

RECENT DEVELOPMENTS

INSURANCE

PLAINTIFF NOT ENTITLED TO ATTORNEY'S FEES EVEN THOUGH INSURER VIOLATED ERISA

Schexnayder v. Hartford Life and Acc. Ins. Co., 600 F.3d 465 (5th Cir. 2010)

FACTS: Plaintiff Schexnayder worked for CF industries as a chemical operator until severe back and leg pain forced him to cease working. Schexnayder was covered by a Long Term Disability Insurance Plan (the "Plan") sponsored by CF Industries for its employees. In addition to underwriting the benefit plan, Hartford Life Group Insurance Co. had sole discretionary authority to determine eligibility for benefits under the Plan and to interpret its terms and provisions. After Schexnayder ceased working and filed for benefits under the Plan, he was entitled to receive up to twenty-four months of disability payments if Hartford determined that he was unable to perform his regular occupation. After this initial period, Schexnayder was entitled to disability benefits only if he was unable to engage in any occupation for which he was or became qualified. Concluding that Schexnayder was disabled from his regular occupation as a chemical operator, Hartford paid Schexnayder disability benefits under the Plan for his initial, twenty-four month "regular occupation" period. During this period, the Social Security Administration (the "SSA") determined that Schexnayder was totally disabled, meaning that he could not perform *any* work, and it authorized him to receive disability payments.

In November 2004, Hartford notified Schexnayder that his "regular occupation" payments would end in November 2005 and that the information it had received from his doctors did not support a finding that he remained disabled from working in any occupation. Schexnayder disputed this determination and provided additional medical documentation in an effort to show that he was totally disabled. Hartford decided to extend Schexnayder's benefits beyond November 2005 while it continued to consider his disability claim. In June 2006, Hartford informed Schexnayder that it would uphold its decision to terminate benefits because Schexnayder was functionally capable of performing a number of occupations requiring only a sedentary level of exertion.

Schexnayder then filed suit in federal court seeking review of Hartford's decision to terminate his disability benefits. The parties submitted cross motions for summary judgment. The district court granted Schexnayder's motion, concluding that Hartford abused its discretion in terminating Schexnayder's disability benefits. In addition to reinstating Schexnayder's benefits under the Plan, the court ordered Hartford to pay past long-term disability benefits retroactive to January 31, 2006 (including pre-and post-judgment interest), and Schexnayder's attorneys' fees and costs. The district court entered a final judgment and Hartford timely appealed.

HOLDING: Reversed as to attorney's fees.

REASONING: Under ERISA, "the court in its discretion may

allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). In deciding whether to award attorneys' fees to a particular party, a court should consider the *Bowen* factors: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merit of the parties' positions. See *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir.1980).

The district court held that the first *Bowen* factor weighed in favor of assessing attorneys' fees against Hartford, because it found that Hartford acted arbitrarily and capriciously when it ignored evidence of Schexnayder's disability from his treating physicians in favor of evidence that benefitted Hartford financially. The district court also awarded attorneys' fees in an effort to deter Hartford from acting in a similar manner with other members of the Plan. The court stated that a finding of bad faith requires more than simply establishing that there was a conflict of interest. Instead, a plaintiff must prove that the conflict of interest actually and improperly motivated the decision. The court found that the legal questions in this case were much closer than the district court credited, and that the district court therefore abused its discretion in assessing attorneys' fees against Hartford.

First, the court found that there was no evidence that Hartford acted in bad faith in denying Schexnayder's claim. Hartford sought to reconcile conflicting medical evidence by actively investigating Schexnayder's claim. Although the court found that Hartford's method of deciding Schexnayder's claim was unreasonable, there was substantial evidence to support its conclusion. Furthermore, there was no direct evidence that the conflict consciously motivated Hartford's decision.

Although Hartford had the ability to satisfy an award of attorneys' fees (*Bowen* factor two), and such an award may have deterred it from allowing its conflict of interest to factor into its benefits determinations in the future (*Bowen* factor three), the court found that *Bowen* factors four and five weighed in favor of Hartford. The court stated that Schexnayder had not purported to benefit anyone other than himself by this litigation or to resolve a significant legal issue. Most importantly, although Schexnayder prevailed, both parties demonstrated merit in their claims.

The court found that the legal questions in this case were much closer than the district court credited, and that the district court therefore abused its discretion in assessing attorneys' fees against Hartford.

RECENT DEVELOPMENTS

Accordingly, the court reversed the district court's determination that Schexnayder was entitled to attorneys' fees.

IF LANGUAGE IN AN INSURANCE POLICY IS SUSCEPTIBLE TO MORE THAN ONE REASONABLE INTERPRETATION, COURTS RESOLVE ANY AMBIGUITY IN FAVOR OF COVERAGE

Verhoev .v Progressive County Mut. Ins. Co., 300 S.W.3d 803 (Tex. App.—Fort Worth 2009)

FACTS: Progressive County Mutual Insurance Company ("Progressive") issued a personal auto policy to both Kimberly Verhoev ("Verhoev") and her ex husband. The policy provided liability insurance coverage and uninsured/underinsured motorist ("UM/UIM") coverage. While the policy was in force, Verhoev sustained severe injuries in a single-vehicle accident owned and driven by her ex-husband. The vehicle in the accident was at that time under the coverage of the Progressive policy. Verhoev was already divorced at the time the accident occurred. Verhoev pursued a liability claim against her ex-husband and also sought underinsured motorist benefits from Progressive. Progressive denied coverage for the underinsured motorist benefits and gave Verhoev \$20,000 as the maximum amount allowable under the liability portion of the policy.

Verhoev then sued Progressive alleging wrongful denial of her claim for the underinsured motorist benefits under Progressive's policy. Because Verhoev's alleged damages exceed the minimum liability limit of \$20,000 tendered to her, she made a claim against Progressive under the policy as a "named insured," to recover UM/UIM benefits to the full amount of the policy limits. Progressive moved for summary judgment based on the definitional exclusion in the policy stating that "uninsured motor vehicle" does not include any that is "owned by or furnished or available for the regular use of you or any family member." Progressive also sought a judicial declaration that any obligation under its liability coverage was limited to \$20,000. The trial court granted Progressive's motions. Verhoev appealed.

HOLDING: Affirmed in part and reversed and rendered in part.

REASONING: The court construes insurance policies according to the same rules of construction that apply to contracts. In light of this rule and with respect to insurance policies, the

court's primary concern is to ascertain the parties' intent as expressed in the policy's language. If an insurance contract uses unambiguous language, then it is enforced as written. If a contract is susceptible to more than one reasonable interpretation, or if its meaning is uncertain, then the court will resolve any ambiguity in favor of coverage. However, if the policy is worded so that it can be given certain or definite meaning or interpretation, then it is not ambiguous, and the court will construe it as a matter of law. The court will view policy terms in their ordinary and commonly understood meaning unless the policy shows that the parties intended a different meaning. Furthermore, no phrase, sentence, or section of the policy should be isolated from the rest and considered apart from the other provisions.

It is not the term "family member" in the policy that is in question because it is undisputed that Verhoev and her ex-husband are not family members. Rather, the dispute is on the meaning of the word "you" as used in the relevant exclusion within the policy. Progressive contends that because the policy defines "you" as "the named insured" and both Verhoev and her ex-husband are listed as "named insured," the term "you" means the ex-husband as the insured claiming bodily injury. Under Progressive's interpretation, the ex-husband's liability coverage for bodily injury to Verhoev was limited to \$20,000, the minimum limits of liability insurance required by Texas law. The court disagrees and found that the term "you" could have meant either the ex-husband or Verhoev because both of them were listed as "the named insured."

In construing a contract, the court considered how a reasonable person would have used and understood the language. Because the meaning of "you" is susceptible to two opposing reasonable interpretations under the circumstances of this case, it is ambiguous. Thus, the court must resolve the ambiguity in favor of coverage. In resolving the ambiguity in favor of coverage, the construction of the insurance policy requires that the court substitute Verhoev for the term "you" in the uninsured motorist paragraph, so that the truck driven by Verhoev's ex-husband was not owned by her, and uninsured motorist coverage for Verhoev is not excluded. This court holds that the trial court erred by granting summary judgment in Progressive's favor.

If an insurance contract uses unambiguous language, then it is enforced as written.