ABA Defending Liberty Pursuing Justice

TortSource

Vol. 11, No. 4

A Publication of the Tort Trial & Insurance Practice Section

Summer 2009

Life Insurance Law

Matthew J. Evans

Mention ERISA and most lawyers cringe. It is an area of the law fraught with potential minefields. In this issue of *TortSource*, with feature articles provided by the Life Insurance Law Committee, we offer information to help practitioners navigate some of ERISA's problematic areas.

Explaining the five-factor test employed by most courts, Elizabeth Bondurant examines the lodestar factors and who prevails in an ERISA action on the issue of attorneys fees. Aaron Pohlmann addresses the split among the federal circuits regarding the exhaustion of administrative remedies and the ability to initiate legal action for an ERISA violation. He focuses on distinctions between the circuits when an allegation of fiduciary duty is made to nullify the administrative remedy exhaustion requirement. Rounding out our themed articles, Jason Walters provokes thought with a discussion of alternative fee arrangements. Writing from experience, Jason gives several examples and considerations to be employed when a lawyer creates an alternative fee arrangement not only to assist existing clients, but to expand a client base.

In other articles, Steve Marcum offers excellent tips for small to medium-sized law firms about using technology at trial. Emily Gifford reviews *Financial Institution Bonds, Third Edition*, the latest expert book developed by the TIPS Fidelity and Surety Law Committee. Hervey Levin's always-informative Legislative Update revisits the debate over the federal regulation of insurance. Michael Carrigan recaps events from the TIPS spring meeting in Colorado Springs, and Karina Juarez's "My San Diego" introduces us to Coronado Island, site of the TIPS fall meeting in October. Saving the best for last, "When I Was a New Lawyer" profiles a man beloved by many TIPS members whose life is an open book with few unexpressed thoughts: our very own John Tarpley. ❖

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The Economic Crisis Presents an Opportunity for Fixed-Fee Agreements

Jason A. Walters

The current economic crisis has intensified the pressure on companies to reduce legal spending. According to a recent survey of general counsel by Altman Weil, 75 percent of respondents reported facing budget cuts averaging 11.5 percent in 2009. While less than 10 percent frequently used alternative fee agreements (AFAs), more than half planned to increase their use of AFAs in 2009 to reduce legal spending. In addition, 81 percent ranked outside counsel fees and the lack of predictability as their greatest concerns. Anecdotal evidence suggests these pressures are even more acute in the life insurance industry. One solution to these challenges is for companies to partner with outside counsel to develop AFAs that will reduce total legal spending, achieve predictability, and generate additional value, while also fairly compensating outside counsel.

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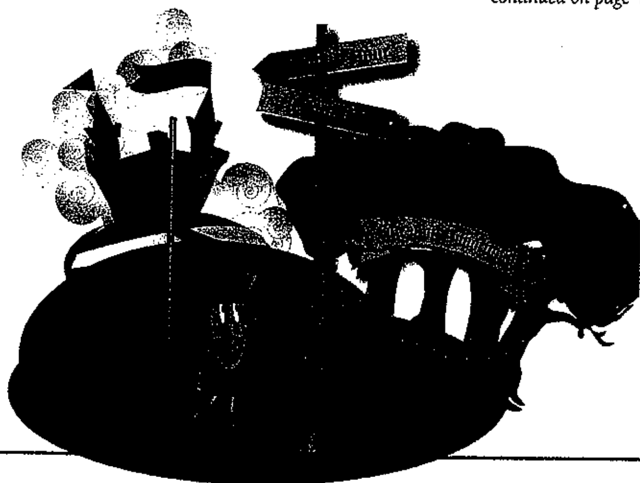

Illustration by Andrew O. Alcala

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The winner here has a chance to go to the Fee Award Round!

Attorney Fees under ERISA

Elizabeth J. Bondurant

The ability to recover attorney fees in any case affects the dynamics of litigation. In cases under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1462 (2004), parties may recover their attorney fees under ERISA's fee-shifting provision, which provides that "[i]n any action under this subchapter . . . by a participant, beneficiary, or fiduciary, 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).

The Prevailing Party

Although not explicitly set forth in the statute, usually only the "prevailing" party may recover attorney fees. Sometimes, however, the party that prevails is not obvious. For example, which party prevails when a settlement is reached? How about when the court remands the case to the plan or insurer for further consideration? In short, the federal circuit courts are divided. Some circuits hold that a party must obtain a judg-

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Perhaps the most prevalent, and arguably the most desirable, AFA structure is the fixed-fee agreement. Its principal benefits are obvious. It guarantees the client predictability and foreseeability of future fees, while also aligning the interests of the attorney and client by incentivizing efficiency and early resolution. But these benefits do not come without risk. Clients often worry that the attorney will cut corners to improve his or her profit, thus lowering the quality of representation. The client may also fear paying more under a fixed-fee agreement than it would have paid by the hour. Outside counsel, on the other hand, primarily worry about underpricing the agreement and bogging down in litigation that requires more resources than anticipated. As a result, the same attorneys who curse the billable hour often cling to it when presented with an opportunity to develop an AFA. It is no surprise therefore that the billable hour remains the most widely used fee structure by a significant margin.

Steps for Structuring a Fixed-Fee Agreement

Many reservations about fixed-fee agreements can be removed by studying the process of developing such an agreement. All fixed-fee agreements contain two essential components—scope and price. While these two considerations define the structure of the agreement, the process must first begin by identifying the needs and objectives of the client. This is without question the most important step in structuring an AFA. If the agreement does not "fit" the client, it has no chance of success. Sample considerations include: Is the client seeking to reduce the number of its outside counsel? Is the client's litigation redundant and predictable or varied and difficult to forecast? Does the client have a need for consultation outside of pending litigation? Does the client aggressively litigate matters or prefer early resolution? These are merely examples of the many threshold issues that clients and outside counsel must consider before structuring an agreement.

Defining the Scope

The next step is to determine the scope. While scope is largely driven by the client's needs, attorneys are often surprised—and sometimes even bewildered—by the number of options. Once again, some structure helps in navigating the alternatives. One initial question is whether the agreement will cover an individual matter or a group of matters. In class action litigation, for example, the agreement will likely apply to only one matter. Litigation that is more redundant, on the other hand, such as policyholder disputes, lends itself to group treatment. If the agreement covers a group of matters, the next step is to define the group. Some options include grouping the matters by the (1) type of case, (2) geographic region, (3) number of cases, (4) amount in controversy, or (5) some combination of the above. Once again, the needs and objectives of the client help narrow these alternatives.

After the parties have identified the matter(s) that will be covered by the agreement, they should define the scope of the work that will be performed on each matter. For example, does the agreement cover trial and appeals? What about prelitigation consulting? Government investigations? Local counsel fees? To reduce the potential for future disputes, the agreement should specifically delineate what services it includes and, just as importantly, what it does not.

Setting the Fee

Once scope has been determined, the parties can proceed to setting an appropriate fee. This will usually involve setting a flat fee for each matter or one fee for all matters. Alternatively, the parties may decide to use the "modular" approach, which involves breaking the matter into tasks and setting a flat fee for each task. Whichever method is chosen, the parties may elect to include a "success fee" to further incentivize favorable results. If a success fee is included, the parties should clearly define the circumstances under which such a fee becomes payable, to reduce the risk of a future dispute.

After determining the basis for pricing the agreement, the parties can finally arrive at a fee for the services to be provided. Outside counsel usually performs the initial calculation of the fee, which will then be subject to negotiation with the client. Attorneys often find themselves seized with indecision at this stage because accurately predicting how many hours of work will be required to complete a broad array of matters is a seemingly impossible task. But the concern of grossly underpricing an agreement can be alleviated by taking a few concrete steps. First, analyze historical billing data and compare average fees incurred on similar matters. Next, consider how the case would be staffed. If, for example, the work could be performed by two partners, three associates, and a paralegal, estimate the amount of revenue the firm would need to collect for those people. Third, depending on the nature of the engagement, itemize the tasks that would typically be performed on each matter and estimate a price for each task in order to come up with a total price. This process should create a reasonable range for the proposed fee. If the parties are still uncomfortable with the fee, they can agree that an adjustment will be made if the actual work performed is less than or exceeds the amount anticipated by a predefined margin.

Although companies and their counsel have traditionally shied away from fixed-fee agreements due to the uncertainty and perceived risk associated with the departure from the billable hour, the current economic crisis has redefined how many view risk. When a client's stock price has lost more than half its value, the suspicion that outside counsel may cut corners is quickly outweighed by the need to ensure compliance with mandatory budget cuts. Similarly, an attorney's fear of a marginal profit reduction tends to wilt when faced with issues of excess capacity. Increasingly, these external factors are convincing those who have flirted with fixed-fee agreements in the past to take the plunge. These parties often discover after reaching the altar that the legitimate but manageable concerns that previously held them back actually amounted to little more than a case of cold feet. And while there will certainly be bumps along the way, it is difficult to imagine any client who has successfully crossed the fixed-fee threshold electing to go back to the billable hour. ❖

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