

INSURANCE DISPUTES AND LITIGATION: HOW TO BE A HERO TO YOUR CLIENT

BY: ERIC BUCHANAN, CHATTANOOGA, TENNESSEE.
EBUCHANAN@BUCHANANDISABILITY.COM

HOW TO BE A HERO TO YOUR CLIENT

- What is your goal:
 - Sell client a policy that meets client's needs.
 - Will be in force when the client has a claim.
 - The claim(s) will be paid promptly.
 - If something goes wrong, you did the best you could do to protect your client.

INSURANCE DISPUTES AND LITIGATION

- Litigation = Court Case
- Two types of litigation:
 - Breach of contract under state law
 - includes bad faith
 - ERISA claims

INSURANCE DISPUTES AND LITIGATION

- Two types of litigation:
 - Breach of contract under state law
 - ERISA claims
- Depends on the type of policy and how it is provided

INSURANCE DISPUTES AND LITIGATION

- What can go wrong?
 - Policy rescissions
 - Policy cancellations
 - Claim denials

STATE INSURANCE LAW

- Don't promise something you can't or didn't deliver:
 - It is an unfair and deceptive practice:
 - To provide advertising material that contradicts or misrepresents any provision of the underlying policy,

DON'T SELL A POLICY THAT CAN BE RESCINDED

- If your client, *or you on your client's behalf*, makes a
 - written or oral misrepresentation
 - During the **negotiations** of a policy,
 - or in the **application** therefor,
 - The policy **may be void** if
 - The misrepresentation is made with actual intent to deceive, or
 - unless the matter represented increases the risk of loss (hint, they all do)

“BUT I TOLD MY AGENT!”

- A very common problem that results in cases going to court:
 - “You can’t cancel my policy for not disclosing something, because I told my agent about it!”
 - And sometimes the rest of the story is:
“And my agent said not to worry about it”

DON'T LET YOUR CLIENT LOSE COVERAGE

- Tell your client to tell the truth on the policy application
 - If in doubt, disclose it
 - It is better to fight for the coverage in the first place than to fight a rescission after a claim is filed
- If your client needs your help on the application, never fill out an answer that you are not sure your client can stand behind

WHAT IS FRAUD?

- Intentionally misrepresenting something.
- Representing something to be true when you are not sure it is true.

SALESPERSON CAN BE AGENT FOR BOTH THE CLIENT AND INSURANCE COMPANY

- An agent or broker who helps someone obtain a policy “is the agent of the insured in negotiating for the policy, and owes a duty to the [person] to exercise reasonable skill, care, and diligence in effecting the insurance.”

- *Morrison v. Allen*, 338 S.W. 3d 417, 426 (Tenn. 2011).

SALESPERSON CAN BE AGENT FOR BOTH THE CLIENT AND INSURANCE COMPANY

- Most states' laws say that an agent who helps procure the policy is an agent for the insurance company
 - What the client tells the agent is deemed to be information told to the insurance company
 - BUT, the client is still responsible to ensure the application for the policy contains all the information requested and is accurate

NEVER SAY “DON’T WORRY ABOUT IT”

- Example: T.C.A. § 56-7-135 creates a rebuttable presumption that when a person signs an application that such person “has read, understands, and accepts the contents of such document.”
 - So, if a client leaves something out of the application, and salesperson/agent allows that to happen, the insurance company can cancel the coverage on the grounds that the insured knew what was in the application, and knew what was left out.

NEVER SAY “DON’T WORRY ABOUT IT.”

- But, even if the insurance company can deny, the client can go after the agent in court if the agent’s actions or inactions makes the policy contestable.
- Or if the policy is not what the client was promised.

WHEN IS AGENT ON THE HOOK?

- The client would need to prove:
 - (1) An undertaking or agreement by the agent or broker to procure insurance;
 - (2) the agent's or broker's failure to use reasonable diligence in attempting to place the insurance and failure to notify the client promptly of any such failure; and
 - (3) that the agent's or broker's actions warranted the client's assumption that he or she was properly insured.

ERISA

ERISA = BAD FOR INSURED

- ERISA = Employee Retirement Security Act of 1974
- Supposed to protect employees, but it doesn't.

ERISA INSURANCE POLICIES

- What is ERISA?
 - Applies to most insurance policies where an employer is involved (most group, but some individual)
 - Applies to LTD, life insurance, health insurance, AD&D, dental, etc., when offered through work

ERISA INSURANCE POLICIES

- What is ERISA and why is it bad for the insured?
 - Turns insurance questions into employee benefit questions
 - Handled very differently in court from ordinary cases that can go to a jury under state law

ERISA: WHY IS IT BAD FOR THE INSURED?

- Litigated in federal court and state laws are preempted
 - i.e. good state law rules don't apply
- No damages except benefits due
 - Except, rarely, attorneys' fees
- No new evidence considered by the court
- And . . .

ERISA: WHY IS IT BAD FOR THE INSURED?

- No jury trial
 - The case is decided by a federal judge based on the documents in the file
 - No chance for a jury of peers to decide if insurance company was wrong
- And ...

ERISA: WHY IS IT BAD FOR THE INSURED?

- Insurance company gets the benefit of the doubt in court – special standard of review
 - Based on Supreme Court case *Firestone Tire v. Bruch*, (U.S. 1989), if the insurance policy gives discretion to the insurance company (and they almost all do, now), then the insurance company wins unless the denial was unreasonable, even if the denial was wrong
 - Also called “arbitrary and capricious standard”
- AND ...

ERISA: WHY IS IT BAD FOR THE INSURED?

- Rules are confusing and many attorneys don't know how to handle these cases.
 - Evidence must be submitted during the pre-litigation phase (called the “administrative phase)
 - Appeal deadlines must be met, or claim is lost forever
 - Policies can require at least one, and maybe two, appeals, and the case cannot go to court until those appeals are over

ERISA: WHEN IS AN INSURANCE POLICY SUBJECT TO ERISA?

- ERISA applies to most insurance provided through an employer,
 - even if the employee/insured pays 100% of the premiums
- ERISA usually applies to group policies, but can apply to individual policies if provided through work or premiums are paid through the employer

WHAT CAN ERISAIFY A POLICY?

- “Individual” policies can be ERISA if an employer is involved.
 - **Company pays premiums**
 - **Premiums are list billed, and a discount is given**

HOW TO BE A HERO

- Don't [accidentally] turn your client's individual policy into an ERISA policy
 - Don't list bill or give a group discount
 - If you can help it
 - Don't let employer pay the bill

ERISA-LET'S GET TECHNICAL FOR A MOMENT

- ERISA § 4(a), 29 U.S.C. § 1003(a) provides that ERISA
- shall apply 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.

ERISA DOES NOT ALWAYS APPLY:

- **(1)** such plan is a governmental plan
- **(2)** such plan is a church plan [unless the church opts in]
- **(3)** such plan is maintained solely for ... complying with ... workmen's compensation laws or unemployment compensation or disability insurance laws;
- **(4)** such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens;

ERISA APPLIES!

- Bottom Line:
 - If an employer was involved at all in providing the coverage (even if the employee paid for it) it is most likely ERISA
 - This includes discounts for list billing for everyone working for the same employer

WHEN DOES ERISA NOT APPLY?

- Provided by/through a government employer
- Provided by church
 - (maybe, church can opt in)
- Not ERISA if only insureds are owners and spouses
 - If it covers another employee, it is ERISA for everyone
- A payroll deduction is ok, if that is ALL the employer does, and the insurer does NOT give a discount

ERISA APPLIES!

- The presumption is that ERISA applies, in most cases

ERISA APPLICATION AND PREEMPTION

- Whether ERISA applies can be a separate lecture – there is a lot more to it.
- I have a paper on my website for attorneys: “How to Tell if Your Client’s Insurance Case is Preempted by ERISA” at: www.buchanandisability.com

SO WHAT IT ERISA APPLIES?

- Lots of special rules

IF ERISA APPLIES

- Employer becomes a “plan sponsor”
- Employer almost always becomes “plan administrator”
 - Lots of duties of a “plan administrator”
 - Insurance company is usually not a “plan administrator”

EMPLOYER AS PLAN SPONSOR

- Must provide plan documents to employees at certain times
- Most provide plan documents after written request
- Can be sued for up to \$110 a day for failing to provide plan documents
- Can be sued for “breach of fiduciary duties” for misleading or failing to inform employees about benefits
- Can be audited and fined by DOL and IRS
- And...no one tells employers this

ERISA CLAIM PROCEDURES

- Administrative Claim procedures
 - Claimant must file a claim in time required by policy or plan
 - 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)
 - May be required to appeal a second time if plan/policy requires
 - May be offered additional voluntary appeals

ERISA CLAIM PROCEDURES

- Administrative Claim procedures
 - ERISA plans must establish maintain reasonable claims procedures. 29 C.F.R. § 2560.503-1.
 - Administrator must make timely decision
 - Administrator must give written explanation
 - Administrator must provide copy of all relevant documents if requested

ERISA CLAIM PROCEDURES – ROLE OF AGENT

- Practical Advice:
 - Ask yourself: “do I want to get involved?”
 - Never let employee miss an appeal deadline
 - Tell client to always submit all evidence in support of the claim during the process, because the court will not consider anything not submitted
 - If the client needs more time, the client should file the appeal on time and ask for more time to submit additional evidence; that will often be granted; if not the insurance company can look unreasonable
 - And-best advice-send employee to attorney who handles ERISA

HOW TO BE A HERO - BASIC ADVICE

- Don't turn your client's individual policy into an ERISA policy
 - Don't list bill or give a group discount
 - Don't let employer pay the bill
- Tell Employers about obligations under ERISA
- When employees are denied benefits, send them to an ERISA attorney to help with any appeal