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ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

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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.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.



Eric L. Buchanan, R. Scott Wilson, and D. Seth Holliday are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization.

SOME THOUGHTS ON PROTECTIVE ORDERS IN ERISA CASES BY: D. SETH HOLLIDAY

Discovery in ERISA disability litigation is limited. Typically, a plaintiff can only pursue inquiries into the issues of lack of due process/procedural irregularity and conflict of interest/ bias as allowed by *Wilkins v. Baptist Healthcare Systems, Inc.*, 150 F.3d 609, 618 (6th Cir. 1998). Furthermore, the discovery must be limited such that it "facilitate[s] the prompt and inexpensive resolution of disputes" and is otherwise "relevant" under ERISA. *See*, *e.g.*, *Mulligan v. Provident Life & Acc. Ins. Co.*, 271 F.R.D. 584, 588, FN4 (E.D. Tenn. 2011). Moreover, this line of inquiry is allowed only if there is an allegation that the defendant had an inherent conflict of interest in the complaint. In other words, if a plaintiff alleges that a defendant had an inherent conflict of interest then the plaintiff is afforded some measure of discovery into that conflict so long as the requests are constrained by relevancy and economy. This, however, is only the beginning of a long and contentious battle.

If a plaintiff makes the appropriate allegations in her complaint, propounds discovery in accordance with the judiciary's present admonitions, prevails in the inevitable and lengthy discovery fight via a motion to compel the defendant to answer her inquiries, then comes the dispute over whether a protective order should govern the exchange of information. Plaintiff's counsel should anticipate that a defendant will reflexively allege that even if the requests are "appropriate" under ERISA, they involve "confidential and proprietary information" which impact privacy issues which cannot be overridden without a sufficient showing of need. This dispute needs to be met directly as such objections are without merit and are typically part of a defendant's overall strategy to delay and prolong the litigation.

Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure provides in relevant part:

A party or any person from whom discovery is sought may move for a protective order. . .The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including. . .requiring that a trade secret or other confidential research, development, or commercial information may not be revealed or be revealed only in a specified way. . .

In other words, it would be the defendant's burden to (1) Identify any document responsive to any appropriate ERISA discovery request by the plaintiff and then (2) to show "good cause" under Rule 26(c) of the Federal Rules of Civil Procedure as to why that document should be designated confidential and proprietary. Once that analysis is complete, and if it were found to be in the defendant's favor, then the issue of an appropriate protective order to govern the production of the documents would arise and which would resolve any alleged privacy issues. However, the defendant would still have to turn over any relevant documents, whether they were confidential and proprietary or not.

Plaintiff's counsel should remember that it is not the plaintiff's obligation to provide a sufficient showing of need for "confidential and proprietary" materials with respect to privacy concerns. Instead, there are numerous state and federal cases holding that it is the defendant's responsibility to show that placing the materials in the public domain will cause a specific harm before a protective order should be issue. Here are 6 representative examples: (1) "When confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business. . .or, stated

differently, great competitive disadvantage and irreparable harm." ***Loveall v. American Honda Motor Co., Inc.,*** 694 S.W.2d 937, 939-940 (Tenn 1985) citing *Essex Wire Corp. v. Eastern Electric Sales Co.,* 48 F.R.D. 308, 310 (E.D. Pa.1969); (2) "To make a showing of good cause, the party seeking confidentiality has the burden of showing the injury 'with specificity.'" *Pearson v. Miller*, 211 F.3d 57, 72 (3rd Cir. 2000); (3) "[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) [good cause] test." *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992); (4) "FRCP allows the sealing of court papers only for 'good cause shown' . . . . To meet this burden, courts traditionally require that the party wishing to have confidential information in the court record kept under seal show that disclosure of the information would result in some sort of serious competitive or financial harm." *Tinman v. Blue Cross & Blue Shield of Michigan*, 176 F. Supp. 2d 743, 745 (E.D. Mich. 2001); and (6) "Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. . .The injury must be shown with specificity. . .Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not support a good cause showing." *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 175 (E.D. Pa. 2004).

Despite this, it should come as no surprise to ERISA practitioners that courts typically do require some form of protective order to govern the exchange of information forcibly compelled by motion. The reason for this is that the compelled conflict of interest disclosures usually involve the defendant's internal documents and data and many courts find this fact alone is enough to warrant protection. The next broad skirmish is over the language to be placed in the protective order and includes issues regarding the use of the "confidential" materials in subsequent cases and whether plaintiff's counsel must destroy or return the materials to defendant at the end of the litigation. These are rather weighty matters and a topic for another day.

UPCOMING SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the ACI Annual Convention New York City. Conference dates are January 26-27, 2012. He will be speaking on pre-trial procedures and protective orders.

Eric Buchanan will be speaking at the Southern Trial Lawyers in New Orleans. Conference dates are February 15-18, 2012. He will be speaking on discovery and protective orders in disability cases.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding Social Security Disability, ERISA Long-term Disability, Group Long-term Disability, Private Disability Insurance, ERISA Benefits, Denied Health Insurance Claims and Life Insurance Claims.

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