Proskauer

newsletter

ERISA Litigation

March 2013
in this issue

A report to clients and friends of the firm

Edited by **Stacey C. S. Cerrone** and **Russell L. Hirschhorn**

Editor's Overview

We are excited to announce the upcoming launch of Proskauer's ERISA Practice Center Blog. Through our blog, we hope to be able to provide more immediate coverage of court rulings and regulatory guidance, as well as provide an alternative medium for our readers to review articles and case notes published in the ERISA Litigation Newsletter. Watch for the launch in March 2013!

This month Michael Spencer addresses the First Circuit's decision in *Colby v. Union Sec. Ins. Co.*, which held that a risk of relapsing into drug addition can constitute a current disability, absent unambiguous plan language. This decision is directly at odds with a previous Fourth Circuit decision and Mr. Spencer discusses the distinctions between the two cases as well as how to avoid this type of plan language pitfall.

As always, be sure to review the section on Rulings, Filings, and Settlements of Interest.

Risk of Addiction Relapse May Entitle Plan Participants to Disability Benefits [1]

Contributed by Michael Spencer

The First Circuit recently split from the Fourth Circuit in concluding that, absent clear plan language to the contrary, the risk of relapsing into addiction can constitute a *current* disability under a long-term disability plan. *Colby v. Union Sec. Ins. Co.*, Civ. A. No. 11-2270, 2013 WL 174419 (1st Cir. Jan. 17, 2013).

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[1] Originally published by Bloomberg Finance L.P. Reprinted with permission.

Welfare plan sponsors and fiduciaries should take note of the decision, not only because of its potential impact on the administration of ERISA disability plans, but also because it serves as a reminder of the importance of clear, unambiguous plan language.

Background

Plaintiff Julie Colby was an anesthesiologist who became addicted to Fentanyl and was diagnosed with, among other things, opioid dependence. After Colby's employer learned of her condition, Colby took a leave of absence and began inpatient treatment for her addiction. As she was receiving inpatient treatment, Colby received disability benefits.

After Colby was discharged from the inpatient treatment center, she remained under regular medical supervision on an outpatient basis. During this time, she sought benefits under her employer's long-term disability (LTD) plan. The LTD plan provided a maximum of thirty-six months of coverage for claimants who suffered an injury or sickness that: (i) required a claimant to be under the regular care and attendance of a doctor, or (ii) prevented a claimant from performing at least one of the material duties of the claimant's regular occupation. Colby argued that she could not perform the material functions of her job because she was at a significant risk of relapse, and returning to work as an anesthesiologist would allow her easy access to opioids and other addictive substances. Her assertion regarding the risk of relapse was uncontested and, in fact, was supported by several medical experts.

The plan denied Colby's request for LTD benefits on the grounds that after she had been discharged from the treatment facility she no longer met the plan's definition of disabled. The plan reasoned that, although Colby remained under a doctor's care and feared a relapse, a risk of relapse in the *future* is not the same as a *current* disability.

Colby subsequently filed suit alleging that the denial of benefits violated ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The district court found that the plan's denial of LTD benefits was arbitrary and capricious because categorically excluding the risk of drug abuse relapse was an unreasonable interpretation of the plan.

The First Circuit's Decision

On appeal, the First Circuit agreed with the district court that the plan's decision to deny LTD benefits was arbitrary and capricious because the plan did not specifically state that it did not cover future risks generally or treat physical and psychological risks differently. The Court concluded that the facts presented in this case demonstrated that an individual's risk of relapse can swell so much as to constitute a current disability. Moreover, mindful that exclusions from coverage under an ERISA plan are not favored, the Court concluded it was unreasonable for the plan administrator to read an exclusion into the plan that was nowhere expressed in the plan itself.

The First Circuit recognized that its decision was directly at odds with the Fourth Circuit's decision in *Stanford v. Continental Cas. Co.*, 514 F.3d 354 (4th Cir. 2008). In *Stanford*, the Fourth Circuit upheld a plan administrator's decision to terminate the disability benefits of a nurse anesthetist who, like the plaintiff in *Colby*, suffered from an addiction to Fentanyl. The *Stanford* plan's definition of disability was similar to the *Colby* plan's definition: it required an injury or sickness that rendered the participant continuously unable to perform the material and substantial duties of his or her regular occupation. The Fourth Circuit drew a distinction between the recurrence of a physical condition such as a heart attack and a psychological condition such as addiction, and concluded that it was not unreasonable for the plan administrator to find that the risk of relapse did not constitute a disability under the plan. In the Fourth Circuit's view, a claimant had to undergo a relapse in order to maintain his or her entitlement to benefits.

Practical Implications

Apparently seeking to limit the potentially broader implications of its holding, the First Circuit went out of its way to state that its holding was narrow. In the First Circuit's view, its decision "pivots on a fusion of the plain language of the plan," and the fact that the plan could have had an exclusion written in for the risk of relapse, but chose not to. But is the First Circuit's holding really as narrow as it suggests? Read literally, the First Circuit seems to be suggesting that the plan fiduciary's interpretation was unreasonable because it "gap-filled" an ambiguous plan provision by concluding that the risk of relapse was not a disability under the plan. If this is in fact what the First Circuit meant, it would appear to be at odds with well-established case law holding that a plan fiduciary's reasonable interpretation should be deferred to, even in the face of other reasonable interpretations.

While there now appears to be a circuit split on the issue of whether, and the extent to which, courts will conclude that the risk of a relapse is so severe that it constitutes a current (as opposed to future) disability under a long-term disability benefit plan, plan sponsors and fiduciaries can take steps to avoid potential litigation and liability on this issue through plan draftmanship. As the First Circuit observed, the plan sponsor could have written into the plan an exclusion for risk of relapse, but it apparently chose not to do so.

Rulings, Filings, and Settlements of Interest

Contributed by Anthony S. Cacace, Brian S. Neulander, Kara L. Lincoln, Page W. Griffin, and Jacklina A. Len

State Law Waivers

> The U.S. Supreme Court previously held that an ERISA plan administrator must distribute benefits to the beneficiary named in the plan, regardless of any state law waiver purporting to divest that beneficiary of his right to the benefits. That case explicitly left open the question of whether, once the benefits are distributed by the administrator, the decedent's estate can enforce a waiver against the plan beneficiary. The Fourth Circuit in *Andochick v. Byrd*, 2013 WL 781978 (4th Cir. Mar. 4, 2013), held that allowing post-distribution suits to enforce state law waivers does nothing to interfere with any of the ERISA objectives indentified by the Supreme Court, namely, simple administration, avoiding double liability for plan administrators, and ensuring that beneficiaries get what's owing to them quickly.

Health Care

> In *Grote v. Sebelius*, 2013 WL 362725 (7th Cir. Jan. 30, 2013), the Seventh Circuit held that members of the Grote family, and their company, Grote Industries, were entitled to an order enjoining enforcement of the Affordable Care Act's requirements that non-grandfathered health plans cover certain preventative health services, including contraceptives, without cost-sharing. Plaintiffs sued the government, seeking declaratory and injunctive relief from the so-called contraception mandate, under the First and Fifth Amendments of the U.S. Constitution, as well as the Religious Freedom Restoration Act. Agreeing with a prior ruling from the Seventh Circuit, the majority concluded that plaintiffs established a likelihood of some success to warrant an injunction. In a dissenting opinion, Judge Rovner asserted that for-profit companies do not have "cognizable religious liberties independent of the people who animate them" and that there was no right to preliminary relief.

Employer Stock Fund Litigation

> In *Taveras v. UBS AG*, 2013 WL 692535 (2d Cir. Feb. 27, 2013), the Second Circuit held the *Moench* presumption of prudence did not apply to fiduciaries of an eligible individual account plan where the plan document neither required nor "strongly" encouraged investment in the defendant's stock fund. The Court accordingly reversed and remanded a district dismissal of a stock drop lawsuit. In so ruling, the court reasoned that "it is not merely investment in employer stock that entitles a defendant to a presumption of prudence. Rather, 'judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest. Thus, a fiduciary's failure to divest from company stock is less likely to constitute an abuse of discretion if the plan's terms require — rather than merely permit — investment in company stock.'"

Fiduciary Status

> In *Int'l Painters and Allied Trades Indus. Pension Fund v. Clayton B. Obersheimer, Inc.*, 2013 WL 594691 (D. Md. Feb. 13, 2013), a district court rejected plaintiffs' contention that company officers were acting as ERISA fiduciaries in connection with the company's delinquent contributions to a pension plan because they exercised discretionary control over the unpaid contributions. In so ruling, the court determined that discretion whether to pay debts owed to an employee benefit plan does not suffice to confer fiduciary status under ERISA.

Standing

> In *MHA, LLC v. Aetna Health, Inc.*, 2013 WL 705612 (D.N.J. Feb. 25, 2013), a district court held that a hospital lacked standing to bring a claim for benefits under ERISA because its patients had only authorized the payment of benefits, and had not assigned their rights to recover those benefits.

Indemnification

> In *Schafer v. Multiband Corp.*, 2013 WL 607910 (E.D. Mich. Feb. 19, 2013), a district court vacated the decision of an arbitrator who concluded that indemnification agreements executed in connection with the establishment of an employer stock ownership plan and an employee stock ownership trust violated ERISA § 410(a), 29 U.S.C. § 1110(a). The agreements indemnified the plaintiffs for losses arising from their acts as directors of the ESOP's sponsor and as trustees of the ESOP, but the agreements did not indemnify plaintiffs for losses caused by intentional misconduct or gross negligence. The court found that the arbitrator manifestly disregarded clearly established legal precedent. Indemnification agreements such as the one at issue are enforceable and do not violate ERISA Section 410's prohibition of exculpatory provisions because the agreements did not relieve plaintiffs of liability for any losses.

Exhaustion of Administrative Remedies

> In *McCay v. Drummond*, 2013 WL 616923 (11th Cir. Feb. 20, 2013), the Eleventh Circuit held that deficiencies in a notice of denial of benefits did not excuse a participant's failure to appeal within a designated 180-day time period. In so ruling, the Court reasoned that plaintiff's allegations of defendant's noncompliance with ERISA's technical requirements – namely, that his denial notice did not include a statement of the need to obtain a favorable decision – was insufficient to excuse ERISA's administrative exhaustion requirement.

Settlements

> In *In re: Nortel Networks Inc.*, No. 1:09-bk-10138 (Bankr. D. Del. 2013), Nortel Networks Inc. reached a settlement with over 3,000 of its retired employees for nearly $67 million. Nortel, a former telecom equipment maker, filed for bankruptcy in 2009. In the subsequent four years, Nortel sold off

nearly all of its assets, but had been unable to reach a compromise with its retirees to terminate its benefit plans. According to a settlement motion filed on December 31, 2013 in Delaware bankruptcy court, Nortel will stop funding the benefit plans of its retirees as of May 31, 2013 in exchange for a one-time payment of almost $67 million to the official committee of retired employees.

Remedies

- In *Gearlds v. Entergy Servs., Inc.*, 2013 WL 610543 (5th Cir. Feb. 19, 2013), the Fifth Circuit held in light of *CIGNA Corp. v. Amara* that plaintiff pled a plausible claim for relief for losses he claims to have suffered from foregoing benefits under his wife's retirement plan, and remanded to the district court to consider whether the circumstances of the case will warrant surcharge. The Court held that ERISA § 502(a)(3)'s text limiting remedies to "appropriate equitable relief" may – in some cases – include some forms of monetary relief because of the Supreme Court's recent ruling in *Amara*.

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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