doc. 23, Anthone Aff. & Ex.A; Supp.App.256-57, 270). Neither party disputes the district court's determination that the plan at issue in this case meets ERISA's definition of an "employee welfare benefit plan" under 29 U.S.C. § 1002(1). *See Dobbs*, 475 F.3d at 1177 n.1.

The dispute in this case arises from Anthem's payment of benefits for Plaintiffs' son, Skyler (Doc.9, ¶¶ 21-55; Supp.App.45-49). Plaintiffs allege that Anthem unreasonably denied and delayed approval and payment for Skyler's treatment by a physician that Plaintiffs believed was an in-network provider (*id.*). Plaintiffs, how-

ever, have acknowledged that "most of" the benefits due have in fact been paid by Anthem at the desired in-network rate (*see* Doc.9, ¶ 55; Supp.App.49). Despite this acknowledgment, Plaintiffs seek to maintain this action based on the alleged manner in which their benefits were processed.

SUMMARY OF ARGUMENT

In its prior opinion, this Court remanded this case to the district court to determine whether the 2006 amendments to the definition of "governmental plan" under 29 U.S.C. § 1002(32) included employee benefit plans established by Indian tribes. Because, however, Congress intended the 2006 amendments to have prospective operation only, and because it was a change in law and not a mere clarification, the district court correctly held that the amendments do not apply to the plan at issue in this case.

ERISA preempts all state laws relating to any claim alleging the improper processing of a claim for benefits under an employee welfare benefit plan. Plaintiffs' benefit plan, sponsored by the Southern Ute Tribe, is not exempt from ERISA because it is not a "governmental plan" within the meaning of the version of § 1002(32) in effect when Plaintiffs' claims arose. Congress did not intend to create an exception

to ERISA for employees of tribal employers, and ERISA does not impermissibly infringe upon tribal sovereignty.

Because the 2006 amendments to § 1002(32) cannot be applied retroactively, the district court properly dismissed Plaintiffs' state law claims because their employee benefit plan is subject to ERISA, which preempts their claims. The district court's judgment should therefore be affirmed.

ARGUMENT

I. Plaintiffs' state law claims are preempted by ERISA because the 2006 amendments are not retroactive.

A. Standard of review.

Whether federal law preempts state law claims is a question of law that is reviewed *de novo*. Dismissal of a complaint for failure to state a claim under FED.R.CIV.P. 12(b)(6) is also reviewed *de novo*. *Garley v. Sandia Corp*., 236 F.3d 1200, 1206 (10th Cir.2001); *Dobbs*, 475 F.3d at 1177.

B. Whether the Anthem plan is a "governmental plan" exempt from ERISA depends on whether the 2006 amendments to 29 U.S.C. § 1002(32) apply in this case.

The principal issue on appeal is whether an employee benefits plan established by an Indian tribe is subject to ERISA such that Plaintiffs' state law claims are pre-

empted by federal law. In initially deciding that ERISA applies to employee benefit plans established by tribes, the district court reasoned that such a plan is not exempt from ERISA coverage as a "governmental plan" under 29 U.S.C. § 1003(b)(1). Under 29 U.S.C. §§ 1003(b)(1) and 1144(a), ERISA does not preempt state laws that relate to governmental plans. At the time of the court's initial decision, the definition of "governmental plan" under ERISA included plans established or maintained by federal and state governments, but did not explicitly include tribal governments. Employee Retirement Income Security Act of 1974, Pub.L. No. 93-406, § 3(32), 88 Stat. 829, 837 (1974). *See* 29 U.S.C. § 1002(32).

This Court must therefore decide two threshold questions: (1) whether the amended definition of "governmental plan" under § 1002(32) was intended to be applied retroactively; and, if not, (2) whether it was a mere clarification of existing law that can be used to interpret "governmental plan" and thus be applied retroactively. If the answer to both is no, then Plaintiffs' state law claims are preempted by ERISA notwithstanding the 2006 amendments for the reasons originally found by the district court.

B. Scope of 2006 amendments to § 1002(32).

In August 2006, more than a year after the district court entered its initial order, Congress amended the definition of "governmental plan" under ERISA to include employee benefit plans established and maintained by Indian tribes. The amended definition expressly includes some plans established by tribes:

> The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

Pension Protection Act of 2006, Pub.L. No. 109-280, § 906(a)(2)(A), 120 Stat. 780 (2006) (codified as amended at 29 U.S.C. § 1002(32)).

Section 906(c) of the 2006 amendments specifically provides for prospective application only:

> (c) Effective Date. –The amendments made by this section shall apply to any year beginning on or after the date of the enactment of this Act.

Pub.L. No. 109-280, § 906(c), 120 Stat. 780. The date of enactment was August 17, 2006.

C. Congress expressly intended the 2006 amendments to § 1002(32) to have prospective application only.

In its opinion, this Court did not discuss the effective date of the 2006 amendments to § 1002(32), and did not acknowledge § 906(c) of the legislation. On remand, the district court held that the 2006 amendments are not retroactive because Congress expressly intended them to be applied prospectively only (Doc.67 at 5-6; Supp.App.404-05). This ruling is compelled by the explicit language of § 906(c) of the 2006 amendments and therefore should be affirmed.

As the Supreme Court has repeatedly held, the presumption against retroactive legislation is deeply rooted in our jurisprudence. *Lindh v. Murphy*, 521 U.S. 320, 325 (1997); *Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 946 (1997); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). As such, congressional enactments will not be construed to have a retroactive effect unless their language requires such a result. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837-38 (1990); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The Supreme Court has recognized that Congress:

> has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product. No such change, however, has the force of law unless it is implemented through legislation. Even when Congress

> intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear.

Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 (1994).

The only cases where the Supreme Court has found that statutes have adequately authorized a retroactive effect have involved statutory language that was so clear it could sustain only one interpretation. *See*, *e.g.*, *Lindh*, 521 U.S. at 329, citing *Graham & Foster v. Goodcell*, 282 U.S. 409, 416-20 (1931), *Automobile Club of Mich. v. Comm'r*, 353 U.S. 180, 184 (1957), and *U. S. v. Zachs*, 375 U.S. 59, 65-67 (1963). Otherwise, a statute will not be given a retroactive application unless it is required by explicit language or necessary implication. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422, 2428 (2006). This is because "[s]tatutes are disfavored as retroactive when their application 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.*, 126 S.Ct. at 2427-28, quoting *Landgraf*, 511 U.S. at 280.

The Supreme Court has worked out a sequence of analysis when an objection is made to applying a particular statute said to affect a vested right or to impose some burden on the basis of an act or event preceding the statute's enactment:

> We first look to "whether Congress has expressly prescribed the statute's proper reach," and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying "our normal rules of construction." If that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment." If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the "absen[ce of] a clear indication from Congress that it intended such a result."

Fernandez-Vargas, 126 S.Ct. at 2428 (citations omitted).

Here, Congress "has expressly prescribed the statute's proper reach" by enacting the 2006 amendments to § 1002(32) with an unambiguous effective date: "The amendments made by this section shall apply to any year beginning *on or after* the date of the enactment of this Act." Pub.L.No. 109-280, § 906(c), 120 Stat. 780 (emphasis added). As amended, § 1002(32) does not require, or even permit, retroactive application. It requires the opposite instead: prospective application only, from the date of enactment, August 17, 2006. Based on this clear statutory directive, the 2006 amendments to § 1002(32) cannot be applied retroactively.

Where the congressional intent is clear, it governs and there is no need to resort to statutory construction or judicial default rules. *Landgraf*, 511 U.S. at 264, 280 ("[W]hen a case implicates a federal statute enacted after the events in suit, the

court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules."); *Rivers*, 521 U.S. at 313 ("[I]n statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 896-97 (1996) (reversing court of appeals because it disregarded express prospective language in amendment and held that where temporal effect of statute is manifest on its face, there is no need to resort to judicial default rules and inquiry is at an end); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (court must give effect to unambiguously expressed intent of Congress).

Congress enacted the 2006 amendments to § 1002(32) with an unambiguous effective date requiring prospective application only. Congress's intent therefore could not be clearer. The Supreme Court has mandated that the inquiry ends there, and there is thus no need to interpret the statute or review its legislative history to determine whether Congress intended to apply the amended definition of "governmental plan" retroactively or prospectively. *See Landgraf*, 511 U.S. at 258 ("[A] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

This Court, like the district court, cannot disregard the clear intent of Congress not to apply the 2006 amendments to § 1002(32) retroactively. In § 906(c), Congress expressly mandated prospective application only of the 2006 amendments to § 1002(32). Because these amendments were enacted on August 17, 2006, the amended definition of "governmental plan" to include some benefit plans established and maintained by Indian tribes can be applied from that date forward only.

Plaintiffs nonetheless argue that the language in § 906(c) does not mandate prospective application only because it refers to a "year," whereas other effective-date provisions in the Pension Protection Act of 2006 refer to "plan years." Plaintiffs then make the confusing argument that because the term "year" in § 906(c) is broader than the term "plan year," it must somehow be more narrowly construed. In reality, Congress's use of the term "year" in § 906(c) could not be clearer: the plain and ordinary meaning of "year" is a " a period of twelve months commencing on a specified day of a particular month and terminating as of the same day of the same month in the succeeding year." *See Yokley v. Belaski*, 982 F.2d 423, 424-25 (10th Cir.1992).

In any event, the difference between the effective date clause in § 906(c) and other effective date clauses that refer to "plan years" is inconsequential. That other effective date clauses may specifically apply to "plan years" does not alter the retro-

activity analysis given the explicit language of § 906(c). There is more than one way to draft an effective-date clause that leads to prospective application; the language of § 906(c) clearly and unambiguously provides that it applies prospectively, and would also so provide even if it used the term "plan year" instead of "year." Congress thus intended to apply the 2006 amendments to § 1002(32) prospectively, particularly where they constitute a substantial change to "substantive rights, liabilities, or duties [on the basis of] conduct arising before [the amendment's] enactment" under ERISA that prevents them from being applied retroactively. *See Fernandez-Vargas*, 126 S.Ct. at 2428. Plaintiffs' purported distinction is therefore irrelevant. If anything, the phrase "any year beginning on or after the date of the enactment of this Act" rather than "plan year" recognizes that some of the changes affect the tax consequences and Congress wanted the tax consequences to coincide with the most common tax year, *i.e.*, the calendar year.

Plaintiffs further argue that the new definition of "governmental plan" in § 906(a)(2)(A) was intended to be a "clarification" because § 906(b) provides that certain amendments to other statutes are a "clarification that tribal governments are subject to the same pension plan rules and regulations applied to state and other local

governments and their police and firefighters." Pub.L.No. 109-280, § 906(b), 120 Stat. 780.

However, Plaintiffs acknowledge that "the statement regarding clarification pertains to subsection (b) while the language amending the definition of governmental plan appears in subsection (a)." Had Congress intended the new definition of "governmental plan" in § 906(a)(2)(A) to be a mere "clarification" of existing law instead of a new definition, it could have so provided, as it did in § 906(b), but did not. This confirms that in enacting the amendment to § 1002(32) in § 906(a)(2)(A), Congress intended to change the law rather than merely "clarify" it. *See Fernandez v. INS*, 113 F.3d 1151, 1153 (10th Cir.1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). As Plaintiffs conceded below, it "might reasonably be inferred from that drafting decision . . . that Congress recognized different sections do different things and should be implemented and interpreted accordingly" (Doc.61 at 10; Supp.Appp.__). The amendments in § 906(b), moreover, have the same effective date as the amendment to § 1002(32) in § 906(c), thus casting further doubt on

whether they were intended as a mere "clarification" of existing law or as a substantive change.

Plaintiffs also cite *Fernandez*, 113 F.3d at 1153, for the principle that an amendment to a jurisdiction-eliminating statute may be applied retroactively, but this argument is misplaced because § 1002(32) is not a jurisdiction-eliminating statute. In *Fernandez*, the petitioners were found deportable for offenses specified in § 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which states that final orders of deportation shall not be reviewed by any court. *Id.*, 113 F.3d at 1152. The petitioners argued that AEDPA did not apply to their cases because their petitions for review were filed before its enactment. This Court recognized the presumption against retroactivity, but held that it did not apply:

> to a jurisdictional statute such as section 440(a), which "takes away no substantive right but simply changes the tribunal that is to hear the case." Section 440(a) does not alter the petitioners' underlying defenses to deportation or claims for relief; it merely changes the locus of their final appeal—from an Article III court to the Board of Immigration Appeals.
>
> Thus, applying section 440(a) to these cases would not *retroactively* divest the petitioners of claims or defenses. Rather, [it] would operate *prospectively* to prevent this court from exercising jurisdiction over the petitions for review.

Id. at 1153 (citations omitted; emphasis original).

Here, in contrast, taking this case out of ERISA does not simply change the tribunal that will hear the case, it changes Anthem's substantive rights. Anthem, and the tribe, relied on ERISA's governance when developing the plan at issue. Applying this amendment to take this case out of ERISA's reach would retroactively divest Anthem of its defenses.

Further, *Fernandez* goes on to state that even if the presumption against retroactivity *did* apply, the legislative history strongly indicated that Congress intended for the statute to operate retroactively. *See id*. at 1153 ("Thus, clear congressional intent rebuts any presumption against retroactivity that might apply."). The exact opposite is true in this case. Congress's express intent in enacting § 906(a)(2)(A) was for the amendment to apply prospectively, as it made clear in § 906(c).

Even if the effective date of the 2006 amendments to § 1002(32) in § 906(c) could somehow be ignored, retroactive application in this case should nevertheless be rejected because application of the amendment would result in "manifest injustice" to Anthem. Section 906(a)(2)(A) is not simply a jurisdiction-eliminating statute that would change the tribunal in which this case is decided, but a substantive change in the law whose retroactive application would divest Anthem of claims and defenses.

If this is applied amendment retroactively, Anthem will be subjected to a law that was not in effect when the plan was implemented or the events at issue occurred.

The Supreme Court has long held that retroactive application of a statute should only occur when Congress has specifically intended such an application:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf, 511 U.S. at 265-67 (citations omitted).

As evinced by § 906(c), Congress clearly intended for the 2006 amendments to § 1002(32) to be applied prospectively only, and thus applying the amended definition of "governmental plan" in this case would result in manifest injustice to Anthem. Retroactive application of the 2006 amendments would impermissibly impair the rights that Anthem possessed when it acted, increase Anthem's liability for past conduct, and impose new duties on Anthem with respect to transactions already completed. *See Landgraf*, 511 U.S. at 280. For this reason as well, Plaintiffs' argument that the 2006 amendments to § 1002(32) should be applied retroactively in this case should be rejected.

D. Because the 2006 amendments to § 1002(32) were a change in law and not a mere clarification, the amended definition of "governmental plan" cannot be retroactively applied.

The 2006 amendments to the definition of "governmental plan" were much more than a clarification; the amended definition was a substantial change of law. The legislative history of the Pension Protection Act of 2006 and the amended definition of "governmental plan" suggest that the change was not a mere clarification, but rather a change to existing law that cannot be applied retroactively. As President Bush stated upon signing it on August 17, 2006, the Pension Protection Act constituted "the most sweeping reform of America's pension laws in over 30 years."[1]

In its prior opinion, this Court did not address the effective-date clause of the 2006 amendment, which specifically provides for prospective application only, but apparently assumed instead that Congress was silent on the effective date of the amendment and cited what it apparently perceived as part of the legislative history of § 1002(32) for the proposition that Congress may have intended to clarify the statute. By this statement, the Court seemed to imply that this statute should be applied retroactively. *Dobbs*, 475 F.3d at 1178.

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[1] www.whitehouse.gov/news/releases/2006/08/20060817-1.html.

Altering statutory definitions or adding new definitions of terms previously undefined, is a common way of amending statutes but does not answer the retroactivity question. *Rivers,* 511 U.S. at 308. However, a statute's legislative history may be interpreted to determine retroactivity only if there is congressional silence on the issue. *See Chevron*, 467 U.S. at 843.

In support of its perception that the amended definition may be a mere clarification of existing law, the Court cited to 150 CONG. REC. S9526, 9533 as a presumptive part of the Pension Protection Act's (and the new definition's) legislative history. *Dobbs*, 475 F.3d at 1178. This was a bill introduced in the Senate by Senator Gordon Smith on September 22, 2004 as S.2831 to "clarify that federally recognized Indian tribal governments are to be regulated under the same government employer rules and procedures that apply to Federal, State, and other local government employers with regard to the establishment and maintenance of employee benefit plans." S.2831, 108th Cong. (2004). This bill never passed, however, and was not cited as part of the Pension Protection Act's legislative history (Doc.49-2; Supp.App.331-43). Thus, it appears that this Court relied on a bill that was not actually part of the relevant legislative history of the 2006 amendments to the definition of "governmental plan" in § 1002(32).

The Pension Protection Act of 2006 was enacted from a bill introduced by Representative Boehner on July 28, 2006 as H.R.4. H.R.4 was passed in the House of Representatives on July 28, 2006 and in the Senate on August 3, 2006, and was signed into law on August 17, 2006, and codified as 109 Pub.L. 280, 120 Stat. 780 (Doc.49-3). The prior bills listed in the legislative history of H.R.4 do not include S.2831 (Doc.49-2; Supp. App.__).

H.R.4 represented the agreed-upon provisions from H.R.2830 and S.1783. H.R.2830 was introduced by Representative Boehner on June 9, 2005 as the "Pension Protection Act of 2005" "to amend ERISA of 1974 and the Internal Revenue Code of 1986 *to reform the pension funding rules*, and for other purposes" (emphasis added). H.R.2830, 109th Cong. (2005). This bill was passed in the House on December 15, 2005. This same bill was considered and passed in the Senate, as amended, on March 3, 2006. The Senate's amendments, however, were rejected by the House on March 8, 2006 (Doc.49-4; Supp.App.353-62). H.R.2830 did not include any proposed amended definition of "governmental plan" to include Indian tribal governments.

S.1783 was introduced on September 28, 2005 as the "Pension Security and Transparency Act of 2005" by Senator Grassley "to amend ERISA of 1974 and the

Internal Revenue Code of 1986 *to reform the pension funding rules*, and for other purposes" (emphasis added). S.1783, 109th Cong. (2005). This bill was passed in the Senate on November 16, 2005 (Doc.49-5; Supp.App.363-71). Section 1311(b) of S.1783 included the following proposed language to amend the definition of governmental plan under ERISA:

> The term "governmental plan" includes a plan established or maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency instrumentality (or subdivision) of an Indian tribal government, or an entity established under Federal, State, or tribal law that is wholly owned or controlled by any of the foregoing.

151 CONG.REC. S12960, § 1311(b). S.1783 also proposed retroactive application: "The amendments made by this subtitle shall apply to any year beginning before, on, or after the date of the enactment of this Act." 151 CONG.REC. S12960, § 1314.

In contrast to this proposed amendment, the language that ultimately passed amended the definition of "governmental plan" by adding language that excepted those plans established by tribal governments for employees whose services are "in the performance of commercial activities":

> The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), or an agency or instrumentality of either, and all of the participants of which are

> employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

Pension Protection Act of 2006, Pub. L. No. 109-280, § 906(a)(2)(A), 120 Stat. 780 (codified as amended at 29 U.S.C. § 1002(32)). Unlike earlier versions, the Pension Protection Act of 2006 mandated prospective application only. *See id.* at § 906(c).

Hence, the version of the Pension Protection Act of 2006 that was enacted did not provide for either a complete exemption of trial benefit plans from ERISA or for retroactive application.

Even assuming, however, that the bill introduced by Senator Smith on September 22, 2004 as S.2831, and cited by this Court in its prior opinion, could be considered legislative history of the Pension Protection Act of 2006, this would also evince that the 2006 amendments constituted a change in law and not simply a clarification. The following language was proposed by S.2831:

> The term "governmental plan" also includes a plan established or maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), an agency or instrumentality of an Indian tribal government or subdivision thereof, or an entity established under tribal, Federal, or State law which is wholly owned or controlled by any of the foregoing.

S.2831, § 2(b). S.2831 also proposed retroactive application: "The Amendments made by this Act shall apply to years beginning *before, on, or after* the date of the enactment of this Act." S.2831,§ 5 (emphasis added).

Thus, even if S.2831 could be considered relevant legislative history, both the amended definition of "governmental plan" and the effective date of the amendment as enacted substantially differ from that proposed in S.2831. As originally proposed, the revision to the definition would have placed Indian tribes on the same footing as state or federal governments. As passed, however, only select tribal plans fall within the definition of "governmental plan," such that tribal casino employee benefit plans are not subject to ERISA. Hence, the additional language clearly resulted in a change and addition to the definition of "governmental plan." This makes clear that Congress rejected any different language proposed in S.2831.

Most importantly, Congress explicitly rejected the concept that Indian tribal plans were always within the definition of "governmental plan," and further rejected the proposed retroactive language in S.2831 and S.1783 when it enacted the amendments to § 1002(32) with clear prospective application only. Therefore, S.2831 offers further support of Congress's intent when it enacted § 1002(32). Congress explicitly rejected any language pertaining to retroactive application and thus clearly demon-

strated an intent to apply this amendment prospectively only. *See Landgraf*, 511 U.S. at 262-63.

Moreover, even assuming that the 2006 amendments to § 1002(32) are silent on whether they should be applied retroactively or prospectively, the issue of clarification versus change in law still requires § 1002(32) to be applied prospectively.

Congress may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1436 (10th Cir.1997). "It is hazardous, however, to assume from the enactment of a 'clarifying' amendment that Congress necessarily was merely restating the intent of the original enacting Congress." *Id.* As this Court has observed, "using [an] amendment to interpret Congress' intent [years ago] is a questionable practice, particularly because of the long lapse of time and because the legislative history of both the original statute and the amendment are not enlightening." *Id.*, quoting *O'Gilvie v. U.S.*, 66 F.3d 1550, 1559 (10th Cir.1995), *aff'd*, 519 U.S. 79 (1996). In this case, the length of time between the enactment of ERISA and the 2006 amendments is 22 years–the same as in *Fowler*–which is long enough that the Court should be reluctant to presume that Congress in 2006 was authoritatively interpreting and clarifying what Congress in 1974 intended. *See Fowler*, 128 F.3d at 1436.

The touchstone of analyzing an amended statute is congressional intent: absent a clear indication that Congress intended an amendment merely to clarify the proper interpretation of its prior act, an amendment is considered to implement a change in the act, and should be applied only to events occurring after the act's effective date. *Id.*, 128 F.3d at 1436.

To ascertain congressional intent, all of the various portions of the legislative enactments on the particular subject, including subsequent enactments, should be construed together and given effect as a whole. *In re Midpoint Dev., LLC*, 466 F.3d 1201, 1204 (10th Cir.2006). A subsequent amendment to an act can be used to ascertain the meaning of a prior statute where the meaning of the prior statute is subject to serious doubt and has not been judicially determined. *Id.* at 1204-1205. In *Midpoint*, the Court held that the earlier version of the statute was unambiguous, and therefore the later amendment was viewed as a change in the law, rather than a clarifying amendment, and could not be applied retroactively. *Id.* Thus, if a prior statute is unambiguous, the amendment is viewed as a change in the law and cannot be applied retroactively. *Id. See Suiter v. Mitchell Motor Coach Sales*, 151 F.3d 1275, 1281 & n.7 (10th Cir.1998) (because statute was unambiguous, amendment did not clarify existing law).

Here, the prior statute, ERISA, was enacted in 1974. *See* Pub. L. No. 93-406 § 3(32), 88 Stat. 829, 837. ERISA was in effect for more than 30 years before being amended. As such, it can hardly be argued that the definition of "governmental plan" in ERISA, as enacted in 1974 and enforced by the judiciary for over 30 years, was ambiguous and never judicially determined. In fact, as this Court noted in its prior opinion, the specific issue in the instant case was judicially determined by the Seventh and Ninth Circuits in *Smart v. State Farm Ins. Co.,* 868 F.2d 929 (7th Cir.1989) and *Lumber Industry Pension Fund v. Warm Springs Forest Prods.*, 939 F.2d 683 (9th Cir.1991). *See Dobbs*, 475 F.3d at 1178. Moreover, this Circuit has also specifically held that "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir.2002). Thus, employee benefit plans adopted by Indian tribes did not clearly and unambiguously fall within the definition of "governmental plan" before its recent revision. *See infra* Part II.

The Internal Revenue Service (IRS) has also recognized that the 2006 amendments to the definition of "governmental plan" with respect to Indian tribal government plans substantially changed the law and did not merely clarify it. It further

recognized that this amendment was to be applied prospectively only when it issued I. R.S. Notice 2006-89, 2006-43 I.R.B., dated October 23, 2006, entitled "Transition Relief for Indian Tribal Governmental Plans" (Doc.49-6; Supp.App.372-75).

In this Notice, the IRS recognized the changes made to § 414(d) of the Internal Revenue Code, 26 U.S.C. § 414(d), by § 906 of the Pension Protection Act of 2006. Due to these changes, the IRS provided transitional relief to Indian tribal governments until September 30, 2007, to implement a new plan for commercial employees to satisfy the reasonable and good faith compliance standards as part of this transitional relief.

In reaching this decision, the IRS relied on the language of § 906(c) of the Pension Protection Act that mandates prospective application only: "Section 906(c) of PPA '06 provides that the amendments made by section 906 apply to any year beginning on or after the date of enactment, which is August 17, 2006. The Joint Committee on Taxation's Technical Explanation states that the amendments apply to plan years beginning on or after the date of enactment" (Doc.49-6 at § II; Supp.App. 373). The IRS concluded that an Indian tribal government "must operate in accordance with the applicable changes to § 414(d) made by PPA '06 as of the related PPA '06

effective date, *i.e.*, the first day of the first plan year beginning on or after August 17, 2006" (*id*.).

Thus, not only has the IRS recognized that the amended definition of § 1002(32) was a substantial change in the law, such that it needed to offer transitional relief to Indian tribal governments, it also relied on the effective date as being prospective only.

Although such administrative interpretations are entitled to deference, the judiciary is the final authority on issues of statutory construction and must reject constructions contrary to clear congressional intent. *Chevron*, 467 U.S. at 843. Here, notwithstanding any *dicta* in this Court's prior opinion that may suggest the contrary, any proposal for retroactive application in the legislative history of § 1002(32) was expressly rejected by Congress and is therefore directly contrary to the clear congressional intent mandating its prospective application only.

The amendment to ERISA in August 2006, therefore, can only be held to have changed existing law. As such, it cannot be applied retroactively. The legislative history of the amendment, and its interpretation by the IRS, conclusively negate any argument that § 1002(32) is merely a clarification of law that should be applied retroactively. Further, even if the August 2006 amendments to ERISA could somehow be

considered a mere clarification, this amendment cannot be applied retroactively when Congress has clearly mandated prospective application only in § 906(c).

E. The district court's original conclusion that the Anthem plan is not a "governmental plan" and is subject to ERISA is unaffected by the 2006 amendments.

Because the district court correctly determined the 2006 amendments to § 1002(32) were not intended to be applied retroactively, its original conclusion that the Anthem plan was not a "governmental plan" exempt from ERISA remains unaffected by this subsequent legislation. Plaintiffs nonetheless argue that this Court's "mandate" and "the law of the case" required the court only "to determine, based on factual inquiry, whether the Southern Ute tribal plan meets the amended definition of governmental plan; and if[sic] to remand the case to the state court."

Plaintiffs' argument that this Court's "mandate" and "the law of the case" require a result different from that reached below is misplaced. In its prior opinion, this Court did not determine the effective date of the 2006 amendments to § 1002(32) or whether they should be retroactively applied, and, in fact, did not even address the issue. In particular, this Court did not consider the effective-date provision in § 906(c), as the district court noted at the status conference following remand (3/28/2007 Transcript at 3:3-7; Supp.App.416). For this reason, the district court cor-

rectly held that neither the "mandate rule" nor the "law of the case" doctrine required it to deny Anthem's renewed motion to dismiss.

The "mandate rule" is a "discretion-guiding rule that generally requires trial court conformity with the articulated appellate remand, subject to certain recognized exceptions." *U.S. v. Hicks*, 146 F.3d 1198, 1200 (10th Cir.1998) (quotations omitted). Where, however, "the appellate court has not specifically limited the scope of the remand," the district court generally has discretion. *Id.* (stating that mandate rule "is a rule of policy and practice, not a jurisdictional limitation"). Application of the mandate rule is "discretionary, not mandatory." *Grigsby v. Barnhart*, 294 F.3d 1215, 1218 (10th Cir.2002). To limit the district court's discretion, the appellate court's mandate must be highly specific. *See Hicks*, 146 F.3d at 1201 (holding that because remand did not specifically limit scope of remand, district court had discretion to re-sentence defendant).

The mandate consists of this Court's instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions. *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir.2003). Although the district court is bound to follow the mandate, and the mandate "controls all matters within its scope, the district court on remand is free to pass upon any issue

which was not expressly or impliedly disposed of on appeal." *Id. See Hicks v. Gates Rubber Co.*, 928 F.2d 966, 971 (10th Cir.1991) (noting that with general mandate, district court "is free to decide anything not foreclosed by the mandate").

Here, this Court did not specifically limit the scope of its remand, but rather stated that "The judgment of [the district court] is vacated. The case is remanded to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this court" (Doc.46; Supp.App.303). The specific directions on remand are that "The determination of whether a tribal plan qualifies as a governmental plan under § 1002(32) requires a fact-specific analysis of the plan at issue and the nature of its participants' activities. . . . [W]e do not have enough information to determine whether the benefit plan meets the requirements of § 1002(32) and therefore remand the case to the District Court for consideration in light of the amended definition." *Dobbs*, 475 F.3d at 1178. The Court further stated that "If the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." *Id.* at 1179.

However, the Court did not direct the district court to rule in Plaintiffs' favor, did not instruct the district court how to rule if it determined that Plaintiffs' benefit

plan did not meet the amended definition of "governmental plan" in § 1002(32), and did not instruct the district court how to rule if it determined that the 2006 amendments to § 1002(32) should not be retroactively applied.

The mandate thus required the district court to reconsider the issues, taking into consideration the amended definition of "governmental plan." This issue had not previously been briefed in the district court (since the amendment did not yet exist when the district court issued its initial order of dismissal), and was not briefed in this Court either, as the Court specifically noted in its opinion. *See Dobbs*, 475 F.3d at 1179. Thus, examining the statute to determine its effective date is well within this Court's mandate to consider the issues "in light of the amended definition." As such, the district court's review and analysis of these issues is in full compliance with the Court's mandate and prior opinion.

As the district court observed in its August 23, 2007 Order, it did apply "a fact-specific analysis of the plan at issue and the nature of its participants' activities," and held that Plaintiffs' benefit plan met the amended definition of "governmental plan" under § 1002(32) (Doc.67 at 6; Supp.App.405). Consequently, the court held, "resolution of the Tenth Circuit's mandate does not dictate the outcome of this case because the 2006 amendments are not retroactive" (Doc.67 at 7; Supp.App.406).

The district court also correctly rejected Plaintiffs' argument that the "law of the case" doctrine required it to remand their case to state court if it determined that their benefit plan meets the amended definition of "governmental plan" under § 1002(32). As the court stated, for the "law of the case" doctrine to apply, "the issue in question must have been decided explicitly or by necessary implication in the previous disposition" (Doc.67 at 7; Supp.App.406). *See Procter & Gamble*, 317 F.3d at 1126. Citing *Guidry v. Sheet Metal Workers Intl. Ass'n, Local No. 9*, 10 F.3d 700, 707 (10th Cir.1993), the district court noted that this Court has identified three circumstances from which a court might conclude that an issue was implicitly resolved in a prior appeal:

> (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; (3) the issue is so closely related to the earlier appeal its resolution involves no additional consideration and so might have been resolved but unstated (Doc.67 at 7; Supp.App.406).

The district court correctly concluded that "None of the *Guidry* factors are met here" (Doc.67 at 8; Supp.App.407). As the court explained, *id*.:

> The Tenth Circuit's holding noted two issues on appeal: "whether federal or state law applies to an employee benefit plan established and maintained by a tribe for the benefit of its employees;" and "[if] federal law applies, . . . whether it preempts the state-law causes of action in this case." *Dobbs*, *supra*, 475 F.3d at 1177. The Tenth Circuit explicitly declined to answer either question: "We do not reach the second issue concerning preemption because we

> remand the case so that the District Court can consider the first question in light of a recent change in federal law." *Id*. Although the court's subsequent statement—"If the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem"—appears on its face to "reach the second issue concerning preemption," the court's prior statement declining to rule on the preemption issue indicates the issue was not actually considered or resolved. Where an issue is not considered or resolved, a statement regarding the issue cannot be the rule of the case. *See Guidry*, *supra*, 10 F.3d at 707.

This analysis is correct. The effective date of the 2006 amendments to § 1002(32) and their retroactive application to the plan at issue in this case were never considered or addressed in this Court's prior opinion, not even implicitly. Even Plaintiffs acknowledge that "this Circuit did not articulate in its opinion its analysis regarding application of the amendment." There is thus no "law of the case" that precluded the district court on remand from determining the effective date of the amendment and rejecting its retroactive application in this case.

II. Because the Anthem plan is not a "governmental plan" and therefore not exempt from ERISA, the district court correctly held that Plaintiffs' state law claims are preempted.

ERISA expressly preempts all state laws relating to any claim for improper processing of a claim for benefits under an employee welfare benefit plan. 29 U.S.C. § 1144(a). No recourse may be had to any state law for the alleged improper processing of claim for benefits. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46-47 (1987).

If ERISA applies in this case, then all of Plaintiffs' state law claims are pre-empted, including their claims for bad faith breach of insurance contract, *see Kidneigh v. Unum Life Ins. Co.*, 345 F.3d 1182, 1185 (10th Cir.2003); outrageous conduct, *see Settles v. Golden Rule Ins. Co.*, 927 F.2d 505, 509 (10th Cir.1991) (dismissing outrageous conduct claim based on ERISA preemption); violation of the Colorado Consumer Protection Act, *see Halprin v. Equitable Life Assur. Soc'y*, 267 F.Supp.2d 1030, 1037 (D.Colo.2003) ("[plaintiff] concedes that if ERISA applies, it bars his CCPA claim"); fraudulent denial of coverage, *Settles*, 927 F.2d at 509; and fraudulent inducement as to letter of promised correction. *See Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 1050-51 (10th Cir.1992) (promissory estoppel and estoppel by conduct claims preempted by ERISA); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1264-66 (10th Cir.1988) (same). *See generally Pilot Life*, 481 U.S. at 51-52.

Whether Plaintiffs' state law claims are preempted by ERISA depends on whether the Southern Ute employee benefit plan is subject to ERISA. Plaintiffs contend that because it is a "governmental plan" exempt from ERISA, their state law claims against Anthem are not preempted.

When the Amended Complaint was filed, the definition of "governmental plan" under § 1002(32) included plans established or maintained by federal and state governments, but did not specifically include tribal governments. Before the 2006 amendment, "governmental plan" in § 1002(32) was defined as:

> a plan established and maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

ERISA, Pub. L. No. 93-406, § 3(32), 88 Stat. 829, 837 (1974). There was no mention of Indian tribes or tribal government in this version of § 1002(32).

The conclusion that a tribe does not fall within this definition of "governmental plan" is seemingly compelled by this Circuit's pronouncement in *NLRB v. Pueblo of San Juan*, 276 F.3d at 1192:

> Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate. Indian tribes consistently have been recognized by the United States as distinct, independent political communities qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty. Tribes retain those attributes of inherent sovereignty not withdrawn either expressly or necessarily as a result of their status.

In light of this emphatically clear statement, it is difficult to conceive how any reasonable construction of the definition of "governmental plan" in § 1002(32) could result in the finding that a tribe is the "Government of the United States," "the gov-

ernment of any state or political subdivision thereof," or an "agency or instrumentality of any of the foregoing."

Nevertheless, this Circuit has never directly addressed this specific question, although two other federal circuits have–the Seventh and Ninth Circuits respectively in *Smart v. State Farm* and *Lumber Industry Pension Fund v. Warm Springs Forest Prods*. As this Court recognized in its prior opinion, *Dobbs*, 475 F.3d at 1178, both Circuits held that ERISA applies to employee benefit plans established and maintained by Indian tribes.

Specifically, both circuits held that: (1) tribal plans are not "governmental plans" exempt from ERISA; (2) ERISA is a federal statute of general application and there is no indication that Congress intended to create an exception to ERISA's comprehensive regulatory scheme for Indian tribes or tribal entities; and (3) there is no countervailing infringement on tribal sovereignty that would otherwise render ERISA inapplicable. *Smart,* 868 F.2d at 933-36 (establishing foregoing three principles through exhaustive analysis and ruling that ERISA applied to group health insurance plan for employees of tribal health center); *Lumber Industry,* 939 F.2d at 687 (applying *Smart* and holding pension plan of sawmill owned by tribal entity subject to ERISA).

In *Smart*, the key to the analysis is the one point Plaintiffs ignore: ERISA is a statute of general application whose preemption provision is deliberately expansive and remarkable for its breadth of inclusion. *See FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) ("the express pre-emption provisions of ERISA are deliberately expansive"); *Kidneigh,* 345 F.3d at 1184-85. As such, ERISA is applicable to Indian tribes unless (1) the law touches "exclusive rights of self-governance in purely intramural matters" (2) the application of the law would "abrogate rights guaranteed by Indian treaties," or (3) "there is proof by legislative history or some other means that Congress intended not to apply the law to Indians on their reservations." *Smart*, 868 F.2d at 932-33 (internal citations omitted).

This Court has noted this same analytical framework with apparent approval and followed it in determining tribal sovereignty issues. *See Nero v. Cherokee Nation*, 892 F.2d 1457, 1462-63 (10th Cir.1989); *see also Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 984 (10th Cir.2005) ("this circuit and others have acknowledged [the above] three exceptions.") (Lucero, J., concurring).

Applying this formulation, the Seventh Circuit thoroughly analyzed whether ERISA governed a benefit plan offered to employees of an Indian tribe. First, noting ERISA's breadth and comprehensive scope, the court had little difficulty concluding

that "ERISA is clearly a statute of general application, one that envisions inclusion within its ambit as the norm." *Smart*, 868 F.2d at 933-34. Accordingly, ERISA applies to Indian tribes unless one of the above exceptions applies.

Turning to the exceptions, the Seventh Circuit concluded that none of them was applicable. First, the court examined whether application of ERISA would abrogate rights guaranteed by treaty. After noting that the mere existence of a treaty is not sufficient to avoid application of a federal law of general applicability, the court found that the critical question was whether ERISA would "jeopardize a right that is secured by the treaty." *Id.* at 935. The court held that the employee had failed to identify any specific treaty rights that would be infringed by the application of ERISA. Plaintiffs here have similarly failed to identify any specific treaty rights that might be impaired by the application of ERISA to an employee of the Southern Ute Tribe as an employer.

With respect to whether ERISA impinges on the tribe's right of self-governance, the plaintiff in *Smart* made the same arguments that Plaintiffs here advance. The Seventh Circuit, and subsequently the Ninth Circuit, both rejected these arguments. The Seventh Circuit found that the issues raised did not alter the conclusion that ERISA does not impinge on the right of self-governance, stating:

> A statute of general application will not be applied to an Indian Tribe when the statute threatens the Tribe's ability to govern its intramural affairs, but not simply whenever it merely affects self-governance as broadly conceived. Any federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government. But Indian Tribes are not possessed of absolute sovereignty. The "right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

Smart, 868 F.2d at 935. *See Federal Power Comm'n v. Tuscadora Indian Nation*, 362 U.S. 99, 116 (1960) ("a general statute in terms applying to all persons includes Indians and their property interests"); *see also* W. Canby, AMERICAN INDIAN LAW 193-94 (1981) ("The federal power to regulate matters relating Indians is plenary. . . . [F]ederal legislation is assumed to be applicable to Indians . . . unless specific statutory language or particularized Indian interests (such as express or implied treaty rights) indicate to the contrary.").

The Seventh Circuit determined that "The application of ERISA to this case would not impermissibly upset the Tribe's self-governance in intramural matters" because ERISA "is only applied to an employment relationship if the employer decides to offer an employee benefit plan," and, "[e]ven then, ERISA merely requires reporting and accounting standards for the protection of the employees." *Smart*, 868 F.2d at 935-36. ERISA, the court concluded, "merely imposes beneficiary protection

while in no way limiting the way in which the Tribe governs intramural matters." *Id.* at 936. Finally, the Seventh Circuit noted, there is nothing in ERISA's legislative history to suggest that Congress did not intend for ERISA to apply to Indian tribes that offer group health benefits to their employees in their capacity as employers. *Id. See Ramirez v. Potawatomi Bingo Casino*, 2006 WL 3327124, 40 Empl. Benefits Cas. (BNA) 1929 (E.D.Wis.2006) (citing *Smart* to reject "the argument that as a result of tribal sovereignty, ERISA does not apply to tribal employers"; dismissing plaintiff's state tort and contract claims against tribal entity as preempted by ERISA).

Here, the effect of applying ERISA to an employee, as distinct from a member of the tribe, is even more attenuated than in *Smart*. Anthem is obligated to fund and pay claims covered by the policy. The plan is underwritten by Anthem, not self-funded by the tribe. As a result, it is the tribe's actions as an employer, not as a sovereign, that are affected by ERISA. Moreover, ERISA does not force the tribe to offer benefits or to otherwise modify its conduct unless the tribe chooses to do so. The administrative burdens imposed on the tribe under the plan are nominal, and do not constitute the level of impingement on the self-governance over intramural affairs required for the exception to apply. Instead, these concerns involve only a proprietary interest of the tribe as an employer.

The Ninth Circuit subsequently applied *Smart* to reach the same conclusion, in *Lumber Industry*, 939 F.2d at 687. However, the holding in *Lumber Industry* took *Smart* one step further, as the Ninth Circuit reversed and noted that the district court's conclusion that application of ERISA would interfere with exclusive rights of self-governance was "wholly erroneous" and that the "self-governance exception applies only where the tribe's decision-making power is usurped." *Id*. at 685 (internal citations omitted). The court also ruled that neither of the other two *Smart* scenarios was shown to exist. *Id*. Similarly here, Plaintiffs' Amended Complaint fails to raise any cognizable issue of infringement of tribal sovereignty.

Plaintiffs nonetheless contend that the tribe is "an instrumentality of a government" within the meaning of § 1002(32), and therefore part of a "governmental plan" exempt from ERISA pursuant to § 1003(b)(1). No case authority is cited for this position, which directly contradicts Plaintiffs' previous argument on tribal sovereignty. On one hand, Plaintiffs argue that the tribe is sovereign and that sovereignty concerns should bar application of ERISA altogether, and then argue that the tribe is not sovereign, but rather an "instrumentality" of the federal government for purposes of establishing a "governmental plan." They cannot have it both ways. If a tribe is

a sovereign political entity, as this Court recognized in *Pueblo of San Juan*, it cannot be an "instrumentality" of the federal government.

Plaintiffs nonetheless cite *Colville Confederated Tribes v. Someday*, 96 F.Supp.2d 1120 (E.D.Wash.2000) for the premise that the "governmental plan" exception applies to tribal employees. In *Colville,* the defined benefit plan of a tribal government underwent termination following ineffective adoption of amendments to the plan resulting in a benefit formula dispute submitted to the Department of Labor and Pension Welfare Benefits Association by a plan participant. The tribe sought a declaratory judgment that the plan was a "governmental plan" within the meaning of § 1002(32). The district court ruled that it was, based on a Pension Benefit Guaranty Corporation (PBGC) letter opinion declaring that particular plan exempt under the facts and circumstances presented regarding the plan's termination. *Colville*, 96 F.Supp.2d at 1131. Noting the requirement of judicial deference required toward PBGC pronouncements of this kind, the court ruled that the plan was a governmental plan. *Colville* further pointed to other PBGC rulings which expressed the opinion that plans involving anything other than strictly participants who were elected tribal government officials engaged in "characteristically governmental, non-profit activities focused within the reservation" would probably not qualify under § 1002(32).

The court below explained why it found *Colville* unpersuasive:

> ERISA does not exempt the plans of all entities possessing governing authority. Instead . . . "The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. 29 U.S.C. § 1002(32). The Tribe is not a state or a subdivision of a state. Nor is it an agency or instrumentality of the United States Government. Under no reasonable reading of Section 1002(32) could I conclude that the Tribe is a government for the purposes of exemption from ERISA (Doc.22 at 8-9; Supp.App.237-38).

Plaintiffs next cite *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir.1993). *Reich*, however, did not hold that a tribal benefit plan is exempt from ERISA under the "governmental plan" exception either; in fact, *Reich* recognized that ERISA covered employee benefit plans established by Indian tribes. In *Reich*, the Department of Labor sought to apply the Fair Labor Standards Act to the Great Lakes Indian Fish And Wildlife Commission, a tribal law enforcement body deputized by the State of Wisconsin and empowered to enforce Indian fishing and hunting rights established by treaty. The Seventh Circuit expressly distinguished the facts before it from those applicable in the ERISA context:

> We realize that other general federal statutes regulating employment, notably ERISA and OSHA, have been applied to Indian agencies when, as in the present case, no treaty right was at stake. *Smart v. State Farm Ins. Co.*, *supra*, 868 F.2d at 933-36; *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir.1985); *U.S. Dept. of Labor v. OSHRC*, 935 F.2d 182 (9th Cir.1991); *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*,

> 939 F.2d 683 (9th Cir.1991). But the employees in those cases were engaged in routine activities of a commercial or service character, namely lumbering and health care, rather than of a governmental character. They were not law enforcement officers, who if they had been employed by a state or local government would have been exempt from the law.

Reich, 4 F.3d at 495.

Not only was a wholly different statute at issue in *Reich*, but the Seventh Circuit's reasoning, in proper context, is narrowly related to police power, a form of plenary self-governing authority, and the enforcement of an express treaty right through that police power. With two of the three *Smart* scenarios implicated, *Reich* is fully consistent with *Smart*'s reasoning, though partially distinguishable on the facts. *Reich* recognizes a form of quasi-sovereignty applicable to tribes, which Anthem does not deny. However, *Reich* does nothing to establish that a tribe is an "agency or instrumentality" of the federal government as required by the clear and unequivocal language of the definition of "governmental plan" under § 1002(32). *Reich* is thus inapposite to whether the "governmental plan" exception to ERISA applies to Indian tribes.

Plaintiffs also cite *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir.1989) for the notion that the district court should have interpreted the terms "governmental plan" or "instrumentality" liberally in favor of the tribe, based on the principle that

ambiguities in a statute should be construed in favor of Indians. Not only is there no ambiguity in § 1002(32), but this principle of pro-Indian construction does not apply to statutes of general application. *See San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C.Cir.2007). Plaintiffs' argument once again contradicts itself, and also conflicts with the holding of *Cherokee Nation*, for it is not in the tribe's favor to construe "instrumentality" to apply to it, since an "instrumentality" is neither sovereign nor independent.

Plaintiffs offer another contradictory argument on tribes being considered instrumentalities. After listing several cases stating that tribal courts may act as instrumentalities with regards to state taxation issues, Plaintiffs then subvert their rationale by stating that this Circuit has "protected tribal sovereignty and independence by refusing to find tribal instrumentality in contexts where that was the result most conducive to tribal autonomy, and a contrary ruling would have subjected tribes to greater outside control." This argument is contradictory because tribal sovereignty and independence are not aided by tribes being classified as an instrumentality subject to governmental control. Moreover, as the district court noted (Doc.22 at 9; Supp. App.308), the line of analysis in the cited cases involving state taxation issues has since been overruled. *See Washington v. Confederated Tribes of Colville Indian*

Reservations, 447 U.S. 134, 187 n.8 (1980); *Federal Land Bank of Wichita v. Board of County Comm'rs*, 582 F.Supp. 1507, 1510 n.10 (D.Colo.1984).

In sum, Plaintiffs' arguments should be rejected and the district court's judgment should be affirmed because (1) ERISA is a statute of general application and the definition of "governmental plan" in former § 1002(32) does not include plans adopted by Indian tribes or tribal entities and does not express any intent to exclude plans adopted by tribes or tribal entities from ERISA's general application; (2) ERISA does not interfere with or otherwise implicate tribal sovereignty; and (3) an Indian tribe is not an "agency or instrumentality" of the federal government within the "governmental plan" exception in § 1002(32).

III. Because Plaintiffs' Fourth Claim for Relief is premised on conduct that occurred after the plan had been established, *Woodworker's Supply*'s exception for pre-plan fraud does not apply.

Plaintiffs next appeal the dismissal of their Fourth Claim for Relief. This claim was properly dismissed pursuant to Rule 12(b)(6) because it, too, is preempted by ERISA.

Plaintiffs' Fourth Claim for Relief, entitled "Fraudulent Inducement as to Policy Terms and Promotional Literature," is premised on allegations that Anthem knowingly and falsely represented that its Blue Preferred policy allowed policyholders to

visit any Blue Cross and Blue Shield Preferred Provider and receive coverage at in-network levels, and that Anthem refused to provide Plaintiffs this highest level of benefit under the policy, even when they met Anthem's requirements and conditions (Doc.9, ¶¶ 80-85; Supp.App.52).

There is no allegation, however, that Anthem ever sold any form of insurance to Plaintiffs directly, or that it made any "pre-contractual representations" to them. Instead, Plaintiffs alleged that Anthem contracted with the Southern Ute Tribe to provide health insurance benefits to certain eligible participants as defined in the plan, and that Steven Dobbs elected to participate in an existing ERISA plan as an eligible participant and an employee of the tribe (Doc.9, ¶¶ 6, 9-10, 17; Supp.App.43-44).

In its motion for reconsideration, Anthem clarified that at the time Plaintiffs enrolled in the group health plan and allegedly relied on Anthem's "pre-contractual representations," the plan had already been established, and was in effect as of February 1, 2000; Plaintiffs, however, did not apply for enrollment in the plan until April 2, 2001, more than a year later (Doc.23, Ex.A; Supp.App.258-70; Doc.24; Supp.App. 271-72). Thus, as the district court found, Plaintiffs "relied upon Anthem's alleged misrepresentations, and their fraud claim accrued, more than a year after the Tribe began participating in the plan" (Doc.29 at 4; Supp.App.291). Plaintiffs therefore

could not have relied on any alleged misrepresentations that induced the employer to participate in the plan.

For this reason, the district court held that Plaintiffs' Fourth Claim was pre-empted notwithstanding *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co*, 170 F.3d 985, 991 (10th Cir.1999), which held that ERISA does not preempt fraudulent inducement claims against an insurer with respect to its pre-plan activity in its role as a seller of insurance, as opposed to its role as administrator of an employee benefit plan. "Holding insurers accountable for pre-plan fraud does not affect the administration or calculation of benefits, nor does it alter the required duties of plan fiduciaries." *Id.* at 992.

The district court distinguished *Woodworker's* on this ground, holding that the reasons for the rule it adopted–the insurer cannot act as a plan fiduciary before the plan exists, and allowing preemption would not further Congress's purpose in passing ERISA–are not implicated here (Doc.29 at 4-5; Supp.App.291-92). Because Plaintiffs here alleged that any misrepresentations by Anthem occurred after the plan had already been established, and not that the tribe was induced to participate in the Anthem plan on their behalf, their fraud claim necessarily arose after the ERISA plan was established and thus occurred during its administration. The district court cor-

rectly recognized that *Woodworker's* did not save Plaintiffs' Fourth Claim and thus properly dismissed it as preempted by ERISA.[2] *See Settles*, 927 F.2d at 509; *see also Beach v. Mutual of Omaha Ins. Co.*, 229 F.Supp.2d 1230, 1238 (D.Kan.2002); *Kaus v. Standard Life Ins. Co.*, 176 F.Supp.2d 1193, 1197-98 & n.1 (D.Kan.2001).

IV. The district court erred in determining that Plaintiffs' employee benefit plan meets the amended definition of "governmental plan" under § 1002(32) based solely on statements in Plaintiffs' motions.

On cross-appeal, Anthem appeals the district court's determination that Plaintiffs' employee benefit plan meets the definition of "governmental plan" under § 1002(32) as amended. The amended definition exempts from ERISA employee plans established and maintained by an Indian tribal government only if substantially all of the employee's duties are executed in the performance of essential government functions, not commercial activities, even if the commercial activities are an essential government function. The district court decided this issue without benefit of post-appeal briefing or hearing (Doc.67 at 4; Supp.App.403). This was error because it prematurely resolved what this Court explicitly recognized is an issue of fact.

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[2]Because Plaintiffs' assertion that they should have been granted leave to amend their complaint to plead a claim within the *Woodworker's* exception to ERISA preemption is raised for the first time on appeal (*see* Doc.32; Supp.App.296-98), it should not be considered. *See Dahn v. U.S.*, 127 F.3d 1249, 1252 (10th Cir.1997); *Glenn v. First Natl. Bank*, 868 F.2d 368, 371 (10th Cir.1989).

In their Amended Complaint, Plaintiffs alleged, without specifying the nature of his employment, that Steven Dobbs is employed by the Southern Ute Tribe (Doc.9, ¶ 6; Supp.App.43). In their brief in opposition to Anthem's motion to dismiss, Plaintiffs asserted, without more, that Mr. Dobbs "assists to manage the tribal treasury," which, they maintain, is "a core function of sovereign government" (Doc.17 at 9; Supp.App.184). In a later submission, Plaintiffs asserted that "Mr. Dobbs' activities were not 'commercial' in the sense of being directed into the private wholesale or retail marketplace. Rather, he was managing tribal wealth in order to provide security for tribal functions" (Doc.32 at 2; Supp.App.297). No evidence was offered to support this bald assertion, which was not alleged in the Amended Complaint.

The district court nevertheless relied on these unpled assertions to decide what is clearly an issue of fact (Doc.67 at 4; Supp.App.403). As this Court stated in its prior opinion, however:

> Because the amended provision [of § 1002(32)] makes a distinction between "essential governmental functions" and "commercial activities," not all plans established and maintained by tribes will fall under the governmental plan exemption. The determination of whether a tribal plan qualifies as a governmental plan under § 1002(32) requires a fact-specific analysis of the plan at issue and the nature of its participants' activities.

Dobbs, 475 F.3d at 1178. The Court further noted that, based on the Complaint, it did "not have enough information to determine whether the benefit plan meets the requirements of §1002(32)." *Id*.

Although the district court had no more information before it on remand than this Court had on appeal, it nonetheless proceeded to determine this issue solely from assertions made in Plaintiffs' motions notwithstanding this Court's explicit direction that the issue "requires a fact-specific analysis of the plan at issue and the nature of its participants' activities." This district court proceeded to determine this issue also notwithstanding its own recognition at the status conference following remand that "whether or not the subparagraph would apply given the nature of the employment of the employees of the tribe covered by the act" "may well be a question . . . potentially of fact" (3/28/2007 Transcript at 3:20-4:1; Supp.App.416). The court further recognized that this issue "implicates potentially discovery, potentially a Rule 56 motion and, potentially, depending on a resolution of a Rule 56 motion, again, assuming that the statute applies retroactively, potentially to trial on that question" (*id.* at 4:4-9; Supp.App.417). Anthem also advised the court that this issue was not ripe in its reply in support of its renewed motion to dismiss: "If section 906's amendments are applied in this case, ERISA might not govern (depending on the facts that develop

regarding whether the employees were engaged in essential government functions or commercial activities)" (Doc.66 at 8-9; Supp.App.397-98).

Because ERISA implicates federal subject matter jurisdiction under 28 U.S.C. § 1331, the district court has the authority under FED.R.CIV.P. 12(b)(1) to conduct an evidentiary hearing and decide facts to determine whether it has subject matter jurisdiction over the action. *See Radil v. Sanborn Western Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir.2004) ("Where a party attacks the factual basis for subject matter jurisdiction, the court does not presume the truthfulness of factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts."); *Pringle v. U.S.*, 208 F.3d 1220, 1222 (10th Cir.2000) ("A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts . . . ."). Deciding this issue of fact, as the district court did, based solely on unsupported assertions in motions, was therefore error. If the judgment is reversed, then the district court's finding that Plaintiffs' plan meets the definition of "governmental plan" under § 1002(32) as amended should also be reversed, and remanded with directions to the district court to make "a fact-specific analysis of the plan at issue and the nature of its participants' activities" following an evidentiary hearing.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Defendant-Appellee-Cross-Appellant Anthem Blue Cross and Blue Shield respectfully requests that the judgment be AFFIRMED. In the alternative, if the judgment is reversed, then the finding that Plaintiffs' employee benefit plan is a "governmental plan" under § 1002(32) as amended should also be reversed and remanded with directions to conduct an evidentiary hearing to make a fact-specific analysis of the plan at issue and the nature of its participants' activities.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED.R.APP.P. 34 and 10TH CIR.R. 34.1, Defendant-Appellee-Cross-Appellant Anthem Blue Cross and Blue Shield does not request oral argument in this case.

Respectfully submitted,

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/s John R. Mann

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C)

As required by FED.R.APP.P. 32(a)(7)(C), I certify that this Brief is proportionally spaced and contains 13,629 words. I relied on my word processor to obtain the count and it is Word Perfect X3.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s John R. Mann
John R. Mann
KENNEDY CHILDS & FOGG, P.C.

CERTIFICATION OF DIGITAL SUBMISSIONS

The undersigned hereby certifies, pursuant to General Order of August 10, 2007, that: (1) no required privacy redactions, have been made and every document submitted in Digital Form is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned for viruses with the program eTrust Antivirus, Version 8.1.637, on May 28, 2008 and, according to the program, are free of viruses.

/s John R. Mann
John R. Mann
KENNEDY CHILDS & FOGG, P.C.

CERTIFICATE OF SERVICE

The undersigned does hereby certify pursuant to FED.R.APP.P. 25 that on this 28th day of May, 2008, a true and correct copy of the foregoing **BRIEF OF THE APPELLEE AND OPENING BRIEF OF THE CROSS-APPELLANT** was placed in the U.S. Mail, first-class postage prepaid, along with a CD-ROM containing the Brief in PDF format identical to that submitted to the Clerk of the Court in Digital Form, addressed to the following:

Shawn Mitchell, Esq.
Law Office of Shawn Mitchell
12530 Newton Street
Broomfield, Colorado 80020

/s John R. Mann
Signature of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Action No. 04-cv-02283-LTB

STEVEN DOBBS and NAOMI DOBBS,

Plaintiffs,

v.

ANTHEM BLUE CROSS AND BLUE SHIELD,
A Colorado Insurance Company,

Defendant.

ORDER

This breach of insurance contract case is before me on Defendant, Anthem Blue Cross and Blue Shield's, Renewed Motion to Dismiss Plaintiffs' Amended Complaint on Remand [**Docket # 49**]; Plaintiffs, Steven Dobbs and Naomi Dobbs's, Response in Opposition [**Docket # 61**]; and Defendant's Reply [**Docket # 66**]. Defendant seeks dismissal of Plaintiffs' five state-law claims based on ERISA preemption. Oral arguments would not materially assist in the determination of this motion. After consideration of the motion and the case file, I GRANT Defendant's Renewed Motion to Dismiss Plaintiffs' Amended Complaint on Remand [**Docket # 49**].

I. Background

Plaintiffs filed suit against Defendant in September 2004 in Denver County District Court alleging five causes of action arising out of Defendant's failure to comply with its obligations under a health insurance policy issued to Plaintiff Steven Dobbs as an employee of the Southern Ute Indian Tribe. Mr. Dobbs's wife, Naomi Dobbs, and child, Skyler Dobbs (collectively "the

Dobbses"), are also covered by the policy. Plaintiffs allege Defendant refused to apply "in network" pricing for a consultation with a "Preferred Provider" physician that culminated in a cranial surgery—also billed as "out of network." Plaintiffs claim they were improperly denied the coverage they purchased and were subject to numerous and unnecessary appeals that cost significant amounts of time and money. Defendant removed to the United States District Court for the District of Colorado on the grounds that Plaintiffs' claims arose out of an employee welfare benefit plan under ERISA. Defendant moved to dismiss the complaint on November 2, 2004 based on ERISA's preemption scheme or, in the alternative, based on the policy's arbitration clause. As accurately noted by Plaintiff, if ERISA does not apply to the underlying claims at issue here, this Court is divested of jurisdiction and may not reach the arbitration clause issue.

Plaintiffs appealed my dismissal of their state law claims to the Tenth Circuit. The Tenth Circuit stated: "The threshold question in this case is whether federal or state law applies to an employee benefit plan established and maintained by a tribe for the benefit of its employees." *Dobbs v. Anthem Blue Cross & Blue Shield*, 475 F.3d 1176, 1177 (10th Cir. 2007). If the answer to the first question is "yes," the next question is whether ERISA preempts the specific state law claims at issue. *Id*. The Tenth Circuit remanded to this Court to determine the first issue in light of the Pension Protection Act of 2006 ("the Act"). *Id*. at 1077–78 (citing Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780). Section 906(a)(2)(A) of the Act amended 29 U.S.C. § 1002(32) to include plans established and maintained by Indian tribal governments under the "governmental plan" exception to ERISA. Section 906(a)(2)(A) only exempts employee plans established and maintained by an Indian tribal government if substantially all of the

employee's duties are executed in the performance of essential government functions, not commercial activities—even if the commercial activities are essential government functions. The Tenth Circuit concluded: "Based on the Dobbses' complaint, we do not have enough information to determine whether the benefit plan meets the requirements of § 1002(32) and therefore remand the case to the District Court for consideration in light of the amended definition. If the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." *Dobbs*, 475 F.3d at 1178–79.

II. Standard of Review

The Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim. *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989). Granting a motion to dismiss is a harsh remedy which must be exercised with caution to protect the liberal rules of pleading and the interests of justice. *Id*. When considering a motion to dismiss for failure to state a claim upon which relief can be granted, a district court must accept as true all factual allegations in the complaint. *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007). A district court should dismiss the complaint if the plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). While the factual allegations need not be pleaded in great detail, they must be sufficiently precise to raise a right to relief above the speculative level. *Id*. at 1964–65, 1969 (abrogating the rule of *Conley v. Gibson*, 355 U.S. 41, 44–45 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

III. Discussion

The Tenth Circuit remanded this case to this Court to determine "[i]f the Dobbses' benefit plan meets the new definition of a governmental plan under § 1002(32)." *Dobbs*, *supra*, 475 F.3d at 1178–79. I conclude it does. In light of this holding, Plaintiffs argue I am bound by the Tenth Circuit's "mandate" that "ERISA does not preempt their state-law causes of action against Anthem." *Id*. at 1179. I disagree. The Act expressly states that the 2006 amendments to § 1002(32) do not apply retroactively. The Tenth Circuit's holding is not contradictory.

A. The Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32)

The benefit plan at issue here is established and maintained by an Indian tribal government. The plan states the "Nature of Business" is "Tribal Government." Mr. Dobbs claims he assists to manage the Tribal treasury in order to provide financial security for tribal functions, a position he believes is "a core function of sovereign government." [**Docket # 32, p.2; Docket # 17, p.9**]. For the purposes of Defendant's Motion to Dismiss, I must accept the factual assertion that Mr. Dobbs assists to manage the Tribal treasury as true.

Management of the treasury is a vital element of self-governance that enables a government "to perform its most essential functions." THE FEDERALIST NO. 30 (Alexander Hamilton). The ability to procure a regular and adequate supply of money is "an indispensable ingredient" in every government. *Id*. Because there is no indication that Mr. Dobbs was engaged in "commercial activities (whether or not an essential government function)," 29 U.S.C. § 1002(32), the Dobbses' plan meets the new definition of a governmental plan under ERISA, as amended.

B. The new definition of governmental plan under § 1002(32) does not apply retroactively to the

Dobbses' benefit plan

Although the Dobbses' benefit plan meets the new definition of a governmental plan, at the time their state-law complaint was filed on September 2, 2004, and at the time their state-law complaint was dismissed by orders entered on March 14 and May 13, 2005, the new definition did not exist. Holding the Dobbses' plan retroactively exempt from ERISA would materially alter the rights, duties, and liabilities of the parties in this case. Retroactive application of statutes is disfavored when such an application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Thus, such a statute will not be given retroactive effect unless retroactive application is required by explicit language or by necessary implication. *See Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422, 2428 (2006).

"When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf*, *supra*, 511 U.S. at 280. If the face of the statute does not so indicate, the court tries to draw a comparably firm conclusion about the statute's intended temporal reach by applying "normal rules of construction." *Fernandez-Vargas*, *supra*, 126 S.Ct. at 2428 (citing *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)). If that effort fails, the court will refuse to apply the statute retroactively if such an application would affect substantive rights, liabilities, or duties on the basis of conduct occurring before the statute's enactment. *Id.*

Defendant argues Congress expressly intended Section 906(a)(2)(A) to be applied

prospectively only. I agree. Defendant cites to § 906(c) of the Act: "Effective Date–The amendments made by this section shall apply to any year beginning on or after the date of the enactment of this Act." This explicit language reflects the statute should not be applied retroactively and would seem to settle the matter on Defendant's behalf. *See Landgraf, supra*, 511 U.S. at 280. I am required, however, to consider the Tenth Circuit's prior ruling in this case.

1. The "mandate rule"

The "mandate rule" requires I conform my analysis to the articulated Tenth Circuit remand. *United States v. Moore*, 83 F.3d 1231, 1234–35 (10th Cir. 1996). The "mandate" consists of the Tenth Circuit's instructions at the conclusion of its opinion, and the entire opinion that preceded those instructions. *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003). When the remand is general, I am free to decide anything not foreclosed by the mandate; but if the remand is specific, I am limited to the further proceedings directed. *See id.* (citing *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 971 (10th Cir. 1991)).

The mandate here was specific: "The determination of whether a tribal plan qualifies as a governmental plan under § 1002(32) requires a fact-specific analysis of the plan at issue and the nature of its participants' activities. . . . [W]e . . . therefore remand the case to the District Court for consideration in light of the amended definition." *Dobbs, supra*, 475 F.3d at 1178; *see Procter & Gamble Co.*, 317 F.3d at 1132 (holding that a district court violates the mandate rule when it goes beyond a determination of the narrow factual issue remanded by the appellate court). I applied "a fact-specific analysis of the plan at issue and the nature of its participants' activities" in Part III.A of this Order, *supra*, and held the Dobbses' benefit plan meets the new definition of governmental plan under 29 U.S.C. § 1002(32).

Despite the parties' arguments to the contrary, resolution of the Tenth Circuit's mandate does not dictate the outcome of this case because the 2006 amendments are not retroactive. Therefore, it is unnecessary to consider whether "exceptional circumstances" exist justifying my departure. *See Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1133 (10th Cir. 2001).

2. The "law of the case" doctrine

The "law of the case" doctrine requires me to apply the prior decisions of the Tenth Circuit in this matter. *United States v. Webb*, 98 F.3d 585, 587 (10th Cir. 1996) ("Under the law of the case doctrine, findings made at one point during litigation become the law of the case for subsequent stages of that same litigation"). Plaintiffs argue the law of the case is: "If the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem." *Dobbs*, *supra*, 475 F.3d at 1179. I disagree.

For the law of the case doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in the previous disposition. *Procter & Gamble Co.*, *supra*, 317 F.3d at 1126 (citing *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1193 (9th Cir. 2000)). "The Tenth Circuit has identified three circumstances by which a court may determine that an issue has been implicitly decided in a prior appeal for purposes of the law of the case doctrine: (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; (3) the issue is so closely related to the earlier appeal its resolution involves no additional consideration and so might have been resolved but unstated." *First Savings Bank, F.S.B. v. U.S. Bancorp*, 117 F. Supp. 2d 1078, 1091 (D. Kan. 2000) (citing *Guidry v. Sheet*

Metal Workers Int'l Ass'n, Local No. 9, 10 F.3d 700, 707 (10th Cir. 1993)).

None of the *Guidry* factors are met here. The Tenth Circuit's holding noted two issues on appeal: "whether federal or state law applies to an employee benefit plan established and maintained by a tribe for the benefit of its employees;" and "[if] federal law applies, . . . whether it preempts the state-law causes of action in this case." *Dobbs*, *supra*, 475 F.3d at 1177. The Tenth Circuit explicitly declined to answer either question: "We do not reach the second issue concerning preemption because we remand the case so that the District Court can consider the first question in light of a recent change in federal law." *Id.* Although the court's subsequent statement—"If the Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32), ERISA will not preempt their state-law causes of action against Anthem"—appears on its face to "reach the second issue concerning preemption," the court's prior statement declining to rule on the preemption issue indicates the issue was not actually considered or resolved. Where an issue is not considered or resolved, a statement regarding the issue cannot be the rule of the case. *See Guidry*, *supra*, 10 F.3d at 707.

The Tenth Circuit's second statement on ERISA preemption merely reaffirms the obvious: if § 1002(32), as amended, applies to the claims arising out of the Dobbses' benefit plan on the date their complaint was filed—September 3, 2004—ERISA will not preempt their state-law causes of action. As the effective date of the § 1002(32) amendment, prospective in its application, was August 17, 2006, the September 3, 2004, claims arising under the Dobbses' plan are not covered under the amendment and are preempted by ERISA.

IV. Conclusion

When Congress enacts a new statute, it has the power to decide when the statute will become effective. *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994). This Court has no authority to depart from a congressional command setting the effective date of a law that it has enacted. *Id*. Even when Congress amends a statute to clarify its meaning, its intent to reach conduct preceding the clarifying amendment must clearly appear. *Id*. Congress expressly stated that the 2006 amendments to 29 U.S.C. § 1002(32) would apply to any year beginning on or after August 17, 2006. When Congress expressly states the effective date of a statutory amendment, my inquiry is at an end. *See Fernandez-Vargas, supra*, 126 S.Ct. at 2428; *Landgraf, supra*, 511 U.S. at 280. Therefore, for the reasons stated in my Orders on March 14, 2005 [**Docket # 22**] and May 13, 2005 [**Docket # 29**], Plaintiff's state law claims are preempted by ERISA.

Accordingly, IT IS ORDERED that Defendant's Renewed Motion to Dismiss Plaintiffs' Amended Complaint on Remand [**Docket # 49**] is GRANTED, Plaintiffs' Amended Complaint [**Docket # 9**] is DISMISSED with costs awarded Defendant and Judgment to enter accordingly.

Dated: August 23, 2007, in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE