



# The Agency Argument—

## What ERISA Plaintiffs and Defendants Need to Know

**By Thomas O. Sinclair and  
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*The Employee Retirement Income Security Act of 1974, commonly known as ERISA, governs most employer-provided employee welfare benefits. If an employer provides its employees with benefits such as group disability insurance, ERISA may govern legal disputes that arise concerning those benefits. In practical effect, ERISA (a federal statute) may preempt any state law claims an employee would otherwise have and subject those claims to the increasingly specialized area of ERISA litigation. This article is written for ERISA practitioners on both sides of the bar and for corporate counsel who are faced with ERISA questions arising in the administration of employee benefits.*

**M**rs. Smith worked more than 15 years for an employer she respected in a job she enjoyed. When Mrs. Smith was diagnosed with a potentially debilitating medical condition, she planned to obtain treatment and continue working. More than five surgeries later, Mrs. Smith and her attending physicians concluded she was simply no longer physically capable of working. Luckily for Mrs. Smith, one of the employee benefits provided by her employer was a group disability insurance plan, one which paid 60 percent of her pre-disability salary in monthly Long-Term Disability (“LTD”) benefits upon a finding of total disability under the policy.

Mrs. Smith submitted a claim for disability benefits with ABC Insurance, the LTD insurance carrier, was approved for benefits and began receiving a monthly check for disability benefits. Mrs. Smith readjusted her life plan and set a new goal—meeting her daily needs on only 60 percent of her former salary. Within a few months, ABC Insurance offered to arrange for Mrs. Smith to be represented

in a claim for Social Security Disability (“SSDI”) benefits. ABC Insurance made clear that Mrs. Smith would not be responsible for obtaining representation in the SSDI claims process but rather that ABC Insurance itself would “help her” obtain representation. Mrs. Smith accepted the insurer’s offer.

Mrs. Smith was then contacted by Government Benefit Advocates, an entity that represents individuals in claims for Social Security Disability benefits. One of the initial forms Government Benefit Advocates requested Mrs. Smith sign was one allowing Government Benefit Advocates to release information on the status of her SSDI claim to the LTD carrier, ABC Insurance. Mrs. Smith executed the form and provided Government Benefit Advocates with the contact information for all her attending physicians—contact information she had also provided ABC Insurance. Government Benefit Advocates contacted Mrs. Smith’s attending physicians and obtained her medical records. Government Benefit Advocates also had consultants review Mrs. Smith’s medical records and these consultants opined that

Mrs. Smith was unable to perform the job duty requirements for any occupation in the national economy.

Government Benefit Advocates then submitted the medical records and reports outlining Mrs. Smith's inability to perform any occupation in the national economy to the Social Security Administration in support of Mrs. Smith's claim for Social Security Disability benefits. Government Benefit Advocates then represented to the Social Security Administration and to the administrative law judge at the hearing on Mrs. Smith's claim for Social Security Disability benefits that Mrs. Smith was unable to work in any occupation. Mrs. Smith was found to be "disabled" by the Social Security Administration and awarded Social Security Disability benefits. Mrs. Smith then received a check for \$50,000 in retroactive Social Security disability benefits, covering the same period of time she was receiving LTD benefits and also received notice that she would receive monthly Social Security Disability benefits in the future. Her future monthly benefit from Social Security was less than the monthly LTD benefits she was presently receiving from ABC Insurance.

Throughout her claim for Social Security Disability benefits, Government Benefit Advocates kept ABC Insurance updated on the progress of Mrs. Smith's Social Security Disability claim through e-mails and phone conversations.

Government Benefit Advocates communicated regularly with Mrs. Smith's insurer, notifying ABC Insurance when medical records were requested and keeping ABC Insurance apprised of the status of Mrs. Smith's claim for Social Security Disability benefits. Upon the award of Mrs. Smith's Social Security Disability benefits, Government Benefit Advocates notified ABC Insurance of the award and provided ABC Insurance with a copy of the award letter from the Social Security Administration. Government Benefit Advocates then notified Mrs. Smith that she would be responsible for reimbursing ABC Insurance for the resulting "overpayment" of benefits<sup>1</sup> and that Government Benefit Advocates would coordinate repaying ABC Insurance.<sup>2</sup> Government Benefit Advocates later notified Mrs. Smith that the amount of the "overpayment" was \$50,000, the total amount of her retroactive Social Security Disability benefit payment, and that she was required to pay this amount to ABC Insurance.<sup>3</sup>

Mrs. Smith submitted the \$50,000 check to Government Benefit Advocates who immediately turned over the funds to ABC Insurance. ABC Insurance paid Government Benefit Advocates for its services in representing Mrs. Smith in her claim for Social Security Disability benefits and recovering the "overpayment." Shortly thereafter, Mrs. Smith received notification from ABC Insurance that it was ABC Insurance's determination that she was not disabled pursuant to the terms of her group LTD disability policy and that ABC Insurance would no longer pay her monthly LTD benefits. Mrs. Smith received no further LTD benefits from ABC Insurance.

## *What Happened to Mrs. Smith's Social Security Award?*

Most disability insurance plans contain reimbursement provisions that provide that upon an insured's receiving a Social Security Disability award, the insured must pay back what is deemed an "overpayment" of benefits. In many cases, as is illustrated by the case of Mrs. Smith, this overpayment will constitute the entire amount of the insured's initial lump sum Social Security award paid for past-due benefit periods. These reimbursement provisions have been discussed in depth by other ERISA practitioners<sup>4</sup> and therefore will not be discussed at length here. It is sufficient for the purpose of this article to note that most plans provide that even if the insured chooses not to

apply for Social Security Disability benefits, the LTD insurer may have the contractual right to estimate the amount of those benefits and reduce the amount of monthly benefits the LTD insurer is paying accordingly. Thus, insureds have little choice in determining whether to apply for Social Security Disability benefits.

*...it is the existence of a right of control, notwithstanding whether it is actually exercised, that is a factor to be considered when determining the existence of an agency relationship.*

## *Considerations for Claimants and Insurers*


ERISA practitioners who represent parties in litigation resulting from an insurer's denial of disability benefits should recognize the events related above raise important legal issues that could weigh on the success of a lawsuit seeking to recover additional LTD benefits. Questions pertinent for ERISA practitioners are whether medical records gathered by Government Benefit Advocates and the information therein could be imputed to ABC Insurance and whether ABC Insurance may be judicially estopped from arguing that Mrs. Smith is capable of working in a job in the national economy as a result of Government Benefit Advocates' representations to the Social Security Administration during Mrs. Smith's claim for Social Security Disability benefits. The answer to these issues hinges on whether Government Benefit Advocates can be deemed ABC Insurance's agent or whether Government Benefit Advocates' actions link itself, the group LTD Plan and ABC Insurance so tightly that the agency argument is unnecessary.<sup>5</sup> Alabama law is clear that the facts, not how the parties characterize their relationship, are determinative as to the existence of an agency relationship.<sup>6</sup> Alabama law is also clear that it is the existence of a right of control, notwithstanding whether it is actually exercised, that is a factor to be considered when determining the existence of an agency relationship.<sup>7</sup> For this reason, an agency analysis will require a case-by-case factual determination. Such

facts include the existence and contents of any service agreement between the LTD insurer and its purported agent, communications between the LTD insurer and its purported agent, payment of the purported agent by the LTD insurer and the level of control exerted by the LTD insurer over its purported agent.

A request from the claimant for documents evidencing any of these factors is likely to result in a discovery battle. From the LTD insurer's perspective, it neither wants its purported agent to be deemed as such nor does it want to produce any service agreement between the LTD insurer and its purported agent. LTD insurers could consider such service agreements to be proprietary information and refuse to produce them on that basis. The service agreement, however, may contain provisions that specify the amount of control the LTD insurer retains over its purported agent—a key issue in determining the existence of agency. Communications between the LTD insurer and its agent will be relevant for similar reasons but will likely also be the subject of discovery disputes. Therefore, consideration must be given to the unique discovery issues raised in ERISA cases.

## *Discovery in An ERISA Case*

Although the Employee Retirement Income Security Act of 1974<sup>8</sup> was enacted to promote the interests of employees . . . in employment benefit plans and to protect their contractually defined rights[,]<sup>9</sup> the body of law of ERISA has, in practical effect, created hurdles rather than reprieve for many ERISA plaintiffs.<sup>10</sup> The most notable manner in which ERISA plaintiffs are hindered and insurers favored is in the context of discovery. Although the ERISA statute doesn't set forth limits on discovery, the scope of what would constitute admissible evidence is limited, and as such the scope of discovery is, in large part, determined by the applicable standard of review employed by the court in an ERISA case. The standards of review range from *de novo*, in which the insurer's denial of a claim for benefits is afforded no deference and the court is free to review evidence outside the "ERISA record," to arbitrary and capricious, in

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which an insurer's denial of a claim for benefits will not be overturned unless it is determined to be both arbitrary and capricious. In cases in which an arbitrary and capricious, or modified arbitrary and capricious standard of review applies, arguments are often presented that the scope of admissible evidence is limited to the "ERISA record," or those documents that were before the insurer at the time it made the determination to deny further benefits.

In cases such as Mrs. Smith's, the scope of what is deemed the "ERISA record" could be affected by whether the entity that represented her in her claim for Social Security Disability benefits (here "Government Benefit Advocates") is deemed her LTD insurer's agent. If so, should the Government Benefit Advocates' documents used in the Social Security proceeding be considered as documents that were before the defendant insurer, ABC Insurance, at the time ABC Insurance made its determination to deny further benefits? If so, ABC Insurance's defense in the LTD litigation then would be affected by the scope of the "ERISA record" being much larger than just the claim file it maintained on Mrs. Smith's claim.

## *Defining the "ERISA Record"*

A finding of agency in an ERISA case is significant for the potential that the LTD insurer could be imputed with the knowledge in the records garnered by its agent and those records could be considered as part of the ERISA record. Knowledge that an agent acquires within the scope of his employment is imputed to his principal.<sup>11</sup> "[N]otice to [an] agent while engaged in the business of the principal, acting within the scope of the agent's authority in respect to a transaction depending, is imputed to the principal, and when the principal adopts the acts of the agent, he does so in the light of such imputed notice."<sup>12</sup> Moreover, "the principal cannot take the benefit of the agent's act without taking also the burdens resulting from the agent's knowledge and intentions."<sup>13</sup>

In Mrs. Smith's case, Government Benefit Advocates obtained medical records that her LTD insurer, ABC Insurance, did not. Government Benefit Advocates also obtained reports based on physician reviews and examinations ABC Insurance did not. Moreover, ABC Insurance benefited by Government Benefit Advocates' representation by receiving Mrs. Smith's entire lump sum award for past due Social Security disability benefits. In an ERISA action based on the subsequent denial of her claim for LTD benefits, Mrs. Smith's attorney should consider obtaining Government Benefit Advocates' records and submitting them to the court as part of the ERISA record. Mrs. Smith's attorney could also argue that the knowledge of these documents is necessarily imputed to the LTD insurer due to the agency relationship.

*...the principal cannot take the benefit of the agent's act without taking also the burdens resulting from the agent's knowledge and intentions.*

Therefore, it is important for ERISA practitioners to realize the potential that if an agency relationship is supported by the facts of the case, those records garnered by the agent may be submitted for consideration of the court as part of the ERISA record and the knowledge of their contents imputed to the LTD insurer. In an ERISA case, where the war is often won or lost based on who wins the discovery battle over what constitutes the "ERISA record," this is a significant point.

Because of judicially created doctrine, insurers whose policies are governed by ERISA do not have a duty to investigate the claim, unlike insurance claims governed by state law. Thus, an LTD insurer could and normally has policy language placing the burden of properly documenting the claim on the claimant, a result that often finds a disabled layman trying to navigate the system of properly documenting an ERISA claim during the administrative process. Because judicial review is often limited to the "ERISA record," proper documentation of the claim during the administrative process can win or lose the subsequent litigation. Thus, insurers whose policies are governed by ERISA have no incentive other than moral grounds to gather every single record supportive of a claim. Contrasted with Social Security advocates who seek to fully document SSDI claims, the "ERISA record" can contain much less evidence of the extent of the claimant's condition and current vocational abilities than that found in the Social Security record. The litigation advantages of having those SSDI records outside of the "ERISA record" are significant for the LTD insurer, and the effect of including the SSDI records in the LTD litigation can be substantial.

## *Could Judicial Estoppel Apply?*

Equally important to the issue of whether the SSDI record should be included in the ERISA record is whether the LTD carrier can be bound by representations to the Social Security Administration in its insured's claim for Social Security Disability benefits. In Mrs. Smith's case, her insurer retained a third party who represented to the Social Security Administration that Mrs. Smith was not capable of working in any occupation in the national economy. That third party was successful in obtaining Mrs. Smith's Social Security disability benefits. Is the LTD insurer now judicially estopped from taking a contrary position to those statements made in that prior proceeding?

It is important to note at the outset that this issue of judicial estoppel due to representations to the Social Security Administration is a completely different issue than whether the insurer is necessarily bound by a Social Security Administration's determination of disability. The answer to this latter question is decidedly no.<sup>14</sup> However, judicial estoppel,

which “precludes a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding”<sup>15</sup> may still apply.

Although the application of judicial estoppel in this specific context may be an issue of first impression for many judges, the United States Supreme Court has offered some guidance by setting forth the factors to be applied in determining whether to invoke judicial estoppel:

First, a party’s later position must be “clearly inconsistent” with its earlier position. Second, ... whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position at a later proceeding would create “the perception that either the first or the second court was misled.” ... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”<sup>16</sup>

Although the Eleventh Circuit has not spoken on this particular issue, other circuits have squarely addressed it. In *Darland v. Fortis Benefits Ins. Co.*, the Sixth Circuit held that “the principles of judicial estoppel certainly weigh against [an LTD insurer] taking such inconsistent positions.”<sup>17</sup> The Seventh Circuit, without addressing the potential of a formal agency relationship, found judicial estoppel *principles* persuading in *Ladd v. ITT Corp.* but remained hesitant to extend the doctrine itself:

It brings the case within the penumbra of the doctrine of judicial estoppel—that if a party wins a suit on one ground, it can’t turn around and in further litigation with the same opponent repudiate the ground in order to win a further victory. The doctrine is technically not applicable here, because MetLife and ITT, the defendants in this suit, were not parties to the proceeding before the Social Security Administration. Yet they “prevailed” there in a practical sense because the grant of Social Security benefits to

Ladd reduced the amount of her claim against the employee welfare plan. If we reflect on the purpose of the doctrine, which is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant, we see that its spirit is applicable here. To lighten the cost to the employee welfare plan of Ladd’s disability, the defendants encouraged and supported her effort to demonstrate total disability to the Social Security Administration, going so far as to provide her with legal representation. To further lighten that cost, it then turned around and denied that Ladd was totally disabled, even though her condition had meanwhile deteriorated. In effect, having won once the defendants repudiated the basis of their first victory in order to win a second victory. This sequence casts additional doubt on the adequacy of their evaluation of Ladd’s claim, even if it does not provide an independent basis for rejecting that evaluation.<sup>18</sup>

In both *Ladd* and *Darland*, the courts recognized the potential injustice resulting from an LTD insurer’s pressing its insured to apply for Social Security disability benefits, paying for representation in the claim for Social Security disability benefits, accepting the benefit of those proceedings by accepting repayment of the “overpayment” created by those proceedings and then refusing to pay further disability benefits.

## Conclusion

The implications of an LTD insurer hiring or even referring its insureds to third parties to represent its insureds in claims for Social Security disability benefits are many—ranging from discovery disputes regarding whether the Social Security record should be part of the “ERISA record” to the issue of whether the LTD insurer could find itself judicially estopped from taking positions contrary to the prior representations regarding its insured’s ability to work. ERISA practitioners on both sides of



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the bar should take careful note of the presence of such an argument in their ERISA cases and adjust their litigation strategy accordingly. Moreover, those attorneys who routinely represent plaintiffs in ERISA litigation should take special care to tailor their initial client interview to determine the potential for those agency arguments. ▲▲▲

## Endnotes

1. Most group disability insurance contracts contain an "offset" provision that the amount of disability benefits the LTD insurer is required to pay may be reduced by the amount of monthly Social Security disability benefits its insured receives.
2. It is important to note the additional layer of a potential agency relationship created by ABC Insurance's retention of Government Benefit Advocates in the recovery of ABC Insurance's benefit "overpayment." Some LTD insurers will hire a recovery specialist separate and apart from the SSDI representative or undertake this function "in-house" to recover this "overpayment" on the LTD insurer's behalf. This practice would help to insulate LTD insurers from this additional factor supportive of a finding of an agency relationship.
3. Whether Government Benefit Advocates' representation of Mrs. Smith's legal obligation to forfeit her Social Security benefits to ABC Insurance was a correct statement of law is a topic recently addressed by David Martin in a prior issue of this publication. See David P. Martin, *Taking Benefits Back: Reimbursement Under ERISA*, 69 Ala. Law. 44 (2008).
4. See generally, David P. Martin, *Taking Benefits Back: Reimbursement Under ERISA*, 69 Ala. Law. 44 (2008).
5. Because this article addresses the agency argument, the issue of whether Government Benefit Advocate's actions on behalf of the plan bind ABC Insurance and the plan itself in resulting litigation is not addressed herein. It is sufficient, for the purposes of this article, to note that the practical effects discussed, *i.e.*, Government Benefit Advocates' documents being imputed to ABC Insurance and the issue of judicial estoppel do not wholly depend on a finding of agency. Where the fictional "ERISA Plan" is named in an ERISA case (as some jurisdictions have determined it must be) and an entity such as Government Benefit Advocates has acted as a fiduciary of that plan, the same legal issues described herein may be raised without the necessity of finding an agency relationship between Government Benefit Advocates and ABC Insurance.
6. See *Semo Aviation, Inc. v. Southeastern Airways Corp.*, 360 So. 2d 936, 940 (Ala. 1978) ("In Alabama, agency is determined by the facts, and not how the parties may characterize the relationship."); See also *Butler v. Aetna Finance Co.*, 587 So. 2d 308, 310-311 (Ala. 1991) ("[A]gency is to be determined by the facts and not by how the parties characterize the relationship.")
7. See *Wood Chevrolet Co., Inc. v. Bank of the Southeast*, 352 So. 2d 1350, 1352 (Ala. 1977) ("It has been said that there can be no agency relationship absent a right of control by the principal over his agent. . . . It is not essential that the right of control be exercised so long as that right actually exists.")
8. 29 U.S.C. § 1001 *et seq.*
9. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113, 109 S. Ct. 948, 956, 103 L. Ed. 2d 80 (1989).
10. See Hon. William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 Cumb. L. Rev. 285, 287 (1998-1999). ("[ERISA's legislative] history suggests that the recipients of retirement and medical benefits were the objects of great concern. Yet, as the statute is applied, the real beneficiaries of ERISA, if any, turn out to be the fiduciaries, the administrators, the employers and the insurers. . . . The defendant-fiduciary-administrator-employer-insurer invariably wants ERISA to govern because of ERISA's severely limited or absent remedies for the plaintiff-employee-participant-beneficiary.")

11. See *Harris v. Gulf Refining Co.*, 240 F.2d 249, 252 (5th Cir. 1957) ("[S]ince he undoubtedly was the agent of one of the defendants the knowledge he acquired within the scope of his employment is chargeable to his master."). See also, *Stone v. Mellon Mortgage Co.*, 771 So.2d 451, 457 (Ala. 2000).
12. *Life & Cas. Ins. Co. of Tennessee v. Crow*, 231 Ala. 144, 164 So. 83, 85 (Ala. 1935).
13. *Connecticut Fire Ins. Co. v. Commercial Nat. Bank of San Antonio*, 87 F.2d 968, 969 (5th Cir. 1937).
14. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832, 123 S. Ct. 1965, 155 L.Ed.2d 1034 (2003).
15. *Lett v. Reliable Ruskin*, 2006 WL 2056582 at \*3 (M.D. Ala. 2006).
16. *New Hampshire v. Maine*, 532 U.S. 742, 750-751, 121 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001).
17. 317 F.3d 516 (6th Cir. 2003), *overruled on other grounds by Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965 (2003).
18. 148 F.3d 753, 755-756 (7th Cir. 1998).



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