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ERISA & DISABILITY BENEFITS NEWSLETTER

VOLUME 5, ISSUE 6, OCTOBER 2013

ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization. For more information, visit our website at www.buchanandisability.com.

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WHICH PLAN APPLIES? BY RACHAEL PAS

When an individual obtains a long-term disability policy through work, the employer usually provides a summary plan description ("SPD"), summarizing the general terms of the plan. The employee usually is not given the entire policy itself, where he would find the critical language stating that the plan can be amended at any time and in any way that the plan sponsor desires. Realistically, he would not typically read the policy if given the chance, and would not understand the importance of such a provision even if he did read the policy. It is not uncommon for a plan to be amended several times over the course of a few years. It is typical for an employee to work for several years, become disabled, and then find himself entitled to benefits under a plan that is drastically different from the one he originally received. He might also find himself not entitled to benefits under the amended plan, even if he would have been entitled to such benefits under the original plan. What then happens to those who have been receiving long-term disability benefits, only to have a plan amended in such a way that they are no longer entitled to those benefits?

Long-term disability policies provided through work are usually covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). Although providing no substantive rights, ERISA sets standards and guidelines for the processes by which long-term disability policies are administered. Unfortunately, judicial interpretation of ERISA has afforded the drafters of these policies a great deal of leeway in drafting plan provisions, usually to the detriment of the insured. A judicial standard affording substantial deference to the actions of the plan administrator and principles of contract law that undergird ERISA make successfully litigating an ERISA claim difficult, to say the least. The courts ask only if the plan administrator has been "reasonable," and tend to defer to the language of the policy, no matter the outcome for the insured.

ERISA states that a long-term disability policy must provide some mechanism for amending the plan, but offers little to no guidance on what this mechanism should look like. ERISA § 402(b)(3) (stating that every plan must "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan"). The courts have construed this requirement liberally, allowing for even the most one-sided policy provisions to be satisfactory. Most long-term disability plans contain the following language: "the company reserves the right at any time to amend the plan." *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 78 (1995) (holding that these provision satisfied the requirements of ERISA § 402(b)(3)).

The Supreme Court has endorsed the employer's essentially unlimited freedom to change an ERISA employee welfare benefit plan, stating that the employer is not even acting in a fiduciary capacity, as long as the benefits affected have not yet "vested." *Izzarelli v. Rexene Products Company*, 24 F.3d 1506, 1524 (5th Cir. 1994) (holding that "an employer that decides to terminate, amend, or renegotiate a plan, does not act as a fiduciary [and thus cannot violate its fiduciary duty] provided that the benefits reduced or eliminated are not accrued or vested at the time").

The courts have long emphasized the "malleable" nature of long-term disability policies under ERISA. *Shaw v. Delta*

Airlines, Inc., 463 U.S. 85, 90-91 (1983) (ERISA does not establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans). In fact, there is a presumption that long-term disability benefits do not vest until they are denied. *Hackett v. Xerox Corp.*, 315 F.3d 771, 774 (7th Cir. 2003). Therefore, a plan participant or beneficiary has no cause of action until benefits have been denied. *Daill v. Sheet Metal Workers' Local 73 Pension Fund,* 100 F.3d 62, 65 (7th Cir. 1999).

There are only two exceptions to this presumption against the vesting of ERISA employee welfare benefits. The first is where the policy explicitly provides for a vested benefit – but the provision must be clearly and unequivocally stated. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996) (holding that "contractual vesting of a welfare benefit . . . is an extra-ERISA commitment that must be in clear and express language"). The second exception, much less commonly applied and not accepted by all circuits, allows the court to infer that the parties intended for a vested benefit to be conferred, by looking to the specific language in their agreements. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983).

Practically speaking, this caselaw indicates that long-term disability benefits do not vest until they are denied or terminated. For this reason, an employer is "at liberty to change the plan and thus change the benefits to which a participant is entitled" at any time. *Hackett*, 315 F.3d at 774. If someone has already been receiving long-term disability benefits, his benefits become vested and his cause of action accrues when the plan administrator ceases payment of the benefit. *Id.*

The plan sponsor could make several possible amendments to a long-term disability policy that would have a drastic effect on a participant/beneficiary's receipt of benefits or eligibility for benefits. One such example is where a plan has been amended to add a discretionary provision. This provision would grant to the plan administrator complete authority to: interpret the terms of the policy, determine eligibility for benefits, and administer the plan. According to the United States Supreme Court's holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989), courts will review a denial of benefits using a *de novo* standard of review, unless the plan itself contains a discretionary provision. If a discretionary provision is present, the *arbitrary and capricious* standard of review will be utilized, and will cause the court to give a great amount of deference to the decisions of the plan administrator. *Id.* Other examples of amendments that may have a significant impact on a claim for benefits range from altering appeal deadlines, changing the definition of disability, or limiting payment for certain types of disabilities.

In addressing the question of "which plan applies?" the courts have looked to the nature of long-term disability policies themselves, emphasizing that long-term disability benefits are not required to vest and do not vest at all unless they are denied or terminated. A consensus seems to be emerging that an amended plan would therefore govern over the original, often leaving participants/beneficiaries at the mercy of a plan with which they are unfamiliar. *Hackett*, 315 F.3d at 771, *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1159-1162 (9th Cir. 2001). The courts are unsympathetic. In *Podolan v. Aetna Life Ins. Co.*, 909 F. Supp. 1378 (D. Idaho), the court considered a denial of benefits where Plaintiff began receiving benefits in 1982, the plan was amended in 1988 (adding a discretionary provision), and benefits were subsequently terminated in 1993. The court provided the following reason in support of its decision to look to the terms of the amended plan, as opposed to those of the original plan:

> The instant action focuses on whether or not the Plan Administrator acted improperly in terminating benefits to Plaintiff in 1993. It was in 1993 that the claim for wrongful termination of benefits arose and it is the Plan Administrator's acts in 1993 that are being reviewed by the Court. Therefore, the Court concludes that it is the 1988 Plan governing the Plan Administrator's conduct in 1993 that must be considered in determining the scope of review over the Administrator's decisions.

Id. In *Podolan* the application of the amended plan resulted in the application of a much less stringent standard of review, one asking only whether the plan administrator was "reasonable" when deciding to terminate benefits. *Id.*

While the rationale for applying the amended version of a long-term disability plan makes sense on its face, the result is the creation of another barrier for those whose long-term disability benefits have been unfairly terminated. In the context of *Firestone* and the resulting rush of amendments to policies to add discretionary clauses that will garner a more favorable standard of review in court, it is becoming even more difficult for a plaintiff to have his claim for LTD benefits heard under a *de novo* standard of review.