

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

<b>GARY STOPP,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No. CIV-09-221-FHS</b>
	)	
<b>MUTUAL OF OMAHA LIFE INSURANCE</b>	)	
<b>COMPANY, a foreign Insurance Corporation,</b>	)	
	)	
<b>Defendant.</b>	)	

**PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT  
ON THE APPLICABILITY OF ERISA  
PURSUANT TO FED.R.CIV.P. 56 AND L.Cv.R 56.1**

Plaintiff Gary Stopp by and through his attorney, Joseph F. Clark, Jr. of Clark & Warzynski, P.A. moves for partial summary judgment on the issue of the applicability of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.* pursuant to Fed.R.Civ.P. 56 and L.Cv.R. 56.1 as there are no genuine issues of material fact as to:

- (1) Gary Stopp was a government employee of the Agua Caliente Band of Cahuilla Indians (Cahuilla Indians), a sovereign Indian nation;
- (2) The Cahuilla Indians are a recognized sovereign nation;
- (3) Gary Stopp was hired by, directly controlled by, and reported to the duly elected Tribal Council of the Cahuilla Indians which comprises their governing body;
- (4) Providing the subject disability policy was a contractual obligation of the employer tribe to Stopp under the written employment agreement.
- (5) The duties required and performed by Gary Stopp under his written employment agreement were essential government functions and not in the performance of commercial

activities and, accordingly, pursuant to 29 U.S.C. § 1002 (32) the Plan, as it pertains to Gary Stopp, is a “governmental plan” and not subject to ERISA jurisprudence.

**Statement of the Case**

In June 2005, Gary Stopp entered into a written employment agreement between himself and the Agua Caliente Band of Cahuilla Indians to serve as Chief of Staff of the Agua Caliente Band of Cahuilla Indians. As part of that agreement the Cahuilla Indians as employer was to provide purchase a disability insurance policy for the benefit of Stopp. In May 2006, under the terms of the employment agreement, Gary Stopp became covered under a long term disability policy for all eligible executives issued and underwritten by the Defendant Mutual of Omaha Life Insurance Company. In January 2007, Gary Stopp suffered a second myocardial infarction and as a result of that and his second by-pass surgery made claim for long term disability benefits on February 14, 2007.

On April 2, 2007, he satisfied the waiting period for the LTD benefits and by letter dated April 14, 2007, the Defendant approved Stopp’s LTD benefits and began payment. Said payments continued until April 4, 2008, at which point the Defendant discontinued benefits. Prior to that, by letter of March 25, 2008, the duly elected Tribal Council fired Gary Stopp pursuant to the terms of the employment agreement due to his inability to effectively carry out his duties and his becoming disabled to carry out the duties of his job description for a period in excess of twenty days.

Although not agreeing that ERISA applies, Gary Stopp complied with the Administrative process in an attempt to reinstate his claim for benefits and has exhausted all of those available administrative remedies. He instituted suit in District Court of Cherokee County on April 30,

2009, alleging two state causes of action, one for contractual benefits, the other for the breach of the obligation of good faith and fair dealing. The Defendant removed the action to this Court under two theories, one being diversity of citizenship and the second being the application of ERISA. Plaintiff admits that this Court has diversity jurisdiction but denies that ERISA is applicable. The parties address the ERISA issue by motion for summary judgment as it is a matter of law for the Court to decide. This Court's determination on this issue will decide how the parties are to proceed forward in this litigation and what type of scheduling order should be entered.

### **Uncontroverted Facts**

The following are the uncontroverted facts that Plaintiff believes support his position on the issue before this Court. Certain documents are part of a Response to a Request for Production of Documents served on the Defendant in state court which would comprise the claims file and/or administrative record. Those documents were Bate Stamped Stopp 000001 - Stopp 000794. When a document comes from that discovery, in addition to identifying the document by name, reference will also be to the Bate Stamp as Stopp P. 1 - P. 275.

1. The Agua Caliente Band of Cahuilla Indians is an eligible Indian Tribe recognized by the United States Bureau of Indian Affairs. (Exhibit 1 - Federal Register/Vol. 74, No. 153/Tuesday, August 11, 2009/Notices, P.40219)

2. According to the website of the Cahuilla Indians "The Agua Caliente Band of Cahuilla Indians in an indigenous sovereign nation that seeks to promote and support the health, welfare and development of its Tribal Membership now and in the future." The governing body is the Tribal Counsel setting policy and is comprised of five positions which are elected by

secret absentee ballot and four proxy members which are appointed by the elected Tribal Council. (Exhibit 2 - Pages 1, 2, and 3, Agua Caliente/Tribal Council).

3. By written employment agreement, Gary Stopp became employed by Agua Caliente Band of Cahuilla Indians as Chief of Staff of the Cahuilla Indians.

Under Item **4. Duties of Employee**, the Employee shall perform such duties and have the authority and responsibility specified by the Tribal Council of Employer.

Under **6.6. Disability Benefits**, the contract specifies “Employer shall purchase for the benefit of Employee, and other eligible executive employees of Employer, a group disability policy.”

Under **7. Termination of Employment**, paragraph 7.1 “Termination for Cause shall be limited to the following: . . .

(d) Employee becomes unable to effectively perform any of Employee’s under this Agreement;

. . .

(j) Employee becomes disabled because of mental or physical illness or other incapacity which renders Employee unable to perform Employee’s duties under this Agreement in a satisfactory manner for a period of more than twenty (20) consecutive days, or more than thirty (30) days in the aggregate in any consecutive twelve (12) month period, as determined in the reasonable judgment of the Tribal Council of Employer.” (Exhibit 3 - Employment Agreement Stopp PP. 275 - 279).

4. United of Omaha Life Insurance Company issued a disability insurance policy to Agua Caliente Band of Cahuilla Indians being group policy number GLTD-506E, and the policy

shows it is a group long-term disability benefits for the Agua Caliente Band of Cahuilla Indians, All eligible executives effective March 1, 2006. (Exhibit 4 - Portion of insurance policy - Stopp P. 1 and Stopp P. 16.)

5. The job description for Chief of Staff states that he reports to the Tribal Council. Under **Job Description Summary** it states “Provide administrative management and support for the Tribal Council; strategic direction in government and legislative affairs and in lobbying; leadership and strong guidance in public relations; and policy analysis and updates in all council and ACBCI Tribal affairs.”

**Essential Duties and Responsibilities** (other duties may be assigned) include, “

”Coordinates and attends all designated activities of Tribal Council. This includes accompanying the Council on business trips.  
Coordinates Council services which include; Public Relations, Administration, Lobbying, and all Council related meetings.  
Plans, coordinates and directs the work of the Tribal Council support services.  
Oversee meetings and logistics.  
Conducts continuous research in administrative practices and recommends to the Tribal Council those practices which will produce greater efficiency and economy in Tribal government.  
Service effectively as the administrative agent of a Tribal Council.  
Works with and coordinates the activities of administrative support staff.”

Under the heading **Government and Legislative Affairs:**

“Understands and advices on the provisions of the laws and ordinances of the Tribe. Provides updates and recommendations on legislation and policies required in the Tribal and public interest.”

The jobs **Supervisory Responsibilities** include:

“Executive Assistant  
Chief of Planning & Development  
Director of Tribal Family Services  
Director of Tribal Programs  
Director of Government Affairs/Public Relations  
Director of Administrative Services.”

The job has limited access to the gaming facilities requiring notification of surveillance, access to the Count Room only when Count is not in progress and escort is required. His Keys are to the Tribal Administrative Offices and not to the gaming or other commercial activities (Exhibit 5 - Chief of Staff Job Description, Stopp P. 368 - P. 370)

6. By letter of May 3, 2007, sent by the Special Council of the Cahuilla Indians, the Tribe, by its duly elected Tribal Council, terminated the Employment Agreement of Gary Stopp under Section 7.1 (d) and (I) which were set out above. (Exhibit 6 - Termination letter - Stopp P. 270)

### Argument and Authority

**PROPOSITION NUMBER ONE: THE CAHUILLA INDIANS ARE A RECOGNIZED SOVEREIGN GOVERNING TRIBE AND THE JOB DESCRIPTION OF GARY STOPP IS THAT OF A GOVERNMENT EMPLOYEE AND THUS THE INSURANCE POLICY THAT IS THE SUBJECT OF THIS LITIGATION WOULD BE CONCERNED A “GOVERNMENT PLAN” AND EXCLUDED FROM ERISA JURISPRUDENCE**

From the Plaintiff’s standpoint, the issue of whether or not ERISA applies is of great importance. In an ERISA case, the Plaintiff is denied his right to trial by jury, ability to confront the witnesses against him, faces a judicial standard that gives deference to the insurance company’s denial, and provides no compensation for a wrongful denial of the Plaintiff’s benefits.

29 U.S.C. § 1002 provides that “Governmental plans” are exempt from ERISA application. In regard to Indian Tribes the operative language is as follows:

“The term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of Title 26), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of Title 26), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)” 29 U.S.C.A. § 1002 (32)

The above language was an amendment to the ERISA statute that occurred in 2006.

There seemed to be a disagreement as to how the governmental plan immunity from ERISA should be handled as far as Indian Tribal Governments were concerned. The first, and probably still the most significant case to address this new amendment comes from our own Circuit in the case of *Dobbs v. Anthem Blue Cross and Blue Shield*, 475 F.3d 1176 (10<sup>th</sup> Cir. 2007). In *Dobbs*, the Court noted that the determination of whether or not ERISA should apply was a matter of law for the Court and accordingly the reason for the present summary judgment.

The Court stated the following:

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

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

The amendment's legislative history suggests that Congress expanded the definition to clarify the legal ambiguity regarding the status of employee benefit plans established and maintained by tribal governments. *See* 150 Cong. Rec. S9526, 9533 (describing the senate bill as a “bill to amend the Internal Revenue Code of 1986 and the Employee Retirement Income Security Act of 1974 to clarify that federally recognized Indian tribal governments are to be regulated under the same government employer rules and procedures that apply to Federal, State, and other local government employers with regard to the establishment and maintenance of employee benefit plans”). Prior to the amendment, the Seventh and Ninth Circuits held that ERISA applies to plans established and maintained by tribes. [Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.](#), 939 F.2d 683 (9th Cir.1991); [Smart v. State Farm Ins. Co.](#), 868 F.2d 929 (7th Cir.1989). The new definition of governmental plan undercuts the courts' reasoning, but not necessarily their conclusions, in these two cases. 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 participants' activities.

Based on the Dobbsses' 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.<sup>FN2</sup> See \*1179 [Petrini v. Howard](#), 918 F.2d 1482, 1485 (10th Cir.1990) (remanding case to district court for further proceedings under federal statute enacted while appeal was pending). If the Dobbsses' benefit plan meets the new definition of governmental plan under [§ 1002\(32\)](#), ERISA will not preempt their state-law causes of action against Anthem.” @1178

The important thing that the Court noted was that these cases all revolve around a fact specific analysis of the plan in question. In the case at bar, it is undisputed that the employer is the governing body of the Indian Tribe. It is also undisputed that Gary Stopp is directly under their authority and reports directly to them. That the insurance contract in question was a requirement of his employment contract. There is no doubt that Gary Stopp is a government employee and that his duties are essential to the government operation. His job description could not make that more clear.

When the *Dobbs, supra*, case was remanded back to the District Court in Colorado the Trial Court focused on the individual's job duties to determine whether or not this was a government plan. In *Dobbs v. Anthem of Blue Cross and Blue Shield*, 2000 W.L. 2439310, 2007 U.S. Dist. Lexis 62277, 42 Employee Benefits Cas. 1181 (d) Colo. 2007, the Trial Court made the following observation:

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



1179. I disagree. The Act expressly states that the 2006 amendments to § 1002(32) do not apply retroactively. The Tenth Circuit's holding is not contradictory.

A. The Dobbses' benefit plan meets the new definition of governmental plan under § 1002(32) The benefit plan at issue here is established and maintained by an Indian tribal government. The plan states the "Nature of Business" is "Tribal Government." Mr. Dobbs claims he assists to manage the Tribal treasury in order to provide financial security for tribal functions, a position he believes is "a core function of sovereign government." [**Docket # 32, p. 2; Docket # 17, p. 9**]. For the purposes of Defendant's Motion to Dismiss, I must accept the factual assertion that Mr. Dobbs assists to manage the Tribal treasury as true.

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

*Dobbs v. Anthem Blue Cross and Blue Shield*, 2007 WL 2439310, 2 (D.Colo.) (D.Colo.,2007)

It is important to note that the Court honed in on the particular beneficiary's job and as stated above, it is clear that using this test that Gary Stopp is unquestionably a government employee and thus this benefit is a government benefit plan and not subject to ERISA jurisprudence. In *Dobbs, supra*, the Trial Court found that the new application of 29 U.S.C. § 1002(32) was not retroactive and did not apply to that case. Obviously, that is not a problem in the case at bar because this claim arose after that amendment was in effect.

From a factual basis, we would again reiterate that there is no question that the governing body of the Indian Tribe hired and supervised Gary Stopp. He reported to that governing body. Gary Stopp in turn supervised what would be characterized as other executives who were in government positions such as his Executive Assistant, the Chief of Planning and Development,

the Director of Tribal Family Services, the Director of Tribal Programs, the Director of Government Affairs/Public Relations and the Director of Administrative Services. Just by the names of these positions, it is obvious that these are also government type jobs.

We anticipate the argument that because other non-governmental employees were bootstrapped into this plan that somehow that turns the plan into a non-government plan. First, the statute does not appear to read that way. Like most ERISA provisions, the statute is not particularly artfully written. However, we would hone in on the language that deals with the performance of essential government functions. There the language states “substantially all of whose services of such **an employee** are in the performance of essential governmental functions but not in the performance of commercial activities . . . “ (emphasis added) We would point out that there the language is the singular employee rather than the employees. Rephrasing the language, it could state, “Substantially all of Gary Stopp’s services as such an employee are in the performance of essential government functions but not in the performance of commercial activities.” Again, the Trial Court in *Dobbs* honed in on the job description of the particular employee, Mr. Dobbs. This being a group policy it goes without saying that other employees were covered but the Trial Court did not consider any other job description. Secondly, we would point out that this particular policy was required under the employment contract of Gary Stopp. The contract in question covers “all eligible executives” and we know from Mr. Stopp’s own job description he supervises a number of executives who have government jobs. The initial policy covered all eligible executives and only by later amendment were other employees added. The fact that additional employees might have been bootstrapped onto this policy should not change the fact that it was established to meet the contractual obligations of the government

entity toward a government employee. Unquestionably, it is a government plan. A government established for the benefit of a government employee in order for the government to fulfill its contractual obligation toward that government employee under the employment contract.

**Conclusion**

In conclusion, there is no question that the contract in question is a government plan and thus not subject to ERISA. The Court should rule as a matter of law to that effect and this matter should proceed under diversity jurisdiction under the state court causes of action pled in Plaintiff's initial Petition.

Respectfully Submitted.

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