IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

GARY STOPP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-09-221-FHS
	)	
MUTUAL OF OMAHA LIFE INSURANCE COMPANY, a Foreign Insurance Corporation,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING APPLICABILITY OF ERISA

Defendant United of Omaha Life Insurance Company ("United") files this brief in response to the Motion for Partial Summary Judgment filed by Plaintiff Gary Stopp ("Plaintiff"). For the reasons set forth below and in United's Brief Regarding the Applicability of ERISA (Dkt. No. 17), which is incorporated herein by reference, Plaintiff's Motion should be denied. The undisputed facts confirm that ERISA applies to and governs the law in this case.[1]

The Agua Caliente Band of Cahuilla Indians (the "Tribe") established one employee welfare benefit plan (the "Plan") pursuant to which Plaintiff has claimed long-term disability benefits. That Plan falls outside the effective date of the 2006 amendment exempting some tribal plans from ERISA, and does not, in any event, meet the amended definition so as to be exempt. Accordingly, ERISA governs this dispute, and preempts the state law claims Plaintiff asserts.

[1] On February 17, 2010, United filed its own Motion for Partial Summary Judgment with supporting evidentiary material pursuant to Fed.R.Cv.P. 56, establishing that ERISA applies to this dispute. United fully incorporates those arguments and materials herein.

Response to Plaintiff's "Uncontroverted Facts"

1. United does not dispute that the Tribe is an eligible Indian Tribe recognized by the United States Bureau of Indian Affairs.

2. United does not dispute that the Tribe "seeks to promote and support the health, welfare, and development of its Tribal Membership" or how the Tribal Council is selected as described on the website, and further notes the website references to the many commercial activities of the Tribe, including the Tribe's purchase of the Spa Hotel in 1992, the addition of the Spa Resort in 1995, the development and construction of the Agua Caliente Casino in 2001, the Spa Resort Casino in 2003, and the Spa Hotel's Well Spirit Center Fitness Center in 2004. (Plaintiff's Exhibit 2).

3. United does not dispute that Plaintiff was employed by the Tribe pursuant to a written employment agreement, does not dispute that the sentences in Paragraph No. 3 appear in that employment agreement, and further notes additional grounds the Employment Agreement provides for which Plaintiff could be fired, §7.1 Termination for Cause: (a) if the Agua Caliente Gaming Agency determines he is not suitable for a work permit or suspends his work permit, or (i) if he violates…any rules, procedures or directives of either the State Gaming Agency, the Tribal Counsel, or the Agua Caliente Gaming Commission. (Plaintiff's Exhibit 3, Stopp 000279).

4. United disputes the contention in Paragraph No. 4 that the Policy issued to the Tribe, group policy number GLTD-506E, "shows it is a group long-term disability [sic] benefit for the Agua Caliente band of Cahuilla Indians, "All eligible executives effective March 1, 2006." To the contrary, the Policy covers ***all*** eligible employees - not just the Plaintiff and/or

executives. *See* Policy, attached as Exhibit A, and Certificate, attached as Exhibit B.[2] As explained in the Policy and the Certificate, the one Plan provides for all employees, divided into different classes. The Plan covers some 2,000 Tribal employees, only one of whom is Plaintiff, and the vast majority of whom are non-executive employees performing commercial activities in the Tribe's casinos, hotel and spa. (*See* Attachment 1 to Exhibit C, Affidavit of Dave Wulf.) Tellingly, Plaintiff has attached only the first page of the Policy and the first page of the individual Certificate issued to him, leaving the incorrect impression that the Plan is limited to executive employees.

5. United does not dispute that the items listed by Plaintiff in Paragraph No. 5 are included in his job description. United does dispute and deny, however, that the job description states that Plaintiff's "keys are not to the gaming or other commercial activities," and disputes the inference that in his job, Plaintiff has only limited access to the gaming facilities. To the contrary, the job description specifically lists the numerous areas of the Tribal casinos that Plaintiff has access to, some unlimited and some requiring notification and the presence of others, and further specifies that "experience in the gaming industry" was a job qualification requirement for Plaintiff's hiring. (Plaintiff's Exhibit 5, Stopp 000369).

6. United does not dispute that the Tribe terminated Plaintiff's employment agreement by letter.

ARGUMENTS AND AUTHORITIES

ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans" and "to protect [their] contractually defined benefits." S*haw v. Delta*

[2] The Plan documents have been authenticated via affidavit attached to United's Brief Regarding the Applicability of ERISA (Dkt. No. 17) which, as noted above, is incorporated herein by reference.

Airlines, Inc., 463 U.S. 85, 90 (1983); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1995). A primary purpose of ERISA preemption is, then, "to protect the financial integrity of benefit plans" for all plan beneficiaries, including potential harm that could result from extra-contractual claims. *See*, *Peckham v. Gem State Mutual of Utah*, 964 F.2d 1043, 1050 (10th Cir. 1992).

Although Plaintiff complains of what he sees as personal harm to him from its application in this case, ERISA was enacted to benefit and protect ***all*** employees who receive benefits under employee benefit plans, even those who are not executives. *See* 29 U.S.C. § 1001(a) (citing the importance of protecting the "well-being and security of millions of employees and their dependents.")

1. <u>The 2006 Amendment Does Not Apply to Exempt the Plan at Issue from ERISA.</u>

Plaintiff assumes without analysis that the 2006 amendment to ERISA's definition of "governmental plan" applies to this case because "this claim arose after that amendment was in effect." (Plaintiff's Brief at 9). This is not accurate. The amendment, in fact, was specifically designed to apply prospectively only, and as enacted by Congress, applies only to plans with the first day of a plan year beginning ***on or after August 17, 2006***. *See* Pension Protection Act of 2006, Pub.L. No. 109-280, § 906(c), 120 Stat. 780.

In *Dobbs v. Anthem Blue Cross and Blue Shield*, 2007 WL 2439310 (D.Colo. 2007), the Court refused to apply the amended definition prospectively, stating:

> When Congress enacts a new statute, it has the power to decide when the statute will become effective…This Court has no authority to depart from a Congressional command setting the effective date of a law that it has enacted…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 ends.

Id. at *5.

As held repeatedly by the United States Supreme Court, the presumption against retroactive legislation is deeply rooted in our jurisprudence. *Lindh v. Murphy*, 521 U.S. 320, 325 (1997); *Hughes Aircraft Co. v. United States*, 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 this result. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837-838 (1990); *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208, (1988).

Here, Congress enacted 29 U.S.C. §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(a)(2)(c), 120 Stat. 780 (emphasis added). As such, the amended 29 U.S.C. §1002(32) does not require, or even permit, a retroactive effect. It requires the opposite: a prospective application only. Based on this clear statutory prospective mandate, and the limitations imposed upon retroactive application to statutory amendments, §1002(32) cannot be applied retroactively.

The undisputed facts in this case establish that the first day of the Plan at issue here was March 1, 2006, before the effective date of the amendment, as established by Congress. The Plan document, which controls on this issue, states in unequivocal terms that the Plan Year has "a 12 month period ***beginning on March 1, 2006.***" (Exhibit A, Stopp 000004 at ¶ 7; Exhibit B at Stopp 000051).

Clearly, the Plan at issue in this matter does not have "a plan year beginning on or after August 17, 2006," and it predates the effective date of the 2006 amendment of the

"governmental plan" definition. Because the exemption for certain tribal plans is inapplicable, ERISA preempts the state law claims in this case.

2. <u>The Plan at Issue Does Not Fall Within the 2006 Amended Definition of Governmental Plan.</u>

Plaintiff recognizes that the correct analysis for determining whether a particular ITG plan falls within the new definition of a governmental plan involves "a fact-specific analysis of ***the Plan at issue*** and the nature of the ***its participants'*** activities," and characterizes *Dobbs v. Anthem Blue Cross and Blue Shield*, 475 F.3d 1176 (10th Cir. 2007), as "the most significant case to address this new amendment." (Plaintiff's Brief at 8). In *Dobbs*, the Tenth Circuit Court of Appeals plainly stated:

> Because the amended provision 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 participant's activities. *Id.* at 1178.

<u>Id</u>. at 1178 (emphasis added). Therefore, to determine whether the Tribe's Plan is exempt from ERISA under § 1002(32) as amended, this court must consider not only Plaintiff's services as an employee of the Tribe, but also whether substantially all of the services of the tribal employees who are participants in the Tribe's Plan are in the performance of essential governmental functions.

It is puzzling, then, why Plaintiff focuses only on his duties as a Tribal employee, and not on the Plan as a whole. The facts regarding the Plan pursuant to which Plaintiff seeks benefits demonstrate that it was established by the Tribe as the employer for ***all*** employees - not just the Plaintiff. The Plan documents themselves establish that one Policy - No. GLTD-506E - was issued to the tribe on March 1, 2006, to cover all of its employees, and Plaintiff admits he is insured under the Policy. (Plaintiff's Brief at 4-5). As explained in the Policy and the

Certificate, individual certificates were issued to all employees, both executive and non-executive employees, to explain to them the coverage provisions. The employees' ERISA rights were clearly set forth in the Plan documents - Plaintiff further admits he followed those ERISA procedures. (Plaintiff's Brief at 2). The Tribe filed only one Form 5500 for all benefits offered under the Plan, which had one name - the Agua Caliente Flexible Benefit Plan. It reported under one Plan ID number - Number 501. The sponsoring employer was the same for each benefit - the Agua Caliente Band of Indians, and not the Tribal Council.[3] (*See*, 2006 Form 5500, Attachment 2 to Exhibit C.)

The Tribe further submitted to United in one 2006 Census Data document specific information on each employee covered by the Plan, including Plaintiff. The Census Data listed approximately 2,000 executive employees and non-executive employees that are covered by Policy GLTD-506E. (*See*, 2006 Census Data, Attachment 1 to Exhibit C.) These are the facts established by the Plan documents.

Plaintiff, however, does not even discuss or attach the Plan documents. Indeed, Plaintiff's entire argument is that the Plan was established for him alone under his employment contract, and that the other Tribal employees were "bootstrapped" onto his Plan. (Plaintiff's Brief at 10). This contention flies in the face of the true facts as set forth above. Plaintiff's employment contract is not a Plan document, and there is absolutely no proof underlying Plaintiff's bald assertion that the Plan "was established to meet the contractual obligations of the governmental entity toward a governmental employee," or that "the initial policy covered all eligible executives and only by later amendment were other employees added." (Plaintiff's Brief

[3] "Form 5500 is an annual report disclosing financial and actuarial information that is required to be filed with the Secretary of Labor under ERISA. 29 U.S.C. §§ 1023, 1024." *Bollsen v. Unun Life Ins. Co. of America*, 629 F.Supp 2d 878, 882 (E.D. Wisc. 2009).

at 10-11). The evidence is that the exact opposite is true. The Plan was in effect for the Tribe's employees as of March 1, 2006, and through Plaintiff's employment contract dated June 1, 2006, he was covered by the Plan, which was the existing Policy GLTD-506E. Indeed, if the entire Plan had been set up solely to meet an individual obligation to this one Plaintiff, it would have been much simpler for the Tribe to take out an individual disability policy for him than to "bootstrap" 2000 other employees on to his Plan.

Plaintiff further misconstrues the amended ERISA statute and subsequent case law interpreting it. Plaintiff contends the analysis as to the nature of the duties should be on "the singular "employee" rather than the "employees." (Plaintiff's Brief at 10). This argument is wrong. The amended definition of "governmental plan" in § 1002(32) exempts employee plans established and maintained by an Indian tribal government from ERISA only if all of the participants of the plan are employees of the tribal entity, and only if substantially all of those employees' services as employees "are in the performance of essential government functions but not in the performance of commercial activities." The statutory language appears to provide that qualification for exemption of a tribal plan as a governmental plan requires that none of a plan's participants may engage substantially in commercial activities.

Further, the contention that the analysis regarding the nature of job duties should be on "the singular employee rather than the employees" would create a wholly unworkable standard, that would inevitably result in one welfare benefit plan being subject to ERISA for certain employees, and the same plan exempt for other employees.

Congress, when amending the definition of governmental plan, plainly recognized that there are many tribes who are ***not*** involved in commercial business activities like the Agua Caliente tribe operates, such as spas, casinos and hotels. (*See* Plaintiff's Fact No. 1, accepted

tribes). Employee welfare benefit plans enacted by those tribes, whose employees perform substantially all of their services in governmental functions, are exempt from ERISA under the amended definition. If the Agua Caliente Tribe had wanted to establish separate plans for commercial and governmental employees, it could have done so, but did not. To the contrary, the Tribe as employer clearly established only one plan, identified by one Plan number, and covering approximately 2,000 employees, including Plaintiff, the vast majority of whom performed commercial functions for the tribe. (*See* Exhibit C, Attachment 1.) No separate plan has been established for Plaintiff.

Plaintiff's argument also conflicts with the opinions of those courts who have addressed the issue. The Tenth Circuit Court of Appeals has decided two cases involving the amendment. In both, the Court held that the nature of a Plan's ***participants'*** activities should be analyzed - using the plural - and not an individual ***participant's*** activities. *Dobbs* at 1178; *Vandever* at *3. Recently, in *Bollsen v. Unum Life Ins. Co. of America*, 629 F.Supp. 2d 878 (E.D. Wis. 2009), the court followed the Tenth Circuit's direction in thoroughly examining the Plan details and activities of ***all*** the Plan participants. The court examined the evidence presented and noted that "there is nothing to suggest that substantially all of the services performed by the employees covered by the plan were of essential governmental functions." *Id*. at 882. Accordingly, the court found that "[i]t therefore follows that the plan is not an exempt governmental plan within the meaning of § 1002(32)." *Id*.

Plaintiff's reliance on the Colorado court's opinion on remand in *Dobbs v. Anthem Blue Cross and Blue Shield*, 2007 WL 2439310 (D. Colo. 2007), is also misplaced. As noted, the Tenth Circuit had remanded this case to the Colorado district court, who ultimately found that

the statute could not be applied retroactively, so that ERISA covered the Plan and preempted the state law claims asserted by the Plaintiff.

Notwithstanding this result, the court also briefly addressed whether the Plan met the amended statute's definition. Notably, the court was reviewing the case on remand under a motion to dismiss standard, and was thus bound "to accept as true all factual allegations in the complaint." *Id*. at *2. With no affidavits or exhibits providing additional facts, the only information available for the court to consider was the Plan's statement that the "nature of the business" was "tribal government," and the plaintiff's allegations regarding his duties. The plaintiff claimed he assisted the tribal treasury, "a position be believed was a core function of sovereign government," and the court found "there is no indication that Mr. Dobbs engaged in commercial activities, whether or not an essential government function." *Id*. at *2. Based on this finding and the few facts available, the court found the plan did meet the amended definition. To the extent the court considered only one employee's job duties, the case conflicts with Tenth Circuit holdings. Indeed, this is in stark contrast to the *Bollsen* case, where the court had exhibits and affidavits submitted of the parties, fully considered them, and found no evidence that substantially all of the services performed by the ***employees*** covered by the plan were essentially governmental functions.

Finally, with respect to Plaintiff's job activities, United does dispute that he performed substantially "essential governmental functions" - the documents clearly show that he was hired to and did conduct commercial activities. Indeed, a specific qualification for Plaintiff's job was that he have "experience in the gaming industry." (Plaintiff's Exhibit 1, Stopp 000369).

In fact, the June 1, 2006 Employment Agreement includes as a ***condition precedent*** to his initial employment and continued employment that Plaintiff submit to a background

investigation by the Agua Caliente Gaming Commission, and keep his work permit with the Commission in effect at all times. (Plaintiff's Exhibit 3, Stopp 000275). The Employment Agreement also specifically provides that Plaintiff would be terminated if the Agua Caliente Gaming Agency determined he was not suitable for a work permit from it, or suspended or terminated his work permit, or if he violated any of the rules or directives of the State Gaming Agency or the Agua Caliente Gaming Commission. (Plaintiff's Exhibit 3, Stopp 000275, 000279).

Plaintiff's job description further demonstrates that he was required to perform non-governmental activities; "Governmental and Legislative Affairs" appear to be the least of Plaintiff's responsibilities. The description shows that Plaintiff was expected to accompany the Tribal Council on business trips; coordinate meetings on public relations, administration and lobbying; oversee meetings and logistics; act as an administrative agent; coordinate support staff activities; and even respond to constituents seeking help with a variety of issues. Further, Plaintiff's access to sensitive casino areas and information was extensive, rather than limited, including access – sometimes unlimited and sometimes with notice and others present – to casino areas including the Cash Cage, Slot Storage Repair, Slot Shift Manager Office, Pit Area, Count Room, Gaming Commission Surveillance Monitor Room, Surveillance Tape Review Room, Slot Paper Storage, ACC/SRC Surveillance Monitor Room, Receiving Storage and IT Area. (Plaintiff's Exhibit 5, Stopp 000369). Without doubt, operations involving casinos are not "traditional attributes of self government," and Plaintiff's activities in these areas, as required by his employer, could not possibly be termed "essential government activities." *See Bolssen*, 2009 WL 1307781 at 3 (quoting *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1316 (DC Cir. 2007).

In conclusion, the undisputed facts show that Plaintiff was an employee of a Tribe that maintained and established a welfare benefit plan for all of its employees, which Plan is not exempt from ERISA under § 1002(32). Plaintiff was not covered by a separate Plan for himself, or for himself and other executives. The Plan at issue is covered by ERISA, which governs the law in this case.

CONCLUSION

Defendant United respectfully requests the Court grant summary judgment that the Plan at issue is governed by ERISA, and all state law claims asserted by Plaintiff are preempted.

Respectfully submitted,

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