

DISCOVERY IN A DISABILITY CLAIM: WHAT YOU NEED TO PROVE YOUR CASE

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There are two types of disability claims, one based on a contract that is obtained personally by the individual, referred to as an “Individual Disability Policy” and one obtained through a group benefit of some kind, referred to as a Long Term Disability, or “LTD” claim. This discussion will focus on both types of policies, because it is always useful to discover the insurance companies’ approach to the evaluation of claims. Did the company give equal consideration to the evidence that supported payment, or were they bent on creating a record to support a denial? How did the company fulfill its duty of good faith and fair dealing? For a disability claim controlled by ERISA, you are usually looking to establish that a conflict of interest poisoned the otherwise fair evaluation of the evidence. In order to resolve these questions, you must obtain company documents. Only then will you know the true basis for their decisions and be on your way to convincing the judge or jury that the company violated the contract of insurance and in some cases, committed bad faith.

No insurance company is pleased when forced to produce internal documents, especially those created years ago. In the early 1990s, insurance disability companies were suffering financial woes caused by greatly reduced returns on premium dollars and a greater than expected influx of new claims. Some sold their disability business to other companies; others revamped, restructured, and refocused their approach from claims payment to claims management. Companies directed their attention to financially strengthening their fortress, and in so doing set termination ratios and goals. They proclaimed their glee in the “savings” realized by denials in internal documents certainly never intended for our eyes. Through diligent efforts of many attorneys, this information has trickled into courtrooms where judges and juries have become informed of the true nature of the insurance business.

Finally, after years of suffering from onerous limitations on discover in ERISA cases, we now can present evidence demonstrating that claims decisions are financially motivated. Following *Pinto v. Reliance Standard Life Ins. Co.* 214, F. 3d 377 (3rd Cir 2000) and its progeny, evidence of a conflict of interest ignites the heightened arbitrary and capricious standard. The court is no longer limited to the administrative record in weighing the existence or extent of a conflict of interest and the resulting possibility of bias of the administrator in deciding the claim. *Lasser v. Reliance Standard Life Ins. Co.* 130 F. Supp. 2d 616, 627 (D.N.J.2001). The Court may consider evidence outside the record to evaluate the level of an administrator’s conflict of interest and to determine the appropriate standard of review. *Dorsey v. Provident Life & Accident Co.* 167 F. Supp. 2d 846 (E.D.Pa.2001)

Courts finally permit discovery as to whether the plan, by its very design, creates a specific danger of a conflict of interest or whether the beneficiary can point to evidence of specific facts calling the impartiality of the administrator into question. *Goldstein v. Johnson & Johnson Employee Health & Welfare Plan v. Gourley*, 248 F. 3d 206, 216 (3rd Cir. 2001). *Quesinberry v. Life Insurance Company of North America*, 987 F. 2d 1017, 1027 (4th Cir. 1993) This analysis pertains not only the plans administered by insurance companies, but self-insured

plans because there as well, specific evidence of bias or bad faith requires a heightened standard. *Bill Gray Enters, Inc. Employee Health & Welfare Plan. V. Gourley*, 248 F.3d 206, 216 (3rd Cir. 2001)

Thus, in ERISA cases, you should obtain documentation and testimony in discovery to prove the claim handlers placed their own job preservation, their job performance and company financial interests ahead of performing their fiduciary duty as an independent advocate. Categories in the following outline, #8,9,11, & 14 are particularly important.

Companies adjusting individual disability claims are similarly required to properly document all of their conduct in the claims file. Discovery in individual disability cases must, of course, be focused on what the company personnel gathered and did with the information available to them in the context of your client's claim. Beyond that, proof that decisions on your client's case were clouded by financial motivation and performance goals is vital to proving bad faith and a pattern and practice of improperly motivated behavior. The following is an outline of material I have sought and obtained in discovery that has proved fruitful. I identify whether the particular discovery, may, in my view be obtained in both an ID and LTD claim.

CATEGORIES OF DOCUMENTS TO DEMAND IN DISCOVERY AND WHY

- 1. ID CASES: APPLICATION AND UNDERWRITING FILES:** What did *the company* collect concerning *your client* when the application for coverage was submitted. What company criteria was used in deciding whether to accept the application, whether to rate it standard, or issue waivers of coverage?
 - all application and underwriting files pertaining to all policies of insurance *your client* ever applied for with *the company*
 - includes all home office, regional office, local office
 - includes all file folders, adjacent exhibit folders, documents, communications and investigative reports directly pertaining to the *client*
 - includes all documents, statements and communications between *the company* and other parties which directly pertain to the issuance of insurance to *your client*
 - All company underwriting rating documents in existence in “*YEAR*” with the respect to the occupation of “*your client's occupation*”.
- 2. ID CASES: THE INSURANCE AGENT'S FILE:** Find out what information the agent and the company shared about the policy, the company or your client
 - All documents constituting, reflecting or relating to any communications between *the company* and any insurance agent or insurance broker regarding *client*
- 3. ID CASES: ADVERTISEMENTS:** how did the company market the policy? Did they promise to provide protection when your client needed it the most? How does that compare with their denial/termination of benefits?

- Advertisements in and form including commercials, print advertisement from 1985 through and including (date you client's policy was sold) regarding *company* marketing of own-occupation disability income policies, from the inception of this type of policy to the date they were no longer offered by *company* including but not limited to the "type of policy in your case."
 - All *company* document forwarded *client* or his agent/broker in connection with his application.
- 4. BOTH ID AND LTD CASES: COMMUNICATIONS:** collect every interaction between your client and the company
- All document in and form including computer entries, "administrative messages", e-mails, constituting, reflecting or relating to any communications between your *company* and *your client* at any time.
- 5. ID CASES: OTHER INSURANCE APPLICATIONS COMPANY OBTAINED ON YOUR CLIENT:** this is particularly important in the situation where the information provided in the application is being questioned for accuracy
- All documents constituting, reflecting or relating to any other policy of insurance applied for or obtained by *your client* from any company.
- 6. ID CASES: INSURANCE COMMISSIONER OF YOUR STATE:** was the company authorized to sell the type of policy in your state? How many other policyholders have complained to your commissioner about the company?
- All documents constituting, reflecting or relating to any communications between *company* and the State of *****or its agencies and employees regarding disability income policies *the company* marketed or sold in the State of "your state".
 - Include in the request all complaints registered with the Insurance Commissioner by policyholders
- 7. BOTH ID AND LTD CASES: RESERVE** How much was at stake in your case, according to the carrier?? Goes to motivation for denial.
- All documents constituting, reflecting or relating to the reserve set on *clients* claim for disability benefits.
- 8. BOTH ID AND LTD CASES: COMPANY MEDICAL DOCUMENTS**
- All documents prepared by or provided to any physician or medical professional employed by or retained by defendants regarding *client*
 - All documents created by the company or referred to the company to investigate, evaluate and access the medical condition(s) suffered by the claimant

- All documents considered by the company in assessing the medical condition of the claimant and how that medical condition may affect his ability to work

9. BOTH ID AND LTD CASES: PERSONNEL INFORMATION: You need to learn everything you can about the people handling you client's file. How did the company evaluate their worth? How did the company reward their performance? What was their performance? In an LTD setting, this information may help establish that the decision making of the claim adjuster was directly tied into their performance evaluation. >claim denial= higher bonus and raises.

- personnel file of all claim representatives of defendant who handled *client* including application for employment, resume, evaluations performed by supervisors, evidence of bonuses received, evidence of awards given, (redact from this production all records regarding home address, social security number, tax returns and family information).
- All documents relating to financial bonus, incentives, stock options, honors, award, or any other type of compensation or program available to company personnel working in the disability department of the *company* at all levels.
- All documents relating to rewards, bonuses, awards, incentives or remuneration, whether financial or not, given to any company employee who supervised those who handled *clients* claims handled *clients* claim.
- All documents relating to rewards, bonuses, awards, incentives or remuneration, whether financial or not, given to any company employee who handled *clients* claim.
- All documents concerning employment evaluations, including "performance evaluations or appraisals" for all company personnel at *company* who handled *clients* claim or supervised company personnel who handled *clients* claim.
- Produce the curriculum vitae of all physicians or medical professionals of *Company* who reviewed any suspect of *clients* claim
- All depositions, trial testimony or other sworn statements of all *company* personnel, consultants, medical professionals and physicians who have performed any services with respect to the claim of *client*
- All documents evidencing the employment arrangement or agreement between IME doctor and the *company*. All 1099 Tax Forms issued by the *company* to the IME doctor
- Without disclosing the identity of the claimant produce any and all documents relating to any services the IME doctor has performed on behalf of the company with respect to any claimant for disability benefits covered by a policy of disability insurance issued by defendants, including but not limited to IMEs or independent medical reviews.
- Internal audits of the files handled by any company personnel who worked on the *clients* claim at any time

10. BOTH ID AND LTD CASES: FIELD REPRESENTATIVE DOCUMENTS: What material did the field representative have when he interviewed, surveilled or investigated your client? What training did they have, and how was their performance evaluated?

- All documents created, obtained or reviewed by *** field claim representative with respect to the duties of his employment with *company*
- Documents including manuals, audio and video tapes used to hire, train or supervise field representatives on how to carry out a field investigation of disability claims
- All documents regarding
 - how field investigators' performance is evaluated by the company;
 - quotas on the number of claims to handle per day/month;
 - what documents to obtain during their handling of a claim in the field,
 - how to conduct interviews, who to interview,
 - how to investigate a claim,
 - what to include in written reports
 - what documentation to collect,
 - what documentation to create while assigned a particular claim.

11. BOTH ID AND LTD CASES: THE OCCUPATION: obtain all documents the company has regarding your clients' occupation, and specifically the duties as defined by the TD language in the policy.

- All documentation authored by or on behalf of defendants which reflect, refer and /or establish what were the duties of *client's* occupation before she filed for disability
- For example: produce all company documents and information collected concerning the "important duties" of a stock broker.
- Then, as what documents the company collected regard to your clients' important duties: a)All documents which in any manner reflect, refer, relate and/or establish what were the important duties of *client* occupation and hi ability to perform them

12. BOTH ID AND LTD CASES: TAPE RECORDED CONVERSATIONS AND VIDEO SURVEILLANCE:

- Any statement, telephone recordings or tape conversations which reflect *client* conversations or communications with *company*, its employees, agents or representatives.
- Any tapes or recordings in unedited format, by whatever media, including any surveillance tape(s) or client
- Material stored in any format that relate to surveillance performed on *client* including all documents created subsequent to the surveillance undertaken.
- All documentation which in any manner refers, concerns, supports or established *client's* activities outside of the work environment from the date of disability to the present

13. BOTH ID AND LTD CASES: ALL RECORDS REGARDING COMPANY EMPLOYEE INTERACTION REGARDING YOUR CLIENT'S CLAIM I know this is stating the obvious, but consider the following:

- All interoffice memoranda or other form of documents no matter where or how maintained, i.e. written form of hard file, database, disk or communications between any of defendants' employees or persons consulted concerning *clients'* claim
- All documents or communications and written records or oral communications, whether in person or telephone, even if retained on tape only
- ROUNDTABLES
- All documents concerning defendants' conduct of a "roundtable review" of *client* claim at any time
- All documents completed by any company employee tabulating or monitoring the status of cases which had been roundtabled from ***** to *****.

14. BOTH ID AND LTD CASES: ALL COMPANY POLICY DOCUMENTS

- PROCEDURE
 - Complete claims manuals and procedure manuals
 - All additions, revisions, deletions or other changes that have been made to the claims manual and produce manuals
 - All policy statements, bulletins, documents, directives, letters, emails, interoffice networking programs, computer material of any kind directed to managers, supervisors, claims personnel that refer or relate in any way to the *company's* practices or policies regarding
 - Handling, processing and investigating claims for disability benefits were in effect or which were utilized by *the company* from *(year policy was issued to present)
 - Approving or denying a claim for disability benefits
 - Selecting and using independent medical examiners
 - Determining whether to request the claimant undergo an FCE
 - What is appropriate care for the condition causing the disability
 - All documents relating to or reflecting company guidelines for the administration, management, objectification, verification, validation of disability claims, dating from 1980 to the present.
 - All handout, seminar materials made available to *company* employees handling disability claims at any time from 1980 through the present.
- TRAINING
 - All documents reflecting or relating to *company's* training of all company personnel including adjusters, claim representatives, customer care

specialists, consultants, in communicating with claimants in writing, over the telephone or otherwise

- All video and audio tapes used to hire, train or supervise company personnel on how to handle disability claims

- SPECIFIC MEDIAL CONDITION

- Documents of defendant that in any way refer, reflect or relate to the proper method of handling claims involving ***** (specific medical condition)
- Documents used by *company* employees to evaluate ***** (specific medical condition)
- Studies the *company* has undertaken with respect to the nature, treatment and care of *** (specific medical condition)
- Studies the *company* has undertaken or obtained with respect to the occupation of *****.
- Studies the *company* has undertaken or obtained with respect to the administrative duties of owning, administering and maintaining a (specialty) practice.

Obtaining these documents will unearth information vital to your case. It may also help you sustain your burden of proving the existence of improper claims handling motivated by factors other than the facts of your particular claim.