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Insurer's Likelihood to Deny Claim Does Not Excuse Claimant's Obligation to Exhaust Administrative Remedies Prior to Filing Suit

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In *Ruderman v. Liberty Mut. Grp., Inc.*, 2021 U.S. Dist. LEXIS 40516 (N.D.N.Y. Mar. 4, 2021), a New York district court held that just because an insurer might have been likely to deny a claim does not excuse a claimant's obligation to exhaust administrative remedies prior to filing suit. In order to invoke the "futility" doctrine, a plaintiff must make a "clear and positive" showing that exhausting administrative remedies would be futile and further show that he/she made a sincere attempt to appeal the denial or otherwise put defendants on notice that a dispute exists.

Plaintiff Jennifer Ruderman was insured under a long-term disability (LTD) plan (the Plan) offered by her employer Liberty Mutual Group, Inc. (Liberty Mutual). In July 2011, Ruderman sought benefits under the Plan after she fell off her bicycle and struck the left side of her head. Liberty Mutual initially approved the claim and began paying benefits but a few months later terminated benefits after receiving the results of neuropsychological testing that Ruderman underwent as part of the company's customary review of the claim. Ruderman appealed, and Liberty Mutual reversed its adverse benefits decision by letter dated September 10, 2018.

The next day, on September 11, 2018, Liberty Mutual advised Ruderman that her most recent neuropsychological assessment did not support a finding of a psychologically-related neurocognitive impairment and that she no longer suffered from a physical disability. Accordingly, Liberty Mutual found that Ruderman was no longer entitled to receive continuous disability benefits. Instead, the assessment found that Ruderman suffered from a mental health condition, which meant that her benefits would be capped at 18 months, backdated to July 2018.

On December 3, 2019, Liberty Mutual sent Ruderman another letter informing her that benefits would terminate on December 30, 2019. The letter also informed Ruderman that, pursuant to ERISA, she could request a review of the denial of her benefits within 180 days. Rather than filing an appeal, Ruderman filed suit alleging state law claims.

Liberty Mutual moved to dismiss Ruderman's complaint on the grounds that her state law claims were pre-empted by ERISA and that she had failed to exhaust her administrative remedies, as required by ERISA. Ruderman conceded that she did not exhaust her administrative remedies by appealing the December 3, 2019, denial of benefits, but argued that the court should permit her to amend her complaint to assert an ERISA claim because "she is the epitome of a Plaintiff who can demonstrate the futility argument." In support of her motion, Ruderman argued: (1) Liberty Mutual erroneously decided to terminate her LTD benefits and then sought neuropsychological testing to establish a pretextual reason for doing so; (2) the appeal would have consisted of the same evidence so that the outcome would have been the same; and (3) Liberty Mutual purposely waited to inform Ruderman of her right to appeal until after her benefits had ended to limit her ability to appeal the decision.

At the outset, the court noted that "the mere fact that Liberty Mutual might have been likely to deny the claim does not excuse exhaustion." Even where a plaintiff shows that it is certain her claim would be denied on appeal, a plaintiff must show that she made a sincere attempt to appeal the denial or otherwise put defendants on notice that there was a dispute. The court held that the futility exception does not apply where there is no evidence in the record that the plaintiff even *notified* the plan administrator of any disputed claim.

In Ruderman's case, it was clear she understood the administrative process. She knew how to file an appeal, had previously done so, and had previously been successful. Because she did not allege any facts showing that she attempted to resolve her second dispute prior to filing suit, let alone a "clear and positive showing" that exhausting her administrative remedies would have been futile, the court denied her motion for leave to amend her complaint, as amendment would have been futile.

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