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Life, Health, Disability & ERISA Litigation

Fall 2022| First Circuit e-Report | Download PDF

Greetings! We are pleased to provide you with a summary of decisions rendered by the First Circuit Court of Appeals, the U.S. District Courts within the circuit, and state appellate courts within the same geographic area. For your convenience, we have included hyperlinks with direct access to the full decision for each case. Decisions reproduced with permission of Westlaw.

FIRST CIRCUIT UPHOLDS DETERMINATION THAT DEATH CAUSED BY SUICIDE

In **Alexandre v. National Union Fire Insurance Company**, 22 F.4th 261 (1st Cir. 2022), the First Circuit Court of Appeals upheld National Union's determination that an insured's death was by suicide.

Alexandre was a participant in a group accident insurance plan provided by her employer. The plan was funded by a policy issued by National Union, which also administered claims. The plan was governed by ERISA.

Alexandre's husband died after falling nine stories from the interior of a hotel. Alexandre sought payment of accidental death benefits in the amount of $500,000. National Union denied the claim on the grounds that the husband's death was a suicide, which was an exclusion contained in the policy. Alexandre brought suit.

The district court upheld National Union's decision and entered summary judgment in its favor. Alexandre then appealed.

The First Circuit first held that National Union's decision would be reviewed under the arbitrary and capricious standard of review. With regard to the applicable law, the court rejected Alexandre's

FIRST CIRCUIT REINSTATES CLAIM THAT PLAN VIOLATED THE MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT

In **N.R. v. Raytheon Company**, 24 F.4th 740 (1st Cir. 2022), the First Circuit Court of Appeals reversed a district court's dismissal of a Complaint alleging a violation of the Mental Health Parity and Addiction Equity Act ("Parity Act").

N.R., a juvenile, received speech therapy related to his Autism Spectrum Disorder. N.R. and his family were covered by a health plan provided by Raytheon Company, which was administered by United Healthcare. The plan is governed by ERISA. United Healthcare denied the speech therapy claim based upon its interpretation of the exclusions contained in the benefit plan. N.R. brought suit.

The district court allowed the defendants' motion to dismiss the complaint and N.R. appealed to the First Circuit.

The district court dismissed the complaint because it agreed with the defendants' representation of how the benefit plan works. The First Circuit held that, on a motion to dismiss, the district court's determination was premature. The court found that the Complaint adequately alleged a violation of the Parity Act and therefore should be

argument that, because the case was transferred from the U. S. District Court in Florida, 11th Circuit law should control. The court noted its previous rulings that when a district court transfers a case, the norm is that the transferring court applies its own Circuit's cases on the meaning of federal law.

With regard to the merits of the claim, National Union had concluded that the incident occurred as related in the police investigation conducted of the death, which described the husband's volitional and purposeful conduct as sprinting out of the hotel room and hurling himself over the tenth floor railing of the hotel. The court held that this conclusion was not arbitrary or capricious given that the summary was authored by a state official in the exercise of official duties and included the medical examiner's investigation and interviews with two witnesses. Additional evidence included the death certificate which ruled the death as a suicide.

The First Circuit affirmed the district court's decision in favor of National Union.

reinstated. The court also reinstated the claim for ERISA benefits pursuant to 29 U.S.C. §1132(a)(1)(B).

The court also held that the district court erred by dismissing the claim alleging Raytheon failed to respond adequately to a request for information pursuant to 29 U.S.C. §1132(a)(1)(A). The defendants argued that the claim failed because N.R. did not make the information request to the individual named as plan administrator. The court found that to be a "persnickety reading of the statute" and held that N.R.'s attempt to obtain the information by contacting Raytheon (the named administrator's employer), Raytheon's in-house counsel and Raytheon's outside counsel was sufficient.

The court did dismiss the claim for breach of fiduciary duty pursuant to 29 U.S.C. §1132(a)(2) because that provision of ERISA is concerned solely with plan asset mismanagement and solely authorizes remedies that inure to the benefit of the ERISA plan as a whole. Given the Complaint's failure to allege such relief, the court found that claim was properly dismissed.

MASSACHUSETTS SUPREME JUDICIAL COURT FINDS STATUTE THAT REVOKES DESIGNATION OF EX-SPOUSE AS NAMED BENEFICIARY IN LIFE INSURANCE POLICIES IS CONSTITUTIONAL AND APPLIES RETROACTIVELY

In **American Family Life Assurance Company of Columbus ("AFLAC") v. Joann Parker**, 488 Mass. 801 (2022), the Massachusetts Supreme Judicial Court ("SJC") addressed Massachusetts' Uniform Probate Code's "Revocation of probate and nonprobate transfers by divorce" provision, M.G.L. c. 190B, §2-804.

This statute comes into play on life insurance claims where the ex-spouse of a deceased policyholder remains the beneficiary of a policy at the time of the insured's death and neither the divorce agreement nor orders from a court finalizing a divorce specify that the spouse's beneficiary designation was intended to continue post-divorce. Chapter 190B, §2-804 operates as a revocation of the designation of a spouse as a beneficiary, unless there is an express agreement that the designation continue.

Sean and Dawn Parker married in 1999. In 2010, Sean purchased a twenty-year term life insurance policy naming Dawn as the primary beneficiary. The alternate beneficiary was Sean's mother, Joann. Shortly after purchasing the policy, Sean lost his job and Dawn began paying the premium. She made the premium payments at Sean's direction. In 2016, Sean and Dawn divorced. Representing themselves, they used a court-provided form separation agreement. The agreement did not address life insurance even though there were places on the form that prompted users to provide life insurance for the benefit of their children.

According to Dawn, Sean instructed her to keep paying premium on the policy until he died in 2018. Dawn filed a claim with AFLAC, but upon the company learning that Dawn and Sean were divorced, the company requested the divorce agreement. After reviewing the agreement, AFLAC determined that it could not pay the proceeds to Dawn and instructed Joann to file a claim. The competing beneficiaries could not resolve the claim among themselves. AFLAC filed an interpleader action, paid the benefits into court, and was discharged from the case. The trial court found that Chapter 190B §2-804 revoked the designation of Dawn as beneficiary and awarded the benefits to Joann.

Dawn appealed and the SJC on its own initiative transferred the case from the Appeals Court. The appeal focused on four areas. First, that the statute does not apply to life insurance. However, the SJC found the plain language of the statute was clear that it applies to life insurance.

Second, Dawn argued that the statute was unconstitutional and did not apply retroactively. The statute was enacted in 2012. Dawn's position was that the statute should not apply to a life insurance policy issued in 2010. But, the statute has a provision which applies the law retroactively, and the SJC explained that the U.S.

Supreme Court had already interpreted an almost identical law in Minnesota as constitutional in **Sveen v. Melin**, 138 S. Ct. 1815 (2018).

Dawn next argued that she had an oral agreement with Sean to continue the life insurance by agreeing to pay the premiums. But, the separation agreement never provided for Dawn continuing on as the named beneficiary post-divorce. That doomed her argument because the statute specifically requires an express agreement to counteract the revocation of a spouse as beneficiary post-divorce.

Finally, Dawn argued that the express terms of the policy did not mention divorce as an act that would revoke a beneficiary designation by the policyholder. Once again the SJC relied on the requirement in Chapter 190B §2-804 that there be "express" language in a governing instrument providing for the ex-spouse to continue as the named beneficiary post-divorce.

The SJC affirmed the trial court's decision and awarded the benefits to Joann.

The opinion confirms that Chapter 190B §2-804 revokes the designation of a spouse as a beneficiary post-divorce. The statute passes constitutional scrutiny and it applies retroactively. Therefore, life insurance policies issued before the law's enactment are also governed by its language. Claim departments managing life insurance claims in Massachusetts, upon learning that the policyholder is divorced and a former spouse is named as the primary beneficiary, must make inquiry as to whether there is an express agreement allowing for the beneficiary designation to continue after the dissolution of the marriage. Once on notice of the divorce, an insurer risks having to pay the claim twice if it wrongfully pays an ex-spouse. If there is any question about the applicability of Chapter 190B §2-804, interpleader is always a safe option.

Family law practitioners should also keep this statute front of mind when drafting separation agreements. The failure to specifically provide for a spouse to continue on as a named beneficiary post-divorce can have serious consequences. It is easy to comply with the statute. All that is needed is an express agreement stating that after the divorce the named ex-spouse will continue on as beneficiary.

MASSACHUSETTS HOLDS THAT A NEUROPSYCHOLOGIST IS A "PHYSICIAN" FOR PURPOSES OF CONDUCTING A RULE 35 EXAMINATION

In **Ashe v. Shawmut Woodworking & Supply, Inc.**, 489 Mass. 529 (2022), the Supreme Judicial Court of Massachusetts was asked to decide whether a party whose mental or physical condition was an issue in a case could be required, pursuant to Massachusetts Rule of Civil Procedure 35, to appear for an examination before a neuropsychologist. The court answered Yes.

In connection with a civil lawsuit, the defendant had requested the plaintiff submit to a neuropsychological examination by a board-certified clinical neuropsychologist. Rule 35 allows a court to order a party to submit "to a physical or mental examination by a physician . . ." The plaintiff argued that because the neuropsychologist was not a physician, he should not be required to appear for the examination.

The court stated that because "physician" was not defined in the rule, it may look to its "usual and accepted meaning", provided that it was consistent with the purpose of the rule. The court first looked at the dictionary definition of "physician" which was a "person skilled in the art of healing" or a "doctor of medicine." Finding that

COURT DENIES REQUEST TO DEPOSE IN-HOUSE COUNSEL

In **Rain v. Connecticut General Corporation,** 2022 WL 2294061 (D. Mass. 2022), the U.S. District Court of Massachusetts allowed a motion for protective order prohibiting the deposition of one of Connecticut General's in-house counsel, at least for now.

Rain brought suit in a representative capacity because she seeks to represent a class of persons who allege that Connecticut General and others improperly denied benefits under certain long-term care insurance policies. Those policies are no longer sold by the defendants.

During discovery, Rain learned that an in-house counsel, Mark Jackson, and a non-lawyer were the only employees of the defendants who were involved in responding to claims on the closed book of long-term care policies. Rain sent a demand letter pursuant to the Massachusetts consumer protection act, Chapter 93A, and Jackson drafted the response. Rain argued that because Jackson was functioning in a business capacity as a claim representative, she was entitled to depose him. The defendants moved for a protective order.

The court first referred to a three factor test developed by the Eighth Circuit to determine whether a deposition of an opposing counsel, including in-house counsel, is appropriate. The court noted that the crucial factor is the extent of

neuropsychologists conduct assessments to evaluate, diagnose and treat individuals with known or suspected neurological diseases or injuries, the court held that although neuropsychologists are not medical doctors, they are skilled in the art of healing and therefore a physician pursuant to that definition of the word.

The court also noted that in considering the meaning of "physician" as used in the rule, it was incumbent on the court to interpret the rules of civil procedure in a manner which accomplishes their obvious purpose and objective. Because the purpose of Rule 35 is to provide a defendant with an equal opportunity to evaluate any injuries the defendant is alleged to have caused, and the plaintiff was relying, in part, on a report from another neuropsychologist, the court said it was obvious that the defendant may invoke Rule 35 to give themselves an opportunity to have their own neuropsychologist examine the plaintiff.

In a footnote, the court stated that it was asking a standing advisory committee on the rules of civil procedure to consider whether an amendment or other guidance on the rule was in order.

The decision is also noteworthy for life insurers because the Massachusetts Appeals Court previously interpreted Massachusetts General Law c.175, §124, which governs recissions of life insurance policies, to require the medical examination referred to in §124 be performed by a physician, not a nurse. See **Robinson v. Prudential Ins. Co.**, 56 Mass. App. Ct. 244 (2002). In that case, the court construed the term "medical examination" as contained in the statute. The court referred to Ballantine's Law Dictionary's definition of medical examination which was an examination of a person by a "physician", and that a nurse was not a physician. Query whether this new SJC decision opens the door for the argument that a medical examination by a nurse should also be considered as one conducted by a physician.

the lawyer's involvement in the pending litigation. The court noted that establishing the scope of protection under the attorney-client privilege for an in-house counsel can be complicated because their work often consists of a combination of legal and business tasks. The court held that the rendering of business advice unrelated to any legal issues is not protected by the attorney-client privilege or the work product doctrine. However, as long as the communication is primarily or predominantly of a legal character, the protection is not lost merely because it also deals with matters that might more fairly be characterized as business matters.

Rain's primary purpose for deposing Jackson was to ask questions about the basis of the Chapter 93A response. The court found, however, that in responding to the Chapter 93A letter Jackson was providing legal advice about potential liability. Thus, the response letter appeared to be a legal analysis of coverage. As a result, Rain would be questioning Jackson about opinion work product that is only discoverable in unusual circumstances.

While acknowledging that Rain was entitled to discover the basis of the denial of her claim, the court agreed with the defendants that there are other discovery options that may be sufficient and should be exhausted before seeking to depose Jackson. While noting that she may ultimately be able to do so, Rain had not yet satisfied her burden to establish the deposition of Jackson was necessary.

The motion was denied without prejudice for Rain to file a subsequent motion if she can make a showing that complied with the court's ruling.

U.S. DISTRICT COURT OF MASSACHUSETTS FOLLOWS RULING OF AMERICAN FAMILY LIFE, AND AWARDS FEES IN INTERPLEADER

In **Sevelitte v. The Guardian Life Insurance Company of America**, 2022 WL 1051351 (D. Mass. 2022), the U.S. District Court of Massachusetts held that the divorced spouse of the deceased was not entitled to the proceeds of a life insurance policy. The court also entered a judgment in favor of Guardian Life and awarded it attorney's fees.

Joseph Sevelitte purchased a life insurance policy in

GRANT OF DISCRETIONARY REVIEW CONTAINED IN APPLICATION AND SUMMARY PLAN DESCRIPTION SUFFICIENT

In **MacNaughton v. Paul Revere Life Insurance Company**, 2022 WL 780724 (D. Mass. 2022), the U.S. District Court of Massachusetts agreed with Paul Revere that the insertion of discretionary language in the application for insurance, which was made part of the group policy, and in the summary plan description were sufficient to grant discretion to Paul Revere. However, the court remanded the claim to Paul Revere on the grounds that MacNaughton was prejudiced by not receiving medical reviews conducted by Paul Revere during

1986. It named his then wife, Renee, as beneficiary. There was no contingent beneficiary. In 2013, Joseph and Renee divorced, and he later married Robyn. Joseph died in 2020.

A dispute arose regarding who was entitled to the proceeds of the policy. While Guardian was attempting to resolve the dispute, Renee filed suit in state court bringing multiple claims against Guardian. Guardian removed the case to federal court, added Robyn as a party, and brought a counterclaim for interpleader. The parties then brought dispositive motions.

On the merits of who was entitled to the proceeds, the court ruled in favor of Robyn, based primarily on the application of Massachusetts General Law, c. 190B, §2-804. That statute, which was specifically addressed by the Supreme Judicial Court in **American Life Assurance Company of Columbus v. Parker**, 488 Mass. 801 (2022), operates as a revocation of the designation of a spouse as a beneficiary in a life insurance policy after a divorce, unless there is an express agreement that the designation continue. While Renee made multiple arguments to establish such a designation, the court rejected them. Regarding Guardian, the court dismissed Renee's multiple claims, including breach of contract and violations of Chapter 93A. The court also made an express order enjoining Renee and Robyn from commencing or prosecuting any claim against Guardian in state or federal court regarding the policy.

Finally, the court awarded attorney's fees to Guardian for its time spent on the interpleader. While noting that additional time was required to be spent by Guardian in addressing Renee's claims against the company, the court applied the "American Rule" which holds that each party must bear its own legal fees.

J. Christopher Collins represented The Guardian Life Insurance Company of America.

the administrative appeal.

MacNaughton was a radiologist who had stopped working in 2007 due to an eye condition. She was paid benefits for 10 years until an independent medical examination determined that her vision would allow her to perform the duties of a radiologist.

Shortly after benefits were discontinued, MacNaughton requested a copy of her claim file. It was promptly provided. During the appeal, MacNaughton submitted new medical information, which was reviewed by Paul Revere's medical consultant. Paul Revere upheld its decision discontinuing benefits. After receiving the determination, MacNaughton again requested a copy of the claim file. Again, it was promptly provided. She then filed suit.

On cross-motions for summary judgment, the court first determined the standard of review. Noting that the plan documents contained specific language that the contract consisted of not only the group policy, but also the application for the policy, the court found that the application, which contained language giving Paul Revere discretionary authority over claim determinations, was appropriate. Similar language was contained in the summary plan description.

MacNaughton argued that de novo review should be applied because she was not given a copy of either the application or the SPD. The court rejected the argument noting that both documents would have been available to MacNaughton, who was not only an employee of the group but also a part owner.

The court next addressed MacNaughton's argument that she was not given a full and fair review because Paul Revere did not disclose the medical opinions generated on appeal until after the appeal decision was reached. MacNaughton first raised this argument in her motion for summary judgment relying on the First Circuit's recent decision in **Jette v. United of Omaha Life Ins. Co.**, 18 F.4th 18 (1st Cir. 2021). The claim was governed by the "old", pre-April 2018, Department of Labor claim regulations. Those regulations require that Paul Revere provide documents related to the claim "upon request." Despite the fact that MacNaughton was provided with the claim file promptly after each of her two requests, the court, relying on the request made by MacNaughton after the claim was initially denied, held Paul Revere was also required to disclose information generated on appeal despite the fact that no ongoing request was made by MacNaughton.

Because the court found that MacNaughton was prejudiced by not having access to the medical reviews on appeal, it remanded the case to Paul

Revere.

J. Christopher Collins and Joseph M. Hamilton represented The Paul Revere Life Insurance Company.

COURT FINDS DE NOVO STANDARD OF REVIEW APPLIES

In **DeCristofaro v. Life Insurance Company of North America**, 2022 WL 1801088 (D. R.I. 2022), the U.S. District Court of Rhode Island found that a decision regarding entitlement to disability benefits in an ERISA plan would be decided under the de novo standard of review.

DeCristofaro sued seeking disability benefits. The threshold issue raised was the standard of review. The court noted that, presumptively, the denial of benefits is subject to de novo review and that Life Insurance Company of North America ("LINA") bore the burden of proof to demonstrate that the arbitrary and capricious standard of review should apply.

The court first reviewed the group policy and found no language that would provide a deferential standard of review. The court noted that the language in the policy saying proof of disability must be "satisfactory" to LINA had been deemed insufficient by the First Circuit.

LINA pointed to language contained in the Summary Plan Description ("SPD"). However, the court found the SPD contained a disclaimer that it was not the insurance contract and did not waiver or alter any terms of the policy. The court found that LINA could not rely on discretionary language in the SPD where the SPD specifically disavows setting forth terms of the policy. This appears to be a broad reading of that provision of the SPD.

Going further, the court rejected the argument that the language contained in the SPD provided discretionary authority. That SPD stated LINA "shall have the authority, in its discretion, to interpret the terms of the Plan, decide questions of eligibility for coverage or benefits under the Plan, and to make any related findings of fact." A classic grant of discretionary authority. Again, a ruling that appears to be on shaky grounds.

Finally, the court found that Rhode Island General Law, §27-18-79, which bans policies from including discretionary language applied to the group policy. While LINA argued that the statute was preempted by ERISA and that the statute should not have retroactive effect, the court rejected both arguments. The court concluded that ERISA did not preempt the banning of discretionary language, similar to the majority rule in the United States, and that the statute applied to the group policy because the policy had been reissued after the enactment of the statute.

The court ruled that the de novo standard of review applied.

THIRD PARTY ADMINISTRATOR NOT AN ERISA FIDUCIARY

In **Massachusetts Laborers' Health and Welfare Fund v. Blue Cross Blue Shield of Massachusetts**, 2022 WL 952247 (D. Mass. 2022), the U.S. District Court of Massachusetts found that Blue Cross Blue Shield was not acting as a fiduciary while serving as a third party administrator for a health-benefit plan.

The Massachusetts Laborers' Health and Welfare Fund (the "Fund") operates a self-funded multi-employer health-benefit plan. That plan is governed by ERISA. The plan hired Blue Cross Blue Shield of Massachusetts to be the third party administrator for the plan. A dispute arose between the Fund and Blue Cross Blue Shield regarding the processing of claims, the overpayment and recoupment of benefits, and the refusal to provide certain information to the Fund. The Fund filed suit. The Complaint contained three claims under ERISA for various fiduciary duty violations, and three claims under state law. Blue Cross Blue Shield moved to dismiss on the grounds it was not a fiduciary and that its obligations to the Fund were solely contractual in nature. The court agreed.

The court noted that there were two methods by which fiduciary status may be attributed to an entity under ERISA. The first was the entity could be a named fiduciary in the plan documents. The second is to be a functional fiduciary, which arises from the exercise of discretion or control with respect to the management of assets, or undertake discretionary tasks related to the plan's management and administration.

The court quickly dealt with the named fiduciary option by noting that nothing in the plan documents expressly named Blue Cross Blue Shield as a fiduciary.

With regard to whether it was a functional fiduciary, the court also rejected this. The court held that Blue Cross Blue Shield did not become a functional fiduciary by handling the day-to-day activities of claims, by providing a preferred provider network available to members of the Fund, or by its negotiating rates with medical providers. The court found that none of these activities constituted exercising meaningful discretionary authority or discretionary control regarding the management of the plan or having discretionary authority or responsibility in the administration of the plan.

In reaching its decision, the court specifically rejected a contrary decision made by the Sixth Circuit in **Hi-Lex Controls Inc. v. Blue Cross Blue Shield of Michigan**, 751 F.3d 740 (6th Cir. 2014).

Finding that the ERISA claims lacked any basis, the court also granted Blue Cross Blue Shield's request for a dismissal. Blue Cross Blue Shield requested the court not retain jurisdiction over the pendant state law claims. The court held that it found no compelling reason to retain jurisdiction given that no discovery had been undertaken and no trial had yet been set. Thus, the complaint was dismissed in full.

TEAM NEWS

Congratulations to Joan Vorster who, earlier this year, was admitted to the American College of Trial Lawyers, the preeminent organization of trial lawyers in North America.

Congrats also go out to Lauren Sparks who recently graduated from the Massachusetts Bar Association Leadership Academy and was named an "Up and Coming Lawyer" by Massachusetts Lawyers Weekly.

Chris Collins, Joe Hamilton, and Lauren Sparks were among the authors of the latest edition of the ABA's Misrepresentation in the Life, Health, and Disability Insurance Application Process: A National Survey. This is the third edition of this publication. Joe Hamilton is the editor.

In May, Chris Collins, Nancy Gunnard and Joe Hamilton presented the Legal Year in Review to the New England Claims Association, and later that month to the International Claims Association.

In May, Chris Collins and Nancy Gunnard attended the Life, Health, Disability and ERISA seminar held by DRI in Nashville.

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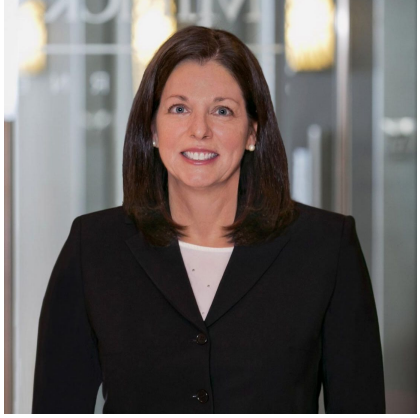

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ABOUT US

Mirick O'Connell's Life, Health, Disability & ERISA Litigation Group represents clients throughout New England. With offices in Boston, Westborough and Worcester, our attorneys are within an hour of all the major courts in Massachusetts, Hartford, Connecticut, Rhode Island, and southern New Hampshire. In addition, our attorneys are admitted to practice not only in Massachusetts, but in Connecticut, New Hampshire and Rhode Island as well. We have repeatedly and successfully represented clients in each of these jurisdictions. So remember, we are not here for you just in Massachusetts - think New England!