ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

VOLUME 3, ISSUE 11, NOVEMBER 2011

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.



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

Last month we explored discussed the use of protective orders in ERISA litigation. We discussed the fact that courts often require some form of protective order to govern the exchange of information when that information involves a defendant's internal documents and data. This article discusses the next battle that must be fought, concerning what language should be placed in a protective order. The major issues here involve the definition of "confidential documents," procedures for challenging the "confidential" designation, and limited use of these documents by plaintiff's counsel in other cases.

When drafting your protective order it is important to pay close attention to how the phrase "confidential documents" is defined. We typically require a defendant to make a designation of "confidential" only as to material which it *reasonably and in good faith believes* is confidential and entitled to protection under the Federal Rules of Civil Procedure (or whatever body of law governs the matter). We also seek to include a limitation that documents designated as "confidential" should not include any documents that have been previously made public. This forces the defendant to actually review the documents it has been forced to produce so that you don't receive a "document dump" of hundreds or thousands of documents all of which have been designated as confidential.

Furthermore, if you've litigated against a particular defendant before and know about the existence of documents previously designated as confidential, you want to make sure that you can reference them if their existence is denied. Accordingly, we further draft our protective orders to indicate that while "all documents produced in the litigation that are designated 'confidential' shall be used solely for the preparation and trial of the instant suit, particular documents may be referenced if the document's existence is denied."

Another critical component of any protective order is the procedure for challenging the "confidential" designation. Specifically, the burden of establishing the confidentiality of any document should be placed squarely upon the designating party (i.e., usually the defendant). Our protective orders require that (1) the plaintiff "challenge" the designation by written notification to the defendant within 30 days of receipt of the document and (2) the defendant must then seek a protective order from the court for the challenged documents. This requirement is consistent with Rule 26, which governs when protective orders may reasonably be requested.

We also place language in the protective order specifying that defendant's failure to file a motion for protective order within 14 days of receiving the notification of the plaintiff's challenge means that the documents at issue will be excluded from the provisions of the protective order – that is, they lose their confidential designation and become part of the public domain. If you fail to place this type of language in your protective order you may find yourself saddled with the burden of challenging the defendant's confidential designation by motion. This means you will have to make your arguments about why the documents should not be designated as confidential before you know the defendant's arguments about why they should be

designated as confidential. That is not a particularly comfortable place to be.

The last item on the agenda concerns a particularly sensitive issue: the use of confidential documents by plaintiff's counsel in other cases. The basic idea is that if you obtain confidential documents from a defendant in one ERISA case, you certainly don't want to have to re-litigate the issue in a subsequent case against the same defendant. Moreover, this is consistent with the judiciary's usual admonition that discovery in ERISA cases must be limited such that it "facilitate[s] the prompt and inexpensive resolution of disputes. . ." *See*, *e.g.*, *Mulligan v. Provident Life & Acc. Ins. Co.*, 271 F.R.D. 584, 588 (E.D. Tenn. 2011). Accordingly, the protective orders we seek direct that plaintiff's counsel may make use of the confidential documents obtained under the order such that disclosures can be made only in cases in which the same defendant is a party, and in which a member of plaintiff's counsel's firm is counsel of record for another party to the case. You should know at the outset that this is a very difficult row to hoe and courts are hesitant to adopt such language. However, it is certainly worth pursuing. Indeed, a court may be persuaded to place such language in the governing protective order if you make clear that (1) the protective order in your case will still apply to the documents at issue in the next case, (2) if the documents are to be disclosed to a subsequent court for *in camera* inspection then the disclosing counsel (i.e., plaintiff's counsel) must provide that court with a copy of the protective order and explain that the materials are deemed "confidential" and must be filed under seal, and (3) the provision satisfies the requirement that discovery in ERISA cases facilitates the prompt and inexpensive resolution of disputes.

None of this is easy or a sure bet. These provisions are not looked upon favorably by any defendant and you will have to fight hard to get a court to place them in the governing protective order. However, this is one fight certainly worth pursuing. Good luck!

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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