

June 26, 2003
PRESS RELEASE

To: The Working People of the U.S.

BEWARE OF ERISA

(Employee Retirement Income and Security Act)

SITUATION

You are self-employed, meaning that you work 6 or 7 days a week for minimal rewards and fewer benefits. However, you are your own person, and do not have to face a Dilbert-like corporate mentality.

Your spouse has a thicker skin, and works for a major corporation. She has good pay and benefits, including salary continuance, life insurance, and health insurance, under which you are also covered.

Your spouse is suddenly diagnosed with terminal and inoperable cancer. She has a year, at most, to live.

QUESTION

Which of the following persons do you contact first?

- A clergyman
- A funeral director
- An ERISA lawyer
- A Dana-Farber Cancer Institute oncologist

ANSWER

It would surprise most people to be told that the correct answer is C, an ERISA lawyer. It would surprise many people to know that there is such a thing as an ERISA lawyer. It would even surprise a few lawyers to know that there is an ERISA problem.

The correct answer cannot be (A) or (B). There is no emergency in calling a clergyman or a funeral director, when death may be a year off. And even if it happened right away, these folks are trained to respond quickly; there is no urgency.

As to (D), if the cancer is indeed terminal and inoperable, but nevertheless you want to waste your time; well, that is your privilege.

But why (C)? What is the problem? And how could it impact you?

WHAT HAPPENED TO ME

General Background

I had worked in a large international financial corporation, headquartered in Hartford, CT, from 1968-1988. Let's call it "the Company". It makes no difference which one; the

Company is no worse than other giants, and is actually better than many. I left in 1988 and became self-employed; earning less money, but sleeping far easier at night.

My late wife started working at the Company in 1974.

Group Life Insurance

All employees of the Company had a modest amount of non-contributory (free) group life insurance. For the year 2000, it was \$20,000.00.

Employees could also purchase contributory group life insurance for a small fee. You had to buy it in multiples of your annual salary.

For the year 2000, my wife had 3-times salary. Thus, at her salary of \$83,000.00 a year, she paid for \$249,000.00 worth of group life insurance.

Therefore, in the summer of 2000, she had a total of \$269,000.00 worth of group life insurance.

In that summer, she decided to increase the amount of her contributory group life insurance to 5-times salary. To do so, she was required to take a physical exam. She took it and passed, and was notified in August of 2000 that she had been approved for an increase to 5-times salary.

Since it was group life insurance, all increases would take effect as of the first of the year. The non-contributory portion was due to increase to \$25,000.00 for all employees. Her contributory portion would increase to \$415,000.00. Thus, as of January 1, 2001, my wife would have \$440,000.00 worth of group life insurance.

Or so we thought.

Cancer Diagnosis

For Thanksgiving of 2000, we went to Georgia, as was our custom, to visit our daughters and grandchildren who lived there. As usual, we walked for exercise. One fine day, at the end of a walk, my wife's leg suddenly gave out. She could barely make it back to the room. No one could figure out what was going on, and someone gave her a cane to get her through. Upon returning home, she went to her doctor, who sent her to the orthopedist, who ordered an MRI, and inoperable metastasized lung cancer was discovered.

My wife was very brave, and planned for death at age 57. She had numerous conversations with employee benefits people at the Company, who helped her through short-term disability, long-term disability, and other options. She never went back to the office, but had a computer at home linked to work (as did many employees) and communicated regularly with her unit, doing whatever she could. She could, in fact, have gone in to the office, in her wheelchair, but everyone encouraged her to stay at home on disability pay. She was happy to work on the computer from home, although she did

complain that her management made it clear that they wanted nothing to do with her. I felt bad about that, but as a business owner myself, I could understand their position.

My wife and I had wills that left everything to each other. Nevertheless, she told me how she wanted everything divided, trusting that I would do as she wished. She gave away virtually all of her jewelry before she died, and certain other household possessions that were of no practical use to me. Based on the \$440,000.00 worth of group life insurance, and some other insurance, and her savings, my wife told me how much I should give to each of the three adult children (her two and my one).

Starting in January, 2001, the extra premium for the increased contributory group life insurance started coming out of her pay checks. On July 4, 2001, she watched the fireworks at our Lake house, with friends and relatives in close attendance. The next day, she died.

Insurance Denial

As Executor, I had considerable work to do, and among other things filed a claim for \$440,000.00 of group life insurance benefits. It was denied; only \$269,000.00 was approved, which represented the year 2000 benefits.

The extra premiums that had been taken out of her pay check were duly refunded to me. My children, step-children and I were, in my opinion, cheated out of 171,000 tax-free dollars.

Company Reasoning

Buried within a paragraph inside a 70-page single-spaced booklet on group life insurance benefits was a clause stating that increased life insurance benefits would be ineffective unless the employee was actively at work for some period during the new effective year. My wife did not physically show up at the office during the year 2001. Hence, her approved new benefits were denied, and she was paid at year 2000 rates.

THE COMMON LAW

There are at least two reasons why the Company's argument would fail in ordinary State courts under the common law.

Estoppel

The first is called "estoppel", which is a lawyer's fancy way of saying that you cannot assert a claim or a fact in court, even if it is otherwise valid or true, when you have previously asserted or implied the contrary, and it would be unfair to the other person to allow you to make that claim in court.

In other words, estoppel says that even if the law is technically on your side, principles of equity or fairness may prevent you from winning, if your own statements or conduct prejudiced the other side.

Here are three realistic examples:

1. A man acts as the father of a child for years. Suddenly he says that he is not really the father, and wants a blood test, to get out of paying child support and meeting other responsibilities. The court may estop him from asserting this claim, and not even allow the blood test. In other words, it doesn't matter if he really isn't the father, when by his conduct he has implied that he was. It would be unfair to the mother and child to let him use the technicality of the blood test, at this stage, to avoid his responsibilities.
2. Mr. Smith deeds property that he doesn't legally own to Mr. Jones. Mr. Smith then acquires the property legally. He claims that it is his, and not Mr. Jones', since at the time he deeded it to Mr. Jones, he really had no right to do so. The court may estop Mr. Smith from asserting this claim. In other words, it doesn't matter if it was true that he really had no right to deed the property to Mr. Jones in the first place, when by his conduct he implied that he did. It would be unfair to Mr. Jones to let Mr. Smith use that technicality, at this stage, to cheat Mr. Jones.
3. A man has premiums taken out of his pay each month for \$50,000.00 worth of group life insurance. When he dies, the company discovers that, under the contract, he was really entitled to only \$30,000.00 worth of group life insurance. The company admits its error, apologizes, and offers the widow \$30,000.00, plus a refund of the excess premiums with interest. The court, in this actual famous case, did estop the company from using the contract technicality against the widow, who was expecting a higher benefit, and possibly basing her financial planning on that expectation. In other words, it didn't matter what the contract literally said, since the Company's own actions made it unfair to enforce the terms.

In my particular case, the Company, through its employee benefits counselors and its taking of the extra premium, led my wife and her survivors to reasonably believe that they had \$440,000.00 worth of group life insurance; and we actually used this fact in our financial planning.

It must be noted, again, that my wife could easily have gone in to the Company, in her wheelchair, to work at her desk, for one day, during the early part of the year 2001.

Reasonable Contract Interpretation

This one is far less involved.

Even if the Company were not estopped from asserting the contract literally, we could still have won under a reasonable modern-day interpretation of the contract.

Decades ago, someone had to actually be at the office to be "at work". But not today. People work from home. They are given computers by their companies, which are

connected into computers at the office, and are encouraged, if not ordered, to work from home. This is what happened with my wife. Therefore, under any reasonable interpretation, my wife could be said to have “been actively at work” during the year 2001.

There is something comical about a company lending its own computer to an employee, telling the employee to take it home and hook it in to computers at work, telling the employee to work from home; and then claiming that the employee is not “actively at work” when the employee is working from home on the computer connected to work computers at the company’s own request. I would take my chances with a Jury.

What Happened

So what happened when my case went to court?

Answer: It didn’t.

I could not find a lawyer to take the case! And while I am a lawyer myself, I am a solo practice country lawyer, scarcely able to take on a large big-city law firm with virtually unlimited resources.

But why could I not find a lawyer, if I had a good case, as stated above?

The answer is that I did have a good case under State common law, but there is no longer any State common law for this type of claim! The law has been pre-empted by ERISA, a Federal law; and the Federal courts, despite their reputation from the civil rights days, have no inclination to protect ordinary people against big corporations.

How and why this happened will now be discussed. So that you will be aware, there are two themes to the following discussion:

1. The positive theme: How to protect yourself against having this outrage happen to you. I cannot make guarantees, but I can give you concrete suggestions. Forewarned is forearmed.
2. The negative theme: How to maintain your political and economic sanity by understanding that politicians will not protect you against big corporations. This is true for Liberals, Conservatives, and anything else. Those distinctions are an obsolete myth; you have to protect yourself.

ERISA

Protection of Pensions

In the early 1970’s, Congress was determined to do something about protecting employee pension funds. A scandalous situation had developed, in which employees thought they were contributing to pensions for their retirement enjoyment, only to discover that most or all of it was gone when it came time to cash in.

The result was the Employee Retirement Income and Security Act of 1974, fondly known as ERISA, codified at 29 USC 1001. ERISA is thus a Federal law, and would normally be enforced in the Federal courts. It would be possible to enforce it in State courts, but a defendant could always remove it to Federal court.

Pre-emption of State Law

ERISA specifically pre-empts State law. That means that State common law principles of contract interpretation and fraud and misrepresentation will not normally be followed in court cases. ERISA also denies punitive damages in most cases, thus giving large corporations a dis-incentive to settle.

By way of explanation: without the threat of punitive damages or attorney's fees, corporations prefer to hold on to the money for years, while their big-firm lawyers employ a battery of stalling tactics. The extra interest they receive more than makes up for an award that they might occasionally have to pay. Further, without attorney's fees, lawyers collect less if they win. In certain discrimination and other cases, winning plaintiffs get punitive damages, which means that the government is serious about enforcing those laws: but not in ERISA.

In State law, if two people disagree, one can file suit. The plaintiff sues the defendant. The court hears the full case from the beginning. If one side disagrees with the decision, it can be appealed; although appeals are costly, time-consuming, and seldom successful. However, the plaintiff does get his or her day in court.

ERISA, however, handles matters differently. It works closer to what is often called Administrative Law. That is, the pension plan has an Administrator, and the Administrator is given wide latitude to interpret the contract in light of the facts as he sees them. In the event of a dispute, the courts do not normally hear the full case, but rather review the Administrator's decision to see if it was totally arbitrary, unreasonable, capricious, or illegal. If not, then the courts almost always uphold the Administrator's decision.

In other words, the courts show deference to the Administrator, rather than hearing both sides equally from scratch.

There are various reasons why administrative review is less thorough than a full case hearing. The standard reason is that deference is due to governmental and other administrative bodies, so that they can do their jobs effectively. The real reason is to ease the workload on the courts.

This sort of thing is done when dealing with State administrative agencies, such as review of zoning decisions. Most people would be quite surprised to hear that it is used in pension disputes.

Still, for pension plans, ERISA at least gave employees more than they had had before.

Group Insurance Tacked On

Through a strange quirk, ERISA came to include not simply “pension plans”, but rather “benefit plans” of most large private corporations. This includes the ordinary group life and health insurance that employees of large corporations had come to take for granted. The problem is that people who feel cheated out of life or health insurance benefits assume that they will get their day in court. After all, they have normally paid premiums for their insurance, and a contract is created. If the contract is breached, they want their day in court.

Not so under ERISA. Administrative review is not a full case review. And in actual practice, as in my own case, no lawyer would pursue the matter, as they realized that the courts would uphold the administrator. The common law challenges listed above (estoppel and contract interpretation) would not be heard by a Jury.

Exactly how this came about is a mystery. ERISA started out as pension reform, not as a group insurance scam. Some extremely bright, unheralded business lobbyist saw an opportunity; and Congress, never one to let the needs of ordinary lobby-less people get in the way, let it pass.

Hence, I could not even get my day in court. Not a single lawyer thought it was worth it.

Arrogance

ERISA gives corporations an arrogance that is hard for the ordinary person to imagine. I was first notified that my expected life insurance benefits were denied in a crude letter from a plan administrator. I demanded to speak to a company lawyer, and simply got another letter back from the administrator. I wrote to the company’s Law Department, and got yet another administrative letter.

Only if you sue will the company get a lawyer. But it will be an outside law firm, able to throw dozens of lawyers with unlimited resources at you, using funds that only bureaucratic quasi-monopolistic corporations can muster.

After a dozen lawyers turned me down, I conceded defeat.

WHAT IS BEING DONE

The last lawyer who turned me down was the most sympathetic. She said that ERISA is extremely pro-business, and that is that. I asked her why no one is doing anything about the situation, and she said they are. I asked who, and she replied with the name of some group of employment lawyers. I asked what they had accomplished, and she was silent. I asked what consumer groups were doing, such as Ralph Nader. I am still waiting for an answer.

In fact, nothing is being done. As of this update (May, 2006), not a single politician, Republican, Democrat, or Ralph Nader and Common Cause, will even respond. The media will not respond. The reasons, I believe, are:

1. Politicians are not anxious to advertise that they helped to write this law.
2. Politicians are not anxious to let you know that they all get heavy corporate money, and thus do not dare to publicize the law, let alone try to change it.
3. The media believes that the general public cannot understand the issues, so it is afraid to run the story, lest it lose readers (to say nothing of advertisers).

Just to tie up loose ends: it might have been possible to win, if a number of improbable events occurred:

1. I could catch the Company in a clear-cut lie to my late wife. Of course, that would not happen. Nothing is ever put in writing, and trusting people believe that their supposed benefactors have their best interests in mind.
2. I could prove that my late wife had definitely worked from home, and that that work was fully encouraged and accepted. That was unlikely, since management would deny it; and her friends, the workers, in a bad economy, would be unlikely to testify and jeopardize their jobs. I wouldn't have the nerve to ask them. Further, after her death, the Company asked me to give back the computer, which I of course did; and there went the evidence of her work. All of this was known to all the lawyers who looked at the file, and all still declined to take the case.
3. I had a Judge endowed with an old-fashioned sense of justice. Apparently none of the lawyers thought that was worth the chance, even at 1/3 contingency. Funny: in the Civil Rights era, Southern judges struck down unjust State segregation laws; but today, Northern judges will not strike down unjust worker-unfriendly laws.

WHAT SHOULD YOU DO

Preventive Care

Most people understand the need to see a physician even when they aren't sick. Regular checkups can detect problems before it is too late. Similarly, most people get regular dental checkups.

People even know to bring in their cars for tune-ups and oil changes, as a preventive measure to forestall bigger and costlier problems.

Why the idea of prevention never took off for legal work is a mystery. It is surprising how many people, including educated ones, do not even have wills.

Preventive care is a good idea when you reasonably suspect that there might be a problem. For medicine, there might always be heart blockages, cancerous conditions, or tooth decay, which if caught early will save you time, money, and aggravation. For automobiles, regular oil changes and tune-ups can save you hundreds or thousands of dollars in repair (or new car) costs.

Similarly, when your life situation changes, and big dollars are at stake, and corporate interests are in control, there is at least a reasonable suspicion that there could, maybe, be a problem. And if you did not have such a suspicion, as I didn't – well, now you should.

ERISA Lawyers

Suppose that, as my late wife was dying, and I knew that she had group life insurance of which I was the beneficiary, health insurance which might be continued for me, salary continuance coverage, long-term disability coverage, and the possibility of social security disability --suppose that I had said to myself:

“This is a major life change. Big dollars are at stake. These dollars are controlled by big corporations.”

Suppose I had thought of that. There is at least a chance that I would have sought out a lawyer knowledgeable in employee benefits and ERISA.

That lawyer would have been told the complete factual situation. That lawyer also would have had to review a multitude of documents. There would have been a charge for these services. And that lawyer would, hopefully, have spotted the clause about working for at least one day in the calendar year 2001.

Even if the whole thing had cost me a few grand or so, I would have saved 171,000 tax-free dollars.

And if the lawyer had found nothing, and there were no hidden traps: well, think of it as (a good) insurance policy. The peace of mind of not having to trust in large corporations to protect your financial interests is worth some money to me.

As they say, we report, you decide. But at least now you're aware that there may be a problem.

THE EXAMPLE OF SEN. EDITH PRAGUE

A good example of political inaction is provided by Senator Edith Prague. This kindly lady, a Connecticut State Senator, is known as a tireless advocate for the elderly, and is generally respected on both sides of the aisle.

It occurred to me that this friend of the working classes might be an ally. If Washington won't help directly, then what about having State politicians contact Washington, and publicize the issue with constituents? That might help to raise a groundswell, get a Connecticut U.S. Senator or Representative to raise the issue, and possibly get the U.S. Congress moving.

I sent the ERISA article to Senator Prague. She immediately thanked me for sending it, said that she agreed with me that it was a bad situation, and wished me well.

I asked her if she would do two things:

1. Use her position to publicize the issue in the media, which had thus far refused to write about it.
2. Use her position to write her views to our Connecticut U.S. Senators and Representatives, and ask for their action in changing the law.

Now the fun began. Senator Prague told me that it was a federal matter, and she was just a Connecticut state legislator. I told her that I knew that, but asked if she would use her position to try to influence federal legislation, now that she was aware of the problem; or at least bring the matter to the attention of constituents, now that she was aware of the problem.

Sen. Prague responded that I should visit her at her office, and she would talk to me. I told her that I was busy, and in any event was not the type of person to be schmoozed. I wrote and asked her again if she would publicize the matter for the benefit of constituents, and write to Washington legislators.

She called me and asked me what I wanted. I told her that I had already said that, numerous times. She again invited me to schmooze at her office. I asked if she would put it in writing that she agreed that ERISA needed to be changed, but that she refused to ask the media to publicize it or to write to Washington. She said again that it was a federal matter, and she was a state legislator. I said I knew that, but.... and we went around and around again.

The result: Senator Edith Prague, the Connecticut Democratic Crusader, thinks that ERISA is a bad situation, but will neither publicize the matter for constituents nor ask Washington politicians to consider a bill to change it. Obviously, Senator Prague, a good lady, does not want to advertise the role of the Democrat Party in taking corporate money and thus keeping ERISA going.

As a kid, I took civics in junior high and in high school. As a young adult, I took political science classes in college. I wonder what good they did: I find it difficult to have faith in the Legislative Branch.

THE BOTTOM LINE

As is common knowledge, after all is said and done, employee pensions are not protected, even with ERISA.

The Pension Benefit Guaranty Corporation, established as part of ERISA, is a failure. Employees can lose their pensions through bankruptcy of the corporation, while executives get millions in golden parachutes.

Employees can be cheated with impunity. Just ask any Enron victims.

And Washington claims: lack of funds.

What happened is that ERISA created a monstrous bureaucracy that helped workers virtually not at all, while taking away their centuries-old common law right to sue for breach of contract.

Anyone who trusts the Federal Government to protect individual rights is a fool. With the sole exception of civil rights, the Federal Government is the ally of Big Corporations, Big Bureaucracy, and Big Gambling. And anyone who thinks that the Democrats are any better than the Republicans is an even bigger fool.

The bottom line: This country was founded by individualists, and individualists have to take action to protect themselves. Others will not do it for you; no matter what they say to get your vote on Election Day.