

\\n\\n"); ubertags_renderMarkup(container, bezen.nix);



[Home](#) | [Contact Us](#) | [SHRM Foundation](#) | [SHRM India](#) | [HR Certification Institute](#)

Welcome David J. Riewald ▾



Leading People.
Leading Organizations.

This Week's 5 HR Must-Haves. [Click Here](#)

[Ask an HR Advisor](#) | [HR Jobs](#) | [SHRM Connect](#) | [SHRM Store](#) | [HR Standards](#) | [HR Competencies](#)

SEARCH

MEMBER TOOLS

Select...

> [Find a Chapter](#)
> [Member Directory](#)

[Logout](#)

Exception to Attorney-Client Privilege Extended to Insurers Acting as Plan Administrators

10/10/2012

By Susan M. Schaecher

A plan beneficiary appealing an insurance company's determination of his benefit amount is entitled to information used by the insurance company, even when it consists of internal memoranda created by its in-house attorney regarding the claim, the 9th U.S. Circuit Court of Appeals ruled.

By denying a discovery request for such information and by other action, the circuit court held, the lower court failed to weigh properly an insurance company's conflict of interest in determining whether it had abused its discretion in determining the benefit amount.

Thomas Weisel Partners offered employment to Mark Stephan at an annual salary of \$200,000. The offer guaranteed Stephan a \$300,000 bonus for the first 12 months of employment, provided in that period he performed satisfactorily and did not quit or get terminated for cause. The offer added that, in subsequent years, he would be eligible for annual discretionary bonuses.

Stephan accepted the offer. When he started work, he became covered under the company's long-term disability insurance plan, which was underwritten and administered by Unum Life Insurance Co.

Three months later, Stephan was severely injured in a bicycling accident and became paralyzed. He applied for disability benefits under the policy and Unum approved the application. The plan provided that beneficiaries would receive 60 percent of their pre-disability monthly earnings up to a maximum of \$20,000. Unum based his benefit amount on his \$200,000 salary. Stephan sued, arguing Unum abused its discretion in failing to include his bonus and calculate his benefits based on pre-disability earnings of \$500,000 per year.

The disability plan provided that the administrator or fiduciary (Unum) had discretionary authority to determine eligibility for benefits. Unum was also the insurer and responsible for paying those benefits. The conflict of interest created by Unum's discretion to set the amount it was required to pay was a factor to be considered in determining whether Unum had abused its discretion in determining the benefit amount.

To show that Unum abused its discretion in calculating his benefit amount, Stephan sought copies of internal memoranda that were created by Unum's in-house counsel at the request of Unum's claims analyst. The district court denied the discovery request on the basis that the memoranda were privileged attorney-client communications.

Stephan argued for disclosure based on a recognized exception to the assertion of the privilege against beneficiaries by an employer acting as an ERISA fiduciary on matters of plan administration. Some courts have made this exception because of fiduciaries' duty to disclose to beneficiaries all information regarding plan administration. Other reasons include that the fiduciary acts as a representative for the beneficiaries of the fund it administers. Stephan argued these rationales apply also when insurers act as ERISA fiduciaries. The 9th Circuit had not considered previously whether the exception applied to insurance companies.

The memoranda by Unum's in-house counsel contained advice on the amount of benefits Stephan was owed under the plan and had been created before Unum made any final determination on Stephan's claim. The 9th Circuit found that the memoranda contained advice on plan administration, the advice was given before the interests of Stephan and Unum became adverse and the memoranda should be disclosed under the fiduciary exception to the attorney-client privilege.

In addition to failing to allow discovery and consider any evidence of bias in the memoranda, the circuit court held that the lower court had failed to consider Unum's public record of biased decision-making and failed to consider the evidence in the light most favorable to Stephan.

Stephan v. Unum Life Insurance Co. of America, 9th Cir., No. 10-16840 (Sept. 12, 2012).

Professional Pointer: Employers and insurance companies need to be sensitive to the timing and context in which legal advice is given. Under the fiduciary exception, legal advice is discoverable when it is given in the context of plan administration and before a final appeal decision. When legal advice is given to a fiduciary regarding potential liability or in preparation for litigation, care should be taken to distinguish it as such.

Susan M. Schaecher is an attorney with Stettner Miller, P.C., the Worklaw® Network member firm in Denver.

Society for Human Resource Management

1800 Duke Street
Alexandria, Virginia 22314 USA

Phone US Only: (800) 283-SHRM (7476)
Phone International: +1 (703) 548-3440

TTY/TDD (703) 548-6999
Fax (703) 535-6490

Questions? [Contact SHRM](#)
Careers [Careers @ SHRM](#)

©2012 SHRM. All rights reserved.

\\n\\n\\n"); ubertags_renderMarkup(container, bezen.nix); \\n\\n\\n"); ubertags_renderMarkup(container, bezen.nix); \\n\\n"); ubertags_renderMarkup(container, bezen.nix);