

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

1.	LIFE INSURANCE COMPANY)	
	OF NORTH AMERICA,)	
)	
	Plaintiff,)	
)	
vs.)	Case No. 6:15-cv-00064-RAW
)	
1.	CORA SUE BERRYHILL,)	
2.	ANDERSON BERRYHILL III,)	
3.	HUDSON INSURANCE COMPANY,)	
)	
	Defendants.)	

LINA’S RESPONSE TO HUDSON INSURANCE’S MOTION TO DISMISS

Plaintiff Life Insurance Company of North America (“LINA”) responds to the motion to dismiss [ECF No. 16] of plaintiff Hudson Insurance Company (“Hudson Insurance”).

I. INTRODUCTION.

Hudson Insurance has based its motion to dismiss on the sole ground of the tribal exhaustion doctrine. Hudson Insurance’s position is not well founded, because Hudson Insurance has failed to address the issues and the case law relevant to this case, which seeks a declaratory judgment of various issues relating to the Employee Retirement Income Security Act of 1974 as amended, 29 U.S.C. §§ 1001-1461 (“ERISA”).

The determination of Hudson Insurance’s motion to dismiss requires the consideration of two issues. First, the Court must determine whether LINA has presented a plausible claim that ERISA governs the group employee welfare benefit plan (“Plan”) of the Muskogee (Creek) Nation Casino, Gaming Operations Board (“GOAB”). Second, if LINA has presented a plausible claim that ERISA governs the Plan, the Court must decide whether the tribal

exhaustion doctrine applies to the Plan. The assessment of these issues leads to the conclusion that Hudson Insurance's motion to dismiss lacks any merit.

The resolution of the first issue requires the analysis of the nature of the Plan. Based on the allegations in the complaint and Hudson Insurance's own description of the Plan in its motion, the Plan provides group benefits to employees working in the commercial activities of the tribal casino. In *Stopp v. Mutual of Omaha Life Ins. Co.*, No. CIV-09-221-FHS, 2010 WL 1994899 (E.D. Okla. May 18, 2010), this Court held that ERISA governs the group benefits plan covering the employees of the Cahuilla Indian Tribe's casino, restaurant, and hotel operations. The benefits plan at issue in *Stopp* and the Plan at issue in this case are substantively identical in terms of the types of tribal employees who are plan participants. *Stopp*, thus, resolves the first issue before the Court by supporting the conclusion that ERISA governs the Plan.

The resolution of the second issue requires the consideration of the broad preemptive nature of ERISA and the case law relevant to broad preemptive federal statutes, such as ERISA, falling outside the tribal exhaustion doctrine. Congress established ERISA to provide a regulatory scheme uniformly governing employee benefit plans. Congress included broad preemptive powers as part of ERISA. In *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999), the Supreme Court modified the general tribal exhaustion case law on which Hudson Insurance relies, and held that the tribal exhaustion doctrine does not apply to federal statutes with broad preemptive schemes. In *Vandever v. Osage Nation Enterprise, Inc.*, No. 06-CV-380-GKF-TLW, 2009 WL 702776 (N.D. Okla. Mar. 16, 2009), the Northern District of Oklahoma applied *Neztosie* in the context of a case involving claims under an ERISA governed plan, and held that the tribal exhaustion doctrine does not apply to ERISA benefits claims. *Neztosie* and

Vandever resolve the second issue now before the Court by establishing that Hudson Insurance’s reliance on the tribal exhaustion doctrine lacks merit.

The resolution of both issues before the Court demonstrates that Hudson Insurance’s motion to dismiss is groundless. This declaratory judgment case seeking the determination of various ERISA issues is properly before the Court. Therefore, the Court should deny Hudson Insurance’s motion to dismiss.

II. BACKGROUND FACTS.

For the purposes of considering Hudson Insurance’s motion to dismiss, the Court “assumes the truth of plaintiff’s well-pleaded factual allegations and views them in the light most favorable to” the plaintiff. *Brooks v. State of Oklahoma*, No. CIV-12-481-RAW, 2013 WL 1890712 at *1 (E.D. Okla. May 6, 2013). LINA’s allegations provide the following background facts of this declaratory judgment action.¹

A. The Plan.

The GOAB sponsored the Plan to provide group employee welfare benefits to its eligible employees. ECF 9 at 2 (¶ 8). LINA issued Group Policy FLX 963471 (“Group Policy”) to the GOAB in order to fund the Plan’s life benefits. ECF 9 at 2 (¶ 13). The Plan and the Group Policy provide benefits to employees of GOAB who are involved in the commercial activities of the tribal casino. ECF No. 9 at 4 (¶ 29). ERISA governs the Plan and the Group Policy. ECF No. 9 at 2 (¶¶ 12 and 14). The Plan granted discretionary authority to LINA as an ERISA claim fiduciary to determine claims for benefits under the Plan and the Group Policy. ECF No. 9 at 2 (¶ 15).

¹ The allegations in LINA’s original complaint [ECF No. 3] and amended complaint [ECF No. 9] are identical. LINA filed the amended complaint simply to correct the name of Hudson Insurance. LINA has cited the allegations in the amended complaint, since that document is its most recent submission.

B. The ERISA Benefits Claim at Issue.

Gino Robert Berryhill (“Decedent”) was an employee of the GOAB, who worked as a Sergeant of Security. ECF No. 9 at 2 (¶ 7). The Decedent was a participant in the Plan, who named his mother, Cora Sue Berryhill, and brother, Anderson Berryhill III (collectively “the Berryhills), as his beneficiaries under the Plan. ECF No. 9 at 1 (¶¶ 4-5); 2 (¶¶ 10-11). On September 2, 2012, the Decedent died. ECF No. 9 at 2 (¶ 17).

The Berryhills submitted claims under the Plan to LINA for Basic Group Term Life Benefits (“Basic Benefits”) and Supplemental Group Term Life Insurance Benefits (“Supplemental Benefits”) as the Decedent’s beneficiaries. ECF No. 9 at 2-3 (¶¶ 18-19). LINA approved the Berryhills’ claims for Basic Benefits. ECF No. 9 at 3 (¶ 20). On December 20, 2012, LINA denied the Berryhills’ claims for Supplemental Benefits, and informed them of the grounds for that claim determination. ECF No. 9 at 3 (¶¶ 21-23). LINA notified the Berryhills of their right to submit an appeal of the adverse claim determination. ECF No. 9 at 3 (¶ 24). The Berryhills did not submit an appeal of LINA’s claim determination. ECF No. 9 at 3 (¶¶ 25-26).

C. The Litigation.

Over two years after LINA’s denial of the Berryhills’ claim for Supplemental Benefits, on January 9, 2015, Hudson Insurance filed an action in the District Court of the Muskogee (Creek) Nation, Okmulgee District (“Tribal Court Action”). Hudson Insurance alleged that it had paid the Supplemental Benefits claims of the Berryhills, and sought the recovery of the amounts paid to the Berryhills. Hudson Insurance named Cigna Health & Life Insurance Company (“CHLIC”), RWI Benefits, LLC, and Benefit Management, Inc. as defendants in the Tribal Court Action. On January 16, 2015, Hudson Insurance served CHLIC through the Oklahoma Insurance Commissioner.

On February 17, 2015, CHLIC filed its answer to Hudson Insurance's petition in the Tribal Court Action.² CHLIC denied that it had any involvement with the administration or the insuring of the Plan's benefits. CHLIC also denied any involvement in the determination of the Berryhills' claims for benefits under the Plan.³

On February 13, 2015, LINA filed the complaint in this declaratory judgment action. ECF No. 3. LINA named the Berryhills as defendants in their capacities as the Decedent's beneficiaries and the only claimants with whom LINA had dealt relating to the claims for Supplemental Benefits under the Plan.⁴ LINA named Hudson Insurance as a defendant based on Hudson Insurance's assertion that it had paid the Supplemental Benefits to the Berryhills and now held the Berryhills' claims.⁵

III. ARGUMENT.

A. The Standards Governing Hudson Insurance's Motion to Dismiss.

Hudson Insurance has based its motion to dismiss on Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). These grounds for dismissal involve the consideration of different issues.

² To date, RWI Benefits, LLC and Benefit Management, Inc. have not filed answers in the Tribal Court Action. LINA did not name RWI Benefits, LLC and Benefit Management, Inc. as defendants in this declaratory judgment action, because these entities did not play any role in the funding of the Supplemental Benefits of the Plan or the determination of the Berryhills' claims for Supplemental Benefits under the Plan.

³ Despite CHLIC's answer in the Tribal Court Action and LINA's allegations in this case, which show that CHLIC has no connection with the Plan, Hudson Insurance has persisted in asserting that CHLIC is somehow involved with the Plan and the Berryhills' claim for Supplemental Benefits under the Plan. Hudson Insurance's contention that LINA is a subsidiary of CHLIC [ECF No. 16 at 1] is erroneous.

⁴ On March 19, 2015, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), LINA dismissed without prejudice the Berryhills, who have not submitted an answer or other responsive pleading in this case, based on representations by and information received from counsel for defendant Hudson Insurance Company. ECF No. 17.

⁵ In the original complaint, LINA named Hudson Insurance as "Hudson Insurance Group." On February 24, 2015, based on the representations of Hudson Insurance's counsel, LINA filed its amended complaint changing the name of Hudson Insurance to "Hudson Insurance Company." ECF No. 9. LINA's complaint and amended complaint are identical with the exception of Hudson Insurance's name.

A motion under Fed. R. Civ. P. 12(b)(1) requires a determination of whether the Court has jurisdiction over the subject matter. *Titsworth v. Oklahoma Dept. of Corrections*, No. 13-CV-390-JHP, 2013 WL 6182295 at *1 (E.D. Okla. Nov. 25, 2013). For the purposes of such a motion, the Court will not assess the merits of the case. *Id.*

A motion under Fed. R. Civ. P. 12(b)(6) focuses on whether the plaintiff has stated a viable claim for relief. The Court will deny a motion to dismiss, if there are “enough facts to state a claim to relief that is plausible on its face.” *Brooks*, 2013 WL 1890712 at *1 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007))(internal quotation marks omitted). LINA bears the burden “to frame ‘a complaint with enough factual matter (taken as true) to suggest’ that he or she is entitled to relief.” *Titsworth*, 2013 WL 6182295 at *1 (quoting *Twombly*, 550 U.S. 556). The Supreme Court and this Court have held that “[t]o satisfy this standard, Plaintiff must ‘nudge [[its] claims across the line from conceivable to plausible.’” *Taylor v. Geoffrey, LLC*, No. CIV-11-381-FHS, 2012 WL 6425508 at *2 (E.D. Okla. Feb. 28, 2012) (quoting *Twombly*, 550 U.S. 570); *see also Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

B. ERISA Governs the Plan.

The first issue before the Court is whether LINA has presented a plausible claim that ERISA governs the Plan. Based on LINA’s allegations, Hudson Insurance’s own description of the Plan, and the relevant ERISA precedent, ERISA governs the Plan.

Based on LINA’s allegations, which the Court will take as true for the purposes of deciding the motion to dismiss, the Plan provides group life benefits to GOAB’s employees working at the Muskogee (Creek) Nation Casino. *See* part II(A) above. The Decedent’s

occupation was a Sergeant of Security. *See* part II(B) above. The Plan’s participants, like the Decedent, are engaged in the casino’s commercial activities. *See* part II(A) above.

Hudson Insurance’s own summary of the background facts is consistent with LINA’s allegations. In its motion to dismiss, Hudson Insurance described the Group Policy as “covering tribal employees.” ECF No. 16 at 1. Hudson Insurance states that the Decedent “was an employee of Muskogee (Creek) Nation Casinos, a tribal business.” *Id.* Hudson Insurance has acknowledged that the GOAB entered into an arrangement with LINA “to provide insurance benefits for all *casino employees*.” ECF No. 16 at 2 (emphasis added).

In short, there is no dispute about the fundamental facts about the nature of the Plan. The Plan provides group benefits for all of GOAB’s casino employees. These employees are engaged in the commercial activities of the casino, not governmental activities.

In *Stopp v. Mutual of Omaha Life Ins. Co.*, No. CIV-09-221-FHS, 2010 WL 1994899 (E.D. Okla. May 18, 2010), this Court already has considered whether ERISA governs a group employee benefits plan of a tribal nation. In *Stopp*, the Cahuilla Indian Employee Welfare Benefit Plan (“Cahuilla Plan”) provided benefits for tribal employees who “were engaged in commercial and business enterprises including positions at hotels, restaurants, and casinos.” *Id.*, 2010 WL 1994899 at * 1. The Court based its ruling on *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275 (2010), by which the Tenth Circuit established the test to determine whether ERISA governed a tribal employee benefits plan. *Id.* at * 3. The Court found that the majority of the participants in the Cahuilla Plan “were performing commercial activities.” *Id.* Therefore, the Court held that “the governmental exception [to ERISA] does not apply” to the Cahuilla Plan, and that the Cahuilla Plan “is subject to the provisions of ERISA.” *Id.*

The Court's ruling in *Stopp* is directly on point with the issues of this case. The Plan in this case, like the Cahuilla Plan in *Stopp*, provides benefits for employees engaged in casino operations. Since the Plan applies to employees performing commercial activities, under *Dobbs* and *Stopp*, ERISA governs the Plan.

Hudson Insurance asserts that "it is irrelevant whether ERISA applies to this case – regardless of applicable law, LINA must first exhaust its tribal remedies in Creek Nation Court." ECF No. 16 at 17. This assertion is groundless. Hudson Insurance has failed to take into account the case law holding that the tribal exhaustion doctrine does not apply to broad preemptive federal statutes like ERISA. In the next section of this brief, LINA will discuss this case law.

C. The Tribal Exhaustion Doctrine Does Not Apply to This ERISA Case.

The second issue before the Court is whether the tribal exhaustion doctrine applies to this case seeking the determination of issues arising under ERISA. This issue is the sole basis for Hudson Insurance's motion to dismiss. ECF No. 16 at 3-8. A review of the relevant case law establishes that the tribal exhaustion doctrine does not apply to ERISA cases.

Hudson Insurance relies on *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), to support its tribal exhaustion argument. Although *National Farmers Union* and *Iowa Mutual* address the general doctrine of tribal exhaustion, neither of these cases is relevant to claims relating to ERISA governed employee benefit plans.

In *Vandever v. Osage Nation Enterprise, Inc.*, No. 06-CV-380-GKF-TLW, 2009 WL 702776 (N.D. Okla. Mar. 16, 2009), the Northern District of Oklahoma considered an argument identical to Hudson Insurance's position in this case. The Court held that the "exhaustion of

tribal remedies requirement set out in *National Farmers Union* was subsequently modified in” *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999). *Vandever*, 2009 WL 702776 at * 5. In *Neztosie*, the Supreme Court held that the tribal exhaustion doctrine did not apply to claims relating to the Price-Anderson Act, which is a comprehensive, preemptive federal statute. The Supreme Court distinguished a case under a comprehensive federal statute from another case subject to the tribal exhaustion doctrine by holding that:

This case differs markedly. By its unusual preemption provision, the Price-Anderson Act transforms into a federal action any public utility action arising out of or resulting from a nuclear incident. The Act not only gives a district court original jurisdiction over such a claim, but provides for removal to a federal court as a right if a putative Price-Anderson action is brought in a state court. Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.

Neztosie, 526 U.S. at 484-85 (internal citations omitted). The Supreme Court went on to state that:

We are 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, which are thus accorded neither jot nor tittle deference. The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal as to state court.

Id.

ERISA has the same sort of broad preemption provision as the Price-Anderson Act at issue in *Neztosie*. The federal courts have original federal question jurisdiction over ERISA claims. 29 U.S.C. § 1132(e) (ERISA jurisdiction provision); *see also* 28 U.S.C. § 1331 (general federal question jurisdiction provision). The Supreme Court has recognized that the “purpose of

ERISA is to provide a uniform regulatory regime over employee benefits plans.” *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 207 (2004). ERISA preempts all state law claims relating to benefits under an ERISA governed plan, and provides the exclusive remedy for the resolution of benefit claims by employee benefit plan participants and beneficiaries. 29 U.S.C. § 1144(a); 29 U.S.C. § 1132(a)(1)(B); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987); *Kidneigh v. UNUM Life Ins. Co. of Am.*, 345 F.3d 1182, 1186 (10th Cir. 2003). ERISA’s broad preemptive nature allows a cause of action filed in state court that comes within the scope of ERISA to be removable to federal court under 28 U.S.C. §§ 1331 and 1441(b) as an action arising under federal law, even though the ERISA nature of the claim does not appear on the complaint's face. *Taylor*, 481 U.S. at 66. The Supreme Court has long recognized that ERISA’s preemption provisions are “deliberately expansive, and designed to establish [employee benefit] plan regulation as exclusively a federal concern.” *Pilot Life*, 481 U.S. at 46.

In *Vandever*, the Court held that “ERISA, like the Price-Anderson Act, preempts state court claims relating to benefits plans falling under its purview.” *Vandever*, 2009 WL 702776 at * 5 (citing 29 U.S.C. § 1144). The Court concluded that the tribal exhaustion doctrine did not support abstention “[g]iven the preemptive nature of ERISA and the express purpose of Congress to provide a uniform regulatory scheme over employee benefit plans.” *Id.*; see also *Peabody Holding Co., LLC v. Black*, No. CV-12-08252-PCT-DGC, 2013 WL 2370620 at *5-6 (D. Ariz. May 29, 2013) (holding that tribal exhaustion is not required in a case involving issues arising under ERISA). The same rationale applies directly to this case.

Contrary to Hudson Insurance’s contentions, there are not any tribal remedies to exhaust in this case. ERISA preempts the tribal remedies, and provides the sole remedy for claims

relating to benefits under the Plan. This Court has jurisdiction to determine the issues that LINA has raised in this declaratory judgment action. Based on *Neztsosie* and *Vandever*, the Court should deny Hudson Insurance's motion to dismiss.

IV. CONCLUSION.

The Court unquestionably has jurisdiction under 28 U.S.C. § 2201 to render a declaratory judgment regarding the issues relating to the ERISA governed Plan. LINA has met its burden to show that it has a plausible claim. LINA's allegations taken as true coupled with Hudson Insurance's own description of the Plan and its benefits establish the plausibility of LINA's contention that ERISA governs the Plan. In *Stopp*, this Court held that ERISA governs tribal plans, like the Plan at issue, providing benefits for tribal employees engaged in commercial activities. Based on *Neztsosie* and *Vandever*, the tribal exhaustion doctrine does not apply to this case relating to ERISA issues. The Court should deny Hudson Insurance's motion to dismiss.

Dated this 19th day of March, 2015.

/s/ Jack M. Englert, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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