

MEMORANDUM

TO: Tribal Clients

FROM: Robert A. Burns, Esq.
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RE: *Prescott v. Little Six, Inc.*: ERISA's Applicability to Tribal Entities and the Waiver of Sovereign Immunity

The recent court decision in *Prescott v. Little Six, Inc.*¹ contains two significant holdings. It concludes ERISA applies to Little Six, Inc., a tribally-chartered and tribally-owned corporation, expanding the jurisdictions that have applied ERISA to tribal entities, and it concludes that some common language in employee benefit plan documents waives a tribal entity's sovereign immunity with respect to the plan. Based on these holdings, tribal entities should carefully review their employee benefit plan documents.

ERISA's Applicability

The first significant holding is that ERISA is applicable to Little Six, Inc.'s plans. Prior to *Prescott v. Little Six, Inc.*, three federal courts had addressed the applicability of ERISA to Indian tribes.² In each of the cases, the court applied ERISA to the tribe or tribal entity. Following the courts in two of the cases, the court in *Prescott v. Little Six, Inc.* concluded that ERISA was a law of general applicability that applied unless (1) the law touches exclusive rights of self-governance in purely internal matters, (2) the application of the law abrogates rights guaranteed to tribes, or (3) there is proof that Congress intended the law not apply to tribes on their reservations. The court concluded none of the exceptions applied and that ERISA applied to the plans. This holding expands the jurisdictions that have applied ERISA to tribal entities. No federal court has yet held that ERISA does not apply to tribal entities.

Waiver of Sovereign Immunity

The second significant holding is that Little Six, Inc. waived its sovereign immunity by including model language regarding ERISA in its plan documents. The regulations governing under ERISA require that a summary plan description ("SPD") be distributed to all participants in a plan covered by ERISA. The regulations further require that the SPD contain a statement of the participants' rights under ERISA. The regulations even provide model language, often referred to as the "ERISA rights section." Included in the model language are three clauses that

¹ 284 F. Supp. 2d 1224 (D. Minn. 2003).

² See *Lumber Indus. Pension Fund v. Warm Springs Forest Prod. Indus.*, 939 F.2d 683 (9th Cir. 1991); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989); *Colville Confederated Tribes v. Somday*, 96 F. Supp. 2d 1120 (E.D. Wash. 2000).

state if certain events occur, you (referring to the plan participants) “may file suit in federal court.” Three of the plans at issue in *Prescott v. Little Six, Inc.* contained an ERISA rights section with this language; the other two plans did not (those two plans were not covered by ERISA). The court found the language was a clear, unequivocal statement by which Little Six, Inc. waived its sovereign immunity with respect to the plans. In contrast, it found no waiver with respect to the two plans that did not contain this language.

Most SPDs contain an ERISA rights section with the model language. Unless a tribal entity has had its plan documents reviewed and modified, it is likely that its SPDs contain similar language.

Governmental Plan Exception

ERISA contains a number of exceptions that exempt certain plans from all or a part of ERISA. These exceptions include an exception for plans maintained by governmental entities. The courts have not agreed on whether the governmental plan exception applies to tribes.³ The opinion in *Prescott v. Little Six, Inc.*, however, does not address the governmental plans exception. It is unclear whether the issue was raised. If the court had found the governmental plan exception applied, then ERISA would not be applicable and the court may not have reached the issue of the waiver of sovereign immunity.

Conclusion

Tribal entities should review their employee benefit plan documents, particularly their SPDs, for language regarding ERISA and language that might constitute a waiver of sovereign immunity. Because ERISA may not be applicable or, if ERISA is applicable, the governmental plan exception may apply, a tribal entity should consider removing or modifying language regarding the applicability of ERISA in its plan documents. If you have a question regarding ERISA’s applicability to tribal entities or would like to discuss employee benefit issues, please contact the attorney you work with or call us at (612) 340-2825 (Tim Goodman) or (612) 340-8788 (Bob Burns).

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³ See *Smart*, 868 F.2d at 936. The Ninth Circuit in *Lumber Industry Pension Fund* did not address whether ERISA’s governmental plan exception applied to the plan at issue. 939 F.2d 683. The court in *Colville Confederated Tribes*, 96 F. Supp. 2d at 1122, applied the exception. The *Colville* case is interesting because it also indicates that the PBGC has applied the exception for governmental plans under Title IV of ERISA to tribes.