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TOPIC: ERISA Fiduciary Decisions May Be Reversed if Demonstrably Unfair

CITE: *Tonguette v. Sun Life & Health Insurance Company*, 2014 WL 7243337 (6th Cir., Dec. 22, 2014).

SUMMARY: A participant in an employer-provided group life insurance plan died shortly after termination of employment. The participant died *after* the initial period provided under the plan for conversion to individual coverage—had the participant been given notice of his conversion right. However, the participant *was* still alive during the "extended" conversion period—a period that applied only if the employee was not given notice of his right to convert the group term to individual coverage.

Based on ambiguous policy language, the plan administrator, which was also the insurer, interpreted the language of the plan as denying coverage. The participant's widow sued the insurer. The Federal District Court for the Southern District of Ohio granted summary judgment in favor of the insurer. The widow appealed to the 6th Circuit Court of Appeals which reversed the lower court's dismissal, acknowledging that the applicable standard for reviewing the interpretation of the ERISA fiduciary was high, but still allowing the widow's lawsuit to go forward based on the court's view that the policy language demonstrably favored the widow's interpretation.

RELEVANCE: This case illustrates how courts sometimes strain to find an interpretation that avoids what judges perceive as an unjust forfeiture by plan participants. Though it appears that in this case, the plan administrator has, at least theoretically, the authority to interpret ambiguous plan provisions, the courts may limit this authority when it would lead to an unfair result—especially when the result is due to lack of notice given to the participant by the employer or the plan administrator and where, as here, the plan administrator is the insurer who would otherwise be liable to make payment under the contract.

Life insurance professionals may be called on by family members to help collect life insurance proceeds from an employee benefit plan when an insured dies. If there is any doubt regarding whether the plan fiduciary is treating the family fairly, the professional should consider advising the survivors to seek the advice of an ERISA attorney.

FACTS: Del Tonguette worked for LoBue Associates from August to October, 2009. LoBue sponsored an ERISA benefits plan which included a group life insurance policy insured and administered by Sun Life & Health Insurance Company. Upon termination of a covered participant's employment, the plan permitted terminated employees to convert their group life policy to an individual policy. The conversion right remained open for 31 days from termination—*unless* both the employer and Sun Life failed to give written notice to the terminating employee of the conversion right. In such case, the conversion right would remain open for an additional 60 days, i.e. a total of 91 days.

Tonguette was never given written notice of his conversion right. As noted above, he died less than 91 days after his employment ended. After his death, Tonguette's wife, Dianne requested payment under the group policy based on the following policy language:

> **Death within the Conversion Period**
>
> Claim may be made for a death benefit if you die during the 31 day period during which your insurance may be converted to an individual policy. (See section "Conversion Privilege".)

Sun Life refused payment, arguing that "the 31 day period" had lapsed. Dianne sued in the Federal District Court for the Southern District of Ohio. Sun Life filed a motion for summary judgment. The district court granted the motion for summary judgment, dismissing the lawsuit. Dianne appealed to the 6th Circuit Court of Appeals, where the case was heard by a three-judge panel.

The parties agreed that the meaning of the quoted plan language is straightforward where the employee is given written notice of his conversion right and, therefore, has a 31 day conversion period. It is less clear under the plan where written notice was *not* given, resulting in a 91 day conversion period.

Sun Life argued that the language should be read to mean "the *initial* 31 day period during with your insurance may be converted" regardless of the duration of the conversion right. Dianne argued that it should be read as if it said "the …period during with your insurance may be converted"—effectively deleting the words "31 days."

RESULT: In an unpublished opinion (which is not binding precedent), the majority of the 6th Circuit panel reversed the decision of the District Court, reinstating Dianne's lawsuit. One judge on the panel disagreed, and wrote a dissenting opinion.

All of the judges agreed that Sun Life, as plan administrator, had the authority to interpret the plan and that, when it is interpreting an ambiguous term, Sun Life's interpretation should be overturned only if it was "arbitrary and capricious." Thus, if the plan were found to be ambiguous, Sun Life had the discretion to choose any reasonable interpretation.

But, the majority argued, "there is a difference between vague terms—whose vagueness might give rise to discretion—and poorly drafted terms that, after a careful reading, demonstrably favor one interpretation over another." Here, the majority concluded that, the provision was poorly drafted, but that the heading ("Death within the Conversion Period") and other plan language made it clear that the plan provided for a benefit for

death within the *entire* conversion period, even if it is longer than 31 days. The majority stated:

> Here, a careful reading of the plan's terms reveals that [Dianne's] interpretation is demonstrably better than Sun Life's. As a plan fiduciary, Sun Life was obligated to read the plan carefully; and it lacked discretion to reject [Dianne's] interpretation of the disputed language here. Its interpretation therefore was arbitrary and capricious.

The dissenting opinion reiterates that Sun Life as the plan administrator had interpretive authority over the plan and notes that the majority's interpretation renders "the 31 day" language completely meaningless.

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