

Erisa In The News

Susan Ackerman was vice president of a financial services company in San Rafael. She ran 30 to 40 miles a week on the Mount Tamalpais trails. Once her daughter was grown, Ackerman's work became her life. But in the mid-1990s, her body began to deteriorate. The diagnosis was post-polio syndrome. The polio she had as a child had damaged nerves that were now giving out, cutting off energy to her muscles.

She could no longer run. The fatigue was so oppressive at times she had to pull over on the highway for 10-minute naps just to make it home at night. She cut back to four days a week at work. Then three. Her speech slowed. Her left arm eventually became useless. Finally, in 2000, she couldn't work any longer.

But her insurance company rejected her claim for long-term disability benefits, and she made a dismaying discovery -- one that ought to be stenciled in bold letters across the policies of all 130 million of us who have health and disability coverage through our employers. It is a clause in a well-known 30-year-old law -- the Employee Retirement Income Security Act, or ERISA.

Originally passed to protect employees' pension funds from unscrupulous or negligent employers, ERISA was interpreted by the Supreme Court in 1987 to cover all employee benefits, and it would supersede state laws. The upshot soon became clear.

When a claimant sues an insurance company under an employee benefit plan, the insurer can argue in most cases that state laws don't apply because, as the court ruled, the company is protected under ERISA. And under ERISA, a claimant cannot sue for bad faith, breach of contract or punitive damages. A claimant is not entitled to a jury trial or, in most cases, to even call witnesses before a judge.

If an insurance company is found to have improperly denied a claim, it is required to pay only what the claim would have been in the first place, plus attorneys fees, in some cases. The insurers are not liable for damages caused by their decisions. In other words, ERISA allows insurers that provide insurance through employers to reject claims with virtual immunity.

Ackerman was approved for Social Security disability in 2000. Then, after first deciding she could provide for herself from her retirement savings, her finances changed. She filed a claim for long-term disability with her company's insurance provider, Unum Provident.

Ackerman, as the human resources director for the company she worked for, had chosen Unum to provide employee benefits. She had been paying into a disability policy offered to senior management that provided "same occupation" coverage. It would pay 60 percent of her salary if she became disabled.

Unum rejected Ackerman's claim because her doctor didn't certify her disability, and thus her decision to stop working was a "lifestyle choice." Ackerman had not thought to obtain an official approval from her doctor at the time she stopped working because he had told her months earlier that, because the deterioration progressed differently for different people, only she would know when the time had come to leave work for good.

"I was very familiar with ERISA because it was one of the things I was responsible for at the company," Ackerman said Wednesday when we met at a Starbucks in Mill Valley. "I always saw it as something that protected people who had group benefits. So I was shocked, really shocked, that it could be used against claimants."

Ackerman is a slight woman with short gray hair and a cane. When she is tired, as she was Wednesday, she speaks slowly, working hard to pronounce words clearly. She is 63 and living for the moment in a San Jose nursing home where the average age is 87. She is hoping soon to move into an independent and assisted living facility in Los Gatos. The average age there is 77.

Ackerman said the insurance company sent her to physical therapists hired and paid for by the insurance company. After four hours of testing, the therapists confirmed that she was too disabled to work. Unum dismissed the report as irrelevant. It rejected Ackerman's appeal.

"At the time she left her employment, she was not under a doctor's care for her claim of disability," Unum spokesman Jim Sabourin said from the company's Tennessee headquarters. "We didn't feel the evidence supported her claim."

The U.S. Supreme Court is set to issue a ruling this summer on two cases out of Texas that are challenging ERISA. In one, an insurance company denied a second day in the hospital to a woman who had undergone a complex hysterectomy, even though her physician recommended that she stay. She was back in the emergency room several days later with complications. In the second case, an insurance company required a man to take less-expensive pain medication, even though his doctor recommended Vioxx. The cheaper medication, the man claims, caused bleeding ulcers and a near heart attack.

The litigants and their attorneys say insurance companies, like doctors, should be held accountable if their decisions harm patients. The insurance industry says the current appeals process is a just one, and if claimants are allowed to sue for punitive damages, health premiums would rise, resulting in some employers reducing or eliminating health coverage.

"There are other ways of finding fair resolutions without going to court," said Mohit Ghose, spokesman for America's Health Insurance Plans, the main trade association for the nation's insurance providers. He said ERISA has no bearing on whether companies approve or deny claims.

"It's bad business not to provide benefits when you have been hired to provide benefits," he said. "How could you run a company and continue to sell your product?"

Arnie Levinson, a San Francisco lawyer, has been fighting ERISA for about a decade. He filed an amicus brief on behalf of the plaintiffs in the current Supreme Court case. He has argued, as others have, that enforcing contracts in the courts predates the Magna Carta.

"If there are no consequences for denying a claim, what incentive do insurance companies have for treating you fairly?" Levinson said. "The deck is completely stacked in favor of the insurance companies."

Levinson's firm took on Ackerman's case. Two weeks ago, four years after Ackerman first filed her claim, Unum signed off on a settlement agreement, which has been sealed. Unum declined to explain why it settled. Ackerman, in the meantime, has been living off Social Security, her retirement savings and the largesse of her sister and brother-in-law.

A U.S. district judge in Massachusetts, William G. Young, summed up his frustration in having to dismiss a wife's suit against Travelers Insurance a few years ago because ERISA prohibited any kind of legal or financial redress. Travelers twice denied 30-day alcohol rehab stays for the woman's husband, whose employee-benefits policy expressly provided for it. The man's addictions soon led to his death.

"It is ... deeply troubling," Young wrote in his decision, "that, in the health insurance context, ERISA has evolved into a shield of immunity which thwarts legitimate claims of the very people it was designed to protect.

"What went wrong?"

- [Joan Ryan](#)
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