

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

Dakotas and Western  
Minnesota Electrical  
Industry Health &  
Welfare Fund, by Randy  
Stainbrook and Edward  
Christian, in their  
representative capacity  
as Trustees, and each of  
their successors,

Plaintiffs,

v.

First Agency, Inc. and  
Guarantee Trust Life  
Insurance Company,

Defendants

Case No. 3:15-cv-67

**ORDER GRANTING,  
IN PART,  
MOTION FOR  
ATTORNEY'S FEES  
AND COSTS**

The court previously determined that, under the coordination of benefits provision in the ERISA plan administered by the plaintiffs and federal common law, primary responsibility for payment of medical expenses in this case falls on the defendants. The plaintiffs' motion for summary judgment was granted, and the defendants' motion was denied. The plaintiffs now seek an award of \$14,928.75 for legal services, and \$55.00 for service of process fees. The defendants oppose the motion.

It is within the district court's discretion to award attorney's fees under ERISA.<sup>1</sup> When determining whether to award attorney's fees, the Eighth Circuit has set forth a nonexhaustive list of factors to consider, including:

(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 could 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 significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.<sup>2</sup>

The factors favor an award of attorney's fees in this case. As explained in the court's summary judgment order, Defendant First Agency sold and/or administered a one-year non-renewable term blanket accident policy covering students for accidental injuries sustained while participating in athletic activities. The incident in question involves medical expenses related to a student's injury during an

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<sup>1</sup> Fase v. Seafarers Welfare and Pension Plan, 589 F2d 112, 116 (2d Cir.1978).

<sup>2</sup> Lawrence v. Westerhaus, 749 F2d 494, 496 (8<sup>th</sup> Cir. 1984) (quoting Iron Workers Local No. 272 v. Bowen, 624 F2d 1255, 1266 (5<sup>th</sup> Cir. 1980)).

athletic event. The court found that the order of benefit determination rules provided in the Dakotas Health Plan unambiguously state that First Agency has the primary responsibility for covering the medical expenses relating to the injury at issue. The court further found that First Agency's argument that it is an "excess policy" is without merit.

While First Agency's conduct may not rise to the level of "bad faith," First Agency was a party to an action in the Sixth Circuit in which the court determined that an ERISA plan's coordination of benefits provision controls over a private insurer's provisions. Although that decision is not controlling in this Circuit, First Agency was on notice that its arguments were not persuasive in at least one appellate court. In light of the unambiguous policy language and case law, First Agency faced an uphill battle.

As to the other factors, there may be some level of deterrence in denying similar claims in the future by an award of attorney fees. Moreover, the ability of First Agency to satisfy an award of attorney's fees is not a concern given the amount of fees at issue and the size of the company.

Finding the factors weigh in favor of an award of attorneys' fees, the court turns to the issue of reasonableness. The breakdown of legal services submitted by the defendants is as follows:

- a. Paralegal: .25 hours @ \$150.00/hour = \$37.50

- b. Partner Amanda Cefalu: 1.5 hours @ \$285.00/hour = \$427.50
- c. Partner Christopher Goodman: 2 hours @ \$275.00/hour = \$550.00
- d. Associate Bryan J. Morben: 74.25 hours @ \$165.00/hour = \$13,913.75

The hourly rate for the attorneys and paralegal is not unreasonable. However, the amount of time spent briefing legal issues that had been circulating in other cases is excessive. Associate attorney Bryan Morben spent in excess of 25 hours on the plaintiffs' brief in opposition to the summary judgment motion, excluding approximately 10 hours of time spent on a sur-reply brief. In addition, a significant number of additional hours were spent drafting plaintiff's own motion for summary judgment on issues that could have been and should have been addressed in the opposition brief. Finally, Morben billed another 7.5 hours for researching and drafting the pending motions on attorney fees.

Upon a careful review of the facts and circumstances of this case, there was an unreasonable amount of time billed by Morben to familiarize himself with the issues, to review case law, and to draft briefs. The court finds that reducing the hours billed by Morben by 1/3 to 49 hours is appropriate. The plaintiffs' motions for attorney's fees is **GRANTED in PART and DENIED in PART**. The court awards fees for legal services in the amount of **\$9,100.00**. The court awards costs for the service of process fees in the amount of **\$55.00**.

**IT IS SO ORDERED.**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated this 15th day of July, 2016.

/s/ Ralph R. Erickson

Ralph R. Erickson, Chief Judge  
United States District Court