



# DISABILITY CLAIMS SOLUTIONS CLIENT NEWSLETTER SPECIAL EDITION -- ERISA

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## ERISA Denials Hurt the Most

By Linda Nee, BA, HIA, ALHC, DIA, DHP, CPM

Due to the recent popularity of Michael Moore's *Sicko* dealing with the health insurance industry, and the 40-minute documentary in California called *Bad Faith*, it seems more appropriate than ever to "stand up for" America's working class and the insurmountable tragedies occurring to American families when disability claims are denied.

The working middle class in America is provided with short-term and long-term disability coverage by their employer. In fact, were it not for employers in this country, the majority of working Americans would not have any disability insurance providing financial assistance in times of need. These plans are most commonly referred to as: employer sponsored group welfare plans, group plans, or cafeteria plans (Choices are offered at various levels.)

ERISA is an acronym for the Employee Retirement Income Security Act of 1974 including federal statute 29 USC. 1001, et seq. ERISA laws were originally intended to address issues related to the administration of pension funds, but today ERISA controls practically all employee benefits offered in the private sector, including employer-sponsored health and disability insurance plans.

STD and LTD disability insurance policies are referred to as "the Plan." If you are, or have participated in an employer-sponsored health or disability Plan, ERISA has a profound influence upon your rights to receive plan benefits. If you file a claim you are referred to as a "claimant".

ERISA plan participants are hurt most when claims are denied. Unum, for example, receives more than 500,000 applications per year for group LTD benefits. They deny 40-50% of these claims representing 200,000-250,000 working American families.

### **PHILOSOPHY of DCS**

*Disability Claims Solutions works with both individuals, employers, doctors and attorneys to provide claim specific information to ensure fair and objective claim file review by disability and health insurance companies.*

*We believe all insureds are entitled to clear, specific information relative to their policy provisions as well as specific industry knowledge at least equal to that of the disability insurer.*

Working Americans who have been provided with ERISA employer-sponsored Plans for disability are in need of information about how it all works.

This issue is dedicated to ERISA claimants and the thousands of working middle class Americans who are denied benefits and are left unprotected by our laws and federal judges.

I may not be able to provide a complete discussion on ERISA, but we'll do our best to make it understandable. If anyone has any questions about ERISA after reading this newsletter, please feel free to send me an email.

### **Types of Policies**

*There are two types of disability policies sold in the United States. There are the employer-sponsored group policies with federal ERISA jurisdiction, and Individual Disability Income (IDI) policies, purchased from an agent which are underwritten separately. Premiums are paid for IDI policies by the individual insured.*

*Employer-sponsored plans are "pre-empted" by ERISA which means federal law, not state law applies. IDI claims are subject to state laws which are preferred over federal law. Not all group sponsored plans are subject to ERISA either. State and federal agencies are exempted from the ERISA pre-emption.*

### Tidbits...Unum Corporation and Provident

Unum Corporation was founded in 1848 by Elisha B. Pratt, one of the founders of Connecticut Mutual Life Insurance Company. The company began by selling life insurance policies to those crossing the country in covered wagons during the California Gold Rush of 1849. (How smart was that?) Mr. Pratt operated the company out of his Boston home and coined the slogan, "find a better way." In 1876 John E. DeWitt was named President of Union Mutual and moved the company to Maine to avoid a new Massachusetts law requiring the sharing of profits with the Massachusetts General Hospital.

Provident, on the other hand, can trace its origins back to the Mutual Medical Aid and Accident Insurance Company founded in May 1887 in Chattanooga, Tennessee by a lawyer, an architect and a real estate salesman none of whom had any real knowledge about insurance. Provident took advantage of the industrial revolution taking place in the South in the 1880's offering insurance to "uninsurables" – workers at coal mines, blast furnaces, coke ovens, and railroad employees. Provident withheld 2.5 cents a day from laborer's wages in return for \$7.50 a week for lost time. Provident quickly reversed these policies when the flu epidemic of 1878 took out entire companies. Afterward Provident offered only Accident insurance.

### Does ERISA Protect My Rights?

Well, yes.....and no.

Although the original purpose of ERISA was to protect plan participant rights in "employee welfare benefit plans", ERISA has also stripped employees of many of their rights.

The biggest problem with ERISA is that federal laws "pre-empt" (take precedence over) very important state consumer protection laws. Since there are NO federal insurance consumer protection laws, claimants are virtually left unprotected from unscrupulous insurance companies looking to make windfall profits by denying claims unfairly.

Since practically all employer-sponsored insurance plans are "employee welfare benefit plans" under ERISA, the disability insurance industry has managed in a very ingenious way to obtain the greatest immunity from civil liability ever devised.

In my opinion, the only way to restore fairness to the insurance industry is to seriously curtail ERISA's pre-emption of state law and restore the right of an individual to sue the insurer for breach of contract and bad faith under state consumer protection laws.



*If an ERISA participant files a lawsuit to recover benefits they have no right to a jury trial. As a general rule there is no right to a jury trial in an ERISA benefit dispute. ERISA cases are decided in Federal District Court by a Judge who only reviews the claimant's administrative record and the Plan Administrator's denial decision.*

### 8/11/2005 – Sixth Circuit Holds that Social Security Award is Relevant Factor in ERISA Disability Case.

ERISA policies nearly always allow disability insurers to reduce or offset monthly benefits payment to claimants by the amount of SSDI award received. As you can image, disability insurers love these "offset" provisions and are very anxious to assist claimants with their Social Security applications. Subsidiaries such as GENEX and others are often contracted by disability insurers to help claimants process their claims, even to the Administrative Law Judge level.

However, these same disability insurers often put no, or little weight on SSDI decisions. Of course, disability insurers want, and expect the best of both worlds: they acknowledge SSDI reductions as cost-saving offsets, but then ignore SSDI decisions when evaluating the issue of disability, especially after 24-months of benefits.

Of course disability insurers should not be allowed to ignore SSDI awards of benefits when it suits their purposes. There are several court cases that say so. In *Calvert v. Firststar Finance, Inc.*, the Sixth Circuit held that a Social Security award is a factor that courts should consider when evaluating an insurer's decision to Deny ERISA disability benefits.

Although the Calvert case may have alerted disability insurers of the need to "take into consideration" decisions made by the Social Security Administration, the case fell short in refusing to find that the disability insurer had to make the same decision as Social Security. Therefore, if a claimant has been awarded SSDI, the disability insurer's liability decision does not have to be the same.

This is a good thing since the disability insurer cannot (or should not) deny a disability claim because the claimant was denied SSDI through the first two levels of social security appeal.

It is a bad thing when the disability insurer denies a claim beyond the 24-month own occupation period AND the insured has been awarded SSDI benefits.

By

## All About ERISA and Then Some.....

Myrtle Postalwaite worked for 10 years as a restaurant general manager. After becoming ill, she received short-term and long-term disability benefits under her employer's group sponsored ERISA plan. The long-term disability plan was a "2-year own occupation policy" and paid benefits for 24 months if she was unable to perform the material and substantial duties of her own occupation. After 24 months, however, Myrtle had to prove she was not able to perform ANY work for which she had training, education or experience.

As Myrtle neared the 24-month any occupation period Broadspire contracted with an external physician to conduct an Independent Medical Evaluation of Postalwaite. The IME physician documented he was of the opinion Myrtle could perform a sedentary occupation. In addition, the insurance company also obtained an FCE and an Occupational Assessment supporting Broadspire's position that Myrtle was able to perform sedentary work. Based on these opinions Broadspire terminated Myrtle's benefits claiming she no longer met the definition of disability beyond the 24-month period. Broadspire denied her appeal and she filed suit in federal court.

Plaintiff's only support of her claim for continued benefits was a letter from her primary care physician stating his opinion "that the patient is totally disabled." Her physician provided no explanation whatsoever for the opinion that she was totally disabled.

In applying the "arbitrary and capricious" standard of review, the federal judge ruled in favor of the insurance company claiming Postalwaite's physician provided no explanation whatsoever for the opinion that she was totally disabled. **DCS Rule number One for ERISA claims – never let a disability insurer have a consensus of medical opinion about anything.**

It is clear from the above example that claimants insured by ERISA Plans are playing against a stacked deck. Usually, the federal judge will employ a "deferential standard of review" which means that the plan "fiduciary's (insurer's) final decision will be upheld, unless the court finds the decision to be "arbitrary and capricious". As long as the judge finds there is "substantial evidence" in the "administrative record" (claim file) to support the denial decision, it can be upheld by the court, even if it is technically wrong. So, what is "substantial evidence"? It has been defined as "more than a scintilla, but less than a preponderance". In other words, it means whatever the judge decides it means. This alone gives the disability insurer a clear advantage over the claimant in any ERISA litigation case.

ERISA also presents as a "fiduciary" paradox. Acting as the claims fiduciary, the Plan Administrator (insurer) must discharge duties with respect to the Plan solely "in the interest of the insured" with care, skill, prudence, and diligence, reasonable that any prudent person would use under the same circumstances, and to consider the interests of their insured at least equal to their own, resolving undeterminable issues in their insured's favor. Unfortunately, ERISA laws do little to force disability insurers into carrying out their "fiduciary" duties. Under the most basic concepts of trust law, a fiduciary's interests are not supposed to conflict with that of the "beneficiary". However, there is nothing in the way federal judges have construed ERISA that prevents an insurer from having "conflicts of interest." Under ERISA law "conflicts of interest" are expected, and even condoned.

The Administrative Record (claim file) is extremely important in ERISA cases. By definition, the Administrative Record is anything the disability insurer reviews and accumulates in the claim file when making decisions about the claim. The Administrative Record includes all internally generated documents, videotapes, reviews, emails, surveillance, medical records, IME reports etc. collected, used, reviewed, and or considered when deciding to pay or not pay a claim. Some disability insurers remove documents from the Administrative Record in an effort to hide information from claimants and their representatives.

The contents of the Administrative Record are extremely important to any claim for ERISA benefits. If a lawsuit is filed, the court's review of the case is limited to the contents of the Administrative Record. If the claimant has any hopes of winning in court, all information must be placed in the Administrative Record sometime during the 180 days of appeal review. Few claimants are aware of how to build or supplement the Record. Without assistance may ERISA claimants who cannot afford help from a consultant or attorney are outgunned by the more experienced legal staff of wealthy disability insurers looking to keep the file closed and the claim financial reserves shut down. More often than not, ERISA claimants just.....go away – to the benefit of the insurance company.

ERISA participants may also recover attorney fees, but only those incurred during litigation. Since claimants are required to exhaust their ERISA appeal during the 180 days allowed, any costs associated with the administration of the appeal prior to litigation are not recoverable. In addition, claimants must first win their case in court and then apply for a discretionary award of fees. Therefore, no matter how frivolous or wrongful the denial was in the first place, costs of proving the case during the appeal are not recoverable. This is one of the most unfair aspects of ERISA law. Changes should be made to allow the claimant to recover all legal costs including those incurred during the administrative appeal process. Adding additional hardship, many disability insurers are now demanding the payment of their own attorney fees when claimants do not prevail in federal court.

Up to this point, my discussion about ERISA may appear to be decidedly negative. Does this mean claimants do not have a chance at all in overturning their denial decisions? Of course not. Surprisingly, ERISA does not give Plan administrators carte blanche to devise internal strategies and decide claims any way they want to. There ARE rules that have to be followed even if the Plan administrators and insurers conveniently tend to forget them to their own benefit.

Many ERISA cases are winnable, but the best time to “win” is during the Administrative Appeal, or 180 days allowed by ERISA. I have always found it easier to prevent an appeal denial and present the best case possible to restore benefits than to fight the case afterward in court. I am aware there are some attorneys who would disagree with me, but keep in mind the better part of their fee comes from litigation.

Unfortunately, public attention is generally focused on those insureds with Individual Disability Income (IDI) policies. These types of policies are purchased by insureds who can afford the high cost of annual premiums. Persons who purchase these types of policies are generally self-employed individuals such as physicians, surgeons, dentists, attorneys, judges etc. When their claims are denied they suffer financially just like anyone else. However, if they need to sue to recover benefits they may do so in state court and ask for millions in punitive damages. ERISA claimants can't do that. We hear about the “wealthy” punitive damage awards in the news because it IS news when a jury awards an insured \$30 million in bad faith damages. We never hear about ERISA cases won in federal court when benefits are restored just in time to save homes from foreclosure, or in time to buy the kids school shoes.

## **From Your Consultant.....An ERISA Editorial**

It is extremely important for any ERISA participant to obtain a copy of their employer group disability plan, and employee benefit booklet in order to study the policy and completely understand what YOU are entitled to, and what the INSURANCE COMPANY is entitled to long before the fire bell in the night goes off with an unexpected sickness or injury preventing you from working. Employees really need to help themselves out by doing this since employers are now integrating short-term disability, FMLA, and long-term disability with continued eligibility for health, life, and pension contributions. It is conceivable and probable these days that employees could wind up with no disability benefit and no health coverage.

For the last five years or so, I've been asking my peers, consultants, advocates, attorneys and “those in the know”, why they think those covered by employer plans have no idea what they are entitled to, and do not seem to take the time to find out. The most frequent example that comes to mind is the claimant who has no idea their policy allows reductions in monthly benefits for not only their SSDI award, but the award of their dependents.

And, the response has always been, “employees don't want to take the time”, or “they are too busy”, or “they wouldn't understand it anyway.” This really amazes me. I can assure you those professionals who purchase the higher priced IDI policies know exactly what they are entitled to at the time they sign the policy contract.

But, for some reason, disability coverage obtained from an employer seems unimportant until it is needed unexpectedly. However, in my experience both as a former lead claims specialist and a disability claims consultant KNOWLEDGE IS POWER when it comes to group sponsored disability. Many disability insurers depend on the fact that ERISA plan participants are not well-informed about their rights under the policy and devise internal strategies to take advantage of that fact. If every working American with employer group sponsored disability coverage were to take the extra time to read and understand their policy it would be a lot harder for the insurer to defraud them of benefits to which they are entitled.

If any of our clients have questions regarding ERISA or the current administration of their claims or appeals, please feel free to contact me. If you have not yet received a copy of the Group LTD 101 Manual, please let me know and I will send it to you right away.