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The Evolution of the Applicability of ERISA to Indian Tribes: We May Finally Have Congressional Intent, but It's Still Flawed

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COMMENTS

THE EVOLUTION OF THE APPLICABILITY OF ERISA TO INDIAN TRIBES: WE MAY FINALLY HAVE CONGRESSIONAL INTENT, BUT IT'S STILL FLAWED

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I. Introduction

Indian tribes have played a vital role in American history, and modernly, they are becoming ever more a part of this country's economy. The mention of an Indian tribe may bring to mind a history lesson or perhaps the image of flashing lights and the sounds of ringing slot machines. Today, Indian tribes are often associated with casinos and gaming enterprises, and many tribes have recently seen "unprecedented economic growth and development" in commercial and business ventures due at least in part to the emergence of Indian gaming under the Indian Gaming Regulatory Act.[1] The Indian Gaming Regulatory Act was created by Congress in recognition of the fact that many tribes were promoting gaming activities in order to raise governmental revenue and that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[2]

As tribes are now "creating, owning, and operating new business enterprises at an accelerated pace," tribal employers now find themselves in the new position of seeking and hiring the best possible workers to fill a large number of jobs.[3] Because these new ventures and businesses are commercial in nature, often conducted off-reservation, and include non-Indians, they raise the issue of whether federal and state labor and employment laws may be applied to tribal employers.

In general, the question of whether a federal or state law will apply to an Indian tribe is guided by principles of sovereignty. Indian self-governance principles "are so deeply engrained in our jurisprudence that they have

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1. William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365, 1366 (1995).

2. 25 U.S.C. § 2701 (2006).

3. Buffalo & Wadzinski, *supra* note 1, at 1366.

provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured."[4] The right of Indian tribes to govern themselves, however, remains "subject to the broad power of Congress."[5] Thus, Indian tribes possess sovereignty, but that sovereignty is "limited" and "subject to complete defeasance."[6] At times Indian sovereignty must give way both to state[7] and federal laws, including employment laws. This comment discusses the latter. Some federal statutes with employment-law components, such as Title VII of the Civil Rights Act and the Americans with Disabilities Act, are explicit in their *non*-applicability to Indian tribes.[8] But others are silent on this point and are considered "statutes of general applicability."[9] If a statute is one of general applicability, the determination of whether the statute applies to Indian tribes is made judicially.[10]

The federal statute at issue in this comment is the Employee Retirement Income Security Act of 1974 (ERISA), a federal employment statute that governs employee benefit, pension, and retirement plans established and maintained by employers.[11] ERISA has been recognized as a statute of general applicability because it governs all qualified employee benefit plans offered by employers, and the exemptions from it "are explicitly and specifically defined, as well as few in number."[12] There is no mention of an Indian tribal employer in any exception.

Currently, no short answer exists as to whether ERISA will apply to an Indian tribal employer, though some courts have already approached the issue.[13] Although the Supreme Court has not yet answered this question, the Pension Protection Act of 2006[14] amendment to ERISA has helped clear up

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4. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (quoting McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 173 (1973)).

5. *Id.*

6. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985).

7. *See* Nevada v. Hicks, 533 U.S. 353, 361 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.").

8. Buffalo & Wadzinski, *supra* note 1, at 1367-76 (noting that both federal statutes expressly exclude Indian tribes from the definition of "employer").

9. *Id.* at 1376.

10. *Id.* at 1376-77.

11. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2006).

12. Smart v. State Farm Ins. Co., 868 F.2d 929, 933 (7th Cir. 1989).

13. *See id.*; *see also* Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991).

14. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended at 29 U.S.C. § 1002(32) (2006)).

some of this conflict. Even so, the result is not favorable to Indian sovereignty.

This comment discusses the current state of Indian sovereignty matters as it pertains to ERISA. Because tribal employment has expanded both in its scope and in numbers, tribal employers typically now must offer employee benefit plans to attract the best workers. Whether traditional federal employment law, including ERISA, will regulate this area has become a hot-button issue. This comment first explores the history of the application of a general federal statute to a sovereign Indian tribe and focuses on the evolving issue of whether ERISA applies to Indian tribes. More specifically, this comment illustrates the relationship between ERISA and Indian tribes, examining the implications that ERISA holds for Indian sovereignty and assessing where the road leads from here for Indian tribes and ERISA.

Part II of this comment provides a brief historical overview of ERISA and the rules and principles of Indian sovereignty. Part III examines the courts' conflicting holdings in the determination of whether a general federal statute such as ERISA should apply to tribes in the absence of express congressional intent. Part IV details the Pension Plan Act amendment to the "governmental plan exception," which provided Congress's intent with respect to Indian tribes, and examines whether this has helped resolve the conflict. Part IV also analyzes the current status of the applicability of ERISA to Indian tribes, as well as its impact on the evolution of Indian sovereignty. This comment concludes in Part V.

II. A Brief History of the Employee Retirement Income Security Act (ERISA) and the Applicability of a General Federal Statute to an Indian Tribe

A. ERISA

In 1974, Congress implemented ERISA, a federal employment statute designed to protect employees and their interests in employee benefit plans.[15] ERISA was designed to provide a uniform standard and to govern employee benefit plans and welfare plans established or maintained by an employer or an employee organization.[16] The plans are "an important factor affecting the stability of employment," and the sheer "growth in size, scope, and numbers of employee benefit plans" spurred Congress to take action for the "well-being

15. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44 (1987) (quoting 29 U.S.C. § 1001(b)).
16. *See* 29 U.S.C. § 1001(a).

and security of millions of employees and their dependents . . . directly affected by [the] plans."[17] Congress thus enacted ERISA in order to implement the twofold aim of protecting interstate commerce—a "national public interest"—as well as the interests of the participants and beneficiaries in employee- and welfare-benefit plans.[18]

In order to protect the revenue of the United States and provide for the free flow of commerce (along with protecting employees and their beneficiaries), Congress deemed it necessary to establish minimum standards in order to "assur[e] the equitable character of such plans and their financial soundness."[19] ERISA protects the interests of participants and their beneficiaries "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" while "providing for appropriate remedies, sanctions, and ready access to the Federal courts."[20] Employers must comply with these standards by offering plans that meet the prescribed requirements. If an employer fails to do so, a plan participant may file suit.[21]

The ERISA preemption scheme is broad. Besides an exception in what has been termed the "saving clause,"[22] which exempts state laws that regulate insurance, banking, or securities from being preempted,[23] the provisions of ERISA supersede all state laws that relate to any employee benefit plan.[24] In addition, ERISA impliedly preempts all state remedies because they would conflict with the federal ERISA remedies detailed in the Act's civil-enforcement scheme.[25] ERISA's civil-enforcement scheme is exclusive and includes "an integrated system of procedures for enforcement."[26] It is also comprehensive, containing six provisions "that represent[] a careful balancing of the need for prompt and fair claims settlement procedures against the public

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* § 1001(b).
21. *Id.* § 1132(a)(1).
22. *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-45 (1987).
23. 29 U.S.C. § 1144(b)(2)(A).
24. *Id.* § 1144(a) ("Except as provided in subsection (b) of this section [the saving clause], the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .").
25. *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (stating that the "six carefully integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly").
26. *Id.* at 147.

interest in encouraging the formation of employee benefit plans."[27] In sum, a "state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."[28] The preemption scheme of ERISA makes it employer-friendly, because employees can seek only a requisite number of enumerated remedies, rather than limitless state-law remedies.

The definitions embedded in the ERISA provisions are not difficult to satisfy. As provided in section 1002, an "employee welfare benefit plan" and a "welfare plan" are plans, funds, or programs established or maintained by an employer to provide participants and their beneficiaries with medical and fringe benefits, whether through the purchase of insurance or otherwise.[29] An "employee pension benefit plan" and a "pension plan" are plans, funds, or programs offered by an employer to provide retirement income to employees.[30] Equally broad are the definitions of "employer" and "employee."[31] From the outset, most established plans will fall under these definitions and thus fall under ERISA's broad scope.

Despite the statute's broad reach, some explicit exceptions remain. Specifically, "governmental plans" are exempted. The original terms of the 1974 statute defined "governmental plan" as one "established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."[32] This exception makes no express mention of a tribal government; therefore, unless tribal governments are included as state- or federal-government actors, tribes are not included in the exception. This state of affairs changed in 2006, however, when the definition of "governmental plan" was revised. If ERISA does not apply to the Indian tribe, then the tribe's own regulations will govern the employee benefit plan.

27. *Pilot Life*, 481 U.S. at 54.

28. Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004).

29. 29 U.S.C. § 1002(1).

30. *Id.* § 1002(2)(A).

31. *Id.* § 1002(5)-(6). Under the statute, an employer is "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." *Id.* § 1002(5). An employee is "any individual employed by an employer." *Id.* § 1002(6).

32. *Id.* § 1002(32).

B. The Applicability of a General Federal Statute to an Indian Tribe

Indian tribes have long been recognized as "a separate people, with the power of regulating their internal and social relations."[33] The principle of sovereignty affords tribes independence as political communities "distinct" from federal and state governments as well as the ability to retain their "original natural rights."[34] Although the sovereignty rights of Indian tribes are well-established and historically preserved, the interplay between federal and state governments and Indian tribal governments often ends up as a tug-of-war.[35] The tradition of Indian sovereignty has been promoted and upheld through federal policy, which has encouraged tribal independence,[36] but this is not to say that Indian tribal sovereignty is without limits.

In contrast with the sovereign rights of the states, Indian tribal sovereignty is not only limited but also "subject to complete defeasance."[37] Thus, even though this retained sovereignty is necessary in order to control and preserve the tribes' internal relations, unique customs, and social order, Congress still has the inherent, plenary power to "modify or extinguish that right."[38] Tribal power has been described as "necessarily subject to the overriding authority of the United States, yet retaining necessary powers of internal self-governance. . . . [T]he 'sovereignty that the Indian tribes retain is of a unique and limited character.'"[39] Striking a balance between tribal sovereignty rights and the limitations thereof is not an easy task.

The right of sovereignty, of course, helps determine whether an Indian tribe is subject to a federal law. An Indian tribe may be subjected to a federal law if the statute is made expressly applicable to them or Congress is silent as to the applicability. On this latter point, to be discussed *infra,* some courts have

33. United States v. Wheeler, 435 U.S. 313, 322 (1978) (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886)).

34. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

35. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980) ("The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.").

36. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980) (citing the Indian Financing Act of 1974, 25 U.S.C. § 1451; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450; Indian Reorganization Act of 1934, 25 U.S.C. § 461).

37. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985).

38. *Id.*

39. Duro v. Reina, 495 U.S. 676, 685 (1990) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004)).

fashioned rules under the guise of upholding the long-standing principles of tribal sovereignty,which are to be used in determining whether a general federal statute will apply. Essentially, the courts must interpret whether the congressional silence is an expression of intent to include or exclude. Judicial interpretation is difficult when the rules and principles conflict. Many federal employment statutes, including ERISA, are silent as to whether they apply to Indian tribes, and although unanimous agreement exists among courts that Congress has the power to enforce such statutes, "[t]hey differ . . . on the central question of whether Congress intended to exercise this power and include Indian tribal employers within the coverage of these general statutes."[40]

1. The Tuscarora *Rule*

Courts have utilized the *Tuscarora* rule in determining the applicability of a general federal statute. In *Federal Power Commission v. Tuscarora Indian Nation*, the United States Supreme Court stated that "a general statute in terms applying to all persons includes Indians and their property interests."[41] Although this has been noted as likely dictum—albeit "dictum that has guided many . . . decisions"[42]—the "rule" was adopted by the Seventh and Ninth Circuits in applying ERISA to Indian tribes.[43] The *Tuscarora* rule is essentially the presumption that a federal law silent as to its applicability extends to a tribe regardless of whether such application diminishes Indian sovereignty. As discussed *infra*, this presumption has garnered stark criticism and has largely been dismissed.

2. The Coeur d'Alene *Exceptions*

The Ninth Circuit adopted three exceptions to the *Tuscarora* rule in *Donovan v. Coeur d'Alene Tribal Farm*, and these exceptions have since been accepted out-of-circuit as well.[44] If one of the following is found, the *Tuscarora* presumption may be reversed:

> (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there

40. Buffalo & Wadzinski, *supra* note 1, at 1376-77.

41. 362 U.S. 99, 116 (1960).

42. *Coeur d'Alene*, 751 F.2d at 1115.

43. *See* 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).

44. *See Smart*, 868 F.2d 929.

> is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."[45]

These exceptions are designed as a catch-all to prevent the abrogation of Indian sovereignty, a possibility that becomes far too certain under the *Tuscarora* presumption. In sum, the analysis begins with the *Tuscarora* presumption that the general federal statute will apply, and the *Coeur d'Alene* exceptions are subsequently analyzed. Each of these exceptions is discussed in turn.

First, the "aspects of tribal self-government" exception is aimed at the focal point of Indian sovereignty: the preservation of the tribe's power to govern its people. If the general law infringes on a tribe's self-government right, it will not apply. This exception is aligned with long-standing principles of Indian sovereignty, and its language is broad. But this broadness has been undercut by the narrow construction given by the court in *Coeur d'Alene*, which stated that the exception "is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes."[46] The court declined to extend the definition of "tribal self-government" to include all tribal business and commercial activity. Rather, it held that federal law already held precedence in these fields and the exception should not apply.[47] The Ninth Circuit further narrowed the definition in *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, where it ruled that this exception "applies only where the tribe's decision-making power is usurped."[48]

The "treaty rights" exception, like the *Tuscarora* rule itself, is a presumption regarding congressional intent. An Indian treaty contains guarantees of specific rights, and "it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians."[49] That is, in order for a federal statute to abrogate a specific right guaranteed to a tribe in a treaty, it

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45. *Coeur d'Alene*, 751 F.2d at 1116 (quoting United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980), *superseded by statute*, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467, *as recognized in* United States v. E.C. Invs., Inc., 77 F.3d 327, 330 (9th Cir. 1996)).

46. *Id.*

47. *Id.* ("[O]ur cases make clear that federal taxes apply to reservation activities even without a 'clear' expression of congressional intent.").

48. 939 F.2d at 685.

49. *Farris*, 624 F.2d at 893.

must be explicitly stated in the statute.[50] Indian treaties are read broadly and are "construed so as to recognize generously the full obligation of the United States to protect the interests of a dependent people."[51] If a treaty is involved, courts look to the explicit statutory language in determining whether that law would abrogate a right secured by a treaty.[52] This analysis is intuitive because congressional intent is explicit in a treaty in designating the specific rights, and it follows that express statutory language is necessary in order to defeat or override the treaty language.

Like the first exception, the treaty-rights exception has also been narrowly construed. This exception does not say that a general federal statute is inapplicable simply because a treaty exists. As the Seventh Circuit stated in *Smart v. State Farm Insurance Co.*, "More than a few federal statutes of general application have already been applied to Tribes that are signatories to treaties with the United States. The critical issue is whether application of the statute would jeopardize a right that is secured by the treaty."[53] Although treaties are read broadly, they delineate specific rights, and these same rights must be expressly threatened in order for this exception to apply. It is a matching game, and its narrow construction makes it a matter of semantics rather than of promoting the big picture—the principle of sovereignty.

Finally, the Ninth Circuit has ruled that a general federal statute will not apply if the tribe can prove "by legislative history or some other means" that Congress intended the statute not to apply to tribes.[54] Evidence must show that Congress did not intend the statute to apply to the Indian tribe. The circumstances surrounding the passage of the statute may be studied and used "to exclude tribal enterprises from the scope of its coverage."[55] This intent to exclude can be difficult to prove, however, because a statute that does not mention applicability to Indian tribes will likely not have an extensive amount of legislative history or discussion regarding such matters. Indeed, the notion may not have even been considered.

In sum, these different exceptions can each rebut the *Tuscarora* presumption. It is also important to note the backward analysis regarding

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50. This exception is opposite in its approach to congressional intent. The *Tuscarora* rule presumes that the law applies if there is no explicit language to the contrary. In contrast, the treaty-rights exception presumes that the law should not apply *unless* there is explicit language.

51. Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 712 (10th Cir. 1982).

52. *Id.*

53. 868 F.2d 929, 935 (7th Cir. 1989).

54. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *Farris*, 624 F.2d at 893).

55. *Id.* at 1118.

congressional intent. If none of the exceptions is found to apply, then congressional intent is not further scrutinized, and the law will apply. If an exception does apply, it is only then that a court will look to see whether Congress intended the statute to apply to the tribe. This makes little sense because, although Congress does have the power to override Indian sovereignty, it should make its intent clear before doing so due to the significant risk it poses to the relationship between tribes and the United States government. Further, these exceptions have been construed very narrowly and thus rarely will apply.

III. The Issue of Applying ERISA to an Indian Tribal Employer

A. The Status Before the Amendment

Because Congress did not mention whether ERISA would apply to Indian tribal employers, determination of congressional intent was left to judicial interpretation. Prior to the 2006 Pension Protection Act, the courts were faced with the responsibility of balancing the policy and purpose of ERISA, a federal statute of general applicability, with the self-government rights of Indian tribes. Predictably, this led to inconsistency among courts and circuits. Some courts applied ERISA to tribal employers under the *Tuscarora–Coeur d'Alene* analysis,[56] one court found that the ERISA "governmental plan" exception under section 1002(32) applied to an Indian employer,[57] and other courts, in evaluating other federal employment statutes, have followed the traditional principles of Indian sovereignty and not applied the laws in the absence of explicit congressional intent.[58] These latter courts required an express congressional intent of application to Indian tribes before the federal statute could be applied.[59]

56. *See* Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991); *Smart*, 868 F.2d 929.

57. Colville Confederated Tribes v. Somday, 96 F. Supp. 2d 1120, 1139 (E.D. Wash. 2000).

58. *See, e.g.*, Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 730 F. Supp. 324, 329 (E.D. Cal. 1990) (holding that the formulation of a tribal pension plan is an intramural matter and a right of self-government), *rev'd*, 939 F.2d 683 (9th Cir. 1991).

59. *See, e.g., id.*

1. Cases Applying ERISA Under the Tuscarora–Coeur d'Alene *Analysis:* Smart *and* Lumber Industry Pension Fund

Prior to the amendment two principal cases specifically addressed the question of whether ERISA applied to an employee benefit plan established and maintained by a tribal employer. The Seventh and Ninth Circuits both held that ERISA applied to the tribal-employer-offered plans under the *Tuscarora–Coeur d'Alene* rule. The first case to examine this issue was *Smart v. State Farm Insurance Co.*, in which a tribal member and plan participant of an employee benefit plan brought state-law claims in Wisconsin state court against State Farm for allegedly failing to pay his medical-expenses claim.[60] The plaintiff was a member of the Bad River Band of the Chippewa Tribe and an employee of the Chippewa Health Center, a tribally owned entity on the reservation.[61] Following removal to federal district court, the issue on appeal before the Seventh Circuit was whether the plaintiff's Wisconsin state-law claims were preempted by ERISA. The court agreed with the insurer that ERISA governed the claims.

The Seventh Circuit's inquiry began with the issue of whether Congress intended ERISA to govern benefit plans established by a tribal employer and held by Indian employees, where the place of business is located on an Indian reservation.[62] Because "[n]owhere in ERISA [was] mention made of the Act's applicability to Indian Tribe employers operating a business employing Indians on a reservation," the court had to determine whether ERISA was a statute of general applicability and, if so, whether an exception applied.[63] The court found that ERISA was a statute of general applicability and adopted the *Tuscarora* presumption that a statute of general applicability will reach everyone within federal jurisdiction, including Indian tribes and entities, unless they are explicitly excluded.[64] The court acknowledged that this presumption was not by itself entirely or necessarily determinative of the dispute. Instead, a court needed to determine whether application of ERISA would affect the right of the tribe to govern itself or whether it would extinguish rights that it held in accordance with a treaty (the *Coeur d'Alene* exceptions).[65]

60. 868 F.2d at 930-31.
61. *Id.* at 930.
62. *Id.* at 932.
63. *Id.* at 933.
64. *Id.*
65. *Id.* at 934.

As to the first *Coeur d'Alene* exception, the Seventh Circuit concluded that although ERISA would have "the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government," it "would not impermissibly upset the Tribe's self-governance in intramural matters."[66] Because any federal statute applied to an Indian tribe would have some effect on its tribal sovereignty, the court stated that the statute must actually threaten the tribe's self-government of its intramural affairs rather than "merely affect[] self-governance as broadly conceived."[67] The court applied the narrow definition from *Coeur d'Alene* where the Ninth Circuit limited such "intramural matters" to factors such as "conditions of tribal membership, inheritance rules, and domestic relations."[68]

The court held that ERISA, as applied, "does not broadly and completely define the employment relationship."[69] Rather, it "merely requires reporting and accounting standards for the protection of the employees" and in so doing protects the beneficiary while avoiding any limitation on the tribe's right to govern its intramural affairs.[70] Therefore, ERISA would not affect intramural affairs because there would be little, if any, impact on "tribal self-governance" as conceived by *Coeur d'Alene*.[71]

Although the Chippewa Tribe was a signatory to a treaty with the United States, the second *Coeur d'Alene* exception was likewise rejected. The court stated that "[s]imply because a treaty exists does not by necessity compel a conclusion that a federal statute of general applicability is not binding on an Indian Tribe."[72] Instead, tribes must demonstrate that the federal statute will "jeopardize a right that is secured by the treaty."[73] In asserting that this exception applied, the plaintiff in *Smart* relied on the Tenth Circuit's opinion in *Donovan v. Navajo Forest Products Industries*.[74] Although ERISA was not at issue in the case, the Tenth Circuit held that the Occupational Safety and Health Act (OSHA), another federal statute of general applicability, did not apply to the tribe.[75] The treaty at issue in *Navajo Forest Products Industries* explicitly provided that "no persons except those herein so authorized . . .

66. *Id.* at 935.
67. *Id.*
68. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).
69. *Smart*, 868 F.2d at 935.
70. *Id.* at 936.
71. *Id.*
72. *Id.* at 934-35.
73. *Id.* at 935.
74. 692 F.2d 709 (10th Cir. 1982).
75. *Id.* at 714.

shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."[76] If the court applied OSHA, the tribe's guaranteed right to exclude unauthorized persons from their land would have been abrogated because OSHA would have permitted inspectors access to the land. In *Smart*, the court distinguished the Chippewa treaties from the *Navajo Forest Products Industries* treaty because, rather than delineating specific rights, the Chippewa treaties "simply convey[ed] land within the exclusive sovereignty of the Tribe."[77] Therefore, the tribal plaintiff was unable to provide evidence of any specific treaty or statutory right that would have been affected if ERISA applied.

Finally, the court rejected the notion that ERISA's legislative history revealed that Congress did not intend it to apply to Indian tribes. The tribal plaintiff in *Smart* attempted to cloak all sovereigns as exempt under the "governmental plan" exception. Noting that significant differences exist between state and tribal governments and that no analogy between them should be drawn, the court stated that there was no evidence of the purported congressional intent to make ERISA inapplicable to tribes or Indian employers.[78] Therefore, the court held that ERISA standards governed the Chippewa employment-benefit plan.

The Ninth Circuit has similarly held ERISA applicable to a tribal employer. In *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, a labor-union pension fund brought an action to recover pension contributions from the Indian entity, a tribally owned-and-operated sawmill.[79] The district court held that ERISA did not apply to the tribe and dismissed the fund's claim, and the Ninth Circuit reviewed de novo whether ERISA would apply to the tribe's mill operations.[80]

Like the Seventh Circuit in *Smart*, the Ninth Circuit recognized ERISA as a statute of general applicability.[81] The court found that the mill fell within the "broad definition of employer" under ERISA and noted that "Congress did not expressly state that ERISA applies to Indian tribes. If one of the exceptions . . . applies, ERISA does not apply to the mill."[82]

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76. *Id.* at 711 (quoting Treaty Between the U.S. and the Navajo Tribe of Indians art. 2, June 1, 1868, 15 Stat. 667).

77. *Smart*, 868 F.2d at 935.

78. *Id.* at 936.

79. 939 F.2d 683, 684 (9th Cir. 1991).

80. *Id.* at 684-85.

81. *Id.* at 685.

82. *Id.*

The court rejected the district court's holding that the first *Coeur d'Alene* exception to the *Tuscarora* rule applied. Relying on previous case law, it further narrowed the self-government exception in holding that the statute must "usurp the tribe's decision-making power" for the exception to be invoked.[83] The court concluded that, even though the tribal mill faced the possibility of being liable for money damages, this alone would not infringe on the tribe's self-government right.[84] The court cited *Coeur d'Alene* for the proposition that the "control of all tribal business and commercial activity [is] not within [the] embrace of 'tribal self-government.'"[85] The Ninth Circuit further held, without analysis, that the other two exceptions were not applicable.[86]

In sum, these two circuits decided that ERISA could apply to an Indian sovereign both under the *Tuscarora* rule and the *Coeur d'Alene* exceptions, each agreeing that the application of ERISA did not interfere with the tribes' sovereignty. But the courts failed to discuss at length the tribes' activities or scope of employment under the plans or whether the tribal governments fell within the "governmental plan" exception to ERISA. These cases offered an initial guidepost in terms of applying ERISA to a sovereign tribe, but there has since been a break from this line of reasoning.

2. A Change in Reasoning—the Movement from the Flawed Tuscarora–Coeur d'Alene *Analysis*

The application of and reliance on the *Tuscarora* rule is flawed. First, the *Tuscarora* case decided a different issue, making the extracted "rule" simply dictum.[87] The case itself is thus not on point with the subsequent cases that have relied on it. This is dangerous because the rule runs counter to the foundations of Indian sovereignty and is in direct conflict with other longstanding principles upheld by the Supreme Court.

Due to the importance of tribal sovereignty, U.S. courts have adhered to comity toward Indian tribes. The *Tuscarora* rule cuts against the principle that "ambiguities in a federal statute must be resolved in favor of Indians,"[88]

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83. *Id.*

84. *Id.*

85. *Id.* (quoting Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)).

86. *Id.* at 685-86.

87. Buffalo & Wadzinski, *supra* note 1, at 1393-94.

88. San Manuel Indian Bingo & Casino v. Nat'l Labor Relations Bd., 475 F.3d 1306, 1311 (D.C. Cir. 2007).

though this concept has been favorably discussed in several contemporary, post-*Tuscarora* Supreme Court cases.[89] Simply put, if a statute's applicability is unclear as to a tribe, it should be resolved in favor of the Indian tribe and thus would likely not apply because it would affect the tribe's right of self-governance. Sovereignty is the tribe's inherent right to govern itself, and any statute applied to an Indian tribe would impair, at least to some extent, tribal sovereignty. Another long-standing principle is that "a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty."[90] This principle was paramount to the Supreme Court's reasoning in *Santa Clara Pueblo v. Martinez*[91] and was again relied on in *White Mountain Apache Tribe v. Bracker*.[92] Interestingly, under the *Tuscarora–Coeur d'Alene* reasoning, congressional intent is presumed rather than expressed.

The initial and most fatal flaw of the *Tuscarora* rule is the presumption of the applicability of these statutes when silent on the issue of Indian tribes. Even the *Coeur d'Alene* exceptions, which could arguably "save" the tribal employer from the application of the statute, cannot fix this. The exceptions have been construed too narrowly—to the point that they rarely even apply—to do much good. Perhaps in recognition of the injustice this line of reasoning imposes on Indian tribes, a current judicial trend has marked an evolution away from the *Tuscarora–Coeur d'Alene* analysis.

a) A Glimpse at the Governmental–Commercial Distinction

After *Smart*, the Seventh Circuit faced a similar issue in *Reich v. Great Lakes Indian Fish & Wildlife Commission* in interpreting whether the Fair Labor Standards Act, a federal statute of general applicability, applied against a tribal consortium whose employees were law-enforcement officers.[93] Interestingly, although this case was factually similar to *Smart*, the Seventh Circuit held that the federal statute did not apply to the tribe even though, as with the tribes in *Smart* and *Lumber Industry Pension Fund*, no treaty right was at stake.[94] The Seventh Circuit distinguished this case from the other two

89. *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985); Bryan v. Itasca County, 426 U.S. 373, 390-92 (1976); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 176 (1973).

90. *San Manuel*, 475 F.3d at 1311.

91. 436 U.S. 49, 59-60 (1978) (concluding that suits against the tribe were barred under the doctrine of sovereign immunity "[i]n the absence of any unequivocal expression of contrary legislative intent").

92. 448 U.S. 136, 143 (1980).

93. 4 F.3d 490 (7th Cir. 1993).

94. *Id.* at 493.

by discussing the governmental–commercial distinction in the nature of the activities involved, noting that the workers in *Great Lakes* were government employees (wardens and policemen),[95] while "the employees in [*Smart* and *Lumber Industry Pension Fund*] were engaged in routine activities of a commercial or service character, namely lumbering and health care, rather than of a governmental character."[96]

Although the court tried to distinguish the facts of *Smart* from those of *Great Lakes*, the court's underlying justifications actually lie in its policy considerations of Indian sovereignty. Rather than starting with the *Tuscarora* presumption and its subsequent exceptions, the Seventh Circuit focused on the idea of comity, or "treating sovereigns, including such quasi-sovereigns as states and Indian tribes, with greater respect than other litigants."[97] The court further explained that "[c]omity argues for allowing the Indians to manage their own police as they like, even though no treaty confers such prerogatives, until and unless Congress gives a stronger indication than it has here that it wants to intrude on the sovereign functions of tribal government."[98] In fact, the prerequisite of express congressional intent is at odds with the court's application of the *Tuscarora* rule in *Smart.*

Perhaps in acknowledgment of the conflicting lines of reasoning in the cases, the court stated that its dictum in *Smart*—that "federalism uniquely concerns States; there simply is no Tribe counterpart"—went too far, instead arguing in support of inherent tribal sovereignty by likening the sovereign status of tribes to that held by states.[99] This marked a clear shift from the *Tuscarora* reasoning and evidenced a desire to uphold tribal sovereignty not seen in *Smart* or *Lumber Industry Pension Fund.* Though the court's holding rested under the guise of a faulty governmental–commercial distinction, the court promoted the need for express congressional intent before the application of the statute—an important step in the movement away from *Tuscarora.*

b) A Glimpse at the Governmental-Plan Exception

Another break from the *Tuscarora–Coeur d'Alene* rule occurred in *Colville Confederated Tribes v. Somday*, a federal case from the Eastern District of

95. *Id.* at 492.
96. *Id.* at 495.
97. *Id.* at 494-95.
98. *Id.* at 495.
99. *Id.*

Washington.[100] Like the court in *Great Lakes*, this court did not tread through the *Tuscarora–Coeur d'Alene* analysis. Instead of presuming congressional intent or noting the absence of congressional intent, the court found that Congress had indeed expressed its intent in the form of the "governmental plan" exception. In this case, the Colville tribal government amended its pension plan, which was strictly set up for employees of the tribe; the tribe had the power of retained sovereignty, including the power to levy taxes.[101] The plan amendment reduced the rate of benefits the employees received.[102] The tribal government brought a claim against a member of the tribe in order to uphold the amendment, arguing that its actions did not provide the tribal member a cause of action because it was exempt from any ERISA restrictions on this point.[103]

The governmental-plan exception under section 1002(32) of ERISA defines a "governmental plan" as one "established or maintained for its employees by the Government of the United States, by the government of any State or political subdivisions thereof, or by any agency or instrumentality of any of the foregoing."[104] In order to prove it fell within the exception, the tribe produced a letter authored by the Pension Benefit Guaranty Corporation (PBGC), a corporate body that administers plan-termination rules and ERISA programs of pension insurance within the Department of Labor.[105] The letter was written in light of an earlier PBGC Letter Opinion in order to clarify the coverage status of a tribal pension plan.[106] Essentially, the earlier letter concluded that "Congress did not intend to extend ERISA coverage to pension plans maintained as a function of a tribe's internal sovereignty."[107] The PBGC distinguished this plan from other plans that involved off-reservation, non-Indian commercial activities and thus would not fall under the governmental-plan exception.[108] The court in this case gave great deference to the opinion of the PBGC because, in order to disregard the PBGC's determination and conclusion, the court would "essentially [have] to find that PBGC is flat out wrong."[109] And the court did not, accepting that the tribe was to be included

100. 96 F. Supp. 2d 1120 (E.D. Wash. 2000).
101. *Id.* at 1131.
102. *Id.* at 1125.
103. *Id.* at 1131.
104. 29 U.S.C. § 1002(32) (2006).
105. *Somday*, 96 F. Supp. 2d at 1130.
106. *Id.* at 1132.
107. *Id.*
108. *Id.* at 1133.
109. *Id.* at 1131.

under the governmental-plan exception.[110] The PBGC's inclusion of an Indian tribe under this "governmental exception" represented an important step and evidenced the government's recognition that a tribal government was to be held under this exception.

In sum, it is difficult to determine whether a federal law should be applied when no congressional guidance exists. It is even harder when Indian sovereignty, a long-standing principle, is at risk. In *Reich*, the court moved away from the *Tuscarora* rule, though it did not overrule *Smart*. The court's attempt at distinguishing the tribe's activities from those of the tribe in *Smart* stands as a movement in the right direction—the decision recognized Indian sovereignty. In *Somday*, the court took a different approach, finding the "governmental exception" to ERISA applied to the Indian tribe because the tribe was performing governmental rather than commercial functions. Cumulatively, the evolution of these cases demonstrates the importance of the ingredients of Indian sovereignty, congressional intent, and the significance of distinguishing between governmental and commercial activities of a tribal employer. Even so, uncertainty still remained because both cases relied on a faulty governmental–commercial distinction. Perhaps fortuitously, but not coincidentally, some clarity was forthcoming.

3. The Indians Speak: The National Congress of American Indians' Resolution

The uncertainty and inconsistency among courts regarding this issue not surprisingly spurred the National Congress of American Indians (NCAI) into action. In a 2003 resolution, the NCAI noted the failure of the Internal Revenue Service and Department of Labor to provide any "meaningful guidance concerning the status of . . . tribes as 'governments' which are entitled to the same regulatory exemptions as state, local, and federal governments."[111] NCAI passed the resolution in order "[t]o [s]upport [p]assage of [l]egislation by the United States Congress for the [p]urpose of [e]xpressly [c]larifying that Indian Tribal Governments are 'Governments' [u]nder the Employee Retirement Income and Security Act of 1974 ('ERISA')."[112] The NCAI's request to Congress was based on two main principles: (1) the need of Indian employers in a competitive environment to offer employee benefit plans to attract the best workers and (2) the Indians' foundational right of self-government.

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110. *Id.* at 1134-35.

111. NAT'L CONG. OF AM. INDIANS, Resolution # ABO-03-116, at 2 (2003).

112. *Id.* at 1.

First, the NCAI noted tribes' inherent sovereign rights and their responsibility to their citizens' "health, safety, and welfare," which requires the Indian tribes, through their "inherent governmental authority and powers," to "operat[e] an effective and efficient government body through employment of highly-qualified individuals."[113] Consequently, the NCAI recognized the need to offer competitive employee benefit plans in order to remain competitive with public and private employers.[114] The NCAI wanted to be included as a "government" under ERISA so it could effectively promote its enterprises while still retaining "the same privileges and regulatory exemptions as state, federal, and local employers."[115]

The NCAI asserted that if Congress did not recognize an Indian tribal government to be a "government" under the governmental-plan exception of ERISA, it "would be inconsistent with over 200 years of federal-tribal legal history and political relations, and will adversely impact the ability of Indian tribes to employee [sic] qualified personnel to operate essential governmental programs for the benefit of Indian people."[116] It is in the best interest of a tribe to regulate and provide its own requirements for the plans it offers. But current ERISA requirements may make it impossible for some tribes to do so. Tribes are thus placed in a catch-22 situation: a tribe can offer an ERISA-governed plan but must give up some of its inherent sovereign rights, or else it can fail to offer a plan, thereby decreasing the possibility of retaining the most skilled workers. Either way, the tribe as a whole will suffer.[117]

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113. *Id.*

114. *Id.* at 2 ("Indian tribal governments, in order to be able to continue to provide employee benefit plans on par with state, federal, and local governments, and to maintain a level of service for its citizens consistent with that provided by other governmental entities to their citizens, must be clearly and unambiguously recognized as 'governments' . . . through amendment . . . .").

115. *Id.*

116. *Id.*

117. Kristen E. Burge, Comment, *ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291, 1300 (noting that tribal employers may cease to offer employee benefit plans if ERISA applied because "they are either unable or unwilling to comply with ERISA's extensive requirements. As a result, tribal employers may be unable to attract and retain the workforce necessary to maintain and continue their recent economic growth—growth that has helped provide needed revenue for performing essential tribal governmental functions and services.").

B. The Amendment to the "Governmental Plan" Exception: A Day of Reckoning?

After thirty-two years, and no doubt in part a response to the NCAI's resolution, Congress finally broke its silence regarding whether ERISA would govern a tribal employee benefit or pension plan. The Pension Protection Act of 2006 significantly amended ERISA, and in pertinent part it cleared up ambiguity by adding language to the definition of the governmental-plan exception in section 1002(32). The exception states that "[t]he term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."[118] The amendment did not change any of the language, but it added the following to the definition:

> The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in . . . the Internal Revenue Code of 1986), a subdivision of an Indian tribal government . . . , 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).[119]

As defined in the Internal Revenue Code, an Indian tribal government is the "governing body of any tribe, band, community, village, or group of Indians . . . which is determined by the Secretary [of the Treasury] . . . to exercise governmental functions."[120] This will likely include any tribe, so this definition does not present an obstacle. Even though Congress added language that expressly included Indian tribal employers within the exception, it is nevertheless clear that Congress intended a much narrower exception for Indian tribes than other governments. A federal, state, or political-subdivision plan is exempt if it is established or maintained for its employees by the government. By contrast, in order for a plan established and maintained by a tribal government to be exempt, *all* of the participants' services as employees

118. 29 U.S.C. § 1002(32) (2006).

119. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 1051 (codified as amended at 29 U.S.C. § 1002(32)).

120. 26 U.S.C. § 7701(40)(A) (2006).

of the Indian entity must be *substantially* in the performance of governmental functions and *not* commercial activities. This amendment therefore prevents the preemption of ERISA in some cases, but certainly not all. Plainly, Congress still adheres to a distinction between state and tribal sovereignty that greatly values the former over the latter.

C. Cases Post-Amendment: Dobbs v. Anthem Blue Cross & Blue Shield *and* Bolssen v. Unum Life Insurance Co.

At its best, the amendment to the governmental-plan exception provides express congressional intent as to its applicability, thus eliminating the need for the flawed *Tuscarora–Coeur d'Alene* analysis. At its worst, the amendment undercuts its own purpose, perpetuates further ambiguity, and further degrades Indian sovereignty. Since the amendment in 2006, courts have revisited the issue. The amended definition was first analyzed in a Tenth Circuit case, *Dobbs v. Anthem Blue Cross & Blue Shield*.[121] Initially, the employees of an Indian tribe had brought claims against an insurer in state court.[122] The case was removed to federal court, and the court held that ERISA preempted; the claims were dismissed.[123] In contrast with the court in *Somday*, the federal district court held that a tribe was not exempt from ERISA as a (pre-amendment) "governmental plan," and it decided that ERISA applied to the employee benefit plans established by the tribes.[124] Thereafter, the case was appealed to the Tenth Circuit.

During the interim of the appeal, Congress implemented the Pension Protection Act of 2006. The Tenth Circuit therefore had the luxury of evaluating express congressional intent, and it reasoned that "Congress expanded the definition to clarify the legal ambiguity regarding the status of employee benefit plans established and maintained by tribal governments."[125] The court cited the legislative history, which stated that the bill was intended 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.'"[126]

121. 475 F.3d 1176 (10th Cir. 2007).
122. *Id.* at 1177.
123. *Id.*
124. *Id.* at 1177-78.
125. *Id.* at 1178.
126. *Id.* (quoting 150 CONG. REC. S9526, 9533 (daily ed. Sept. 22, 2004)).

The Tenth Circuit noted the outcomes both of *Lumber Industry Pension Fund* and *Smart* and concluded that although the new definition "undercuts the courts' reasoning," it would not necessarily undercut their conclusions of ERISA applicability in the two cases. It is clear that the amendment was not implemented by Congress to offer blanket immunity to tribal employers' plans. Rather, the amended provision "makes a distinction between 'essential governmental functions' and 'commercial activities,' [and] not all plans established and maintained by tribes will fall under the governmental plan exemption."[127] Because the court found this particular determination required a fact-specific analysis, it remanded the case to the district court to reassess the claim in light of the amended definition.[128] The court instructed that if the Dobbses' benefit plan fell within the new definition of "governmental plan" under section 1002(32), then ERISA would not preempt the state-law claims.[129]

Because the benefit plan at issue was maintained and established by an Indian tribal government and Dobbs assisted and managed the Tribal treasury, on remand the district court accepted his claim that his job was "a core function of sovereign government."[130] The court reasoned that "[m]anagement of the treasury is a vital element of self-governance that enables a government to perform its most essential functions."[131] But although the district court found that the benefit plan at issue met the new definition of "governmental plan" under section 1002(32), it concluded that the amended definition in the exception could not apply retroactively and that ERISA therefore applied.[132]

Even more recently, the United States District Court for the Eastern District of Wisconsin evaluated this issue in *Bolssen v. Unum Life Insurance Co.*[133] Bolssen, an Indian employee who worked at an Indian-owned casino, filed state-court claims against an insurance company, Unum, for breach of contract, breach of fiduciary duty, fraud, conversion, and state-law violations.[134] The plan administrator removed the case to federal court, alleging complete preemption under ERISA, and on motion to remand Bolssen argued that his contract under the claim was not governed by ERISA due to

127. *Id.*

128. *Id.*

129. *Id.* at 1179.

130. Dobbs v. Anthem Blue Cross & Blue Shield, No. 04-CV-02283-LTB, 2007 WL 2439310, at *2 (D. Colo. Aug. 23, 2007).

131. *Id.* (quoting THE FEDERALIST NO. 30 (Alexander Hamilton)).

132. *Id.* at *4-5.

133. 629 F. Supp. 2d 878 (E.D. Wis. 2009).

134. *Id.* at 880.

the governmental-plan exception.[135] Unum successfully argued that the fact that Bolssen was employed by the Indian tribe was not determinative of whether the plan fell under the governmental-plan exception because Bolssen's duties at the casino were commercial in nature and not essential governmental functions, as required by the exception.[136] In agreeing with Unum, the court discussed the distinction between "commercial activities" and "essential governmental functions."[137]

The court acknowledged that other courts had provided little comment or guidance regarding the 2006 amendment or in delineating the line between commercial activities and governmental functions.[138] The court then undertook Unum's suggestion of looking to analogous cases determining whether provisions in the National Labor Relations Act (NLRA) would apply to federal Indian tribes.[139] The court focused on *San Manuel Indian Bingo & Casino v. National Labor Relations Board*, in which the D.C. Circuit applied the NLRA to an Indian tribe because the tribal casino's functions were mainly commercial in scope.[140] Acknowledging that any activity of a tribal government can be classified as "governmental" due to its very nature, the D.C. Circuit viewed the term in a more "restrictive sense to distinguish between the traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope."[141] The court concluded that the "operation of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country."[142]

Under this guidance, the Wisconsin court discussed the nature of Bolssen's activities for the casino. Bolssen was employed as a custodian for the Oneida tribe, which also ran a hotel, retail outlets, and farms.[143] Bolssen's plan covered all Oneida employees engaged in the tribe's business enterprises.[144] The disability policy and coverage that Oneida offered its employees distinguished between government employees and the enterprise employees,

135. *Id.*
136. *Id.*
137. *Id.* at 881-82
138. *Id.* at 881.
139. *Id.* at 881-82.
140. 475 F.3d 1306, 1315 (D.C. Cir. 2007).
141. *Id.* at 1313.
142. *Id.* at 1315.
143. *Bolssen*, 629 F. Supp. 2d at 882.
144. *Id.*

and the court found that there were 1225 government employees compared with 1324 enterprise employees.[145] Although the court noted the possibility of some recent fluctuation in the numbers, it would not have been enough to suggest that "substantially all of the services performed by the employees covered by the plan were of essential governmental functions, as opposed to commercial activities," as required in the amendment.[146] The court therefore held that the plan was not a "governmental plan" due to the governmental–commercial distinction.

IV. Where We Are Today

A. The Current Analysis: The Governmental–Commercial Distinction

ERISA's applicability to tribes has undergone an evolution. Although the amendment to the exception in 2006 helped clear up much of the uncertainty by providing congressional intent, the analysis that followed remains flawed. The court in *Great Lakes* was correct in its recognition of a deep respect for Indian sovereignty and comity, but the court extended this only to situations where the activities are governmental in nature. This reasoning may be aligned with the purpose of the amendment, but it ignores the fact that an Indian tribe is one entity—there should be no division. The exception also leaves open the door to ambiguity and inconsistency of interpretation among courts and circuits. To date, little authority exists describing how a governmental and commercial activity should be determined under ERISA, although other cases interpreting federal statutes may provide some guidance.

Not every faction of a tribal enterprise or business affects its self-governance rights. Nor will the implementation of a federal provision silent on its applicability necessarily abrogate Indian sovereignty. There may exist some situations in which federal statutes can be harmoniously applied to a tribal government. In fact, in *San Manuel* the D.C. Circuit noted that the principle that

> a clear statement of Congressional intent is necessary before a court can construe a statute to limit tribal sovereignty [can be] reconcile[d] . . . with *Tuscarora* by recognizing that, in some cases at least, a statute of general application can constrain the actions of

145. *Id.*
146. *Id.*

> a tribal government without at the same time impairing tribal sovereignty.[147]

The D.C. Circuit recognized that there are times when tribal sovereignty will be at its strongest and times it will be at its weakest. The court stated that tribal sovereignty is strongest when it is either "explicitly established by a treaty" or when the tribal government acts solely within the boundaries of the Indian reservation concerning a matter pertaining only to tribal members.[148] These are intramural matters, and examples include "regulating the status of tribe members in relation to one another, and determining tribe membership."[149] On the other hand, tribal sovereignty is weakest when the tribe deals with matters that are not intramural in nature and instead are commercial or off the reservation.[150] The amendment reflects this distinction.

The problem with this categorization, however, is that many cases will invariably fall elsewhere in this very broad spectrum. In these circumstances, the specific facts are crucial. The Supreme Court has stated that "the 'inquiry [as to whether a general law inappropriately impairs tribal sovereignty] is not dependent on mechanical or absolute conceptions of... tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake.'"[151] The new definition of "governmental exception" follows this reasoning. When read, the exception includes an Indian government in the same fashion as a state or federal government. In this way Indian sovereignty is recognized expressly. At first glance, this puts a tribal government in the same realm as a state-government employer and promotes the inherent sovereign rights that a tribe holds.

But pursuant to the exception, ERISA can still apply to a tribal governmental plan in a way that it cannot to a state or federal governmental plan. Clearly, the sovereignty levels differ. There is no line drawn between such activities for state and federal governments. The exception is much narrower for Indian employee benefit plans because the employee's activities must be substantially governmental in nature. This will no doubt result in the widespread application of ERISA to tribes due to the expansion of tribal businesses and commercial enterprises. This requires a fact-specific inquiry

147. *See San Manuel*, 475 F.3d at 1312.

148. *Id.*

149. *Id.*

150. *Id.* at 1312-13.

151. *Id.* at 1313 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 135, 145 (1980)).

in each circumstance to see to what degree ERISA's application would threaten Indian sovereignty.

The current state of ERISA applicability to Indian tribes poses the key question of whether ERISA applies to an Indian tribal government, regardless of whether it is performing commercial or governmental functions. Although the amendment provided clarity as to Congress's intent, significant policy considerations still militate against the application of ERISA to tribes.

B. ERISA Should Not Apply to an Indian Tribe

The overarching question of whether ERISA should apply to a tribal government is best answered with a "no." Under the current law this question should be resolved after an intensive factual inquiry into the tribe's functions. This distinction is rendered irrelevant, however, by the fact that tribal commercial and governmental functions are indistinguishably intertwined.

To be fair, well-articulated arguments exist as to why ERISA should apply to an Indian tribe. First, Congress has the power to regulate interstate commerce[152] and, indeed, this purpose underlies ERISA.[153] But it is not enough simply to argue that, because Congress may have this power, it should assert it. Long-standing principles of comity between the United States and Indian tribes suggest otherwise. Another argument is that Indians, through their commercial enterprises, participate in the economic life of America and therefore should not be "free of any of the regulatory laws to which their non-Indian competitors are subject."[154] As Indian tribes are "increasingly engag[ing] in business activities in commerce with people and business organizations from outside their reservations,"[155] it may seem logical to treat them as any other employer. This includes subjecting them to labor and employment laws. Indeed, many of the activities that tribes conduct are off-reservation, and many of their employees are non-Indians. But this argument misses the mark because there is no real separation between tribal

152. U.S. CONST. art. I, § 8, cl. 3.

153. 29 U.S.C. § 1001(a) (2006) (stating that the recent growth in employee benefit plans "has been rapid and substantial[,] that the operational scope and economic impact of such plans is [sic] increasingly interstate[,] . . . that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce," and that disclosure of such plans and the requirements thereof is needed "to provide for the general welfare and the free flow of commerce").

154. Richard G. McCracken, San Manuel Indian Bingo and Casino*: Centrally Located in the Broad Perspective of Indian Law*, 21 LAB. LAW. 157, 158 (2005).

155. *Id.* at 173.

functions—the connection between a tribe's government and commercial duties comes full circle.

Indian governments must keep pace with economic development in order to sustain their tribes. Sustainment requires revenue: "Tribes establish tribal businesses in order to generate revenue that is needed for performing essential governmental functions."[156] States rely on their power to tax in order to raise revenue, and tribes also have this power.[157] "The [Supreme] Court has stated that '[the] power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government . . . [and] enables a tribal government to raise revenues for its essential services . . . .'"[158] The power to tax, however, is not the only way a tribe may sustain itself, for the Court has also held that Indians may regulate activities with nonmembers by other means, including "commercial dealings, contracts, or other arrangements."[159] Tribes look to these other ways in which to raise their revenue, including through commercial enterprises or businesses.[160] These businesses require employees:

> Indian tribal governments, limited to the extent in which they can offer competitive salaries and bonus options because of their fiduciary duties to preserve the public treasury with which they have been entrusted, must instead attract, recruit, and retain competent and qualified individuals for employment by offering employee benefit plans . . . .[161]

And although it may be that some Indian businesses are for-profit, "a majority of the profits are used to financially support tribal governments and fund governmental activities."[162]

Further, the rise in tribal businesses is due in large part to the Indian Gaming Regulatory Act (IGRA). Under this act, tribes may use the proceeds

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156. Burge, *supra* note 117, at 1315.

157. *Id.* at 1317.

158. *Id.* (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)).

159. *Id.* at 1318 (citing Montana v. United States, 450 U.S. 544, 565 (1981)).

160. *Id.* "[A]lthough tribes have the power to tax and to raise revenue to fund government programs and services, their tax base is small because reservations are sparsely populated and the residents often have a low per capita income. As a result, the income generated from taxation is insufficient to perform necessary governmental functions. . . . Thus, the revenue from tribal businesses activities is essential for running tribal government and carrying out basic governmental functions." *Id.* at 1317.

161. NAT'L CONG. OF AM. INDIANS, *supra* note 111, at 1.

162. Burge, *supra* note 117, at 1316.

they make from the tribal gaming outfits for only five purposes: "(1) 'to fund tribal government operations or programs; (2) to provide for the general welfare of the Indian tribe and its members; (3) to promote tribal economic development; (4) to donate to charitable organizations; or (5) to help fund operations of local government agencies.'"[163] Therefore, even if the tribe is conducting a "commercial activity" such as a casino, the profits obtained must be used for governmental purposes under IGRA.[164]

Even assuming that a distinction could be drawn between the commercial and governmental functions of a tribe, good authority suggests that the relationship of a tribal employer and employee vis-à-vis an employee benefit plan is itself an intramural affair. Under the first *Coeur d'Alene* exception, an act of self-government is often described as one that is an "intramural matter."[165] Though it cannot be denied that these affairs predominantly include "tribal membership, inheritance rules, and domestic relations,"[166] tribal self-governance is not limited merely to intramural matters.[167] Rather, tribes possess a wider scope of powers related to self-government. First, the district court in the *Lumber Industry Pension Fund* case, which held that ERISA should not be applied due to the *Coeur d'Alene* self-government exception, stated that "the formulation and operation of a tribal pension plan is a purely intramural matter of self-government. For the tribal self-government exception to be of any value beyond beads and trinkets, this must be the case."[168] The Supreme Court also has spoken on this issue in *Montana v. United States*, essentially noting that tribal self-governance extends to the regulation by a tribe over nonmembers.[169] Further, under the Court's analysis, "the regulation of an employment relationship . . . is an exercise of self-governance."[170]

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163. *Id.* (quoting 25 U.S.C. § 2710 (1994)).

164. *Id.*

165. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

166. *Id.*

167. Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 117 (1991).

168. Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 730 F. Supp. 324, 329 (E.D. Cal. 1990), *rev'd*, 939 F.2d 683 (9th Cir. 1991).

169. Buffalo & Wadzinski, *supra* note 1, at 1394-95 (citing Montana v. United States, 450 U.S. 544 (1981)).

170. *Id.* at 1395 (citing *Montana*, 450 U.S. at 565-66).

C. The Congressional and Case Law Aftermath

Not surprisingly, the Pension Protection Act of 2006 has not been well-received by Indian tribes. The Act, by distinguishing commercial and governmental functions, requires a tribal employer to create separate benefit plans instead of a single plan that covers all employees. This has posed such significant hardship to tribes that the Internal Revenue Service allowed an extension of the one-year compliance deadline for tribes.[171]

Because many of the requirements of ERISA include the accounting, auditing, and filing of plans, the Internal Revenue Service is responsible for issuing regulations that provide guidance on a particular subject, such as ERISA's applicability to an Indian tribe. Regulations have not been promulgated on this issue, but the Joint Committee on Taxation's (JCX) Technical Explanation of the pertinent section of the Pension Protection Act provides some possible guidance.[172] For instance, the JCX includes as an exempt governmental plan one held by teachers in tribal schools, but this exemption would not protect a plan held by an employee of "tribally owned or operated hotels, casinos, service stations, convenience stores, or marinas, as the work conducted by the tribal employees would presumably be 'in the performance of commercial activities,' regardless of whether such activities were an essential governmental function."[173] Again, this misses the mark because it

> ignore[s] the intrinsic link between commercial activities and tribal governments' ability to provide essential governmental services as part of tribal self-determination and self-governance. With this governmental-commercial distinction created by the [Pension Protection Act], Congress has ignored the fact that without tribal commercial activities, any hope for tribal governments achieving any level of self-sufficiency is seriously hindered.[174]

Significantly, some members of Congress have recognized the inherent connection between governmental and commercial activities. It has been

171. Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435, 446-47.

172. *Id.*

173. *Id.* at 447-48 (quoting JOINT COMM. ON TAXATION, JCX-38-06, TECHNICAL EXPLANATION OF H.R. 4, THE "PENSION PROTECTION ACT OF 2006," AS PASSED BY THE HOUSE ON JULY 28, 2006, AND AS CONSIDERED BY THE SENATE ON AUGUST 3, 2006 (2006) *available at* http://www.jct.gov/x-38-06.pdf).

174. *Id.* at 448.

inferred that some of these members now recognize that the current state of ERISA applicability to Indian tribes has a negative impact on Indians and may be contrary to ERISA's overall purpose of protecting the benefit plans of employees.[175] Indeed, some members have fought for legislation that would extinguish the governmental–commercial activity distinction, though no congressional hearings have been commenced as of yet.[176] For these reasons, no distinction should exist. A tribe's right to raise revenue in order to provide self-governance is a significant part of the way in which it governs. This right belongs to the tribe as a quasi-sovereign. Although the Pension Protection Plan Act was significant in its recognition that a tribal government plan may be exempt, the scope of those plans should not be restricted. The application of ERISA affects the sovereign rights of tribes, as both governmental and commercial activities preserve their right of self-governance. Though the activities of a casino employee and an employee managing the treasury may differ in nature, they both lead to the same result and have the same effect.

The amendment has also provided evidence of congressional intent on a similar issue, sovereign immunity. Indian tribes possess sovereign immunity similar to that of other sovereigns,[177] and under federal law an Indian tribe will be subjected to suit only if Congress has authorized the suit through abrogation of immunity or the tribe has waived its immunity.[178] In one recent case, the United States District Court for the Northern District of Oklahoma held that the 2006 amendment to ERISA evidenced a congressional waiver in some cases, thus abrogating tribal sovereign immunity with respect to those ERISA cases.[179] Relying on the Tenth Circuit's opinion in *Dobbs*, the court concluded that, under the amendment, "Congress has abrogated sovereign immunity of the tribes with respect to certain ERISA plans."[180] The court noted that, even though *Dobbs* did not explicitly discuss the sovereign immunity of tribes, "it recognized that as a result of the 2006 amendment of [section] 2002(32), some tribal plans are exempt from ERISA and some *are*

175. *Id.* at 447 (stating that "tribes are, or will be, required to separate benefit plans that may have previously included all governmental and commercial tribal employees. This may end up hurting the returns on such benefit plans as the number of employees and the amount pooled together will be reduced.").

176. *Id.*

177. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

178. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998).

179. Vandever v. Osage Nation Enter., Inc., No. 06-CV-380-GKF-TLW, 2009 WL 702776, at *4 (N.D. Okla. Mar. 16, 2009).

180. *Id.*

not."[181] The court therefore drew the conclusion that *Dobbs* acknowledged that tribal plans would be subject to ERISA unless they fell under the new definition of "governmental plan."[182] ERISA would abrogate tribal immunity as to the plans that did not fall under this definition. This is further evidence of injustice; the governmental–commercial distinction is a dangerous path to follow.

V. Conclusion

Since ERISA's inception, the legislative and judicial understanding of how and even whether ERISA should be applied to tribes has gradually evolved, and the result has slowly become more favorable to Indians, though not completely so. Even though the congressional intent behind ERISA is no longer silent and the flawed *Tuscarora* rule is no longer a threat, the current analysis still cuts against full respect for Indian sovereignty. In recognition of their right to govern themselves, Indian tribes should be completely exempt from ERISA. In balancing Congress's need to regulate interstate commerce through ERISA and the abrogation of Indian sovereignty, the latter must prevail because there really is no true governmental–commercial distinction in Indian activities. Forthcoming regulations and legislation may finally recognize this basic truth. Until then, Indians will need to continue their uphill battle at retaining their sovereign rights as they expand further into business enterprises in order to sustain their cultural values and presence.

181. *Id.* (citing Dobbs v. Anthem Blue Cross & Blue Shield, 475 F.3d 1176, 1178 (10th Cir. 2007)).

182. *Id.*