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Multiple Individual LTD Policies Found to be Subject to ERISA, Due to Employer Involvement

A district court in the Ninth Circuit has held that ERISA applied to a number of individual long-term disability ("LTD") policies purchased by employees of a physical therapy business, due to the employer's involvement in arranging for the LTD policies. Thus, ERISA preempted the plaintiff's state law claims brought pursuant to one of those policies. (*Bommarito v. Nw. Mut. Life Ins. Co.*, (2018, DC CA) 2018 WL 3537118)

Background. Devra Bommarito was a physical therapist and 50% owner of XCEL Orthopaedic Physical Therapy, Inc. ("XCEL") from May 1992 to December 2010. Thereafter, she became XCEL's sole owner.

On September 7, 1997, Bommarito purchased an LTD policy from Northwestern Mutual Life Insurance Company ("Northwestern"). A Northwestern employee also met with Bommarito's former business partner at XCEL's office several times, and the Northwestern employee was also allowed to meet with other XCEL employees to discuss its services, including the LTD policy.

Beginning December 31, 2006, Bommarito suffered injuries to her cervical spine and shoulder, which ultimately led to her claim for LTD benefits under her policy. Bommarito's claim was approved in January 2010.

While Bommarito was collecting her LTD benefits, Northwestern learned that Bommarito was still practicing physical therapy.

On January 17, 2014, Northwestern sent a letter to Bommarito accusing her of intentionally misrepresenting her level of functionality, informing her that her policy was being canceled, and notifying her that her claim would be closed.

Bommarito filed a lawsuit against Northwestern, alleging breach of contract and other state-law claims. Northwestern argued that Bommarito's LTD policy was part of an ERISA plan, and as such, her state law claims were preempted by ERISA.

LTD policies subject to ERISA. The district court held that Bommarito's LTD policy was indeed subject to ERISA due to XCEL's involvement in establishing the policy. In reaching this conclusion, the court analyzed the facts and circumstances to determine whether the elements of an ERISA plan were present.

Bommarito had argued that the ERISA plan elements didn't apply to her, because she had intended merely to purchase a policy for herself, not to establish a plan for XCEL employees (who obtained coverage through separate individual policies).

The court disagreed, noting that the LTD policies' application materials indicated employer involvement. Most notably, there was a form signed by XCEL specifying the eligible class of employees, and stating that XCEL would pay all or part of the premium, as well as recommend the LTD policies to eligible employees through an endorsement letter.

The court also concluded that even though there were multiple individual policies, an ERISA plan existed, because a reasonable person could ascertain the intended benefits, class of beneficiaries, source of financing, and procedure for receiving benefits. The other ERISA plan elements were also present, as XCEL was clearly an employer, and the policies provided ERISA-listed benefits to participants and beneficiaries.

Bommarito had also argued that the LTD policies were excluded from ERISA under the safe harbor for certain voluntary employee-pay-all insurance arrangements (see Labor Reg. 2510.3(j)). However, the court ruled that the safe harbor didn't apply here since XCEL had endorsed the plan.

Also, while the court had acknowledged that it was not clear whether XCEL had actually paid the employees' premiums, there was still evidence that XCEL had contributed to the program by facilitating discounted premiums for the policies. The discounts would not have

been available absent XCEL's involvement, the court noted.

Ultimately, due to XCEL's entanglements, the court found that the LTD policies did not fall within the safe harbor, and instead constituted an ERISA plan. As a result, ERISA applied, and preempted Bommarito's state-law claims relating to the denial of her benefits under her policy.

 **Observation:** In other cases, courts have held that premium discounts alone do not constitute an employer contribution for purposes of the ERISA safe harbor. Thus, the applicability of the ERISA safe harbor remains open to interpretation.

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