IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF OKLAHOMA

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

PLAINTIFF'S ANSWER BRIEF IN RESPONSE TO THE DEFENDANT'S COMBINED MOTION AND BRIEF FOR PARTIAL SUMMARY JUDGMENT REGARDING THE APPLICABILITY OF ERISA

COMES NOW the Plaintiff Gary Stopp by and through his attorney, Joseph F. Clark, Jr. of Clark & Warzynski, P.A. and responds to the Defendant's Motion and Brief for Partial Summary Judgment regarding the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) filed pursuant to Fed.R.Civ.P. 56 and L.Cv.R. 56.1.

I.

Introduction

Both parties have filed simultaneous Motions For Summary Judgment on this issue and both parties believe that this is a matter of law to be decided by the Court. That does not, however, change the fact that these cases are factually intensive as set out by the Tenth Circuit.

From the factual standpoint, looking at the facts set out by the Defendant and those set out by the Plaintiff in their initial Briefs there are certain things that are undeniable.

1.) The employer that **established** this Plan was the Agua Caliente Band of Cahuilla Indians which is a recognized Indian Tribe;

2.) Gary Stopp was directly employed by the Indian Tribe through its duly elected governing counsel;

3.) Gary Stopp was employed under a written employment agreement which clearly describes his duties and obligations as a government employee and further obligates the employer to provide a disability insurance policy for the benefit of Gary Stopp;

4.) The subject disability policy satisfies that contractual obligation;

5.) The original disability contract covered only eligible executives and by a premium

rider added a second class of "all other eligible employees";

6.) The effective date of the act amending the government plan exclusion was January 1st, 2007, and this action is subject to the amendment of 29 U.S. C. § 1002(32) including Indian Tribal Government Plans as exempt from ERISA..

II.

Response to Defendant's Statement of Undisputed Facts

1.) Plaintiff admits that the Indian Tribe, which is a recognized sovereign nation, obtained the subject group policy. We would point out that the policy was initially prepared for all eligible executives and then by policy rider added a second class of "all other eligible employees" (See policy attached as Exhibit "A" to Defendant's Motion For Summary Judgment premium rider Stopp p. 11; Exhibit "B" to policy Stopp p. 16; and Benefit Summary Stopp p.18)

2.) Defendant does not deny that the Plaintiff's group disability policy is provided and administered by the Indian Tribe;

3.) Plaintiff admits the policy year for coverage under the plan ran from March 1st, 2006, through March 1st, 2007;

4.) Plaintiff admits that he has alleged and is in fact disabled under the "long-term disability group insurance policy issued by the Defendant to the Agua Caliente Band of Cahuilla Indians;

5.) Plaintiff admits his last day of work with the Tribe was on January 2nd, 2007, and he alleges he was totally disabled as of February 15th, 2007;

6.) Plaintiff admits that the documents speak for themselves regarding the statement of the ERISA Plan Benefits;

7.) Plaintiff neither admits or denies the allegations contained in paragraph 7 as he has no access other than the attached documents. He would, however, point out that there are left blank four of the thirteen employees that would be classified as executives, including apparently the Plaintiff. (See case document 17-7, page 3 of 38, Stopp 000796;

8.) Plaintiff would make the same comment with regard to Defendant's paragraph 8 as set above in paragraph 7;

9.) The Employee No. 13 is one of those that the occupation was left blank. Plaintiff would claim that the salary information does not appear to coincide with his;

10.) The document appears to speak for itself. Plaintiff has no information to deny the allegation of paragraph 10;

11.) Plaintiff would disagree that some of the executive positions are commercial in nature. For example, Director of Construction should also include construction of government buildings, highways, hospitals and there is no information to indicate that the Director of Construction is limited to commercial activities. Plaintiff further believes that the Executive Director of Opera is really the Executive Director of Operations. It is, however, interesting that there are four (4) descriptions of occupations of executives that are not listed at all in this census, including that of Gary Stopp.

12.) Plaintiff does not deny the allegations set forth in paragraph 12;

13.) Plaintiff admits the allegations in paragraph 13;

14.) Plaintiff has set out in greater detail the employment agreement between the Plaintiff and the Tribe but would point out the Plaintiff's "access to sensitive areas in the Casino" is supervised and does not have unrestricted access to these areas.

15.) Plaintiff admits the allegations set forth in paragraph 15.

III.

ERISA Does Not Apply To The Indian Tribes Plan and State Laws Are Not Pre-empted

A. Overview

The Parties are not in disagreement that this Plan was established by the Agua Caliente Band of Cahuilla Indians (Cahuilla Indians). That of course is the focus of the issue before this Court as to whether or not this Plan qualifies as a Government Plan and thus is exempt. Thus, the opening portion of Defendant's Brief, although educational, really is not relevant. The Plaintiff does not deny that the Cahuilla Indians established a welfare benefit plan and that this

plan was established and maintained by the Indian Tribe. Indeed, it is because this Plan was established and maintained by the Indian Tribe that we are proposing the arguments that are before this Court. Further, we agree that the Tribe is an employer as defined by ERISA and it provides welfare benefits to participants.

The true issue before this Court is first, does the amendment to 29 U.S.C. § 1002(32) apply to the case at bar. It certainly does and although this first argument offered by the Defendant looked to be the most bothersome, when one reads the statute it becomes simply a matter of reading and interpreting English. The amendment in question became effective on January 1st, 2007 and the parties agree that Mr. Stopp quit work on January 2nd, 2007, and made his claim on February 15th, 2007, and thus the amendment applies to the case at bar.

Given that this amendment applies to the case at bar then we address whether or not the plan in question becomes a government plan under the amended definition of a government plan. It is undisputed and clear that the Cahuilla Indians are a qualified sovereign Indian Nation. It is undisputed that they employed Gary Stopp. It should be undisputed that Gary Stopp is a government employee and that this insurance policy satisfies a contractual obligation the Cahuilla Indians owed Gary Stopp under his employment contract. Further, it is undisputed that the initial insurance policy was designed to cover what appears to be just thirteen (13) executive officers. By amendment a second class of employees was established.

Plaintiff offers two arguments in this regard. First, the plan was initially established to satisfy a contractual agreement with at least one government employee and in regard to the thirteen (13) covered executives it is not clear that there are a majority of commercial versus government employees. That the "establishment" of this benefit plan was to provide benefits to

a small group of executives, many of whom were government employees and at least one who had a contractual promise that such benefits would be provided.

Secondly, and we believe equally important, is that the statute provides that you are to look at the individual employee as opposed to the group as a whole. Given that, obviously this is a government plan.

B. The Amendment to 29 U.S.C. § 1002(32) Applies to This Plan

The parties agree that all the relevant activity in this case occurred in the year 2002. The Defendant, as well as the Plaintiff will agree that the Plaintiff went off work on January 2nd, 2007, and made his claim for benefits on February 15th, 2007. All of the handling of the claim and all of the other complaints occurred during that particular time. The amendment in question was part of PL109-280, August 17th, 2006, 120 Stat. 780. It was passed by the 109th Congress in it's second session and is entitled the **PENSION PROTECTION ACT OF 2006**. This Act covered many different items and attached as Exhibit "A" to this Answer Brief are the content pages of this particular Act. As the Court can see, the Act covers a variety of matters including funding rules for multi-employer defined benefit plans, special funding rules for certain plans maintained by commercial airlines, treatment of certain plans for a succession or change in membership of a controlled group, benefit accrual standards, increase in deductions limits for single-employer plans as well as Section 906 treatment of certain pension plans of Indian Tribal Government.

The following is an electronic copy of a portion of 26 U.S.C. § 414, which shows that the effective date of this particular amendment is to apply to any year beginning on or after the enactment of this Act.

C.) by adding at the end the following:
"(14) 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).".

<< 26 USCA § 414 NOTE>>

(c) EFFECTIVE DATE.--The amendments made by this section shall apply to any year beginning on or after the date of the enactment of this Act.

PL 109-280, 2006 HR 4

The following is another electronic copy of the Public Law itself showing a variety of effective dates of various portions of the Act:

In 2006, P.L. 109-280, Sec. 114(c) (applicable to plan years beginning after 2007, as provided by Sec. 114(g) of P.L. 109-280, which appears as a note to Code Sec. 401), amended subsec. (1)(2)(B)(i) by substituting subcl. (I) for one which read: "(I) the amount determined under section 412(c)(7)(A)(i) with respect to the plan, over".

--P.L. 109-280, Sec. 902(d)(1) (applicable to plan years beginning after 12/31/2007, as provided by Sec. 902(g) of P.L. 109-280, which appears as a note to Code Sec. 401), added subsec. (w).

--P.L. 109-280, Sec. 903(a) (applicable plan years beginning after 12/31/2009, as provided by Sec. 903(c) of P.L. 109-280, which appears as a note to this section), added subsec. (x).

--P.L. 109-280, Sec. 906(a)(1), (b)(1)(C) (applicable to any year beginning on or after 8/17/2006, as provided by Sec. 906(c) of P.L. 109-280, which appears as a note to this section), amended subsec. (d) by adding the sentence beginning "The term 'governmental plan' includes . . ."; and amended subsec. (h)(2) by inserting "or a governmental plan described in the last sentence of section 414(d) (relating to plans of Indian tribal governments),".

--P.L. 109-280, Sec. 1106(b), amended subsec. (f) by adding para. (6).

In 2004, P.L. 108-311, Sec. 408(a)(15) amended subsec. (q)(7) by substituting "subsection" for "section".

In 2002, P.L. 107-147, Sec. 411(o)(3)-(8) (effective as if included in Sec. 631 of P.L. 107-16, pursuant to Sec. 411(x) of P.L. 107-147, which appears as a note to Code Sec. 25B), amended subsec. (v) by adding para. (2)(D), substituting "sections 401(a)(30), 402(h), 403(b), 408, 415(c), and 457(b)(2) (determined without regard to section 457(b)(3))" for "section 402(g), 402(h), 403(b), 404(a), 404(h), 408(k), 408(p), 415, or 457" in para. (3)(A)(i), substituting "section 401(a)(4), 401(k)(3), 401(k)(11), 403(b)(12), 408(k), 410(b), or 416" for "section 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 403(b)(12), 408(k), 408(p), 408B, 410(b), or 416" in para. (3)(B), inserting ", except that a plan described in clause (i) of section 410(b)(6)(C) shall not be treated as a plan of the employer until the expiration of the transition period with respect to such plan (as determined under clause (ii) of such section)" in para. (4)(B), deleting ", with respect to any plan year," following "means" in the introductory matter of para. (5), substituting para. (5)(A) for one which read: "(A) who has attained the age of 50 before the close of the plan year, and", substituting "plan (or other applicable) year" for "plan year" in para. (5)(B), and substituting para. (6)(C) for one which read: "(6) Exception for section 457 plans. This subsection shall not apply to an applicable employer plan described in subparagraph (A)(iii) for any year to which section 457(b)(3) applies.".

In 2001, P.L. 107-16, Sec. 631(a) (applicable to contributions in taxable years beginning after 12/31/2001, as provided by Sec. 631(b) of P.L. 107-16, which appears as a note to this section), added subsec. (v).

--P.L. 107-16, Sec. 635(a)-(c) (applicable to transfers, distributions, and payments made after 12/31/2001, as provided by Sec. 635(d) of P.L. 107-16, which appears as a note to this section), amended subsec. (p) by substituting "section 409(d), and section 457(d)" for "and section 409(d)" in para. (10), substituting "certain other plans" for "governmental and church plans" in the heading of para. (11), inserting "or an eligible deferred compensation plan (within the meaning of section 457(b))" in the text of para. (11), redesignating para. (12) as para. (13), and inserting new para. (12).

In 2000, P..L. 106-554, Sec. 1(a)(7) (enacting into law Sec. 314(a) of Subtitle B of Title III of H.R. 5662, as introduced on Dec. 14, 2000 (effective as if included in the provisions of P..L. 105-34 to which it relates, as provided by Sec. 314(g) of such H.R. 5662, which appears as a note to Code Sec. 56)), amended subsec. (s)(2) by substituting "section 125, 132(f)(4), 402(e)(3)" for "section 125, 402(e)(3)". 26 USC § 414

We have emphasized the language for the applicable statute which shows that this amendment is applicable to any year beginning on or after 8-17-2006. As the Court will review the various other effective dates we could see that the Legislature was very specific in their language. For example, we see that P.L.109-280 § 902(d)(1) is applicable to **plan years** beginning after 12-31-2007. The next section is applicable to plan years beginning after 12-31-2009. On down in the quoted language we see in 2001 P. L.-107-16 § 631(a) that it is applicable to contributions in taxable years beginning after 12-31/2001. Other sections are applicable to transferred distributions and payments made after a certain date and other sections state that the amendment actually reverts back as though it were a part of an earlier amendment.

The point is that the Legislature was very specific and precise in their language when it concerns when a particular amendment would become effective. The Defendant likes the Court to read that the subject amendment is effective in a "plan year" when in fact that just simply is not the case. If the Legislature had wanted that to be the case thy certainly would have told us because they did tell us that certain other sections were triggered by change in the plan year as opposed to the calendar year. The relevant amendment becomes applicable to any year beginning

on or after 8-17-2006. January 1st, 2007, is a year that begins after that particular date and thus this amendment is applicable to the subject action.

C. The Tribal Plan in Question Does Qualify as a Government Plan
At Least as Far as Gary Stopp is Concerned

The parties agree that the case of *Dobbs v. Anthem Blue Cross and Blue Shield*, 475 F.3d 1176 (10th Cir. 2007) governs this case and that the issue involved is one that is factually intensive. As the Plaintiff, in his Summary Judgment Brief, stated the trial judge in *Dobbs v. Anthem Blue Cross and Blue Shield*, 2000 W. L. 2439310, 2007 U.S. Dist. LEXIS 62277, 42 Employee Benefits Cas.118 (D. Colo. 2007) honed in on the particular employee's job description, and found based on that particular employee's job description that the plan in question was a government plan under the new amendment but then went on to state that the amendment was not applied retro-actively. Those issues all evolved around circumstances in 2004 and that particular conclusion is not applicable to the case at bar.

The Defendant cites a case of *Bolssen v. Unum Life Insurance Company*, *2009 W.L. 10307781*, 2009 U.S. Dist. Lexis 44365, 46 employee benefits cas. 2651(E.D. Wis. May 07, 2009) for the proposition that you look at all of the covered employees' services. We would first point out that in this particular case the employee in question was a custodian for a casino and obviously regardless of how you look at the reading of the statute *Bolssen* would have had the same result. Indeed, it appears that Court honed in on the particular claimant's work activity in arriving at his final conclusion.

There appear to be just two cases that address this particular issue of whether you looked at the particular employee's job description or the plan as a whole. The *Dobbs* case from this

circuit and the *Bolssen* case. However, we would make the following observation in this regard. First, we know that the initial establishment of the plan in question was at least in part to satisfy a contractual agreement between the governing counsel of the Indian Tribe and their government employee, Gary Stopp. That initially, this plan covered thirteen (13) eligible executives and with the exception of Gary Stopp it is not clear how many of these were government and non-government employees except we know that Gary Stopp had supervisory responsibilities over some of these executives from his job description. The addition of the commercial employees was simply that, an addition to a plan established by the Tribe to satisfy their contractual obligation with their government employee. Secondly, Bolssen, was not a government employee anyway. Finally, we believe that the proper way to read the statute is how we set it out in our initial Brief that the statute changes from the plural to the singular when you look at a particular employee's job function.

Bolssen, like another case cited by the Defendant, has some significant language that helps the Plaintiff. In *Bolssen* it was argued that the employer's failure to file a Form 5500 with the United State Department of Labor made the benefit a non-ERISA benefit. The Court said it is often argued that failure to comply with the formal requirements can often prevent the establishment of an ERISA Plan. As pointed out in the Defendant's Brief, establishment of an ERISA Plan is by an employer for the benefit of employees and that is what we look at and what we look at is the type of employer and the type of employee to determine whether or not one of the exceptions such as the government exception applies. In the case of *Schalit v. Cigna Life Insurance Company of New York*, 539 F. Supp. 2nd 715 (SD. New York 2008), the Court held that a church plan was still a church plan even though it was structured to be an ERISA Plan.

After arguing that because the plan was structured as an ERISA Plan with an SPD that Court stated the following:

> "Whether, 'church plan' status is entirely a function of the nature of the institution that maintains the plan." 539 F. Supp. 2nd @ 717.

Interestingly enough, the Defendant cites the case of *Vandever v. Osage Nation*, 2009 W.L. 702776, 2009 U.S. Dist. Lexis, 21162 (N.D.Okl. March 16, 2009) for the proposition that the review is a fact specific consideration. It is interesting to note that the Court in that case did observe that his reading of the Tenth Circuit opinion in the *Dobbs* case led him to believe that the amendment be applied retroactively, of course we do not think that is necessary. It is interesting that the Defendant gives us several cases support our proposition on certain issues before this Court. This being a case that deals with ERISA where the defense usually has its pick of cases indicates that the defendant is on the wrong side of this argument.

This being a factual review, the important things to note are:

1.) We have a recognized sovereign Indian Nation establishing the plan and being the employer;

2.) Gary Stopp is unquestionably and Government Employee;

3.) The establishment of the disability policy was a contractual obligation of the Indian Tribe towards Gary Stopp;

4.) The initial policy covered only qualified executives and there appear to be thirteen (13) of those, at least some of who we are fairly well convinced are like Gary Stopp, government employees;

5.) The other employees were added by a rider;

Thus, the Court is faced with the question whether or not you looked at Gary Stopp or all

of the employees. Two District Courts have decided this question. One in the Tenth Circuit determining that you look at the employee that is seeking the benefits and another Judge in Wisconsin looking at all of the employees. However, regardless of how the employee would have been looked at in that case the result would have been the same.

Finally, it is important to emphasize once again that the establishment of this Plan satisfies the contractual obligation that the Tribe had towards Gary Stopp. Looking at this from a factually specific basis unquestionably this Plan was established by a government entity to satisfy a contractual obligation it had to a government employee. It has to be a government Plan.

Respectfully Submitted.

/s/ Joseph F. Clark, Jr.

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