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**37 BPR 2552**

*Benefit Claims*

**Court Nixes Putative Class's Claim Alleging Voluntary Appeals Need 'Full and Fair Review'**

Prudential Insurance Co. of America persuaded the U.S. District Court for the Eastern District of New York Nov. 12 to partially dismiss a putative class action alleging that Prudential's voluntary appeals procedure for denied benefit claims does not comply with the Employee Retirement Income Security Act (*DaCosta v. Prudential Insurance Co. of America*, E.D.N.Y., No. 10-CV-720 (JS) (ARL), 11/12/10).

Judge Joanna Seybert dismissed the putative class's claim that ERISA requires a "full and fair review" of any appeal an insurer undertakes, regardless of whether ERISA mandates the appeal. According to the court, the text of ERISA Section 503 only covers mandated appeals. "[N]othing in the text supports that 'every' opportunity an insurer affords must be 'reasonable,' or that 'every' review an insurer offers must be 'full and fair,'" the court said.

However, the court refused to dismiss the class's claim that Prudential failed to provide sufficient information concerning the voluntary appeal process.

**Attorney: Change to Review Process**

Gregory Michael Dell, a nationwide disability insurance attorney with Dell & Schaefer, told BNA Nov. 16 that the court seemed angry that Prudential violated ERISA regulations regarding voluntary appeals when, in 2005, it changed its procedures for voluntary appeals but did not inform millions of plan participants. The court recognized this, Dell said, by allowing the plaintiffs' case to continue due to Prudential's failure to provide "sufficient information" to all plan participants about the decisionmaker for voluntary appeals and circumstances that may impact the decisionmaker's impartiality.

Dell said he was "pleased that the court recognized that Prudential is trying to make up their own rules and blatantly ignore ERISA regulations." Dell was one of the attorneys representing the plaintiffs in the case.

Dell added that the decision could change how Prudential reviews all voluntary appeals of long-term disability benefit claims in the future. According to Dell, the court has the discretion to grant injunctive relief and require Prudential to give notice to every single person in the class—potentially thousands—who had their disability benefit claim appeals denied since Prudential changed their voluntary appeal procedures in 2005. As a result, class members should have the opportunity to resubmit a second appeal with the knowledge that Prudential does not need to provide a full and fair review in accordance with ERISA regulations.

**Alleged ERISA Violations**

The lawsuit was filed by four plaintiffs who had either received benefits for a period of time under group long-term disability benefit policies through Prudential, or were denied benefits. The plaintiffs each lost an administrative appeal of their benefits and were offered a voluntary second appeal.

The plaintiffs charged that Prudential did not provide them with sufficient information about the voluntary appeals process. Among other things, they claimed that Prudential did not inform them that it would assign the same claims administrator and physician who handled the initial appeal to handle the voluntary

appeal, or that the voluntary appeal was not de novo and lacked any “hard and fast” rules.

The plaintiffs further alleged that the voluntary appeal process substantively violated ERISA because it did not provide a full and fair review as required by ERISA Section 503 and 29 C.F.R. § 2560.503-1. As relief, the plaintiffs sought damages, equitable relief, and injunctive relief.

### **Sufficient Information Claim Survives**

Among other things, Prudential argued that the plaintiffs’ “sufficient information” claim failed because it substantially complied with ERISA’s regulation. According to the court, ERISA requires an insurer who offers voluntary appeals to provide sufficient information relating to the appeal to enable a claimant to make an informed judgment about whether to use the voluntary appeal. Under 29 C.F.R. § 2560.503-1(c) (3)(iv), such information includes a statement that the decision to use a voluntary appeal will not impact a claimant’s rights to other plan benefits, the process for selecting a decisionmaker, and the circumstances that may affect the impartiality of the decisionmaker.

Prudential did not provide this information to the plaintiffs, the court said. While Prudential’s original denial letters stated that the plaintiffs should forward the voluntary appeal to the claims administrator who handled the original appeal, the letters did not suggest that this claims administrator would do anything more than accept the voluntary appeal papers, the court said. The letters did not tell plaintiffs that the same decisionmaker and physician who handled the original appeal handled the voluntary appeal, the court added.

### **No ‘Full and Fair’ Review for ‘Every’ Appeal**

The court next addressed the plaintiffs’ claim about the substance of the voluntary appeal process. Looking at the plain meaning of the terms in Section 503, the court found that ERISA’s regulations cover only mandated appeals.

Under Section 503, an ERISA plan must “afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review...” The court focused on the word “a” in Section 503, finding that “a” means “one” at least when used to qualify “opportunity” and “review.”

The court said its interpretation comported with the plain meaning of the applicable regulations, which require insurers to establish and maintain reasonable claims procedures with respect to “appeal” of adverse benefit determinations. “Much like the statute, the regulations require ‘reasonable procedures’ only for ‘appeal,’ singular, not ‘appeals,’ plural,” the court reasoned.

Among other things, the court added that public policy in favor of encouraging the resolution of disputes through administrative appeals supports that ERISA’s regulations only cover mandated appeals. “[I]t makes no sense to discourage ERISA plan providers from offering voluntary appeals, even if those appeals lack ERISA safeguards. Voluntary appeals provide an additional avenue for insureds to seek relief, before turning to slow and expensive litigation,” the court said.

The plaintiffs were represented by Gregory Michael Dell, Leonard Feuer, and Rachel Alters of Dell & Schaefer, Hollywood, Fla., and Gregory Lance Denes of Gregory L. Denes PA, North Palm Beach, Fla. Prudential was represented by Gary S. Tell, Micah W.J. Smith, and Theresa S. Gee of O’Melveny & Myers, Washington, D.C., and Jeffrey I. Kohn of O’Melveny & Myers, New York.

By Meredith Z. Maresca