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Hudson T. Ellis, Eric L. Buchanan, R. Chandler Wilson, Noah A. Breazeale, Audrey C. Dolmovich, & Kaci Garrabrant

WHO HAS THE BURDEN OF PROOF WHEN APPLYING AN EXCLUSION OR LIMITATION IN A LONG TERM DISABILITY INSURANCE POLICY? BY R. CHANDLER WILSON

I. Introduction

Long Term Disability (LTD) policies that are governed under ERISA frequently have exclusions or limitations that the insurance company will use to deny or terminate the claim of an individual who is otherwise disabled.

To give proper context, an exclusion is when, due to a certain circumstance or condition, there is no coverage. A common example that most insurance companies include in their long term disability policies is an exclusion for pre-existing conditions.

Limitations, on the other hand, differ from exclusions in that an exclusion precludes coverage altogether while a limitation provides some coverage, but less than would otherwise be provided by the policy in question. A common example of a limitation would be a policy that purports to provide a claimant with LTD benefits until age 65 but includes a "mental illness limitation," which provides a claimant with no more than 24 months of LTD benefits if their disability is due to mental illness.

This article will discuss which party bears the burden of proof when an exclusion or limitation is applied, and the reasoning courts have used to assign the burden.

II. Which party has the burden to show an exclusion or limitation does or does not apply?

A. The burden is on the insurer to show an exclusion applies.

In ERISA cases, the principle is well settled that the plan has the burden to show the applicability of an exclusion once the claimant has presented a prima facie case that she is covered and thus entitled to benefits under the plan terms. *See*, e.g., *Dowdy v. Metro. Life. Ins. Co*., 890 F.3d 802, 810 (9th Cir. 2018); *Critchlow v. First Unum Life Ins. Co.*, 378 F.3d 246, 256-57; *Glista v. Unum Life Ins. Co. of Am.*, 378 F.3d 113, 131 (1st Cir. 2004); *Horton v. Reliance Standard Life* Ins. Co., 141 F.3d 1038, 1040 (11th Cir. 1998); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1205 (10th Cir. 1992).

While the burden is on the insurer to show the

applicability of an exclusion, what Courts consider an adequate showing varies significantly depending upon the applicable standard of review in the underlying case. Under *de novo* review, courts will apply the doctrine of contra proferentem and resolve any ambiguity against the insurer. *See Masella v. Blue Cross & Blue Shield of Conn., Inc*., 936 F.2d 98, 107 (2d Cir.1991). However, if arbitrary and capricious review applies, courts will be deferential toward the insurer's interpretation of an exclusion as long as that interpretation is reasonable. *Ramsteck v. Aetna Life Ins. Co*., No. 08-CV-0012(JFB)(ETB), 2009 WL 1796999, at *9 (E.D.N.Y. June 24, 2009); *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir.1995).

B. Courts are split on who has the burden to show a limitation applies.

A few courts have held that limitations are distinct from exclusions and place the burden on the claimant to show that a limitation does not apply. For example, in *Ringwald v. Prudential Ins. Co. of Am*., disability benefits were paid for 24 months, based on the plaintiff's depression, and terminated due to the policy's 24-month mental illness limitation. 754 F. Supp. 2d 1047 (E.D. Mo. 2010). According to the *Ringwald* court, the plan tied the mental illness limitation on benefits to the plan's benefits structure, not the exclusions. *Id*. at 1057. Since the plan imposed the burden on the participant to establish a right to receive disability benefits, the court reasoned, the burden remained on the "plaintiff to establish that his alleged disability is not due in whole or in part to mental illness." *Id*. at 1057. A similar conclusion was reached by the Second Circuit in *Critchlow v. First Unum Life Ins. Co. of Am.*, 378 F.3d 246, 256 (2d Cir. 2004) (Held that the Plaintiff had the burden of proving that "her disability was not based on a mental illness").

Other courts, including the Sixth Circuit, have held that limitations should be treated the same as exclusions and that the burden thus shifts to the insurer. *See Okuno v. Reliance Standard Life Ins. Co*., 836 F.3d 600, 609 (6th Cir. 2016). The Sixth Circuit examined an ERISA-covered long term disability policy that limited benefits to one year for disabilities caused or contributed to by mental or nervous disorders. *Id.* at 603. In discussing the parties' respective burdens of proof, the court held, "Reliance bears the burden to show that the exclusion on which it based denial of benefits, the Mental and Nervous Disorder Limitation, applies in this case." *Id.* at 609. The Sixth Circuit treated the limitation as an "exclusion," and accordingly assigned the burden of proof to the plan. *Id.* (citing *McCartha v. Nat'l City Corp*., 419 F.3d 437, 443 (6th Cir. 2004), holding that "[a]n ERISA plan, not the participant, has the burden of proving an exclusion applies to deny benefits"); *see also McAlister v. Liberty Life Assurance Co. of Bos.*, 647 F. App'x 539, 545 n.6 (6th Cir. 2016) (shifting the burden when reviewing the application of a 24-month mental illness limitation in a long term disability policy).

Many district courts have found as the Sixth Circuit did. In *Kamerer v. Unum Life Insurance Company of America*, the participant had sufficiently proved her disability, so "[i]f Unum wants to then reduce her benefits, it seems appropriate that they should demonstrate why Ms. Kamerer is not entitled to those benefits." 334 F. Supp. 3d at 428. The court bolstered its conclusion by noting that Unum cited the limiting clause for the first time after several years of having paid benefits. *Id.* Other federal courts have similarly determined that the burden to prove the applicability of a policy limitation rests with the plan. *E.g., Owens v. Rollins, Inc*., No. 1:08-CV-287, 2010 WL 3843765, at *2 (E.D. Tenn. Sep. 27, 2010); *Williams v. Grp. Long Term Disability Ins.*, No. 07 C 6022, 2009 WL 500626, at *7 (N.D. Ill. Feb. 27, 2009); *Deal v. Prudential Ins. Co. of Am.*, 263 F. Supp. 2d 1138, 1143 (N.D. Ill. 2003); *see also Chavez v. Standard Ins. Co.*, No. 3:18-CV-2013-N, 2020 WL 1873547, at *3 (N.D. Tex. Mar. 10, 2020). All of these courts adopted a federal common law that accords with the common law for insurance requiring insurers to prove limitations.

Recently, the Secretary of Labor, who has primary responsibility for interpreting and enforcing ERISA, weighed in on this issue by filing an amicus brief in *Ovist v. Unum Life Ins. Co. of Am*., 14 F.4th 106, n.2 (1st Cir. 2021). The Secretary endorsed the position taken by the Sixth Circuit that there is no meaningful distinction between exclusions and limitations, and thus the burden of proof should shift to the insurer in both instances. In support of burden-shifting, the Secretary argued 1) Federal common law based on insurance cases places the burden on the insurer to prove limitations; 2) General principles of burdens of proof support burden-shifting[1]; and 3) there is no principled distinction between exclusions and limitations. Ultimately, however, the First Circuit declined to rule on this issue. *Id.* at n. 10.

III. Conclusion

The case law is clear that the burden rests on the insurer to prove an exclusion applies, though the showing required to meet that burden will vary depending upon the applicable standard of review in the underlying case. On the other hand, which party has the burden is much less clear regarding the application of a limitation. Given the lack of any meaningful distinc-

tion between exclusions and limitations and the Secretary of Labor's recently stated position on the issue, the more reasoned argument is in favor of shifting the burden of proof onto the insurer in cases of limitations as well. However, until more courts definitively address this issue, this remains an unsettled area of law.

End Notes:

[1]Specifically, the Secretary argued the principles of burden shifting as outlined in McCormick on Evidence support shifting the burden of proving limitations to the insurer. Namely, those principles are 1) the natural tendency to place the burdens on the party desiring change; 2) special policy considerations such as those disfavoring certain defenses; 3) convenience; 4) fairness and; 5) the judicial estimate of the probabilities. *Allocating the Burdens of Proof*, 2 McCormick on Evid. § 337 (8th ed. 2020). *See Brief for the Sec. of Labor as Amicus Curiae, Ovist v. Unum Life Ins. Co. of Am.,* 14 F.4th 106, n.2 (1st Cir. 2021).

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Eric Buchanan & Associates, PLLC
414 McCallie Avenue • Chattanooga, Tennessee 37402
PO Box 11208 • Chattanooga, Tennessee 37401
telephone (423) 634-2506 • fax (423) 634-2505 • toll free (877) 634-2506
intaketeam@buchanandisability.com • buchanandisability.com