IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AMY COPPE,

Plaintiff,

v.

THE SAC & FOX CASINO HEALTHCARE PLAN and BENEFIT MANAGEMENT, INC.,

Defendants.

Case No.: 2:14-cv-02598-RDR-GLR

Plaintiff's Response to Defendant Sac & Fox Casino Healthcare Plan's Motion to Dismiss

Plaintiff states as follows in response to Defendant's Motion to Dismiss:

Introduction

Plaintiff Amy Coppe was employed by Sac & Fox Casino from 1997 until 2011. During that time, Plaintiff gave birth to two sons, Cody in 2000 and Derek in 2011. Both newborns required neo-natal intensive care services at Stormont Vail Hospital in Topeka, Kansas. For both births, Plaintiff was entitled to health insurance coverage provided by her employer through a group health plan ("the Plan"). For the first birth, the Plan paid a negotiated discounted rate for services provided for Cody and Amy. However, for the second birth, at issue here, the Plan was being administered by Defendant Benefit Management, Inc. ("BMI") which had taken over as claims administrator for the group health benefit plan. BMI underpaid Stormont Vail by more than $160,000 on the grounds that the rates being charged were excessive and not reasonable, leaving Plaintiff with the corresponding debt.

Plaintiff filed this action for benefits under the Employee Retirment Income Security Act ("ERISA"), 29 U.S.C. § 1101, et seq. as she was instructed to do in the Plan document.

Plaintiff's claims are brought pursuant to ERISA (29 U.S.C. § 1132) and completely governed by and preempted by ERISA. 29 U.S.C. § 1144.

In an effort to escape the jurisdictional restrictions of ERISA, defendant Sac & Fox Casino Health Plan ("S&F Plan") filed a Motion to Dismiss or Stay while arguing that Plaintiff must exhaust her remedies in the Sac & Fox tribal court prior to seeking redress here. Defendant S&F Plan's argument fails on, at least, two grounds. First, as at least one other court in this Circuit has noted, the tribal exhaustion doctrine does not apply in ERISA cases where Congress has clearly intended to preempt all other forums for hearing ERISA claims. Second, even if the tribal exhaustion was applicable, Defendant S&F Plan chose the forum for actions for Plan benefits in the Plan document and waived any right to have a claim heard in a tribal court.

Statement of Facts

1. The S&F Plan is governed by ERISA. Complaint at ¶ 6.

2. The S&F Plan document contains a section detailing a participant's ERISA rights. See Plan, attached as Exhibit 1, at p. 46.

3. The Plan states that "there are a number of steps the Plan member can take to enforce" ERISA rights. *Id.*

4. The Plan further provides that "[i]f the Plan member has a claim for benefits which [is] denied or ignored in whole or in part, the Plan member may file suit in a state or federal court." *Id.*

5. The Plan contains no provision indicating that tribal courts have any authority or jurisdiction over disputes about Plan benefits. *Id.*

6. According to Defendant S&F Plan's ERISA regulatory filings with the Internal Revenue Service, the Plan had group health insurance through American Fidelity Assurance. See Form 5500 for 2/1/2011 to 1/31/2012 attached as Exhibit 2.[1]

Argument

A. The tribal remedy exhaustion doctrine does not apply to Plaintiff's ERISA claims.

While Defendant S&F Plan provides a thorough analysis of the history and basis for the tribal exhaustion doctrine, Defendant neglects to recognize the overwhelming preemptive nature of ERISA. In ERISA, Congress enacted a statory scheme that expressed a clear and unmistakable preference for a federal forum. Other courts, including a fellow district court in this Circuit, have recognized the preemptive nature of ERISA and found that exhaustion of tribal remedies is not required when a plan participant brings a claim to enforce rights under ERISA. Likewise here, this Court should deny Defendant S&F Plan's request to either dismiss or stay this ation and allow Plaintiff to proceed with her case as Congress intended and as Defendant recognized in the Plan document.

Congress drafted ERISA with the express intention that it would preempt state regulation of employee benefit plans and that the civil enforcement provisions of ERISA would be the exclusive method to resolve benefit disputes. See *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 207 (2004). In recognizing this intention, the Tenth Circuit has said that ERISA's preemption is so extraordinary that it converts a state law claim into a federal claim for purposes of removal. *Felix v. Lucent Technologies, Inc.*, 387 F.3d 1146, 1156 (10th Cir. 2004). Congress specifically

[1] Whether the Plan was self-funded or not is not determinative of the issues in the Motion to Dismiss. However, the attached 5500 Form appears to contradict Defendant's allegations based on the affidavit of Martin R. Gist that the Plan was self-funded and any payments would be made from the tribe's general funds. Regardless of how it was funded, the ERISA issues in this case have little to do with anything occurring on tribal ground. Plaintiff does not live on tribal lands and she gave birth and incurred charges at hospitals outside of tribal lands. Defendant BMI made claims decisions from Joplin, Missouri. See Exhibit 1.

wanted to avoid a patchwork of non-federal regulations that could be inconsistent. *Shaw v. Delta Airlines Inc.*, 463 U.S. 85 (1983).

Another Tenth Circuit district court was presented with the *identical* legal question involving an ERISA claim for benefits and the tribal exhaustion doctrine in *Vandever v. Osage Nation Enterprises, Inc., et al.*, 2009 WL 702776 (N.D. Okla. March 16, 2009) (attached). The district court in *Vandever* rejected Defendant S&F Plan's argument for withholding federal court jurisdiction on the grounds that ERISA preemption, expressed by both Congress and the Supreme Court, called for proceeding on an ERISA claim for benefits in federal court. The case is directly on point and, while not controlling authority as it is from a fellow Tenth Circuit district court, its well-reasoned analysis is highly persuasive.

Just as in the case before the Court, the plaintiffs in *Vandever* filed an action for ERISA benefits against a tribal employer. 2009 WL 720776, at *1. As in this case, the defendants argued that the federal court should abstain from hearing the case while the plaintiffs were forced to pursue their claims in a tribal court. *Id.* at *4. The court rejected this argument because of Congress's clear intention that ERISA claims be decided in federal courts and that there be a uniform set of precedents to govern participant claims. First, the court noted that ERISA preempts all state law claims and allows removal to federal court of all ERISA matters. Second, the Court cited to the Supreme Court's decision in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) in which the Court instructed that:

> Congress enacted ERISA to "protect…the interests of participants in employee benefit plans" by setting out substantive regulatory requirements for employee benefits plans and to "provid[e] for appropriate remedies, sanctions, and ***ready access to the Federal courts***." 29 U.S.C. § 1001(b). The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ***ERISA includes expansive preemption provisions***, see ERISA § 514, 29 U.S.C. § 1144, which are

> intened to ensure that employee benefit plan regulation would be ***exclusively a federal concern***.

Davila, 542 U.S. at 208 (emphasis added). Given these clear expressions from Congress and the interpretation by the Supreme Court that federal courts should decide ERISA issues, the Northern District Oklahoma court in *Vandever* found that abstention from hearing the plaintiffs claims for ERISA benefits was not warranted.

The decision in *Vandever* was following direction from the Supreme Court that the tribal exhaustion doctrine should not be applied where Congress has intended to have federal law dominate an area. The Supreme Court's decision in *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999) set out this analysis. In *Neztsosie,* the plaintiffs brought tort claims from uranium production on a Navajo reservation. *Id.* at 477-78. The Price-Anderson Act provides for original jurisdiction for federal courts for claims relating to nuclear incidents and contains a preemption provision converting all related claims to federal actions. *Id.* at 484-85. The plaintiffs argued that the matter must proceed in the tribal court. The Supreme Court stated that it was:

> at a loss to think of any reason that Congress would have favored tribal exhaustion. Any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts...The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal—as to state—litigation.

Id. at 485-86.

The preemption provisions of ERISA are effectively the same as the Price-Anderson Act and show that Congress expressed an unequivocal intention for a federal forum as to actions that relate to group benefit plans, such as that at issue here. The removal provisions of the Price-Anderson Act are similar to ERISA. *See Felix*, *supra.* Just as the Supreme Court stated in *El*

Paso, there is no reason to believe that Congress would have favored tribal exhaustion over a purely federal law question.

The decisions in *Vandever* and *Neztsosie* were found to be persuasive by an Arizona federal district court in *Peabody Holding Co. LLC v. Dianarose Black, et al.*, 2013 WL 2370620 (D. Ariz. May 29, 2013) (attached). *Peabody* involved an interpleader concerning ERISA funds brought under 29 U.S.C. § 1132(a)(3)(B). *Id.* at *1. The defendant plan participant was a Navajo tribe member and the benefits were derived from tribal employment. *Id.* The defendant wanted the action stayed or dismissed while the tribal court determined its own jurisdiction. *Id.* at *2. The court, however, rejected the argument that exhaustion of tribal remedies was required. The court noted that ERISA granted exclusive jurisdiction over the interpleader to the federal courts. *Id.* at *3. However, the court also found that the same reasoning in *Vandever* and *Neztsosie* provided for an alternative basis for keeping the case in federal court *even if there was not exclusive federal jurisdiction* over the interpleader dispute. *Id.* at *6. First, the court found that *Neztsosie* "supports the proposition that exhaustion does not appy, even without express language, where a federal statute evinces Congress's intent that specific kinds of actions be addressed in a uniform manner in federal court." *Id.* The court then went on to examine how *Vandever* corrrectly applied this reasoning to find that exhaustion was not required in an ERISA action for benefits where there was concurrent federal and state jurisdiction under 29 U.S.C. § 1132(e)(1) over the claim. The Arizona district court in *Peabody* concluded that "*Neztsosie* and *Vandever* provide persuasive alternative grounds for finding that the principles of comity requiring tribal court exhaustion do not apply in this [ERISA] case." *Peabody* at *6-7.

Defendant S&F Plan's focus on the fact that ERISA does not expressly prohibits tribal courts from hearing ERISA benefit cases is misplaced. The important point is that Congress did

not grant any of ERISA's jurisdictional authority to tribal courts and there is no provision in federal law that specifically grants tribal court authority to decide ERISA claims. Federal jurisdiction is exclusive for many claims arising under ERISA, and state courts are granted only limited, concurrent jurisdiction. 29 U.S.C. § 1132(e)-(f). Tribal courts are not granted jurisdiction under ERISA. This is true even though it is recognized that tribal plans are subject to ERISA when the tribal employees are participating in commercial activities. See 29 U.S.C. § 1002(32). The entire statutory scheme is designed for, and expresses an intention for, a federal forum for these issues and this fact was recognized by the Plan's own governing document that instructed Plaintiff to pursue her claim for benefits in a non-tribal court.

B. Even if the tribal exhaustion doctrine applied to Plaintiff's claim for ERISA benefits, Defendant S&F Plan waived its right to have the matter heard in a tribal court as it specifically instructed that such claims be pursued in non-tribal courts.

While Defendant S&F Plan takes great pains to try and paint this case as involving tribal decisions that have an effect on tribal governance and finances, the Plan document shows that this claim is a standard ERISA case for benefits and was never intended to be treated as a matter for tribal courts. Defendant S&F Plan hired a claim administrator, defendant BMI, which is a non-tribal related entity, to administer all aspects of the Plan. The Plan document was drafted by Defendants, not Plaintiff. Most importantly, the Plan contained a choice of forum provision that specifically omitted any reference to tribal courts. Accordingly, even if the Court did not find the above authority on ERISA preemption persuasive, the Court should find that the Plan waived any requirement that Plaintiff proceed in a tribal court.

As noted above, the Plan specifically states that if a participant is denied ERISA benefits, she "may file suit in state or federal courts." Exhibit 1 at p. 47. That is exactly what occurred here. Federal courts have long held that ERISA plan documents are in the nature of a contract.

The provisions of the Plan are afforded great deference by the federal courts. The Plan document controls in this instance and specifically gives Plaintiff the right to pursue her claim in this Court without need for exhausting remedies in a tribal court. If the tribe had a right to have the claim for ERISA benefits heard first in tribal court, it clearly waived that right through this language in the Plan document.

The Supreme Court, in an analogous scenario, found that Indian tribes can waive their rights not only as to where an action may be heard but even whether an action can be maintained against them. In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), a tribe entered into a contract containing an arbitration and choice of law provision. Normally, Indian tribes are immune from suit in state court. The plaintiff argued that the tribe had breached its contract and sought to enforce the arbitration clause. *Id.* at 416. The tribe asserted sovereign immunity and declined to participate in the arbitration proceeding. *Id.* After an award in the plaintiff's favor, the plaintiff filed an action in state court to enforce the award. *Id.* The tribe appealed to the U.S. Supreme Court asserting it was immune from the suit. However, in a unanimous decision, the Supreme Court found that, by entering a contract with an arbitration and choice of law provision allowing enforcement in a state court, the tribe waived its sovereign immunity and agreed to allow an award to be pursued in an Oklahoma court. *Id.* at 420. The Court concluded:

> In sum, the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures…[the Arbitration] Act concerns arbitration in Oklahoma and correspondingly designates as enforcement forums courts of competent jurisdiction of [Oklahoma]…C&L selected for its enforcement suit just such a forum.

Id.

Likewise here, Defendant S&F Plan tendered the contract (the Plan document) that specifically called for Plaintiff bringing an action in state or federal, not tribal court, to enforce a claim for benefits under ERISA. Plaintiff had no power to reject terms of the Plan document or seek alternatives. Had Defendant wished to add a tribal exhaustion requirement, it could have done so. To the extent that Defendant may have had a right to have the case proceed in a tribal court, it clearly waived that right and agreed that Plaintiff could bring an action in this forum.

Conclusion

The strong Congressional preference for a federal forum for ERISA benefit disputes precludes the necessity of exhausting tribal remedies. In *Neztsosie*, the Supreme Court showed that an expansive preemption provision that allowed for removal of any state law claims is a clear expression that Congress intended that such claims be brought in a federal forum and, therefore, did not require exhaustion of tribal remedies. As shown in *Vandever* and *Peabody*, this same reasoning applies equally to ERISA benefit claims and precludes requiring Plaintiff to bring claims in tribal court first. Furthermore, even if Defendant S&F Plan had the right to require exhaustion of tribal remedies, it specifically waived such a right in the Plan document by instructing and requiring that Plaintiff pursue her claims in a non-tribal court.

For all of these reasons, Defendant's Motion to Dismiss or Stay this action should be denied.

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