Once ERISA always ERISA?

By J. Christopher Collins

In Multi-Life Individual Disability Plans, a Unique Case Can Be Made for Its Application

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As the law of ERISA continues to develop, the infinite number of fact scenarios test the boundaries of principles we learn and apply in everyday practice. This article addresses how the emerging and historical case law treats a multi-life individual disability ("IDI") plan established under ERISA and whether a participant's policy in that plan retains its character of ERISA governance even after the participant changes her employment status before filing a claim for benefits.

As the disability marketplace continues to mature, more and more large disability plans, especially those covering highly paid professionals, use multi-life individual noncancellable disability insurance as the coverage platform. The terms of these plans are uniquely negotiated with employers and often include guaranteed issue amounts of coverage with little or no health underwriting, premium discounts and offers of additional indemnities if a covered person's income grows. Some of these plans can cover hundreds or even thousands of employees. The employer usually joins with the insurer to promote the plan and if certain participation requirements are met (20% of eligible members) the plans are off and running. Some employers go so far as to pay some or all the premium for the guaranteed issue amounts of coverage which helps to drive participation among employees.

These multi-life IDI plans carry all the elements of an ERISA plan. As ERISA states, "(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter **established or** maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise." 29 U.S.C. §1002(1) (emphasis added). When a participant leaves the plan, they can easily continue the coverage (because the policies are noncancellable) by simply notifying their employer and the insurer they want to take on the responsibility for paying the premium and continue the coverage as is. In fact, the ease of portability is one of the ERISA plan features that attracts buyers. Since these IDI policies can be continued until a participant reaches age 65 and some can be extended beyond that if a person is actively at work, claims can be made 20 or 30 years after the coverage is issued and perhaps many years after the participant has left her original employer. The question is does ERISA still govern the terms of the plan if a participant

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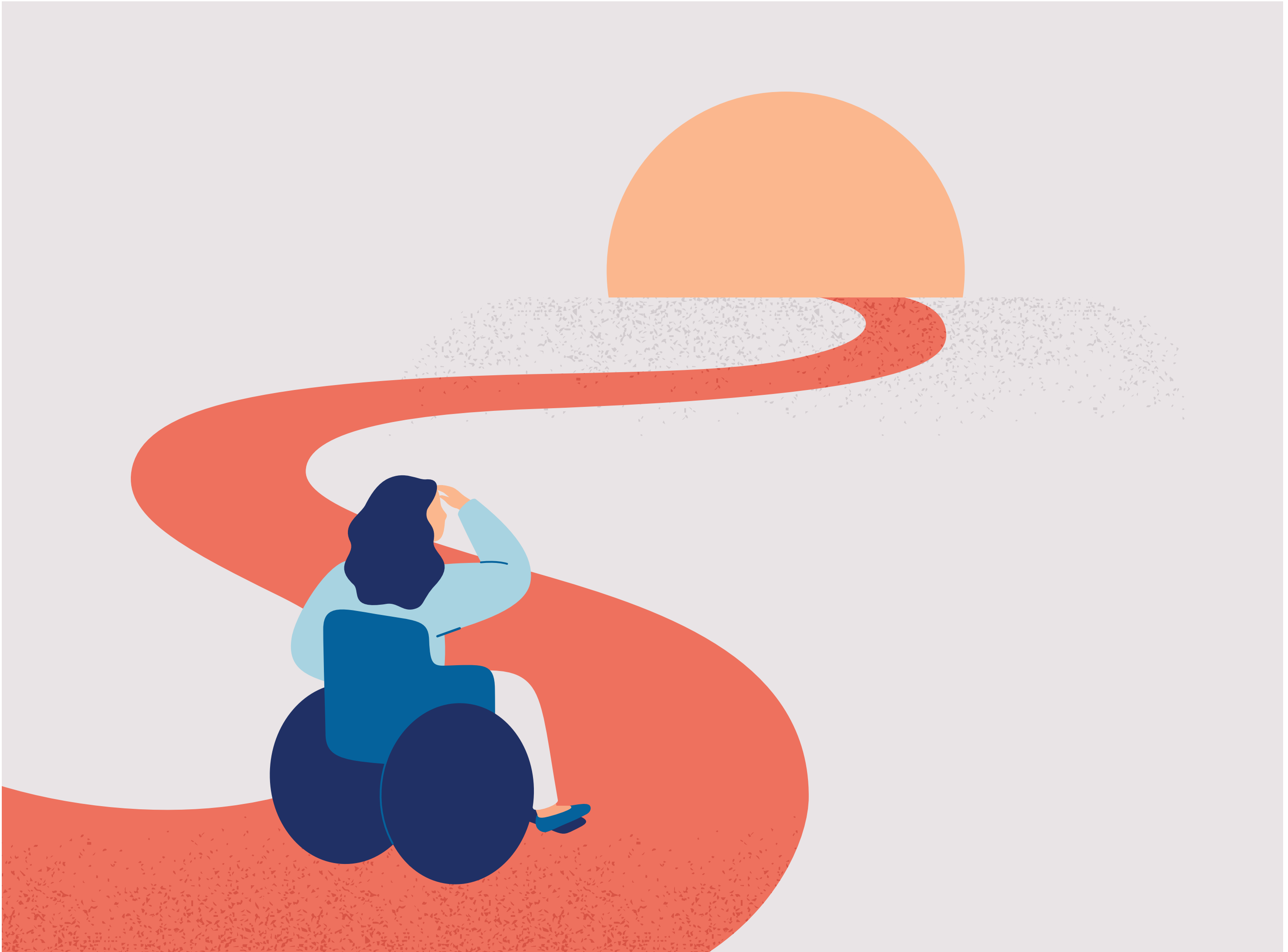

leaves the employer where they obtained the coverage.

One of the more common fact patterns that arise in this area is when a participant is covered by a group life or disability plan that has a conversion privilege which allows the participant to convert the group disability coverage to individual coverage. That was the scenario in *Demars v. Cigna Corp.*, 173 F.3d 443 (1st Cir. 1999). In that case, the court held that the converted policy was no longer governed by ERISA after the participant separated from her employer and was issued a new and separate individual conversion policy. *Id.* at 384. The court specifically defined the term conversion policy in a footnote, remarking as follows:

> Consistent with the usual practice, we use the label "conversion policy" to refer only to a private (non-employer-financed) insurance policy *obtained by a former employee, after termination, through the exercise of conversion rights. Id.* at 450 n.1. (emphasis added).

The principle is that when a participant leaves the coverage of the group insurance policy and enters a new and separate individual insurance contract (often from the same insurer) after their employment is terminated, they are no longer part of the original ERISA governed plan.*Demars* is often cited in cases where the participant has departed from the employer that sponsored their original coverage. In such cases there are usually two effective dates of coverage: the effective date of coverage under the group plan and the effective date of coverage under the converted policy.

However, when a plan is funded by a noncancellable IDI policy and the participant leaves their employer, there is no need to "obtain" a conversion policy. In fact, there is no need for a conversion at all. That is because the IDI policy can be continued merely by the individual insured continuing to pay the premium directly to the insurer. The plan terms are unchanged. In fact, this valuable right to take the coverage "as is" upon termination of employment is one of the incentives for an employer to sponsor a plan on behalf of its employees. Recall that during the debate on the Affordable Care Act one of the criticisms of employer provided insurance benefits was that workers were forced to be continually re-underwritten as they went from employer to employer. As people aged, the chances of a pre-existing condition emerging increased and it made acquiring full coverage more and more difficult. The noncancellable feature in IDI policies removes

that burden and it is a very attractive policy provision to offer to employees as part of these ERISA governed plans.

If it can be shown that no plan features have changed, most courts agree that an individual disability policy once "established" as an ERISA plan retains ERISA governance even after the employee terminates her employment with the employer where they first obtained the coverage. In a recent decision the court in *Campbell v. Unum Group*, 633 F.Supp.3d 378 (D. Mass. 2022), addressed a case where a physician was a participant in a list bill arrangement negotiated between his employer, Mount Auburn Cardiology Associates ("Mount Auburn") and Provident Life to provide disability insurance to physician employees of Mount Auburn. The agreement was memorialized in a Salary Allotment Agreement. *Id.* at 380. The plan was made up of individual disability policies issued to multiple physicians. *Id.* at 384. Eventually, Campbell withdrew from the Salary Allotment Agreement and began paying the premium directly to the insurer. After filing a claim and having it denied, Campbell filed suit in state court alleging three state law causes of action. *Id.* at 381. The case was removed to federal court based on ERISA preemption. *Id.* Campbell moved to remand the case arguing that ERISA did not apply to the Mount Auburn plan insured by Provident Life. *Id.*

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Campbell based his remand motion on several theories, "...that he was an owner of Mount Auburn, not an employee; that Mount Auburn did not establish or maintain a plan; that he, rather than Mount Auburn, paid for the benefits; and there was no written plan." *Id.* at 382. The court rejected each of those arguments and found ERISA governed. *Id.* at 382-385.

In *Zide v. Provident Life*, 2011 WL 12566818 (C.D. Cal. Apr. 13, 2011), Zide challenged the application of ERISA to two individual disability policies issued to him by Provident Life. Zide, a radiologist, was part of a medical practice which had entered into a Salary Allotment Agreement with Provident Life to provide disability insurance to employees of the practice. *Id.* at *2. The terms of the plan provided 10% discounted premiums for participants who purchased disability insurance from Provident Life. *Id.* That discount was not generally available to members of the public seeking disability coverage from Provident Life. *Id.* It also provided for a list bill arrangement whereby all participants of the plan were billed for premium though a single invoice. *Id.* The court found that even though the plan was made up of many individual disability policies an ERISA "plan, fund or program" had been established. *Id. at *5.*

Zide ultimately began paying the premium directly to Provident Life. *Id.* He argued that by personally taking over the premium payment his policy was no longer governed by ERISA. *Id.* However, the court found that because Zide was still the beneficiary of a discounted premium he continued to benefit from his employer's involvement. According to the court, the continuing discount was proof that the employer was still involved in "establishing and maintaining" the plan and therefore ERISA still applied. *Id.*

The Sixth Circuit reached the same conclusion in *Massachusetts Cas. Ins. Co. v. Reynolds*, 113 F.3d 1450 (6th Cir. 1997). Reynolds and his partner were covered under individual policies with premiums billed to and paid by the employer. Upon leaving the job, Reynolds continued coverage by personally paying the premium, which increased because he was no longer eligible for the employer's 10% premium discount. The case was removed to federal court, and Reynolds argued that while the coverage may have been ERISA coverage when issued, it was "converted" when he left the job. The court rejected that argument and noted that the employer did not buy a group policy, but rather, Reynold's policy was one of fiveor six individual policies covering employees, and that when Reynolds left, his individual policy remained in force without change. See also *Jaffee v. PLA*, 2000 WL 349750 (S.D. Fla. 2000); *Nix v. United Health Care of Ala., Inc.*, 179 F.Supp.2d 1363, 1370 (M.D. Ala. 2001); *Griggers v. Equitable Life Assur. Soc'y.*, 343 F.Supp.2d 1190, 1196 (N.D. Ga. 2004) (holding that because the policies were established as ERISA plans, they remained ERISA notwithstanding a change of payor); *Henderson v. Paul Revere Life Ins. Co.*, 2013 WL 1875151, at *12 (N.D. Tex. 2013) ("Indeed, there was no reason to convert the policy from a group policy to an individual policy because it was issued as an individual policy"); *Alexander v. Provident Life and Acc. Ins. Co.*, 663 F.Supp.2d 627, 636 (E.D. Tenn. 2009) (finding that ERISA still governed an individual disability policy after the insured left his original employer and where the terms of the policy were unchanged and the insured continued to receive the same discounted rate that was in place when the policy was first issued.); *Vincent v. Unum Provident*, (2005 WL 1074370 at *2-3 (E.D. Tenn. May 5, 2005) (determining ERISA applied where plaintiff continued coverage he acquired by virtue of his employment, continued to receive a discounted rate, and the only change was he took over payments); *Viechnicki v. Unumprovident*, 2007 WL 433479 (E.D. Penn. Feb. 8, 2007) (finding that IDI policy was part of an ERISA plan established while OB/GYN physician was working for group practice which initially paid 100% of discounted premium and covered at least ten other employees under similar policies. Further finding that ERISA still applied after physician left practice, retained premium discount, and began paying premium directly to the insurer.); and *Kerton v. Provident Life and Acc. Ins Co.*, 2005 WL 3440716 *3 (D. Ariz. Dec. 14, 2005) (holding that policy established as an ERISA plan remained governed by ERISA because coverage "continued" but was not "converted." The fact that the employer went out of business did not impact the ERISA analysis.

And finally in *Moss v. Unum Provident Grp. Corp.*, 2013 WL 837230, (W.D. La. 2013), Moss argued that the policy was not

subject to ERISA after he started personally paying premium. The court stated:

> This court is unaware of any authority supporting Moss's position that a plan may escape ERISA's reach simply by changing the payor status from employer to employee. To the contrary, courts addressing the issue have found that more than simply a change in payor status is required to remove a policy from the realm of ERISA. Moss did not obtain new, separate policies when he began paying the premiums for his New York Life policies. Because the plan as originally established was subject to ERISA, the policies issued under the plan remain subject to ERISA. *Id.* at *6.

The contrary argument is explained in *Demars* and is often cited as to why ERISA should not govern these IDI policies after a termination of employment and the assumption of premium obligations by the insured.

In *Demars*, the court outlined the twofold purposes of ERISA to protect employees and employers.

In *Demars*, the court outlined the twofold purposes of ERISA to protect employees and employers. First, Congress wanted to safeguard employee interests by reducing the threat of abuse or mismanagement of funds that had been accumulated to finance employee benefits. Second, ERISA provided a safeguard to employer interests by eliminating the threat of conflicting and inconsistent state and local regulation. As the argument goes, if the employee terminates her employment and the employer is no longer involved in paying the premium there are no funds to be mismanaged. And, since the employee has left the employer's place of business, there is no concern on the employer's part or by other plan members on how the policy might be inconsistently interpreted by various state and local regulations. But, what those opposing application of ERISA in this context are not considering is that the IDI polices that make up these multi-life plans are identical for every participant. So, if one employee having first taken advantage of purchasing the policy while employed terminates her employment and leaves the plan taking with her the identical policy that also insures all her former colleagues there is a chance of inconsistent application of the law if ERISA no longer governs the relationship. In addition, the premium discounts and all the other favorable underwriting guidelines usually remain in place post termination. The premium rate charged for the insurance remains in place too and there is no need to be re-underwritten. It is the very portability of the identical individual coverage after termination of employment that is one of the incentives to become insured in the first place. The plain terms of these IDI policies make clear that the policy cannot be terminated if the premium is paid. There are no renewal conditions. Having established this unique type of an ERISA plan there is no end to its governance just because the employee leaves her employment and begins paying the premium as an individual. The terms of these established ERISA plans allow all of this to happen.

There is contrary authority where courts disagree that ERISA still applies in these situations. *See*, e.g., *Jilka v. Unum Grp.*, 2019 WL 1221058, at *2 (N.D. Cal. Mar. 15, 2019) (finding ERISA inapplicable to plaintiff's policy where the insurer sent plaintiff a letter asking if he wanted to continue coverage and, after electing to so continue, plaintiff thereafter paid the premiums independent of his employer); *DiNicola v. Unum Life Ins.*, 2017 WL 6940531, at *3 (C.D. Cal. Sept. 12, 2017) (holding that ERISA did not preempt plaintiff's claims where the disability policy was "independent of the ERISA benefits from [the employer] and [did] not place any burdens on the plan administrator or the plan"); *May v. Paul Revere Life Ins. Co.*, 2013 WL 4099997, at *5 (N.D. W.Va. Aug. 12, 2013) (holding that ERISA did not preempt plaintiff's claims in "the unique situation where insurance is dropped by the employer and resumed through an offer by the insurer"); *Eberlein v. Provident Life & Accident Ins. Co.*, 2008 WL 791944, at *6-7 (D. Colo. Mar. 20, 2008) (concluding that plaintiff's policy was not subject to ERISA where plaintiff obtained an individual policy as part of an employee benefit plan and was subsequently offered ongoing coverage by the insurer under the individual policy).

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However, none of these courts consider that the portability of the exact insurance policy is one of the ERISA plan's most valuable original plan features that attracted both employers and employees to buy the coverage in the first place. Employers know they are providing insurance coverage that can continue unaltered for their employees without subjecting them to underwriting in the future even if their health changes. These noncancellable IDI features existed long before the Affordable Care Act addressed the hardship of a person losing insurance when moving from employer to employer because of repeatedly being underwritten for pre-existing conditions. Noncancellable IDI has always been unburdened by this hardship. When an employer negotiates with an insurer to offer this type of coverage to their employees as part of establishing an ERISA plan it should retain that governance whether the person continues their employment because the plan itself was the origin of this unique and enduring feature. In the case of multi-life IDI, Once ERISA Always ERISA.