

VERDICTS & SETTLEMENTS

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Re: Hernandez, et al. v. The Lafayette Insurance Company

Forest County Potawatomi Community Tribal Court Case No. 01-CV-21

Case Description: Kelly Hernandez married John C. Alloway on April 17, 1992. Although separated, they were still legally married until his death on January 6, 1998. In September, 1996, John Alloway was appointed a gaming commissioner by the executive council of the Forest County Potawatomi Community. On January 27, 1997, John Alloway applied for group term life insurance through the Tribe with defendant Lafayette Life Insurance Company. John Alloway's application was subsequently accepted and he thus became a member of the group term life insurance plan. On October 25, 1997, John Alloway and five other gaming commissioners were suspended without pay pending an investigation into alleged wrongdoing. Although suspended, the Tribe maintained benefits for Mr. Alloway and the others by paying, among other things, their health and life insurance premiums. John Alloway died on January 6, 1998, while still suspended. On October 8, 1998, the Tribe's executive council reinstated Mr. Alloway and the other gaming commissioners with full back pay.

Subsequent to Mr. Alloway's death, a claim for the \$135,000 death benefit under the group policy was filed with defendant Lafayette Life Insurance Company. Defendant denied the claim on the grounds the policy did not provide coverage because (1) "the insured was no longer eligible for insurance under the contract;" and (2) "the certificate holder was no longer in active employment due to a labor dispute, including but not limited to any strike, work slow down or lock out."

Plaintiff, Kelly Hernandez, filed an action in Waupaca County Circuit Court on December 14, 2000, alleging wrongful bad faith denial of insurance benefits seeking the policy benefit of \$135,000, plus interest and punitive damages. On January 18, 2001, defendant, Lafayette Life Insurance Company removed the action to the United States District Court, Eastern District of Wisconsin before the Honorable Thomas J. Curran. On April 30, 2001, Judge Curran dismissed the action on the grounds that it should be filed in trial court. On July 11, 2001, plaintiff filed an action in Forest County Potawatomi Community Tribal Court. Plaintiff and defendant filed motions for partial summary judgment on coverage. For the first time in the briefs submitted on that issue, defendant Lafayette Life Insurance Company raised the issue of ERISA preemption. On coverage, defendant argued its denial was appropriate because Mr. Alloway was not in active employment – he was not working at least 32 hours a week at the time of his death. Alternatively, defendant argued that Mr. Alloway's suspension constituted a labor dispute which pursuant to the policy terminated coverage.

In a Decision and Order the Tribal Court rejected defendant's arguments. Judge White-Fish of the Tribal Court held that defendant waived ERISA preemption by not raising it as an affirmative defense in its answers in either the federal or tribal court actions. He

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also found the policy was ambiguous and noted that “if in fact the defendant believed John Alloway was no longer eligible for group term life insurance because of his suspension, then there should have been a mechanism in place by which Mr. Alloway and the defendant were notified of his suspension and loss of eligibility, thus triggering an opportunity to exercise conversion rights and privileges.” With respect to defendant’s argument that Mr. Alloway was not in active employment due to a labor dispute, Judge White-Fish held John Alloway’s suspension was not as a result of a labor dispute – “It did not involve a union or non-union situation and represented nothing more than the exercise of management and oversight by the general council as that right is afforded by the Tribal Constitution. The suspension of John Alloway . . . cannot be characterized as a labor dispute as that term is commonly used and accepted within the context of employer/employee relations.” The Tribal Court thus found coverage and set a hearing on the issue of plaintiff’s entitlement to interest and bad faith damages. The case was settled prior to hearing for \$200,000.

Plaintiff’s Counsel: John C. Cabaniss, Esq.

Plaintiff’s Expert: William P. Croke, Esq.

Defendant’s Counsel: James E. Culhane, Esq., Davis & Kuelthau, S.C.

Defendant’s Expert: Robert Elliott, Esq.