UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN DOBBS, NAOMI DOBBS Appellants, vs. ANTHEM BLUE CROSS AND BLUE SHIELD A Colorado Insurance Company	Case No. 07-1398 On Appeal from the United States District Court for the District of Colorado (Babcock, L.), District Court Case No. 04-B-2283

APPELLANTS' CORRECTED APPEAL BRIEF

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ORAL ARGUMENT REQUESTED BRIEF CONTAINS ATTACHMENTS

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STATEMENT OF RELATED CASES

There was a previous appeal in this case, *Dobbs v. Anthem Blue Cross Blue Shield* 475 F.3d 1176 (10th Cir. 2007)

Plaintiffs Appellants Steven Dobbs and Naomi Dobbs hereby submit their Opening Brief in this case.

I. INTRODUCTION

Appellants confront an obstacle common in the shadows of ERISA. Their allegations of an insurer's egregious misconduct are secondary to the threshold question of whether their complaint is preempted. For at least three independent and adequate reasons, it is not. Steven and Naomi Dobbs purchased their insurance through the Southern Ute Indian Tribal government. This Circuit does not bind Indian Tribes to federal regulatory schemes without Congress' express intent to do so. Further, ERISA exempts benefit plans sponsored by governmental entities. A recent amendment to the definition of governmental plan makes this exception for Indian tribes particularly clear. Finally, the insurer here did worse than withhold promised benefits; in misconduct that this Circuit recognizes as falling outside ERISA preemption, the insurer misrepresented its plan in order to sell insurance before the plan even existed.

The Dobbs show herein that the facts they allege and the law in this Circuit foreclose any issue of preemption. Because the Tenth Circuit protects Indian tribal autonomy from federal statutes that regulate employment, ERISA does not govern tribal benefit plans or preempt state-law claims; (b) even if ERISA overrides judicially ordained comity with tribes' sovereignty, the Act and its revised definition in particular, specifically exempts "governmental plans," including plans issued by agencies and instrumentalities, such as tribes, from the civil enforcement scheme that preempts state law; (c) even regarding a covered ERISA plan, the Tenth Circuit and other courts approve state claims to redress insurers' false promotional promises.

II. JURISDICTION

This is a removed action in which the district court exercised federal jurisdiction pursuant to 29 U.S.C. §1331 and 29 U.S.C. §1132. This court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from a final district court judgment. The district court entered judgment on August 23, 2007. Pursuant to Fed.R.App.P. 4, Appellants

Steven and Naomi Dobbs timely filed their notice of appeal on

September 24, 2007.

III. ISSUES FOR REVIEW

A. Whether the district court erred by departing from the mandate of the case and the law of the case.

B. Whether the district court erred by ruling that the clarified definition of governmental plan does not apply to the Indian tribal Government Plan

Issues previously presented for review and still pending before this

court.

C. Whether the district court erred when it applied ERISA's complex regulatory scheme to an Indian Tribe without Congress's Express Intent to Bind Tribes.

D. Whether the district court erred when it construed ERISA's exemption for "governmental plans" narrowly and against Indian tribal sovereignty and independence.

E. Whether the lower court erred when it restricted application of *Woodworker's Supply*, to claims by employers for misrepresentations made before any plan exists, thus excluding claims by employees for misrepresentations made to them before they elect to purchase and participate in a plan.

IV. STATEMENT OF THE CASE

A. Course of Proceedings below

This matter comes to this Circuit a second time, following the district court's dismissal of the case on remand. Plaintiffs Steven and Naomi Dobbs originally filed suit in Colorado state court against Anthem Blue Cross Blue Shield, asserting claims for bad faith breach of contract, violation of Colorado's Consumer Protection Act, fraud, outrageous conduct, and fraudulent inducement. Anthem removed the case to United States District Court, invoking federal jurisdiction based on preemption under the Employee Retirement Income and Security Act, and moved to dismiss on that ground.

The Dobbs opposed Anthem's motion on several grounds: (1) Steven Dobbs' employer, the Southern Ute Indian Tribe, is not governed by ERISA because the Tenth Circuit does not construe regulatory statutes to bind tribal governments unless Congress expresses its intent to bind tribes; (2) If ERISA binds tribal governments, it classifies their covered benefits as "governmental plans" which are not subject to preemption of state claims; (3) Even if the Tribe's benefit plan is wholly subject to ERISA, in *Woodworker's Supply*, the Tenth Circuit ruled

ERISA does not preempt claims for fraudulent inducement based on insurers' false promises that induce buyers' participation in a plan.

The district court dismissed plaintiffs' claims except for the fourth claim, for fraudulent inducement. Regarding the dismissals, the court declared that statutes of general application bind tribal governments and further, that an Indian tribe is not an "agency or instrumentality" of the federal government within the definition of "governmental plan."

The court denied Anthem's motion as to plaintiffs' fourth claim, which was "predicated upon Anthem's alleged pre-contractual misrepresentations [and] comes within *Woodworker's Supply*. [...] The Dobbses could not have been acting as plan beneficiaries before they purchased the Policy. Anthem's pre-contractual representations, upon which the Dobbs allegedly relied in deciding to participate in the plan, are properly at issue." Order, p.10.

The court ordered Anthem to show cause why the fourth claim should not be remanded to state court. After briefing by the parties, the court reversed itself,

citing the fact the Tribe began participating in the plan more than a year before the Dobbs relied on Anthem's promises. Reconsideration, p. 4. The court declared *Woodworkers* allows claims only by employers, and only for misrepresentations made before an employer creates a plan, regardless of when a complaining employee relies or joins a plan. *Id* at 4-5. It dismissed the fourth claim.

In their first appeal to this Circuit, Plaintiffs raised issues of Indian tribal sovereignty, the governmental plan exception to ERISA, and a theory of fraudulent inducement approved in *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.,* 170 F.3d 985, 992 (10th Cir.1999). This Circuit remanded the case to the district court. It ruled that an amended definition of governmental plan, adopted by Congress while this case was pending, controlled the disputed issue of preemption. This court instructed:

> 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. 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. [citation omitted] 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 v. Anthem Blue Cross Blue Shield 475 F.3d 1176, 1178-1179 (10th Cir. 2007). (emphasis added).

Because the parties failed to bring the amendment to this court's attention, the court instructed "[p]articularly when a legal development *is controlling, as it is here,* we admonish counsel to bring the relevant authority to the Court's attention." *Id* at 1179.

On remand, Anthem immediately renewed its Motion to Dismiss. Anthem argued the amended definition of governmental plan does not control this case; this court's ruling was plainly erroneous; and there was no need to conduct the proceedings ordered by this court.

The lower court granted Anthem's motion. First, the court ruled in favor of the Dobbs on the controlling issue: Steven Dobbs performed a core governmental function and therefore his insurance plan offered by

the Southern Ute Tribal Government met the amended definition of governmental plan. Order on Remand p. 4. After finding for the Dobbs on the sole question, this Circuit directed it to answer, the lower court then defied this Circuit and ruled the amended definition did not control; it did not affect this case because it could be applied prospectively only. Id at 6. The court therefore defaulted to its previous orders of dismissal. Id. at 8-9.

The Dobbs now press this appeal. The Dobbs respectfully submit the district court erred in rejecting this court's order instructing that the amended definition "is controlling." The trial court further erred in concluding that retroactivity analysis is applicable here. Having erroneously determined to invoke that analysis, the court erred in its application, which should have concluded the amendment applies here without implicating retroactivity.

B. Statement of Facts

Plaintiff Steven Dobbs works for the Southern Ute Indian Tribe ("the Tribe"). The Tribe was recognized as an Indian Tribe by the

United States Secretary of the Interior in 1936 and remains so recognized. The Tribe duly ratified a federal charter in 1938 and is constituted as a tribal government and possesses all authority and powers of tribal governments allowed and recognized under United States law. Amended Complaint ¶¶ 6-8.

Through the Tribe, Mr. Dobbs purchased a group policy of health insurance ("the Policy") from Anthem Blue Cross Blue Shield. ("Anthem"). Amended Complaint ¶ 9. The Dobbs' son Skyler has a rare skull deformity. A leading expert in treating Skyler's condition is Jeffrey Fearon, practicing in Dallas, Texas. Because Dr Fearon had previously operated on Skyler, the Dobbs sought insurance that would allow them to consult with Dr. Fearon. Amended Complaint ¶¶ 15-17.

Before selecting an insurance policy, or even deciding to change employment, the Dobbs reviewed literature promoting Anthem's "Blue Preferred PPO Plan." There, Anthem promised that Blue Preferred customers can consult any Preferred Provider (PPO Provider) anywhere

in the country, at in-network, the highest level of benefits. The Dobbs confirmed Dr. Fearon was a PPO provider. Relying on Anthem's promises, they purchased the Blue Preferred Plan. Amended Complaint ¶¶ 18-20

When Skyler's condition appeared to recur, the Dobbs sought approval to visit Dr. Fearon. Anthem advised the visit would be compensated as out-of-network. Amended Complaint ¶ 20.

Ms. Dobbs objected in writing to Anthem's determination and submitted documentation of the plan terms and of Dr. Fearon's status as a PPO provider.Ms. Dobbs and Skyler's doctors made numerous efforts over a period of months to get the visit approved in-network. Anthem issued multiple unexplained denials. Amended Complaint ¶¶ 22-23.

While Ms. Dobbs urgently pursued every possible avenue to change Anthem's decision, Anthem engaged in willful obstruction to block her efforts. Anthem's abusive behavior included:

* falsely telling Ms. Dobbs a scheduled appeal hearing was canceled;

* telling Ms. Dobbs a hearing was unnecessary because her appeal was granted, but refusing repeated requests to confirm the result in writing;

* later conducting a fraudulent appeal proceeding, with Ms. Dobbs participating by telephone. The appeal facilitator feigned introducing panel members to Ms. Dobbs and then told her the panel's decision was to grant her appeal. When she pressed for a written confirmation of the result and started to present her position, the facilitator was forced to admit there was no panel–no one else was on the line. Amended Complaint ¶¶ 30-33.

Eventually, Anthem sent Ms. Dobbs a letter of apology. The letter acknowledged the company's errors, inconsistencies, and missed opportunities to treat the family fairly according to the terms of the policy. Anthem promised it would learn from its misconduct and use the Dobbs' experience as a training scenario for Anthem employees. Amended Complaint ¶ 38.

With approval for in-network coverage, Ms. Dobbs was able to take Skyler, nine months belatedly, to see Dr. Fearon,. The appointment confirmed the Dobbs' fears. Skyler's condition had recurred and he needed surgery for cranial reconstruction. Amended Complaint ¶¶ 43-44.

Dr. Fearon requested Anthem's authorization for the surgery. Incredibly, Anthem advised the treatment would be compensated as out-of-network. Ms. Dobbs immediately reminded Anthem of the prior events that culminated in the earlier apology. Nevertheless, in a cruel and astonishing replay, Ms. Dobbs was forced to re-run the gauntlet of unexplained, unjustified denials. Anthem issued its wrongful out-of-network determination no less than *five times* between March 6, 2003 and July 22, 2003. Amended Complaint ¶¶ 46-49

Although the Dobbs were responsible for the cost difference, which exceeded $100,000, they put their son's health first and arranged for the surgery. Skyler was successfully operated. Amended Complaint ¶ 50.

The family soon began receiving bills for Skyler's care from Anthem, and conflicting and unclear Explanations of Benefits from Anthem. The Dobbs paid all required in-network copayments and the full amount of their "annual out of pocket maximum" associated with the in network level of benefits. Anthem wrongly refused to pay the remainder. Some providers classified the Dobbs as "bad-debt," tendered the accounts to collection agencies, and reported the Dobbs to credit agencies. The Dobbs continued pressing Anthem to pay the promised in-network benefits. Amended Complaint ¶¶ 51-53.

Anthem never reversed its position, responded to the Dobbs appeal, or otherwise acknowledged error. However, without explanation or justification for its actions, Anthem began making erratic payments until the bulk of the accounts were satisfied. Anthem continues to collect premiums with no assurance the Dobbs will be spared identical mistreatment in the future. Amended Complaint ¶ 55.

The Dobbs press this second appeal following remand and the district court's second dismissal of their clams.

V. SUMMARY OF ARGUMENT

The trial court erred in dismissing plaintiffs' complaint on remand because the mandate rule and law of the case required it to follow the instructions of this circuit and apply the amended definition of "governmental plan" to this case. Under well-established canons, the amendment clarified an ambiguous phrase and properly applies here. Even viewed as substantive legislation, the amendment does not violate rules against retroactivity, because it withdraws jurisdiction; it does not impose new burdens by its operation.

If this Circuit concludes the trial court correctly disregarded the instruction to apply the amendment, then it should take up the questions plaintiffs raised in their original appeal, which this court set aside when it remanded for application of the amended language. Those issues, previously argued to this court are as follows:

Preemption does not apply here, because Steven Dobbs' employer,

the Southern Ute Indian Tribe, is not governed by ERISA. The Tenth Circuit does not construe regulatory statutes to bind tribal governments unless Congress expresses its intent to bind tribes.

If ERISA binds tribal governments, it classifies their covered benefits as "governmental plans" which are not subject to preemption of state claims.

If the Tribe's benefit plan is wholly subject to ERISA, in *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 992 (10th Cir.1999), this Circuit ruled ERISA does not preempt claims for fraudulent inducement based on insurers' false promises that induce buyers' participation in a plan.

VI. ARGUMENT

A. Standard of Review

This Court "review[s] the trial court's ruling on ERISA preemption de novo as it involves a question of law." *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 989 (10th Cir.1999) *citing Airparts Co. v. Custom Benefit Services of Austin*, 28 F.3d 1062, 1064 (10th Cir.1994). Moreover, dismissal is appropriate only if it appears

the Dobbs could prove no set of facts under which they would be entitled to relief. *Coosewoon v. Meridian Oil Co.,* 25 F.3d 920, 924 (10th Cir.1994).

B. The Mandate on Remand

> In its remand to the district court, this Circuit directed as follows:
>
> 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. 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. [citation omitted] 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 at 1178-1179. (emphasis added).

The District Court defied this Circuit's mandate and departed from the law of this case. The court was to determine, based on factual inquiry, whether the Southern Ute Tribal plan meets the definition

amended definition of governmental plan; and if to remand the case to the state court.

C. The Principles of Law of the Case and of the Mandate Rule Call for Applying the Amended Definition of Governmental Plan.

This Court gave the district court specific instructions that should have guided its handling of this case. "[W]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal." *Rohrbaugh v. Celotex Corp*., 53 F.3d 1181, 1183 (10th Cir.1995). The Tenth Circuit's clear instructions provide direct what should have happened below: the court should consider the amended definition, and if the plan fell therein, it should remand to the state court because in that event, "ERISA *will not preempt [the Dobbses] state-law causes of action against Anthem*." *Dobbs, supra* at 1179. (emphasis added)

Similarly, the mandate rule supports conducting the analysis called for by the Tenth Circuit: "An 'important corollary' to the law of the case

doctrine, "known as the 'mandate rule,' provides that a district court must comply strictly with the mandate rendered by the reviewing court." *Huffman v. Saul Holdings Ltd. Partnership* 262 F.3d 1128, 1132 (10th Cir.2001) *quoting Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1520-21 (10th Cir.1997) (internal quotation omitted); see also *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir.1991) ("Under the 'law of the case' doctrine, the district court may not deviate from the appellate court's mandate.") The mandate rule dovetails with law of the case to instruct on how this case should proceed.

D. No Exception to Law of the Case or the Mandate Rule Applies Here.

While there are limited exceptions to the two doctrines that guide this proceeding, none applies here: "[A] district court may deviate from the mandate 'under exceptional circumstances, including (1) a dramatic change in controlling legal authority; (2) significant new evidence that was not earlier obtainable through due diligence but has since come to light; or (3) if blatant error from the prior ... decision would result in

serious injustice if uncorrected'." *Huffman, supra,* 262 F.3d at 1133 *quoting United States v. Webb*, 98 F.3d 585, 587 (10th Cir.1996). The occasions *Huffman* recognized for disregarding law of the case are similarly absent: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *Id. quoting McIlravy v. Kerr-McGee Coal Corp*., 204 F.3d 1031, 1035 (10th Cir.2000).

Though none of the exceptions applied, Anthem argued this Circuit's instruction was plain error and the district court should ignore it. The argument is wrong. Though this Circuit did not articulate in its opinion its analysis regarding application of the amendment, the conclusion is fully supported by multiple adequate and independent rationales. First, the mandate may be supported based on the plain understanding of the amendment's legal effect. Clarifying that certain plans do not fall under comprehensive federal control does not implicate

retroactivity at all. It does not impose new duties or withdraw rights. The sole intrinsic consequence is to withdraw federal supervision. The authority of the state flows from preexisting state sovereignty, not from any affirmative federal imposition of retroactive consequences. Second, even traditional analysis of retrospectivity indicates the amendment may be applied prospectively and still govern this case.

E. Giving Effect to the Amended Definition Does Not Constitute Retroactive Application

In arguing to reject this Circuit's mandate, Anthem persuaded the district court that applying the amended definition must be viewed as retrospective, because it relates to actions that predate Congress clarifying the definition. Order on Remand at 5. But the Supreme Court plainly rejects this rigid argument: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, *[citations omitted]* or upsets expectations based in prior law. *Landgraf v. USI Film Products* 511 U.S. 244, 269-270, 114 S.Ct. 1483,1499 (1994) *citing Republic Nat.*

Bank of Miami v. United States, 506 U.S. 80, 100, 113 S.Ct. 554, 565-566, 121 L.Ed.2d 474 (1992) (THOMAS, J., concurring in part and concurring in judgment),

The *Landgraff* court further explained:

> Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. *See Fuller* 60 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever"). Moreover, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox v. Hart*, 260 U.S. 427, 435, 43 S.Ct. 154, 157, 67 L.Ed. 332 (1922). *See Reynolds v. United States*, 292 U.S. 443, 444-449, 54 S.Ct. 800, 801-803, 78 L.Ed. 1353 (1934); *Chicago & Alton R. Co. v. Tranbarger*, 238 U.S. 67, 73, 35 S.Ct. 678, 680, 59 L.Ed. 204 (1915).

Id. at n. 24

Identifying the amendment's proper temporal application requires considering its actual impact: It does not impose new duties on any party as Anthem erroneously argues. To the contrary, its only operation is to

negate a substantial swath of federal jurisdiction and control over certain benefit plans. It retracts, not extends, the burdens imposed by federal law. Thus it may be applied in the present to any pending dispute regarding earlier plan years. *Cf. Fernandez v. I.N.S.* 113 F.3d 1151, 1153 (10th Cir. 1997) which quoted Justice Scalia as follows (emphasis added):

> [o]ur jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power-so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute *to undo past judicial action* would be applying it retroactively; *but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.*

Similarly here, applying the amended definition in to this case, in this year, to block the federal intervention that Anthem urges is a prospective application of the amendment.

F. Clarifying That ERISA's Requirements Are Inapplicable Does Not Generate Any Retroactive Burden.

The logic expressed in *Fernandez* suggests a compelling related basis on which the trial court should have respected this Circuit's ruling; there is no retroactivity issue here at all because the amendment does not do anything to Anthem. That is, its terms and its operation do not prohibit or require anything of Anthem. They do not touch it. Whatever duties may pre-exist under state law are not creations of the federal amendment. The federal government that clarified ERISA's definition of government plan does not thereby demand anything of Anthem. Instead, it negates any duties or requirements ERISA may have imposed without replacing them. The fact a different sovereign, the State of Colorado, upholds *longstanding* laws that take a dim view of fraud, is not a concern of federal law or a factor in retroactivity analysis. Congress' amendment cannot be deemed retroactive or not based on what other law does or does not separately exist in a state. To state the proposition exposes its illogic.

The real issue—different sovereignties and their respective policies—distinguishes this case from every case on retroactivity relied

on by Anthem or the district court. Retroactivity analysis considers whether a newly adopted law may govern past acts. That issue is not present here. The clarification there is no enforceable federal policy regarding the dealings between Anthem and the Dobbs imposes no duties on either party. The state laws to which Anthem will answer are not new.

Applying the amended definition to this case takes no vested right from Anthem, because no entity has a vested right to insist one sovereign, rather than another, perpetuate policies that exercise authority over its activities

G. The Amended Definition of Governmental Plan Was a Clarification, Properly Applied to this Case.

Even if the district court was correct to undertake retroactivity analysis, it erred in the analysis. The amended definition was a clarification which Congress intended to apply to all cases going forward.

Amendments that clarify the law rather than work substantive changes are more readily applied retrospectively. As Anthem acknowledges, "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. *Fowler v. Unified Sch. Dist. No. 259*,128 F.3d 1431, 1436 (10th Cir. 1997).

1. Congress declared the amended definition was a clarification.

In amending the definition of "governmental plan", Congress expressed its intent to make a "clarification" that Indian Tribes operate under the same rules as applied to state and local governments. Congress styled § 906(b) as 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." While courts generally consider amendments to substantively change statutes, a

different rule applies where Congress expresses that it intends to clarify. *Fowler, supra.* (Amendments applied only prospectively unless Congress expresses intent to "clarify."). In interpreting the amendment, this court should presume that when Congress adopts language, it is aware of established judicial interpretations of particular terms. *National Cable & Telecommunications Ass'n v. Brand X Internet Services* 545 U.S. 967, 993, 125 S.Ct. 2688, 2706 (U.S.,2005) quoting *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159, 113 S.Ct. 2006, 124 L.Ed.2d 71 (1993). Congress chose the term "clarification" with a legal connotation that Congress is presumed to intend.

That the statement regarding clarification pertains to subsection (b) while the language amending the definition of governmental plan appears in subsection (a) does not alter this analysis for at least two reasons. First, subsection (b) incorporates language identical to (a), so Congress declared the precise language contained in subsection (a) to be a "clarification." See § 906(b)(2)(c)(14), Second, and more broadly,

Congress expressed its judgment that the *policy* of treating Indian Tribes the same as state governments under ERISA was a clarification of the law.

2. Clarification of Governmental Plan was Appropriate to Remedy an Ambiguity.

Further support for reading the amendment as a clarification comes from the prior ambiguity to which the amendment lent clarity. The term "instrumentalities" is not defined in the Act or in case law. Given the lack of definition and historic application of the term to Indian Tribes, it was appropriate for Congress to clarify whether Indian Tribes were included in governmental plans or not. This need was greater because authorized federal agencies and officers had long held that granting a federal corporate charter to an Indian tribe establishes it as an instrumentality of the United States. The United States Solicitor for Indian Affairs explained:

> The Indian tribes have long been recognized as vested with governmental powers, subject to limitations imposed by Federal statutes. The powers of an Indian tribe cannot be restricted or

> controlled by the governments of the several States. The tribe is, therefore, ***so far as its original absolute sovereignty has been limited, an instrumentality and agency of the Federal Government.*** (See the recent opinion of this Department, "Powers of Indian Tribes," approved October 25, 1934-M. 27781.)
>
> Various statutes authorize the delegation of new powers of government to the Indian tribes. (See opinion cited above.) The most recent of such statutes is the Wheeler-Howard Act, which sets up as one of its primary objectives, the purpose "to grant certain rights of home rule to Indians." This Act Contemplates the devolution to the duly organized Indian tribes of many powers over property and personal conduct which are now exercised by officials of the Interior Department. ***The granting of a Federal corporate charter to an Indian tribe confirms the character of such a tribe as a Federal instrumentality and agency.***

Opinion of the Solicitor of the Department of the Interior Relating to Indian Affairs, December 13, 1934.[1] (emphasis added). The Southern

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[1] The compilation "Opinion of the Solicitor of the Department of the Interior Relating to Indian Affairs, December 1917-1974," is maintained and posted on its Website by the University of Oklahoma Legal Center, at the Internet URL:

Ute Indian Tribe is "such a tribe," having established a constitution and received a federal charter.

Other government officials and academic commentators confirm this principle. In a 1949 pamphlet entitled *The Indian and the Law*, authored by chief counsel of the United States Indian Service, The Department of the Interior declared:

> An Indian tribe has been treated for some purpose as an instrumentality or agency of the Federal Government. For example, it has been delegated certain functions by the Secretary of the Interior, such as the leasing of individual lands for a fee. Furthermore, the granting of *a Federal corporate charter to an Indian tribe under the Indian Reorganization Act confirms the character of the tribe as a Federal instrumentality or agency*.

The Indian and the Law, p. 273 (emphasis added.)"[2]

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http://thorpe.ou.edu/solicitor.html. The URL for the quoted opinion is: http://thorpe.ou.edu/sol_opinions/p476-500.html

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The United States Interior Department Pamphlet *The Indian and the Law* is maintained and posted on its Website by the University of Oklahoma Legal Center, at the Internet URL:

Finally, in the Handbook of Federal Indian Law, published by the United States Government Printing Office, Indian law scholar Felix S.Cohen, wrote regarding "The legal Status of Indian Tribes"[3]:

> In its relations with state and municipal governments, an Indian tribe is treated for certain purposes as an instrumentality of the Federal Government. Following a ruling of the Attorney General of North Dakota to the effect that a state crop mortgage law did not apply to mortgages made to an Indian tribe, for the reason that such tribe was deemed an "'agency" of the United States within the meaning of the statutory exemption, the Interior Department authorized the acceptance of such mortgages as security for revolving fund loans. The Assistant Secretary declared : This Department has previously held in various connections that an Indian tribe, ***particularly where incorporated,*** is a Federal agency.

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http://thorpe.ou.edu/cohen/Indian%20&%20Law%202/indian_law2.html

[3] The Handbook of Federal Indian Law is maintained and posted on its Website by the University of Oklahoma Legal Center, at the Internet URL: http://thorpe.ou.edu/cohen.html
The URL for the quoted passage is:
http://thorpe.ou.edu/cohen/14cohen268.pdf

Just as Congress is presumed, in its use of language, to be aware of judicial interpretations, so to is it presumed to be cognizant of executive interpretations of particular terms and phrases. *National Cable & Telecommunications Ass'n, supra,* 545 U.S. at 933. The cited executive declarations that tribes are instrumentalities obviously were historically more recent at the time Congress passed ERISA in 1974. Indeed, at its adoption, the exemption for government instrumentalities was as proximate to the publication of the *The Indian and the Law, supra,* which authoritatively termed chartered tribes as instrumentalities, as we are today to the legal holdings of 1983.

These executive interpretations are important not because they prove a current executive branch position that would be owed deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Rather, *at a minimum* they illustrate substantial ambiguity about the meaning of "instrumentality" and Congressional intent regarding the status of Indian tribes in ERISA's prior definition of "governmental plan". It is

consistent with judicial canons to take Congress at its word that the amended definition clarified tribes' status.

3. The language of § 906's effective-date is different from all other sections and supports application of the amendment here.

Even if the amendment is deemed a substantive change rather than a clarification, analysis of the relevant language supports its application in this case. Congress adopted separate effective date clauses for different sections of ERISA. . Among those clauses, § 906 has a different formulation from any other section. The clause provides: "The amendments made by this section shall apply to any year beginning on or after the date of the enactment of this Act." Pension Protection Act of 2006, Pub. L. No. 109-280, § 906(c), 120 Stat. 780. This language is different and broader than the formulation used in many other sections of the Act, *e.g*: "The amendments made by this section shall apply to *plan years* beginning after 2007." *Id*. at §101. Emphasis added.

Congress employed the phrase "plan year" in effective date clauses at least 25 times in the PPA.[4]. It employed the language in §906 only once.

The different phrase logically has a different meaning. *"Plan* years" is a more specific and qualified phrase than is the simple word "years." Contrasting the disparate language indicates that "plan years" bears the precise meaning Anthem argues to assign the broader language in § 906. Provisions that apply only to "plan years" after 2006 can apply only to plans that correspond to later years, 2007, 2008, etc. But Anthem's desire to bootstrap the same interpretation onto § 906 must fail. The broader term "years," without qualification, rejects it. Removing the restrictive focus has a consequence. It allows currently adopted provisions to affect, in the present year, issues arising under

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"Plan year" is Congress's trigger of choice in effective-date clauses in at least §§ 101, 103, 110, 111, 113, 115, 201, 402, 405, 501, 502, 503, 504, 507, 508, 611, 621, 622, 624, 901, 902, 903, 1004, and 1104.

earlier "plan years." If Congress had intended the interpretation that Anthem urges, it would have used the phrase "plan year" a 26th time. It did not. It used a broader phrase, once.

H. The Lower Court Disregarded Precedents of this Circuit By Imposing ERISA's Regulatory Scheme on a Tribal Government Without Congress's Express Intent.

If this court concludes that ERISA's amendment cannot apply here then Appellants respectfully submit that the analysis must return to the pending issues previously submitted to the court. If ERISA's former text must be construed, all the questions which this court deferred when it remanded for consideration of the amendment remain to be answered. Plaintiffs therefore refresh the arguments they raised to this court.

The lower court erred in finding the Dobbs' claims preempted, because ERISA does not apply here. The Tenth Circuit does not construe federal regulatory statutes to cover Indian tribal governments unless Congress expresses its intent to cover tribes. The lower court disregarded precedent, asserting that ERISA's threat to tribal autonomy

is slight in this case. The court's legal error was compounded by a logical error: purporting to separate and minimize consequences for the Tribe in this case from the inevitable consequences to all tribes if courts apply ERISA to tribal governments.

1. This Circuit Does Not Bind Tribal Governments Under Federal Regulatory Statutes Unless Congress Expressly Includes Tribes in its Enactment.

Unless Congress expresses its intent to the contrary, the Tenth Circuit protects Indian tribal sovereignty from the intrusion of federal laws, particularly employment regulations. *EEOC v. Cherokee Nation,* 871 F.2d 937 (10th Cir.1989). The rationale is clear: Congress has Constitutional power to override tribal sovereignty, but this Circuit does not implement that power by mere inference; Congress must express that intent. *NLRB v. Pueblo,* 276 F.3d at 1195. This court made clear in *Cherokee Nation,* 871 F.2d at 939, its sense that the Supreme Court observes, and requires, "special canons" for "the benefit of Indian interests."

We believe that unequivocal Supreme Court precedent

> dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no clear indication of congressional intent to abrogate Indian sovereignty rights (as manifested, e.g., by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests.

Because ERISA does not expressly cover tribes, the Tribe here must remain free of ERISA's complex web.

This Circuit has shielded Indian tribal sovereignty against *every* federal statute regulating employment it has considered. Panels have applied this standard to the Age Discrimination in Employment Act, *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir.1989) (EEOC could not enforce ADEA against tribe); the Occupational Safety and Health Act, *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir.1982) (Enforcing OSHA against tribal business would abrogate treaty rights and principles of sovereignty and self-government); and the National Labor Relations Act, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, (10th Cir. 2002) (Labor Act could not bind Tribe). Each case upholds the principle the court denigrated below: courts should not infer

intent to quash tribal autonomy and bind tribes; Congress must clearly express that intent.[1]

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[1]Commentators have noted this Circuit's tradition:

> The Tenth and Eighth Circuits have respected principles of tribal sovereignty by requiring express congressional intent before applying federal statutes of general applicability to tribal employers. In contrast, the Ninth and Seventh Circuits have, in effect, disregarded tribal sovereignty by presuming the applicability of such statutes to tribal employers.

Comment, 2000 Wisconsin Law Rev. 1291, 1301.

Similarly, the American Bar Association, Business Law Section website describes Tenth Circuit regard for tribal sovereignty:

> The circuits, however, are split regarding whether federal regulatory employment laws apply to reservation employers. The *Tenth and Eight circuits have refused to apply to tribes such laws* as the Occupational Safety and Health Act (OSHA), Employee Retirement Income Security Act (ERISA), Fair Labor Standards Act (FLSA), and National Labor Relations Act (NLRA), because doing so would encroach on well-established principles of tribal sovereignty and tribal self-governance. Conversely, the Ninth, Seventh and Second circuits have applied OSHA, ERISA and NLRA to tribes, reasoning that such statutes of general applicability govern tribal employment activity because Indian tribes are not explicitly exempted from the laws. Nevertheless, state labor laws and workers' compensation

This Circuit readily implements Congress's expressed intent to bind tribes. *Osage Tribe v. U.S. Dept. Of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999) (Safe Drinking Water Act governs tribes because Congress inserted "a clear and explicit waiver of tribal immunity."). The standard could not be clearer: when Congress expressly includes tribes in its regulatory enactments, they are bound. When it does not, they are not. Congress did not bind tribes in ERISA.

2. The Rationale Below Is Unworkable.

In applying ERISA, the district court purported to distinguish this Circuit's precedents on the ground that preempting tribal employees' state-law claims does not abrogate tribal sovereignty. The logical flaw in that proposition is that preempting employees' state-law claims is a minor tentacle of a much bigger squid that the court's decision leaves

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statutes generally remain inapplicable to tribal businesses.

http://www.abanet.org/buslaw/blt/2003-07-08/galanda.html
Emphasis added.

securely wrapped around tribal backs.

ERISA imposes a regulatory burden greater than laws this Circuit has refused to impose on tribes. The lower court cannot, consistent with logic, precedent, or the Act itself parse ERISA's tolerable and intolerable effects, allowing the Act sometimes to bind tribes, sometimes not. But the court purported to do so, asserting "*in this case*," ERISA does not affect the Tribe's sovereign interests, only proprietary interests. *Order, p.8* (emphasis added). The court recognized that in other circumstances, though, such as administrative enforcement or litigation discovery disputes, ERISA could pose concerns for sovereignty. *Order, p. 7.* The court purported to clarify, however, that "those issues would have no bearing on the question of preemption of the Dobbs's' state law claims." *Id.*

A decision that ERISA does not govern tribes would have "no bearing on the question of preemption" here? That cannot be. Appellants respectfully submit the district court's analysis is unsupported and unworkable. ERISA cannot be flipped on and off like a

light switch, depending on the legal issues a tribe confronts. Nor can there be preemption if ERISA is not fully operative and binding; preemption has no existence independent of a full complement of ERISA principles participating in a qualified ERISA plan. 29 U.S.C. § 1144(a).

The opinion below cannot be reconciled with the holdings in *Cherokee Nation*, *Pueblo of San Juan* or *Navajo Forest Products*. This Circuit did not parse the respective statutes' permissible and impermissible effects, deflecting only particular applications while permitting others. Rather, this Circuit categorically excluded tribal governments from the laws at issue, indeed, from each federal regulation of employment it has considered. If there is a reason ERISA, unlike OSHA, ADEA and the Labor Act should apply *in toto* to tribes, it cannot be the transient happenstance that a tribal employee raises the issue in a context the court believes poses relatively less severe threat to tribal sovereignty.

The court cited *Phillips Petroleum v. EPA*, 803 F.2d 545 (10th

Cir.1986) as establishing that "Federal statutes of general application apply to Native Americans and their property." *Order, p. 8.* The citation is inapposite. If ERISA applies, it binds tribal *governments*, not just individual Indians. More fundamentally, this Circuit eschewed the lower court's broad characterization of *Phillips* and recognized the holding there was confirmed by Congress's express intent to govern tribes. "In *Phillips* [citation omitted] we held that the Safe Drinking Water Act (SDWA) regulated by the Environmental Protection Agency was applicable to Indians ***because the Act expressly included Indian tribes*** in the 1986 amendments to the SDWA." *N.L.R.B. v. Pueblo of San Juan* 280 F.3d 1278, 1284 -1285 (Tenth Cir. 2000) (emphasis added).

Phillips does not support the approach below.

The lower court effectively ruled that ERISA applies here because it doesn't threaten sovereignty in this case, but that in other inevitable applications, it could. The patent incongruity points up the prudence of this Circuits' precedents and the error of the ruling below. Enforcing

ERISA would tread upon tribal sovereignty. ERISA cannot apply. ERISA cannot preempt.

3. The Decision below Relied upon Speculation and Inference Contrary to the Record and Contrary to the Standard for Reviewing 12(b) Motions.

The lower court's minimizing of impinged tribal authority, as commercial rather than sovereign, is improper for additional reasons. It is contrary to the record, particularly as supplemented by the Dobbs' motion for reconsideration, which supplied evidence Steven Dobbs is responsible for the core sovereign function of managing tribal wealth in the Southern Ute treasury. *Plaintiffs' Motion for Reconsideration*, *p.2*. *Cf.* 5 U.S.C. § 101 (United States Treasury a principal executive department); Colo. Const. Art. 4, § 1(Colorado treasurer a constitutional member of executive department).

Further, the court's reliance on speculative characterization and unfavorable inference conflicts with 12(b)'s standard of review for dismissal, which requires indulging every possible fact and inference favorable to plaintiffs.

This Circuit should correct the error below and remand this case for remand to state court.

I. ERISA's Exemption of Governmental Plans from Preemption Includes Tribal Governments' Plans.

If jurisprudential concerns of tribal sovereignty and comity do not deflect ERISA's application to tribes, simple statutory construction of the Act yields the same result. Congress chose to exempt employee benefit plans that are "governmental plans" from much of ERISA's framework. 29 USC 1002 § (3)32. The Act defines a governmental plan as "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" *Id.* Emphasis added.

The district court ruled plans of tribal governments are not "governmental plans" because no definition of instrumentality includes Indian tribes and because the only case addressing the issue, *Colville Confederated Tribes v. Somday,* 96 F.Supp.2d 1120, 1134 (D.Wa. 2000)

is unpersuasive. This Circuit should correct the error below and clarify that tribes' benefit plans are governmental plans. The Act's policy to exclude governments, as well as cannons of construction respecting tribal sovereignty, counsel that the term "instrumentality" should include tribes. Even if the court concludes "instrumentality" does not literally encompass tribes, it should endorse the Seventh Circuit's analysis in *Reich v. Great Lakes*, 4 F.3d 490 (7th Cir. 1993), which construed an exemption in federal labor law to include tribal police, even though the exemption expressly referenced only state and local police.

1. Federal Instrumentalities, for ERISA's Purposes, include Tribes.

While federal law makes occasional reference to governmental "instrumentality," neither Congress nor the courts have precisely defined the term. Consequently, the question arises *ad hoc* in various contexts. *Cf. Pima Financial Service Corp. v. Intermountain Home Systems, Inc.*, 786 F.Supp 1551, 1560 (D.Colo. 1992) ("no easy answer" whether agency was federal instrumentality for particular purposes.) Ample

authority, guided by canons of construction regarding Indian tribes, places them securely within its meaning here. Appellants direct the court, and incorporate by reference, the federal executive authorities cited at pages 20-23, *supra*, plainly stating that chartered Indian tribes *are* instrumentalities of the federal government.

2. Like all statutes, ERISA, and its "governmental plan" exception, should be construed to promote tribal sovereignty.

The Tenth Circuit construes statutes with vigilance to protect tribal sovereignty and autonomy. In *Cherokee Nation*, 871 F.2d at 939, this Circuit provided clear and forceful guidance for construing laws affecting Indian tribes:

> [N]ormal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue. *See, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985) ("[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that

> treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.... The Court has applied similar canons of construction in nontreaty matters."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152, 102 S.Ct. 894, 909, 71 L.Ed.2d 21 (1982) ("[I]f there [is] ambiguity ... the doubt would benefit the tribe, for 'ambiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.' ") (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, 100 S.Ct. 2578, 2583-84, 65 L.Ed.2d 665 (1980)).

It cannot be said the district court interpreted "governmental plan" or "instrumentality" "generously" or "liberally" or "in favor of the Indians" such that ambiguities would benefit "sovereignty" and "independence." In addition to canons neglected below, the context here provides heightened support for such a construction.

3. Governmental considerations regarding employee benefit plans are identical for tribal and non-tribal governments.

Governmental bodies, including tribal governments, all share certain advantages and disadvantages, compared to private employers, in compensating and providing benefits for employees. Governments,

including tribes, are guided by public obligation and need for constituent services, rather than such concerns as profit or market share. Their resources, and consequently salaries, often are limited relative to private employers. Congress acted to avoid increasing their burden with rigid restraints under ERISA. On the ledger's plus side, however, tribes and other governments possess taxing power. They can protect the solvency of benefit plans by raising funds for necessary public purposes. These conditions affect tribes no less than any other government. The factors that favor exempting any government from ERISA's requirements apply identically to tribes.

The only case plaintiffs have found examining this question is *Colville Confederated Tribes v. Somday*, 96 F.Supp.2d 1120, 1134 (D.Wa. 2000) in which the court determined tribal employee benefit plans are governmental plans exempt from ERISA.. The court relied on the opinion of the US Department of Labor and did not discuss the issue at length. The holding is consistent with plain meaning and construction.

4. The common meaning of "instrumentality" aptly describes benefits that tribes afford the United States.

The American Heritage dictionary defines instrumentality as "a means; an agency." Black's Law Dictionary 3d. Ed. renders "instrumental" as "serviceable, helpful, serving as a means or agent, something by which an end is achieved." This court may properly take notice of the large number of Native Americans congregated on large tracts of land, and the diverse circumstances of such citizens, including significant socio-economic challenge. Tribal governments constitute the primary provider of human service and police-power protection for those American citizens. It comports with ordinary usage to acknowledge that tribal governments function as "serviceable [and] helpful" means to achieve the ends of peace and stability on large swaths of U.S. territory.

Courts have long considered tribal governments as federal instrumentalities, with ebb and flow for specific purposes. See. e.g. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 1676 (1978) (recognizing tribal courts may act as instrumentalities.) *Moe v.*

Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 470, 96 S.Ct. 1634, 1640, (1976) (acknowledging tribes' alignment with federal interests, but superseding former long-applied theory of instrumentality regarding state taxation issues; and refraining from determining precise significance of instrumentality designation); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 184, 100 S.Ct. 2069, 2097 (U.S.Wash.1980) (recognizing that courts long treated Indian tribes as federal instrumentalities for purposes of state taxation.); see also *Federal Land Bank of Wichita v. Adams County Comm'rs.* 582 F.Sup.1507, 1510 (D.Colo.1984) (same.)

Importantly, 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. See, e.g. *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915, 919 (10th. Cir 19) (Indian sued tribe for policies related to tribal membership; court ruled tribe was not federal instrumentality for

purposes of Fifth Amendment due process requirements and courts would not supervise tribal governance). See, also *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971) (same).[2] Here, of course tribal sovereignty and independence would be aided by recognizing tribal instrumentality.

In deciding tribes are not instrumentalities, the district court cited *Confederated Tribes* and *Federal Land Bank* to show that a historical tax doctrine, which treated tribes as instrumentalities for tax collection, was overruled. *Order, pp. 9-10.* That characterization amounts to describing a leaf and missing the garden. The cases did not declare that tribes

[2]If *Martinez* and *Groundhog* tempt Anthem to argue this Circuit has found tribes not to be instrumentalities, the argument fails for at least two reasons: (a) the cases do not negate instrumentality generally, but explain precisely the context in which the tribes are not instrumentalities, a result which, consistent with applicable canons, promoted tribal sovereignty. Here, in contrast, a finding of instrumentality would promote sovereignty and independence; and (b) this Circuit in *Dry*, 235 F.3d at 1255, did not see fit to cite, or establish, a categorical rule.

categorically are not federal instrumentalities general or particular purposes; rather, they ended the use of instrumentality analysis in a specific tax context.

Far from precluding instrumentality status for tribes, the cases create ambiguity; tribes formerly were federal instrumentalities for a particular taxing purpose; for what purposes might tribes *still* be instrumentalities? Absent a categorical negation by the Supreme Court or Congress, even the overruled cases germinate sprouts of ambiguity. The ambiguity finds hospitable soil in ERISA's "governmental plan" exception and draws further nourishment from canons dictating such ambiguity must be construed liberally and generously to promote tribal independence and sovereignty.

The superseded tax cases are not the only sprouts in ambiguity's garden. In *Dry v. United States* 235 F.3d 1249, 1255 (10th Cir. 2000), this court ruled in favor of a challenged tribal interest, while reserving as unnecessary the question whether the tribe exercised criminal jurisdiction as a federal instrumentality. If there were an established

answer in the negative, the *Dry* court would have cited it, and not troubled to reserve the question. If there is not such an answer, ambiguity grows greener.

The statute and case authority discussed above sets several standards that cumulatively dictate a clear result here: (a) ERISA exempts "governmental plans" including plans issued by governmental "instrumentalities," from many of its burdensome requirements; (b) tribes have in some instances been considered instrumentalities, and in others not; (c) ambiguities in law are to be construed in favor of Indian tribes to protect their sovereignty and independence.

This court may easily and properly give effect to each of the foregoing principles only by construing ERISA § 32 to include an Indian tribal plan within the exemption for governmental plans.

5. If "Instrumentality" Does Not Include Tribes, This Circuit Should, As a Matter of Comity, Construe ERISA's Governmental Plan Exemption to Treat Tribes Equally With Other Governments.

If "instrumentality" as used in ERISA's "governmental plan"

exception does not literally include Indian tribes, this Circuit should nevertheless construe the statute to extend the same consideration to tribal governments as to other governments. The decision in *Reich v. Great Lakes, supra,* exemplifies this analysis. At issue there was whether tribal conservation wardens were subject to the FLSA, or were covered by a statutory exemption for law enforcement employed by a "state or local agency." The Seventh Circuit acknowledged express literal exemption was absent: "read literally against the background of the exemption for state and local law enforcement officers, [the Act] covers the Commission's law enforcement officers because the Commission is not a state or local agency." 4 F.3D at 493.The *Reich* court nevertheless exempted tribal officers from the Act because–absent clear congressional intent to the contrary– canons of construction favoring comity with Tribes dictated that tribal officers be exempt to the same degree as comparable employees of state and local agencies.

Writing for the court, Judge Posner explained: "The idea of comity--of treating sovereigns, including such quasi-sovereigns as states

and Indian tribes, with greater respect than other litigants-- counsels us to exercise forbearance in construing legislation as having invaded the central regulatory functions of a sovereign entity." *Reich* better emulates Tenth Circuit precedent than does the ruling below. The district court wrote: "ERISA does not exempt the plans of all entities possessing governing authority." *Order., p. 9.* Rather, the court explained, it extends consideration only to plans established "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." *Id*. If the court meant to illuminate a swath of government bodies *not* covered by the governmental exception, the light is faint, appearing to strike *only* tribes.

The *Reich* court considered and rejected a similar analysis:

> Because the Fair Labor Standards Act does not mention Indians, the Department of Labor takes the position that these exemptions are inapplicable to the warden-policemen of the Great Lakes Indian Fish and Wildlife Commission. The Department's able counsel acknowledged at argument that the difference in treatment between these tribal law enforcement officers and state or local policemen makes no

> sense, but contended that the difference can be erased only by Congress.

Id. at 493

The *Reich* court advanced a different analysis, more consistent with comity and tribal sovereignty. The FLSA does not mention Indians. Indeed, "[n]othing in the legislative history suggests that Congress thought about the possible impact of the Act on Indian rights, customs, or practices." *Id.* "A literal reading of the Fair Labor Standards Act would create a senseless distinction between Indian police and all other public police." ... "We cannot think of any reason other than oversight why Congress failed to extend the law enforcement exemption to Indian police." *Id*. at 494.

This reasoning essentially describes the obverse of Tenth Circuit standards: if Indian tribes are not mentioned, they are not bound. In fact, the Seventh Circuit was following this Circuit:

> We have the support of the *Cherokee Nation* case, cited earlier. Noting that Title VII of the Civil Rights Act of 1964 explicitly exempts Indian tribes but that the Age Discrimination in Employment Act does not, the Tenth

> Circuit held that it would read the Indian tribal exemption into the latter statute. The court was rectifying an oversight. We do the same today, actuated by the same purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow.

Id. at 495-496. This Circuit should uphold its own precedent and its constructive influence on a sister circuit. It should reverse the order below and rule that Indian tribes fall within the shelter of ERISA's "governmental plan" exception.

J. The Opinion Below Defeats *Woodworker's* Rationale to allow States to Hold Insurers Accountable For Fraudulent Marketing Promises.

The district court initially sustained plaintiffs' claim for fraudulent inducement. Upon motion for reconsideration, the court reversed itself, revising and restricting its reading of *Woodworkers*. The court asserted the case allows only employers to bring claims, and only for misrepresentations made before the employer creates its benefit plan. *Reconsideration*, pp. 4-5. This squinting analysis disregards plaintiffs' showing of Anthem's pre-contract fraud. Dismissal without leave

further denied plaintiffs a chance to satisfy the court's exacting standard

Reconsideration thus perpetrated three errors: (1) It abrogated the difference, key to applying *Woodworker's*, between administering a plan for existing beneficiaries and selling a product to new customers; (2) it unnecessarily focused on the genesis of the ERISA plan between employer and insurer, excluding the more relevant genesis of relations between insured and insurer; and (3) even accepting the courts' narrow construction of *Woodworker's*, it misconceived possible facts, inferences and presumptions so as to deny plaintiffs even a chance to carry their burden of showing fraud predating the plan's original creation.

K. *Woodworker's* Rationale Covers All Insurance Marketing Promises to Prospective Customers, Whether Employers or Employees.

This Circuit unambiguously allows litigants to invoke state law to remedy false promises made by the sellers of goods and services, including services related to employee benefits. *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.,* 170 F.3d 985, 992 (10th Cir.1999).

Woodworker's involved an insurer's representations to a

prospective customer about the costs and benefits it could expect from a particular insurance plan. When costs rose significantly above promised levels, the insured company discovered the insurer had misrepresented the workings of its plan. The company sued for fraudulent inducement and the insurer invoked ERISA preemption. The district court allowed the employer to proceed on certain claims, however, and in affirming, this Circuit clarified several points that are instructive here.

ERISA broadly shields decisions by a plan fiduciary about underwriting, financing and administering employee benefits plans, but it does not provide blanket immunity to insurers for false promises. "While the scope of ERISA preemption may be broad, it is certainly not boundless." *Id*. citing *Monarch Cement Co. v. Lone Star Indus. Inc.*, 982 F.2d 1448, 1452 (10th Cir.1992). This Circuit distinguishes between administering a plan, which ERISA covers, and marketing a plan, which ERISA does not. "[E]fforts to prevent sellers of goods and services, including benefit plans, from misrepresenting ... the scope of their services is 'quite remote from the area with which ERISA is

expressly concerned-reporting, disclosure, fiduciary responsibility and the like'." *Woodworkers*, 170 F.3d at 992 *citing Wilson v. Zoellner*, 114 F.3d 713, 721 (8th Cir. 1997). The disputed representations here, as in *Woodworkers* and *Wilson*, are remote from Anthem's activities as a plan administrator.

Moreover, Congress's intent in passing ERISA, and this Circuit's aim in construing it, is to protect beneficiaries. Id at 991. If claims such as appellants make here were preempted, "'*employees*, whom Congress sought to protect, [would] find themselves unable to make informed choices regarding available benefit plans.'" *Id*. at 992 (emphasis added) *quoting Morstein v. National Ins. Serv., Inc.* , 93 F.3d 715, 723 (11th Cir. 1996) (*en banc*) ("When a state law claim involves the reliance on an insurer's promise that a particular treatment is fully covered under a policy, . . . a claim of promissory estoppel is not 'related to' the benefits plan.")

Policing the honesty of insurers' promises does not raise issues relating to underwriting, financing, the integrity of risk pool, or any

other concern of ERISA's. The Dobbs' fraud claim raises different issues that avoid preemption for several reasons endorsed by *Woodworker's* and the authorities discussed above: (1) Anthem was not acting as a plan fiduciary when it printed and distributed marketing promises to do certain things; there was no pending decision or dispute regarding benefits; (2) the fraud claim is not about construing policy terms or identifying benefits; Anthem does not deny it owed in-network coverage and does not argue it was acceptable to make the Dobbs scratch and struggle for months, *twice*, to get it; (3) imposing preemption in these circumstances would hinder, not help Congress' protective purpose in passing ERISA.

1. The District Court Did Not Reasonably Distinguish *Woodworker's.*

The district court presented no persuasive rationale taking this case outside *Woodworker's*. In the cursory explanation of its reconsideration, the court asserted the Dobbs "cannot hope to benefit from the rule exempting from ERISA preemption claims by employers for

misrepresentations that induced plan participation." The court declared the animating reasons for the rule in *Woodworker's* were: "first, by definition, the insurance professional cannot act as a plan fiduciary before the plan exists; and second, allowing preemption would not further Congress' purpose in passing ERISA." *Reconsideration*, pp.4-5 *citing Woodworker's* 170 F.3d at 991. The court announced the two identified interests "are not implicated here." *Reconsideration*, p. 5

Regarding the second prong, the court did not discuss how a Congressional purpose furthered in *Woodworker's* would not similarly be served if appellants' claims proceeded here. Appellants respectfully submit every worthy interest advanced in *Woodworker's* would benefit identically from allowing their fraud claim to proceed here.

Regarding the first prong, appellants submit that the formulation--there is no fiduciary until there is a plan--is to *Woodworker's*, as a tissue biopsy is to a patient; both reveal specific, useful information that does not begin to reflect the whole chart. Focusing on *the chronology* of when a seller becomes a fiduciary, while ignoring whether *the function*

of a disputed act pertains to a fiduciary or a seller, misses *Woodworker's* other vital signs, including: the difference between sellers' representations and administrators' services, such as "reporting, disclosure, fiduciary responsibility and the like." 170 F.3d at 992; the authority of state law over the former and ERISA the latter; the policy to protect *employee*s' ability to make informed decisions; and, the related policy to protect "the integrity of employment benefit plans, ***not insurance companies****" Id.* (*emphasis added*).

There are other important diagnostic tests this Circuit did not administer in *Woodworker's,* simply because the symptoms were not presented. These include (a) determining the rights and status under ERISA of prospective buyers, who are neither employed by the employer nor insured by the insurer when they rely on the insurers' representations to buy a particular plan; (b) whether consideration of "pre-plan" misrepresentations is restricted only to the *employer's* pre-plan frame of reference, or whether it applies with equal force and logic to a consumer's pre-plan reliance and decision-making, *i.e.* "pre" a

consumer deciding to participate in a plan; and (c) determining whether anything in the text or structure of ERISA requires that an insurers' multiple representations, flowing from identical conduct, be deemed "promotional" before a specific date, and somehow exclusively "fiduciary" after that date.

In sum, the district court seized on a few facts present in *Woodworker's*, and, finding the facts not identical here, dismissed wholesale *Woodworker's* rationale's tight fit with the misconduct alleged here. Appellants respectfully request this court to correct the ruling below and clarify *Woodworker's* application in this circuit.

2. Even If *Woodworker's* Is Cut Down to the District Court's Parameters, this Case must Be Remanded and Appellants Permitted to Make Their Showing.

In the context of a 12(b) motion, the lower court was obligated to consider every possible set of facts and inferences favorable to the plaintiff. *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924 (10th Cir.1994). Even under the court's restrictive reading of *Woodworker's*, plaintiffs' complaint would admit of proof, or could be amended to

admit of proof, that Anthem made false promises to the Tribe; the Tribe received and relied upon those promises and was thereby induced to participate in the plan; the promises were false when made; the Dobbs have been injured by Anthem's misrepresentations. Given the reasonable possibility of that constellation of proof, it was error to dismiss plaintiffs' complaint. At a minimum, plaintiffs should have received leave to amend to state a claim consistent with the district court's theory of *Woodworker's*.

VII. CONCLUSION

The Court should reverse the district court and remand with instructions to remand plaintiffs' complaint to the state court.

STATEMENT REGARDING REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument and submit such argument would be of substantial assistance to the Court in considering important questions novel in this Circuit. These include the applicability of ERISA to Indian tribes and the applicability of *Woodworker's* to

claims by employees generally, and particularly to claims of insurer misrepresentation that predate consumers' decisions to become employed by an asserted ERISA employer, and to participate in an asserted ERISA plan. Oral argument will assist this Circuit to determine whether both the rationale, and the practical consequences, of *Woodworkers* are equally applicable and desirable in the context invoked by Appellants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) as follows: this *Opening Brief* contains 10,341 words, exclusive of the table of contents, table of authorities, the statement with respect to oral argument, and this certificate of compliance, which are excluded by virtue of Fed. R. App. P. 32(a)(7)(B)(iii), as computed by Microsoft Word.

s/ Shawn Mitchell

_____

Shawn Mitchell

CERTIFICATE OF DIGITAL SUBMISSION

I, Shawn Mitchell, on March 17, 2008,hereby certify the following:

1. Every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk.
2. The Digital Submissions have been scanned for viruses using Updated McAfee Virus Scan and according to this program, are free of viruses.
3. The digital PDF version of the foregoing brief was filed with the Clerk's office via e-mail to esubmission@ca10.uscourts.gov

Dated: March 17, 2008

s/ Shawn Mitchell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of March, 2008, a true and correct copy of the foregoing instrument was placed in first-class, pre-paid U.S. mail and properly addressed to the following:

John Mann
Kennedy, Childs & Fogg
Independence Plaza
1050 Seventeenth Street, Suite 2500
Denver, Colorado 80265

s/ Shawn Mitchell
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