

ORDINARY EVENTS WHICH CAN CREATE UNUSUAL AND TROUBLESOME CLAIM SITUATIONS

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INTRODUCTION

The idea for this presentation is derived from the experience of the authors with life and disability claims and the realization that many events, ordinary in themselves, can create unusual claim situations if not carefully and promptly addressed. While some of these occurrences are frequent and rather routine -- calls to a customer service line to verify that a policy is in force and/or the applicable face amount or policy value, claims for payments to minor beneficiaries -- others may be more unusual -- garnishment of property served on an insurer paying monthly disability benefits to an insured, provisions of divorce decrees requiring a beneficiary to obtain a Qualified Domestic Relations Order to pay benefits under a group policy, etc.

Failure to appreciate the potential pitfalls inherent in such common situations may lead to unusual claim situations which can create months of expensive litigation and even cause multiple payments to be made for the same policy.

This paper does not contain a complete list of routine situations which can cause trouble. Rather, the hope is that this presentation may offer some warning of potentially troublesome types of situations and, thereby, increase the chance that difficulties may be avoided by prompting questions and careful thought. Every situation is different, so the main purpose of this presentation is to raise questions and warnings which may help avoid the development of difficult claims.

1. Telephone or E-Mail Inquiries Concerning a Policy.

It is not unusual for customer service or claims personnel to receive inquiries about whether a particular policy is in force, the face amount, the current beneficiary, etc. Such an inquiry may be appropriate if from the owner of the policy, and a response

may create no difficulty if the information on the computer screens available to the employee receiving the call is accurate and up-to-date.

On the other hand, if company personnel respond to such an inquiry from an individual not authorized to receive that information, or on the basis of outdated or incomplete information about a policy, this effort to be responsive to a customer may create real problems for an insurer.

For example, in one recent case, a finance company which was considering acceptance of the assignment of a small life insurance policy to pay for the insured's funeral expenses, called a customer service line to ask whether the policy on the life of an insured was in force and to verify the face amount. The customer service employee presumably looked at outdated computer screens and reported that it was in force in a certain amount. The assignment was accepted and the funeral bill was paid by the finance company. When the insurer received the claim for the face amount of the policy, it denied the claim because the policy had lapsed months before the insured's death. The finance company then filed suit, not on the lapsed policy, but on the grounds that it had accepted the assignment and paid the funeral bills in reliance upon the assurance of the customer service employee that the policy was in force and, that for this reason, the insurer was estopped from denying the claim.

In some states, a mistaken assurance that a policy remains in force at a particular benefit level might not result in liability if the court finds that the reliance was not reasonable, or in the absence of a specific promise to pay a claim. See Norman v. Hous. & Redevelopment Auth. of Chisholm. 681 N.W.2d 376 (Minn. Ct. App. 2004); Konover Prop. Trust v. WHE Assoc., Inc., 142 Md. App. 476, 790 A. 2d 720 (2002);

Jerry's Homes, Inc. v. Tamko Roofing Prod. Inc., 40 Fed. Appx. 326 (8th Cir. 2002); Wilhelm & Assoc. Realtors Inc. v. A1 Langer, 2001 Mich. App. Lexis 292 (Mich. Ct. App. 2001); Dunnaville v. McCormick & Co., 21 F. Supp. 2d (D. Md. 1998). These decisions are, however, heavily influenced by the facts of each case. Consequently, the outcome of such a claim may not be free from doubt and may be expensive to achieve, especially in courts in which small dollar claims are involved.

The risks which may be posed by responses to telephone inquiries will depend at least in part upon the training and supervision of customer service personnel, the nature of products offered by the company, and the accuracy and completeness of the records available to those dealing with the public. At a minimum, it would seem that all personnel who routinely receive such calls should be trained to make certain that (a) any inquiry regarding a policy is from an individual entitled to the information sought, and (b) that the information provided is accurate and current. In cases of doubt on either issue, the best course of action may be to require a written request with appropriate evidence of authorization.

2. Recorded Telephone Conversations.

Many insurers and other corporations use recorded telephone interviews, as they can be efficient investigative tools. They can also be troublesome for each party to such a conversation.

A. Recipient of a Call to be Recorded.

The same privacy and accuracy issues discussed above are very important in considering the appropriateness of allowing an incoming call to be recorded. However, there is the added concern that the recording, if admissible at trial, might provide quite

persuasive evidence of what was said. Indeed, it is difficult to understand when it would ever be to the advantage of a company to consent to a recorded telephone call relating to information about particular policies or insureds. However, there may be business reasons for which a careful practice of recording all calls may be desirable when accompanied by a general announcement that the call is being recorded. In that event, it is suggested that a review of the pertinent wiretap statute be conducted before relying on the transcript of any such call in litigation or arbitration.

B. Wiretap Statutes.

In some states, a telephone conversation recorded without consent may constitute an illegal wiretap. The Federal Omnibus Crime Control and Safe Streets Act of 1968, U.S.C. § 2510, et seq., prohibits the willful interception of telephone communications by means of any electronic mechanical or other device unless it falls within certain specific exceptions (the two most prominent of which are that there is “consent” to the recording, or the “business telephone” exception, whereby employers are allowed to monitor conversations of their employees). See, Schmerling v. Injured Workers Ins. Fund, 368 Md. 434, 795 A.2d 715 (2002); Mustafa v. State, 323 Md. 65, 591 A.2d 481 (1991). A list of wiretap statutes may be found in Appendix A.

It seems likely that whenever the record of a conversation is helpful to one party in a lawsuit and harmful to the other, disputes over consent may arise.¹ If a court finds no consent to the recording, then the record of the call may be ruled inadmissible even if it does not serve as the basis for a criminal proceeding. See Commonwealth v. Gonzales, 688 N.E. 2d 455 (Mass. 1997); State v. Baird, 992 F.2d 157 (Wash. App.

¹ An example of an alleged transcript of such a call is included in Appendix B.

1997); Mustafa v. State, 323 Md. 65, 591 A.2d 481 (1991); Markham v. Markham, 272 S.2d 813 (Fla. 1973).

For these reasons, it may be advisable to instruct customer service or claims personnel to refuse to permit recording of any telephone conversations and to terminate a call if they think the recording may still be going on.

3. Affiliate Company and Third-Party Administrator Issues.

In this time of consolidation, mergers and sales of companies, divisions or blocks of business and the employment of third-party administrators with varying responsibilities and capacities, responding to routine questions regarding the company's business may be especially challenging. In those situations in which policyholder records are in multiple locations, in computer databases not yet merged or compatible with each other, or in the records of third-party administrators with varying levels of responsibility, customer service or claims personnel may face particular challenges in obtaining accurate or complete information to respond to legitimate inquiries or discovery requests.

Consequently, it is suggested that all personnel who may be called upon to provide responses to inquiries about particular insureds be made aware of the limits of the records available to them and the need to consult multiple databases to obtain an accurate answer to a legitimate inquiry.

4. Divorce Decrees and Separation Agreements.

It is not unusual for an insurer to be presented with a divorce decree or a separation agreement approved by a state court which orders that a policy be maintained in force for the benefit of one spouse, or requires that the owner or

beneficiary be changed from one to another. Such an order may be the first notice to an insurer of marital discord or that changes in its policies were being considered.

A. Individual Policies.

If an insurer was not notified of the court proceeding until after issuance of an order, it may not be bound by the court's order. However, if the contending parties cooperate, the changes ordered by a court may be accomplished rather easily. On the other hand, if the parties cannot put aside their differences, an insurer may be forced to consider an interpleader or declaratory judgment action in order to protect the rights of its insured, owner and beneficiary.

B. Group Contracts.

If a domestic relations order purports to direct that certain action be taken with regard to a group policy or pension plan which is part of an employee welfare benefit plan governed by the Employee's Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq. ("ERISA"), an insurer will be precluded from making any changes to the policy or other benefit until it receives a Qualified Domestic Relations Order (QDRO). Indeed, an insurer may find itself responding to a claim for violation of its duties under ERISA if it makes any change without proper authority.

These Orders are the only basis upon which changes can be made to ERISA plan benefits, because they are the only exception to the provisions of the ERISA statute designed to protect pensions and other benefits from assignment or alienation. A detailed outline of the nature and requirements for QDRO's are set forth in Appendix C, attached to this paper.

In dealing with any domestic relations orders purporting to require an insurer to take certain actions with regard to an individual policy, it is essential to make certain that the rights of all parties are protected. If there is any doubt, guidance of in-house counsel should be sought. In the event that the policy in question is a group policy governed by ERISA, in-house counsel should be promptly consulted to make sure that a Qualified Domestic Relations Order is obtained before any action is taken.

5. Minor Beneficiaries.

It is widely known that payment to or settlement with a minor may be subject to a later challenge when the minor reaches majority. Various devices can be used to protect a company in such a situation, including payment to a guardian, etc.

However, the age of a claimant may not be known if a claim form is incomplete or a date of birth is omitted from a claim document. The problem may not become apparent until the minor files suit demanding that the insurer pay benefits a second time.

In some circumstances, an insurer may be able to take advantage of statutes providing that an insurer's liability is discharged if it pays benefits in accordance with policy provisions without receiving notice of a competing claim before benefits were paid. See Crosby v. Crosby, 986 F.2d 89 (4th Cir. 1993); Phoenix Mutual Life Ins. Co. v. Adams, 828 F. Supp. 379 (D.S.C. 1993); Rogers v. Union Mutual Stock Life Ins. Co., 782 F.2d 1214 (4th Cir. 1986). However, there are circumstances and situations under which that good faith payment defense, even if set forth in a state statute, has not prevented a court imposing a second payment to an insured. J. C. Penney Life Ins. Co. v. Heinrich, 32 S.W. 3d 280 (Tex. Civ. App. 2000); Bigley v. Pacific Standard Life Ins.

Co., 229 Conn. 459, 642 A.2d 4 (1994); Union Labor Life Ins. Co. v. Parmely, 270 Md. 146, 311 A.2d 24 (1973).

Consequently, it is recommended that prior to claim payment a careful review of all claim documents or further investigation be undertaken to ascertain whether minors may be among the claimants. In the case of doubts which cannot be satisfactorily resolved, interpleader or a motion to appoint counsel or a guardian ad litem may be considered.

6. Missing Beneficiaries.

Although rare, on occasion it may prove impossible to locate one or more beneficiary to a policy or their heirs due to bad addresses, lack of cooperation by family members, etc. Since this difficulty will not likely excuse an insurer's duty to pay benefits, an interpleader action may be advisable if there is more than one beneficiary.

As a possible protective measure, some companies require that the social security numbers of all beneficiaries and owners be included on each application for insurance.

7. Garnishment of Property of Insured.

It is not particularly unusual for an insurer to be served with a garnishment order directing it to pay all property belonging to an insured to another individual. This order may arise from a divorce action or a collection action of which the insurer has no knowledge whatsoever.

Under some circumstances, compliance with such garnishment orders may be relatively simple for all concerned. However, they can cause real problems for an insurer and its insured if, for example, the garnishment requires diversion of a stream of

monthly disability benefits or a change to an annuity which produces income on the death of an insured or after a term of years.

In such circumstances, a company will have to carefully assess its need to comply with the court order while protecting the legitimate rights of its insured. Failure to do so successfully may result in the insurer having to pay the proceeds twice.

Consequently, it is recommended that all personnel be repeatedly reminded to immediately refer all such court orders to in-house counsel.

8. Vocabulary of Communications with Insureds and Regulators.

Although obvious, it is important to point out that clarity and completeness of letters to insureds, their counsel, or regulators, is essential if an insurer is to avoid costly claims and lawsuits.

Every effort must be made to avoid the use of shorthand or jargon which may be clear to the company but subject to several different interpretations by laypersons. As every experienced claims person knows, in the event of litigation or a hearing before an insurance commissioner, all such letters become evidence to be picked apart by hostile eyes.

Consequently, it is recommended that any important letter -- especially one denying or terminating benefits -- should be reviewed with great care before being sent so it can withstand scrutiny.

CONCLUSION.

Although the events mentioned in this paper may be rather common, they can cause unusual or troublesome claim and litigation issues if not handled properly from

the beginning. Hopefully, this discussion might serve to increase the awareness of the risks inherent in those situations so they can be avoided as often as possible.

APPENDIX A: STATE EAVESDROPPING AND WIRETAPPING STATUTES

Alabama

Alabama Code §§ 13A-11-30-13A-11-37

Alaska

Alaska Statutes §§ 42.20.300-42.20.330

Arizona

Ariz Rev Stats Ann §§ 13-3004-13-3017

Arkansas

Ark Code Ann § 23-17-107

California

Cal Penal Code §§ 630-637.2

Colorado

Colorado Revised Statutes §§ 16-15-101-16-15--104

Connecticut

Conn Gen Stat §§ 54-41a-54-41t; §§ 53a-187-53a-189

Delaware

Del Code Ann title 11 §§ 1335, 1336

District of Columbia

DC Code Ann §§ 23-541-23-556

Florida

Florida Statutes §§ 934.01-934.10

Georgia

Georgia Code §§ 16-11-60-16-11-69

Hawaii

Haw Rev Stat §§ 803.41-803.48

Idaho

Idaho Code §§ 18-6701-18-6709

Illinois

Ill Comp Stat Ann Ch 720 §§ 5/14-1 - 5/14-9

Indiana

Ind Code Ann §§ 35-35.5-1-1-35-33.5-5-4

Iowa

Iowa Code Ann § 727.8

Kansas

Kansas Statutes §§ 22-2514-22-2518

Kentucky

Ky Rev Stat Ann §§ 526.010-526.080

Louisiana

La Rev Stat Ann § 14:322 La Rev Stat Ann Crim Pro §§ 15:1301-15:1312

Maine

Me Rev Stat Ann title 15 §§ 709-713

Maryland

Md Cts & Jud Pro Code Ann §§ 10-401-10-410

Massachusetts

Mass Gen Laws Ann ch 272 § 99

Michigan

Mich Stat Ann §§ 750.539a-750.539i

Minnesota

Minn Stat Ann §§ 626A.01-626A.13

Mississippi

Miss Code Ann §§ 41-29-501-41-29-537

Missouri

Mo Rev Stat §§ 542.400-542.424

Montana

Mont Code Ann § 45-8-213

Nevada

Nev Rev Stat §§ 179.410-179.515; §§ 200.610-200.690

New Hampshire

New Hampshire Revised Statutes §§ 570-A:1-570-A:11

New Jersey

NJ Stat Ann §§ 2A:156A-1-2A:156A-26

New York

New York Penal Law §§ 250.00-250.30

New Mexico

NM Stat Ann §§ 30-12-1-30-12-11

North Carolina

North Carolina General Statutes § 14-155

North Dakota

ND Cent Code §§ 12.1-15-02-12.1-15-04

Oregon

Or Rev Stat §§ 133.739; §§ 165.535-165.543

Pennsylvania

Pa Stat Ann title 18 §§ 5701-5726

Rhode Island

RI Gen Laws §§ 12-5.1-1-12-5.1-14

South Carolina

SC Code Ann §§ 17-29-10-17-29-50 [pen registers]

South Dakota

SD Codified Laws Ann §§ 23A-35A-1-23A-35A-32

Texas

Tex Penal Code Ann §§ 16.02-16.04

Utah

Utah Code Ann §§ 77-23a-1-77-23a-16; §§ 77-23b-1-77-23b-9

Virginia

Va Code Ann §§ 19.2-61-19.2-70.3

Washington

Wash Rev Code Ann §§ 9.73.030-9.73.140

West Virginia

W Va Code §§ 62-1D-1-62-1D-16

Wisconsin

Wis Stat Ann §§ 968.27-968.37

APPENDIX B: EXAMPLE OF RECORDED TELEPHONE CONVERSATION

Answer: _____ Life, this is Alex, may I help.

Caller: Yes, Alex, my name is Alan, how are you? I represent the A _____ & R _____ Funeral Home and one of your insureds passed away and we would like to report the death of her for the policy please if I can. But I got to let you know that you may be on a recorded line if that's okay.

Alex: You are calling from where?

Alan: A _____ & R _____ Funeral Home.

Alex: What is the client's policy number?

Alan: 001634114
Alex, may I have your extension or last name please?

Alex: ext. 2095.

Alan: Thank you.

Alan: You did not locate it yet?

Alex: I am looking for it now sir.

Alan: Oh.

Alex: No, it's not there.
Could you please reconfirm the client's name?

Alan: _____ (Insured)

Alex: What is your full name please?

Alan: Alan Holden.

Alex: And for contact purposes for our claims department, what is your area code and phone number?

Alan: 312-263-3097.

Alex: Date of departure?

Alan: The 30th, no I'm sorry, June 20.

Alex: Where do the forms need to be mailed or faxed to?

Alan: Fax them to 312-332-3673

Alex: Attention to?

Alan: My attention is fine.

Alex: Alright the request has been made, sent to our claims department, they should be sending out the forms, they should be sending out the forms within the next 3 to 5 business days.

Alan: Great, okay, now I have a couple of question because we want to take an assignment against the benefits. Our assignment is for \$5,000 and I want to try to make sure that we cover that, and to make sure the wife, Ruth, is the, this is the beneficiary.

Alex: The wife is the beneficiary.

Alan: She's the only primary?

Alex: Yea.

Alan: Okay, and my assignments are for \$5,000, is there enough to cover that?

Alex: Yes, there is enough death benefit.

Alan: Okay, even if there is a loan?

Alex: Yes, there is enough death benefit. That is all I can confirm for you right now by you not being the owner of the policy sir.

Alan: Okay, and it is currently in force?

Alex: Yes it is.

Alan: And it is a life policy?

Alex: Yes sir.

Alan: Okay, and um that is the correct birth date I gave you? Oh, I'm sorry, I did not give it to you. March 30, 1933.

Alex: Yes sir.

Alan: And it is not contestable?

Alex: No, it is not a contestable policy.

Alan: Okay, if you could mark your records where I send a home assignment in I would appreciate it.

Alex: Okay.

Alan: And we will get that out to you right away.

Alex: Okay.

Alan: Thanks Alex, and you have a nice weekend.

Alex: You too.

Alan: Okay, bye.

APPENDIX C: QUALIFIED DOMESTIC RELATIONS ORDERS

1. What law governs QDROs?

A: The governing law is 29 U.S.C. § 1056(d) of the Employee Retirement Income Security Act of 1974 (ERISA).

2. What is a QDRO?

A: A QDRO is a Qualified Domestic Relations Order as defined by 29 USC § 1056(d)(3)(B)(i) - (ii).

A: In essence, it is a judgment, decree, or order of a state court, including approval of a property settlement agreement, relating to the provision of child support, alimony payments or marital property rights to an alternate payee, which is made pursuant to a state's domestic relations law.

3. Who is an alternate payee?

A: An alternate payee means any spouse, former spouse, child, or other dependent of a participant who is recognized by a Domestic Relations Order as having a right to receive all or a portion of the benefits payable under a plan governed by ERISA.

4. Why is a QDRO needed?

A: A QDRO is needed because it provides an exception to the provisions of ERISA formulated by Congress to protect pensions from assignment or alienation for the benefit of private pension holders and pension plan funds. A QDRO is simply a document which, if prepared in accordance with the requirements of ERISA, allows a specific group of individuals including widows, divorcees, and the children or dependents of plan participants, to be assigned pension benefits if ordered by a state court as part of a domestic relations order.

5. Why does a Domestic Relations Order have to be qualified in order for a plan to honor it?

A: ERISA mandates that such an order, decree or judgment meet certain requirements in addition to those mandated under state law, so as to constitute an exception to ERISA's prohibition against assignment or alienation of benefits.

6. What court will issue a Qualified Domestic Relations Order?

- A: Generally, a QDRO will be issued by the state court in which the domestic relations case was filed.
7. Can a federal court enter a Qualified Domestic Relations Order or determine if one exists?
- A: Federal courts have made determinations regarding the existence of QDROs, but the usual course after making such a determination is to remand the QDRO back to state court. Federal courts lack jurisdiction to enter QDROs.
8. How can a state court issue a domestic relations order when ERISA preempts state law?
- A: State law providing for rights and payments under a QDRO is exempt from pre-emption under 29 USC § 1144 (a).
9. Why?
- A: Congress was concerned with the financial security of widows and divorcees and thus amended ERISA effective January 1, 1985 to provide an exception to the pre-emption provisions of ERISA.
10. What happens with Domestic Relations Orders issued prior to January 1, 1985?
- A: Congress provided that a plan administrator may treat any Domestic Relations Order entered prior to January 1, 1985 as a QDRO.
11. How can I determine whether a domestic relations order issued by a state court meets the requirements of a QDRO?
- A: The requirements of a QDRO are found in 29 USC § 1056 (d)(3)(C).
12. What does a domestic relations order need in order to be qualified?
- A: In order to be qualified, a domestic relations order must clearly specify the following:
- i. the name and last known mailing address of the participant;
 - ii. the name and mailing address of each alternate payee covered by the order;
 - iii. the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined;
 - iv. the number of payments or period to which such order applies;
 - v. each plan to which such order applies.
13. What is the purpose of requiring these specific items?
- A: The purpose is to provide to a plan administrator the identity of a beneficiary without creating unreasonable administrative burdens. *Carland v. MetLife Ins. Co.*, 935 F.2d 1114, 1120 (10th Cir. 1991)(cert

denied, 502 U.S. 1020 (1991)).

14. May a participant or alternate payee serve a domestic relations order directly on the plan as an entity, rather than on the plan administrator or trustee?

A: Yes. The plan as an entity can sue or be sued and therefore, service is proper directly upon the plan.

Suggestion: Make sure that any such order received by anyone on behalf of the plan is dealt with promptly.

15. What should a plan do when it receives a domestic relations order?

A: The plan administrator must promptly notify the participant and each alternate payee of the receipt of the domestic relations order;

A: The plan administrator must promptly notify the participant and each alternate payee of the plan's procedures for determining whether the order is qualified

A: The plan administrator must, within a "reasonable period," determine whether the domestic relations order is qualified and notify the participant and each alternate payee of each determination

16. Can an ordinary Domestic Relations Order issued by a state court be qualified for purposes of pre-emption?

A: Yes. Courts usually focus on whether a Domestic Relations Order satisfies the statutory requirements for a QDRO, and if so, such an order can serve as a QDRO.

17. Can a state writ of garnishment by itself constitute a domestic relations order?

A: A writ of garnishment based on a state court judgment awarding a portion of a participant's pension benefits issued pursuant to a state garnishment statute will not be a qualified domestic relations order unless the writ complies with the requirements for a QDRO as outlined in No. 12 above.

18. Can a domestic relations order require a plan to provide a benefit or other option not otherwise provided under the plan?

A: No.

19. Can a domestic relations order require a plan to provide increased benefits?

A: No.

20. Can a domestic relations order require the payment of benefits to an alternate payee when those benefits are already required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order?

A: No.

21. Are employee welfare benefits other than pensions subject to the exception from alienation or assignment provided ?

A: At least one court, the 10th Circuit, has interpreted the exception to alienation or assignment provided in 29 USC § 1056(d)(3)(B)(i) - (ii) to include all qualifying domestic relations orders, including those providing for employee welfare benefits other than pensions (for example, life insurance plans). *Carland v. Metropolitan Life Insurance Co.*, 935 F.2d 1114, 1120 (10th Cir. 1991)(*cert denied*, 502 U.S. 1020 (1991)).

A: Other federal courts have limited the QDRO exception to pension plans, including U.S. District Courts in Michigan and Arizona.

A: Maryland has held that an employee stock purchase plan was not a pension or benefits plan and was not subject to the QDRO exception to ERISA preemption.

22. What should I do if I am not sure whether certain welfare benefits are pre-empted in the state that issued the QDRO?

A: Forward all such orders to in-house counsel.

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