

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

K-VA-T FOOD STORES, INC.,)	
)	
Plaintiff,)	Case No. 1:11CV00037
)	
v.)	OPINION AND ORDER
)	
MARK D. HUTCHINS,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Robert S. Reverski, Jr., Midkiff, Muncie, & Ross, P.C., Richmond, Virginia, for Plaintiff. Carl E. McAfee and Joseph R. Carico, Carl E. McAfee, P.C., Norton, Virginia, for Defendant.

In this ERISA case, in which the court has held that the administrator of an employee health care plan is entitled to reimbursement from the proceeds of an employee’s automobile accident settlement, both the administrator and the employee have moved for attorneys’ fees. For the reasons stated, I will grant the administrator’s motion and deny the employee’s motion.

I

The following facts are shown by the record.

K-VA-T Food Stores, Inc. (“K-VA-T”) operates a chain of grocery stores, primarily under the name “Food City.” Mark D. Hutchins was hired at the Big Stone Gap Food City store on February 13, 2010. K-VA-T sponsors, administers,

and is a fiduciary of an employee welfare benefits plan, the “K-VA-T Food Stores, Inc. Tax Savings Plan” (the “Plan”). The Plan is a self-funded employee healthcare plan organized under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C.A. §§ 1001-1500.

The Plan contains a Third Party Recovery Provision which, as described by the Summary Plan Description (“SPD”), states:

The Covered Person may incur medical or dental charges due to injuries which may be caused by the act or omission of a Third Party or a Third Party may be responsible for payment. In such circumstances, the Covered Person may have a claim against that Third Party, or insurer, for payment of the medical or dental charges. Accepting benefits under this Plan for those incurred medical or dental expenses automatically assigns to the Plan any rights the Covered Person may have to Recover payments from any Third Party or insurer [T]he Plan has a lien on any amount Recovered by the Covered Person This lien shall remain in effect until the Plan is repaid in full.

...

The Covered Person

...

(2) must repay to the Plan the benefits paid on his or her behalf out of the Recovery made from the Third Party or insurer.

(Meadows Decl. Ex. 1 at 19.) Under a paragraph entitled “Amount subject to Subrogation or Refund,” the SPD further explains:

The Covered Person agrees to recognize the Plan’s right to Subrogation and reimbursement. These rights provide the Plan with a 100%, first dollar priority over any and all Recoveries and funds paid by a Third Party to a Covered Person relative to the Injury or

Sickness, including a priority over any claim for . . . attorney fees, or other costs and expenses.

The Plan reserves the right to be reimbursed for its court costs and attorneys' fees if the Plan needs to file suit in order to Recover payment for medical or dental expenses from the Covered Person.

(Id. (emphasis in original).)

Hutchins enrolled for coverage under the Plan after achieving 90 days of employment with K-VA-T. In June of 2010, Hutchins was seriously injured in an automobile accident. K-VA-T eventually paid medical bills on Hutchins' behalf totaling \$191,948.75.

Represented by current counsel, Hutchins filed a lawsuit in state court against Jeffrey A. Stapleton, the individual who negligently caused the automobile accident. When K-VA-T learned of the action against Stapleton, it requested that Hutchins recognize its rights to subrogation and reimbursement, keep it informed of all developments, and, should the claims be settled, retain funds sufficient to reimburse K-VA-T. Hutchins responded by letter that he had instructed his attorney, "not [to] withhold or pay any monies to any party who may have paid any of my medical bills as a result of my employment with Food City Stores under any and all insurance policies." (*Id.* Ex. 4.) Hutchins also said that he had instructed his attorney "not [to] respond to or answer any inquiries as to the amount of any settlement and/or judgment, and you may feel free to file whatever you deem appropriate." (*Id.*)

In view of this response, K-VA-T filed the present action for a declaratory judgment. Thereafter, Hutchins settled his claim with Stapleton in the amount of \$850,000. Because Hutchins refused to recognize K-VA-T's claim or respond to its inquiries, K-VA-T intervened in the state court suit and obtained an order requiring that its lien would be held pending the resolution of the declaratory action in this court. The order required Hutchins to notify all potential lien holders of the settlement so that they would have an opportunity to appear and assert their claims. Despite knowledge that there was a lien holder other than K-VA-T, Hutchins requested entry of an order for the release to his counsel of the settlement funds remaining after K-VA-T's lien. (Pl.'s Mem. in Opp'n to Def.'s Mot. for Att'ys' Fees Ex. 1.) The funds were released to Hutchins' counsel and the second lien holder then informed K-VA-T that it would seek recovery of its lien out of the \$191,948.75 being held by the court. K-VA-T then joined the second lien holder's motion to show cause against Hutchins and his counsel. The state court granted the motion and ordered that Hutchins and his counsel refund to the court the amount due the second lien holder.

In this case, K-VA-T and Hutchins conducted discovery, including at least two depositions. K-VA-T thereafter moved for summary judgment, which Hutchins' opposed. The issues were submitted on the briefs and I granted K-VA-T summary judgment. *K-VA-T Food Stores, Inc. v. Hutchins*, No. 1:11CV00037,

2012 WL 169768 (W.D. Va. Jan. 20, 2012). Following judgment, both Hutchins and K-VA-T filed motions for attorneys' fees, which have been fully briefed and are ripe for determination.

II

A

Hutchins' Motion for Attorney's Fees seeks payment based on counsel's contingent fee arrangement of 30 percent of the recovery against Stapleton, the tortfeasor. Hutchins in effect requests that the reimbursement ordered in favor of K-VA-T be reduced by 30 percent, to reflect that contingent fee.

Hutchins argues that he has the right to attorneys' fees under the "common fund doctrine," which is based upon the equitable principle that "when one who, while establishing his own claim, also establishes the means by which others may collect their claims, a chancellor in equity may award counsel fees to the trail blazer out of the property made available for the satisfaction of all claims." *United States v. Tobias*, 935 F.2d 666, 668 (4th Cir. 1991) (quoting *Gibbs v. Blackwelder*, 346 F.2d 943, 945 (4th Cir. 1965)).

The Plan language here clearly allows K-VA-T to obtain full reimbursement of the medical expenses paid, regardless of any fee claimed by Hutchins' attorneys. *See United McGill Corp. v. Stinnett*, 154 F.3d 168, 173 (4th Cir. 1998) (holding

that unambiguous plan language requiring full reimbursement without deduction for attorneys' fees was controlling). Nevertheless, even assuming that the court may consider equitable principles in determining the issue, *see US Airways, Inc. v. McCutchen*, 663 F.3d 671, 677-79 (3d Cir. 2011), those principles do not support any deduction for the benefit of Hutchins' attorneys.

This is not a case like *McCutchen*, in which allowing full recovery by the plan would have led to the starkly inequitable result of the injured beneficiary not recovering anything on account of his injuries, and in fact being further indebted to his own attorneys for legal fees, "putting him in a worse position than if he had not pursued a third-party recovery at all." *Id.* at 674. Here, Hutchins recovered \$850,000 and K-VA-T seeks recovery of only \$191,948.75. Even after full reimbursement, Hutchins retains a significant award.¹

More importantly, under the facts of this case it would be inequitable to award Hutchins' attorneys' fees. Hutchins fought K-VA-T's subrogation rights every step of the way without any apparent basis for such resistance. Hutchins refused to communicate with K-VA-T and instructed his counsel not to do so. Hutchins refused to recognize K-VA-T's lien and the amount was only held by order of the state court after K-VA-T acted to intervene. Hutchins also improperly

¹ After deducting K-VA-T's lien from the settlement of \$850,000, and reducing Hutchins' net recovery by an additional 30 percent for his attorneys, there will still be left \$460,635.88.

sought and obtained release of the remaining settlement funds despite knowledge of the existence of a second lien holder and without notice to that lien holder. K-VA-T was then forced to take additional action to protect its interests by joining in the motion to show cause on that issue in state court. In all respects, Hutchins has acted to thwart K-VA-T's legitimate right to reimbursement. His conduct has been in direct contravention of the equitable principles underlying both the common fund doctrine and unjust enrichment. *See Tobias*, 935 F.2d at 668 (“A party may not recover and try to monopolize a fund, but then, failing in the attempt, declare it a ‘common fund’ and obtain his expenses from those whose rightful share of the fund he sought to appropriate.”).

B

K-VA-T has also moved for attorneys' fees. The Plan clearly provides that it has a right to be reimbursed for its court costs and attorneys' fees for efforts to recover benefit payments. Moreover, even without such plain language in the Plan, it is within the court's discretion to award attorneys' fees and costs to a prevailing party in ERISA litigation. *See* 29 U.S.C.A. § 1132(g)(1) (West 2009); *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997). There is no presumption in favor of attorneys' fees for prevailing parties. *Carolina Care Plan Inc. v. McKenzie*, 467 F.3d 383, 390 (4th Cir. 2006), *overruled on other grounds by Carden v. Aetna Life Ins. Co.*, 559 F.3d 256 (4th Cir. 2009).

In order to determine whether a prevailing party should receive attorneys' fees, this court must measure: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against opposing parties would deter other persons acting under similar circumstances; (4) whether the party 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 merits of the parties' positions. *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993). None of these factors are dispositive. *Id.* They simply act as general guidelines for the fee analysis. *Id.*

Hutchins' degree of culpability, as discussed above, certainly weighs in favor of granting K-VA-T attorneys' fees. Moreover, Hutchins can easily satisfy an award of attorneys' fees out of his remaining settlement amount. Awarding attorneys' fees will act as a deterrent by encouraging beneficiaries not to resist the subrogation rights of ERISA plans without a reasonable basis.² Finally, Hutchins' opposition to K-VA-T's claim for reimbursement was entirely without merit.

² Hutchins argues that he did not act in bad faith in opposing reimbursement and that, in fact, K-VA-T acted in bad faith for initially refusing to pay his medical bills. Hutchins neglects to note that K-VA-T refused to pay his medical bills because he refused to sign documents agreeing to K-VA-T's right to reimbursement. The Plan specifically provides that on such a refusal, K-VA-T does not have to pay benefits. In general, Hutchins' arguments that he did not act in bad faith essentially rehash arguments he raised in opposition to the Motion for Summary Judgment. I addressed those

Hutchins also argues that the amount of fees and expenses requested by K-VA-T is unreasonable. In response, K-VA-T has filed an itemized statement of counsel's services and expenses. Hutchins has not responded with any specific objections to any particular item. Rather, Hutchins' simply argues that the proposed fee is too high.

“The starting point for establishing the proper amount of [a fee] award is [the so-called lodestar product,] the number of hours reasonably expended, multiplied by a reasonable hourly rate.” *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994); *see Christian v. Dupont-Waynesboro Health Care Coverage Plan*, 12 F. Supp. 2d 535, 538 (W.D. Va. 1998) (applying the lodestar method to determine attorneys' fees in ERISA litigation).

That does not end the inquiry, however. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Other considerations, such as those identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), may require that the award is adjusted from the lodestar figure.³ *Rum Creek*, 31 F.3d at 175. “The most

arguments in my opinion granting K-VA-T summary judgment and found that they were without merit. He has not shown otherwise in these papers.

³ The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and the ability of the attorneys; (10) the

critical [of those] factor[s] . . . is the degree of success obtained.” *Freeman v. Potter*, No. 7:04cv00276, 2006 WL 2631722, at *5 (W.D. Va. Sept. 13, 2006); *see Hensley*, 461 U.S. at 434-35.

Considering all of these factors, I find the attorneys’ fees requested to be reasonable. The hourly rate claimed is not in excess of that normally claimed in this type of litigation in this court. *See Phillips v. Brink’s Co.*, No. 2:08CV00031, 2009 WL 3681835, at *5 (W.D. Va. Oct. 31, 2009). The time spent was reasonable and other relevant factors support the amount claimed.

Accordingly, I will grant K-VA-T’s Motion for Attorneys’ Fees.⁴

III

For the reasons stated it is **ORDERED** as follows:

1. Plaintiff’s Motion for Attorneys’ Fees (ECF No. 49) is GRANTED;
2. Defendant’s Motion for Attorney’s Fees (ECF No. 48) is DENIED;

undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19; *Rum Creek*, 31 F.3d at 175.

⁴ In its reply in support of its Motion for Attorneys’ Fees, K-VA-T stated that as of February 13, 2012, its total attorneys’ fees and litigation expenses was \$24,168.62. This figure did not include time spent preparing K-VA-T’s reply memorandum. To account for this, I will add three additional hours to K-VA-T’s request, which, at a billable rate of \$140 per hour, is \$420.

3. Defendant must pay attorneys' fees to plaintiff in the amount of \$24,588.62.

ENTER: March 1, 2012

/s/ James P. Jones
United States District Judge