

ELDRS Update

Fall Edition 2019, Volume IX, Issue 3

This is a publication of the Elder Law & Disability Rights Section of the State Bar of Michigan. All opinions are those of the respective authors and do not represent official positions of the Elder Law & Disability Rights Section or the State Bar of Michigan. Comments or submissions should be directed to Christine Caswell, Editor, at christine@caswellpllc.com.

Save the Dates

- **Spring Conference**,
March 20, 2020 at the Inn
at St. John in Plymouth
- **Fall Conference**, October
7-9, 2020 at the
DoubleTree by Hilton
Hotel in Bay City

Your 2019-2020 ELDRS Council

By Christine Caswell, Caswell Law PLLC, Lansing

ELDRS welcomed one new officer, renewed one member for a second term, added four new members, and said good-bye and thank you to three members at its annual meeting on October 3 at the Crystal Mountain resort.

New Executive Council

- Chair, **Kelly Quardokus**, Q Elderlaw, PLC, Portage
- Chair Elect, **Christine Caswell**, Caswell Law PLLC, Lansing
- Secretary, **Robert Mannor**, Mannor Law Group, PLLC, Grand Blanc
- Treasurer, **Angela Hentkowski**, Steward & Sheridan PLC, Ishpeming
- Immediate Past-Chair, **Christopher Smith**, Chalgian & Tripp Law Offices PLLC, Southfield

Incoming Council Members

- **Shannon DeWall**, Law Office of Shannon DeWall PLLC, Livonia
- **Catherine Hodge Jacobs**, Warner Norcross + Judd, Grand Rapids
- **Erin E. Mortenson**, The Law Office of Erin Mortenson, Livonia
- **Amanda Murray**, Bassett & Associates, Ann Arbor

Renewed Council Member for a Second Term

- **Raymond Harris**, Buhl Little Lynwood & Harris PLC, East Lansing



Outgoing chair Christopher Smith welcomes incoming chair Kelly Quardokus at the 2019 annual ELDRS meeting at the Crystal Mountain Resort.

Outgoing Members

- **Caroline Dellenbusch**, Dellenbusch & Ryan, PLC, Grand Rapids
- **Maria Messina Wiersma**, Chalgian & Tripp Law Offices PLLC, Southfield
- **Sara Schimke**, Chalgian & Tripp Law Offices PLLC, Southfield

ELDRS also wishes to thank its sponsors for the Fall Conference:

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What ELDRS Attorneys Should Know about ERISA

By Robert B. June, Law Offices of Robert June PC, Ann Arbor

I had a wonderful time at the ELDRS Fall Conference at Crystal Mountain in October. Meeting so many fun and interesting people dedicated to helping vulnerable clients was truly inspiring, and I learned a bit about elder law along the way. My practice focuses on insurance coverage and Employee Retirement Income Security Act of 1974 (ERISA) benefit disputes. Over the past few years, several elder law practitioners have contacted me about their problems dealing with this benefit law, and what follows is a smattering of ERISA concepts that may help avoid problems in your practice.

What Is ERISA?

ERISA is the federal law that governs all private-sector employment benefits. Signed into law on Labor Day, less than a month after President Gerald Ford took office, it is easy to assume the political upheaval of the times explains why the law seems to have so many loose ends. In chameleon-like fashion, ERISA takes on features of administrative law, trust law, equity, and contract law but never seems to fit comfortably in any one category. The statute and implementing regulations are massive, and the case law seems endless.

ERISA governs benefits ranging from pensions to life insurance, health coverage, long-term disability, 401(k)s, and more. If the benefits are provided through a plan sponsored by a private-sector employer, then ERISA most likely governs the outcome.

Common Types of Claims

If your client's asset portfolio includes anything that originated as an employee benefit, you may run into a number of ERISA disputes down the road. For example, beneficiary disputes can arise when a divorced person forgets to change his or her beneficiary, leaving the ex-spouse in a position to collect a windfall, or when beneficiary designations are made on the wrong form or by the wrong process.

Coverage disputes are particularly common in claims involving life insurance and accidental death insurance. A grieving family member may receive a condolence letter one day and a denial letter the next. The insurance company may deny coverage or rescind it altogether based on a claim that the now-deceased insured person failed to fill out an application accurately or did not provide evidence of insurability at an appropriate time. Policy exclusions are frequently the subject of litigation and proving that a death was caused by an accident and not by sickness can be tricky.

Medical benefit claims frequently involve questions of medical necessity and whether a particular treatment was "investigational." Disputes are also common for residential treatment of mental health, substance abuse disorders, and eating disorders.

Perhaps the most commonly litigated ERISA benefit claims are for long-term disability, and there can also be claims for disability retirement under pension plans. These are just a few examples and there are many other types of claims that are subject to ERISA.

Federal Jurisdiction and Procedural Requirements

Most ERISA claims are subject to exclusive federal subject matter jurisdiction. If an ERISA claim is filed in state court, it is likely to be removed to federal court as a matter of course. Federal courts have pleading requirements that are different than state courts, requiring a statement of facts detailed enough to render a claim "plausible." Consequently, claims filed in state court under notice pleading protocols are frequently removed to federal court and dismissed for failure to state a plausible claim. ERISA preempts state laws broadly, and the ERISA statute provides an exclusive set of remedies available in benefit cases. It is essential to state a claim that fits within one of those exclusive remedies.

In the Sixth Circuit, which includes Michigan, ERISA benefit claims are handled in accordance with a streamlined set of procedures. There is typically no discovery, no trial, no evidentiary hearing, and no opportunity to present evidence that was not presented during the administrative process. Claimants are required to follow administrative remedies before filing suit, and the record presented to a judge for adjudication may be limited to those documents presented during the administrative process. In many cases, plan administrators claim that they are entitled to discretionary review, such that the judge can overrule the administrator's

decision only if it is arbitrary and capricious. All of these requirements make handling ERISA claims quite precarious.

Plan Documents and Claim Records

The most important thing a practitioner can do when first confronting an ERISA claim is to get the official plan documents and claim records. It is important to identify the official plan administrator and send a written request for the official plan documents to that administrator. This may be different than the third-party administrator handling the claims on a day-to-day basis. After a benefit denial, the covered person is entitled to request all of the claim records, and this is essential in preparing an appeal of any adverse claim decision.

Analyzing plan terminology is both tedious and enlightening in many cases. The terms of coverage often vary significantly from one plan to the next, and under ERISA, it is the plan terms that will determine the outcome in most cases.

Conclusion

If you are dealing with a controversy that involves employee benefits, it is important to get ahead of the game by getting all of the plan documents and claim documents at the earliest point in the process. You should know that you may end up in federal court, applying federal common law rather than state law, and dealing with unfamiliar practices and procedures.

Legislative Updates

By Todd Tennis, Capitol Services, Inc.

Elder Abuse Legislation Moving in Lansing

Michigan's aging population has created many legislative efforts over the past decade. Increases in spending for senior services, efforts to reform taxes on pensions, and, of course, changes to laws punishing those who exploit and defraud vulnerable adults have all received a great deal of legislative attention. Most recently, the House and Senate have been focused on the latter issue with several bills to crack down on perpetrators of abuse and neglect of elders.

When it comes to protecting Michigan seniors, the sticking point has been whether to create a protected class based solely on age. Currently, these special protections extend to "vulnerable" adults. As defined in Michigan's Social Welfare Act, "vulnerable" means "a condition in which an adult is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age."

The debate over whether to include a special category of "elder adult" has been contentious among advocates for elders and those with disabilities. Representatives from various law enforcement organizations, most notably the Prosecuting Attorneys Association of Michigan (PAAM), assert that a bright-line rule for elders makes it easier to apply additional penalties for perpetrators of crimes ranging from financial exploitation to abuse. Conversely, many senior advocates fear that by equating age with

vulnerability, it may have negative consequences for seniors who are able to maintain their independence.

For the last several legislative sessions, bills have been introduced that would have created this bright-line definition of “elder adult,” and every bill has defined an “elder adult” as a person aged 65 or older. None of these bills have passed, but a bipartisan package of bills in the House has gained traction this year. ELDRS has held several debates about these, and there is a range of opinions even among section members. While many members expressed opposition to creating a definition of “elder adult” that would be an equivalent class of victim as a “vulnerable adult,” others agreed with PAAM’s perspective that proving a victim was indeed a vulnerable adult was more difficult than simply basing the special victim status on age. Instead of supporting or not supporting the legislation, the ELDRS Council took a position that it would support House Bill 4260, but only with suggested amendments.

HB 4260, sponsored by Rep. Sarah Anthony (D-Lansing), includes the definition of “elder adult” and creates a rebuttable presumption that any financial transfer from a vulnerable adult or an elder exceeding \$10,000 would make the recipient guilty of fraud and financial exploitation, placing the burden on the recipient to prove otherwise. The Council was unanimously opposed to this concept, and we have worked with the bill sponsor over the last several months to find a compromise.

Back to Basics Webinar Series

By Maria R. Messina Wiersma, Chalgian & Tripp Law Offices, PLLC, Southfield

Our Back to Basics Webinar series continues as an exclusive benefit to ELDRS Section members. Adding even more to the value of your membership, this benefit extends to your assistants and paralegals as well. For more information, contact Maria Messina. Tune in to the upcoming webinars listed below:

- 11/12/19 – Noon - **Handling Fiduciary Real Estate Transactions**, Christine Caswell, Caswell Law PLLC, Lansing, Michigan
<https://attendee.gotowebinar.com/register/3540593867783883277>
- 1/09/20 – Noon - **PACE Program**, Erin Majka, Chalgian & Tripp Law Offices PLLC, Kalamazoo, Michigan, <https://attendee.gotowebinar.com/register/8768323057514517259>
- 3/12/20 – Noon, **Caregiver Contracts**, Lisa H. Beatty, Nawrocki Center for Elder Law, Special Needs & Disability Planning, PLLC, registration site to be announced on the ELDRS ListServ

Calendar of Events

By Erma S. Yarbrough-Thomas, Neighborhood Legal Services Michigan Elder Law & Advocacy Center, Redford

ELDRS – www.michbar.org/elderlaw

- Dec. 7 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend Street, Lansing at 10 a.m.
- January – To Be Determined
- Feb. 1 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend Street, Lansing at 10 a.m.
- March 7 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend Street, Lansing at 10 a.m.
- March 20 – ELDRS Spring Conference at The Inn at St. John, Plymouth

NAELA – www.naela.org

- Nov 6 & Dec. 17 - End of Life Issues: The Growing National Debate (3 Part Series) - Webinar, 1-2 p.m. EST
- Nov. 14-16 - 2019 NAELA Summit, Capitol Hilton, Washington D.C.
- Dec. 11 - Medicare Appeals in Light of The *Jimmo* Settlement, Webinar, 3- 4:30 p.m. EST

ICLE/SBM – www.icle.org

- Nov. 9 - Breakfast basics: Wellness & Self-Care for Young Lawyers, Detroit (Live)
- Nov. 21 - Ultimate Evidence Workshop: Admitting, Impeaching, and Objecting, Plymouth (Live)
- Dec. 5 - Planning Techniques for the Taxable Estate, Plymouth (Live)
- Dec. 5 – Estate Planning for Retirement Assets, Plymouth (Live)

NAELA Litigation Fund

As a reminder, we are linking the NAELA Litigation Fund [donation form](#). This is a 501(c) (3) organization, so all donations are tax deductible. Thank you in advance for your support.