INTRODUCTION TO ERISA LONG-TERM DISABILITY CLAIMS

By: Clay Williams
SinclairWilliams LLC
2100A SouthBridge Parkway, Suite 336
Birmingham, AL 35209
(p) 205.868.0818
(f) 205.868.0894
e-mail: mcw@sinclairwilliams.com
website: www.sinclairwilliams.com

I. OVERVIEW OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA")

A. What is ERISA? – ERISA is a comprehensive Federal statute that applies to many claims for employee benefits. ERISA is a complicated area of the law that, at the end of the day, creates a number of complex hurdles that an employee or employee's beneficiary (and their attorneys) must clear before they can obtain their benefits.

B. Why ERISA Was Originally Conceived and How It Came to Include "Employee Welfare Benefits" – Congress enacted ERISA in 1974 to address perceived problems of employees' rights not receiving uniform or, in some instances, adequate protection by the laws of the different states in which they worked. Due in part to rising reports of corporate mismanagement, Congress also sought to address corruption and self-dealing involving large pension plans. ERISA's beginnings, therefore, arose out of Congress's intent to afford employee pensions more protection from employers, to empower employees by addressing the disparity in bargaining power between employers and employees in the context of pensions, and to establish uniform national standards. Thus, ERISA was originally intended to apply only to "pension benefits." Fatefully, at the last minute, ERISA was amended to include other employee benefits as well, including "employee welfare benefits" such as <u>health</u>, <u>disability</u>, and <u>life insurance</u>.

C. So what if ERISA applies? In A Word, "Superpreemption"!

1. <u>Any Reliefs or Causes of Action That Otherwise Would Be Available for an Insurer's Failure to Pay Benefits Are Preempted</u>**.** In a benefits case, ERISA may limit your client's remedies to include only the recovery of the benefit that should have been provided. Although in some instances it may be possible to recover interest on past-due monetary benefits and to recover attorneys' fees (an event that can be unusual in Eleventh Circuit courts), no other award is typically permitted, including punitive damages.[1] Furthermore, all state law

[1] In an interesting development, the United States Supreme Court recently suggested "surcharge" remedies should be available but the case law on such remedies in the context of ERISA claims is extremely limited. *See Cigna Corp. v. Amara,* ___ U.S. ___, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011).

remedies, including insurance bad faith and fraud, are (with very few exceptions) precluded. 29 U.S.C. § 1144(a).[2]

2. Federal Court Jurisdiction. This "superpreemption" also means that even though ERISA grants concurrent jurisdiction to both state and federal courts, ERISA cases may land in federal court if defendants want them there due to the existence of "federal question" jurisdiction.

3. Normal Rules of Procedure, Particularly in the Discovery Realm, Are Often Suspended *and There Are No Jury Trials.* There are two big phases to an ERISA LTD or other "welfare benefits" case: (1) the "administrative" appeal at the claims level to the insurance company or plan, and (2) litigation in court. To explain, under ERISA, a claimant typically must present all of his or her evidence to the insurance company before filing suit. The claimant may also be required to pursue internal appeals with the insurance company and "exhaust" administrative remedies before a court will entertain suit. When suit is filed, in the vast majority of cases the court will prohibit all merits-related discovery, limit the scope of review to the materials before the claim administrator who denied the claim and review that claim decision under a highly deferential "abuse of discretion" standard. The court then will decide the case based on briefs or, in rare circumstances, upon conducting a bench trial; in ERISA there are no jury trials.

D. Summary Advice for Attorneys Who Do Not Typically Handle LTD or Other ERISA Benefits Cases As Parts of Their Practices: An ERISA practice is similar to a securities practice, in that it is complex and full of malpractice traps for the unwary. ***Dabbling can be dangerous!!***

[2] The only state laws excluded from ERISA's preemption clause are those qualifying under its savings clause, § 1144(b)(2)(A), which states, "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulated insurance, banking, or securities."

II. ANATOMY OF WORKING UP AN ERISA BENEFITS CASE INVOLVING DISABILITY INSURANCE (THE MOST-OFTEN ENCOUNTERED CLAIM)

A. Types of Disability Insurance

1. Long-Term (or Short-Term) Disability Insurance ("LTD" or "STD")

    a. Usually the nomenclature used to refer to group policies offered through work;

    b. Also applies to group plans offered by employers through self-funded plans;

    c. Also applies to group plans offered by unions;

    d. Almost always these policies fall under ERISA unless the employer through which the insurance is provided is a governmental entity or a church (assuming the church employer has not "opted in" to ERISA).

2. Private Disability Insurance

    a. Usually purchased directly from an insurance company, agent or salesman;

    b. Often offered to professionals and other high income people, such as doctors, lawyers, business owners and executives;

    c. Often are policies which may be litigated outside of ERISA as normal breach-of-contract or bad-faith actions;

    d. Often referred to as "DI, "IDI," or "ID" policies.

B. Determining Whether ERISA Applies to the Policy

1. Determining whether ERISA applies begins with ERISA § 4(a), 29 U.S.C. § 1003(a) which provides: ERISA applies to any employee benefit plan if it is established or maintained:

(1) By any employer . . .; or

(2) By any employee organization or organizations representing employees (*i.e.*, a union) . . .; or

(3) By both.

2. Exceptions – Notwithstanding the nature of the benefit has having satisfied ERISA § (4)(a) above, ERISA does *not* apply if:

   a. The plan is a governmental plan;

   b. The plan is a church plan (provided that the church has not "opted in" to ERISA's governance);

   c. The plan is maintained solely for … complying with … workers' compensation laws or unemployment compensation or disability laws; or

   d. The plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens.

3. BOTTOM LINE to What Can Be An Extremely Complicated Question[3] Under ERISA – If an employer was involved *at all* in providing the coverage (even if the employee paid for it), it is most likely ERISA unless the policy is provided by a government employer or a church (subject to whether the church opted in to ERISA for some reason).

C. What It Will Mean for You Client if ERISA Applies

1. 29 U.S.C. § 1144(a) states that ERISA preempts all state law causes of action, as well as all state law defenses; only claims that can be brought to recover are the statutory claims ERISA authorizes pursuant to ERISA § 502, -- most commonly, § 502(a)(1)(B) which is an action for plan benefits.

[3] For more information on how to approach legally the complexities of determining whether a policy is governed by ERISA, see the article "How to Determine If ERISA Applies to Your Client's Insurance Claim" accompanying this handout.

2. Federal Court is a virtual certainty. A defendant will almost always remove your case if you attempt to bring it first in state court.

3. The claimant must file his or her appeal from the original claims denial or termination in writing with the insurance company on time or will be construed as having forever waived his or her claim.

4. The claimant must exhaust administrative remedies.

5. The claimant must submit all evidence that supports his or her claim to the insurance company or ERISA plan for it to be part of the record the Court will later consider when deciding the merits.

6. ERISA plans and insurance companies are given a deferential standard of review by the district court on their denials or terminations.

III. THE PRE-LITIGATION PHASE OF AN ERISA BENEFITS CLAIM

A. **Administrative Claim Procedures** – ERISA's administrative procedures create obligations both for the claimant and the plan or insurance company. Courts often require claimants to strictly adhere to the procedures governing them, but for plans and insurance companies, Courts often allow leeway depending on the circumstances. Thus, when handling a claim for a claimant, particular attention must be paid to all ERISA-imposed requirements you will face.

1. Claimant's Administrative Procedures:

   a. Claimant must file the claim within the time required by plan or policy;

   b. Claimant must appeal on time as set out in the policy or plan (within limits set out in claims regulations at 29 C.F.R. § 2560.503.1);

   c. Claimant may be offered additional voluntary appeals;

d. Claimant and his/her attorney must be cognizant of limitations period in the plan or policy for filing a court action upon the exhaustion of administrative remedies.

2. The Insurance Company/Plan Administrator's Administrative Procedures:

a. ERISA plans must establish and maintain reasonable claims procedures to ensure claimant is received a full and fair review. 29 C.F.R. § 2560.503.1;

b. Administrator must render a timely decision whether to approve or deny the claim;

c. Administrator must comply with certain ERISA notice requirements, which among other things require the claimant be furnished with a written notice of the administrator's claims decision;

d. Administrator must provide a copy of all relevant documents upon request.

B. **Practical Advice For Conducting a Claim Through the ERISA Administrative Phase**

1. NEVER miss an appeal deadline.

2. Always submit all evidence in support of the claim during the ERISA administrative process, because the Court will not consider anything not submitted.

3. If you need more time to complete an appeal, file the appeal in writing on time and contemporaneously ask for more time to submit additional evidence. Such a request often will be granted. If the insurer/plan refuses, they can look unreasonable to a reviewing Court.

4. There are no rules of evidence that apply, so submit whatever you think will support the claim.

5. Always ask for the claim file from the administrator.

6. Be sure to ask for the actual plan documents from the administrator. Oftentimes, you may need to ask the employer for them as well. Amendments can happen which the insurance company may have ignored.

7. Always read the plan document and/or policy and the denial letters closely and address the reasons given for the denial and the policy requirements

IV. THE LITIGATION PHASE OF AN ERISA BENEFITS CLAIM

A. Bringing a Claim for Benefits – A claim for benefits is filed pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The complaint may be filed either in state court or federal court, but the defendant may – and likely will – remove to federal court.

B. Pre-Trial Procedure in an ERISA Benefits Case – Courts decide ERISA cases based on the "ERISA Record" or "administrative record" only, which consists of the plan documents and documents before the administrator up until the date the final claims decision was rendered. There is almost ***never*** discovery on the merits of the case, although sometimes discovery is permitted on questions of conflict of interest if the entity that made the claims determination the same entity bankrolling the benefit.

C. How the Court Decides the Case – Most Courts decide an ERISA benefits claim based on attorneys' briefs, and, maybe, oral arguments. Courts will use either a "judgment on the record" procedure or a summary judgment procedure as its procedural vehicle for rendering a decision. There is no jury trial.

V. ISSUES ATTORNEYS WHO DO NOT HANDLE DISABILITY CLAIMS IN PARTICULAR SHOULD BE AWARE OF

A. Ask Your Client if He/She Has Disability (STD or LTD) Coverage

1. Become aware so your representation of your client on other matters, whether it be personal injury, Social Security, workers' compensation, does not interfere with your client's LTD coverage or claim.

2. Advise your client to get help with his/her LTD or STD claim immediately if you are not going to handle it. Important deadlines may be running!!

3. Claimants should almost always pursue both Social Security disability and LTD – if they are disabled, it gives them two chances at a critically needed income stream.

B. Things to Understand If You Are Handling Your Client's Social Security Claim

1. Amending Your Client's Social Security Onset can Affect Your Client's LTD Claim – LTD carriers love to look to an amended onset in the Social Security case to say the person was not disabled until later than the policy onset. Most LTD policies cover a person only through the end of his or her employment, meaning that you must prove that the onset coincided with the end of employment. If the SS onset date is amended to a date later than the end of employment, your client's LTD claim could be adversely affected.

2. LTD Companies Use Mental/Nervous Limitations Against the Claimant – Most LTD policies limit benefits to 12 or 24 months for "mental and nervous" conditions, so you need to be careful about overemphasizing your client's mental disability in any Social Security case. Just something to be aware of; obviously, you should do whatever you have to do to win the SS case.

3. Be Aware How the LTD/Social Security Offset Works – LTD policies usually reduce LTD benefits by the amount paid in Social Security. LTD policies usually allow a recover if LTD is paid and SSDI is recovered later. As a matter of client relations, be sure to warn your clients of this, because they can react negatively when the LTD company wants to collect their Social Security back pay.

C. **Significant Synergies Can Be Achieved By Working Cooperatively with Your Client's LTD Attorney** – If your client has an LTD attorney, or if you refer your client to one to handle an ERISA-related LTD matter, be sure to share information with them from your workers' compensation, Social Security or personal injury case. The LTD attorney may have an excellent doctor's opinion, for example, that he or she can share which can help you substantially with your case.