

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 98-1379-CIV-GRAHAM

MAGISTRATE JUDGE BANSOSTRA

ROBERT K. JORDAN,

Plaintiff,

v.

THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA,

Defendant.

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**PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO  
PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS**

Plaintiff, Robert K. Jordan, files this Reply to Defendant's Legal Memorandum in Opposition to Plaintiff's Motion for Attorney's Fees and Costs (hereinafter "Response") and says further that:

Prudential's Response is an attempt to divert the Court's attention away from the true issues of Plaintiff's Motion for Attorney's Fees and Costs by claiming that the motion is somehow a personal attack on Prudential's counsel. This could not be further from the truth and if Prudential's counsel perceives it as such, this could be indicative of a guilty conscience. What seems to be particularly disturbing to Prudential is Plaintiff's description of Prudential's conduct as being a diabolical scheme and the facts surrounding the Myerburg examination negotiations<sup>1</sup>.

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<sup>1</sup> This perception is based on the placement of these arguments in the Response.

Prudential has made the assertion many times during the course of this litigation and in its Response that this suit would have never been necessary if Mr. Jordan had gone through the administrative review. First, this entire argument is based on two major assumptions of law and fact: 1) that it was a foregone conclusion prior to litigation that Mr. Jordan's policy with Prudential was an ERISA plan and 2) that the administrative review procedures in place were not futile or inadequate<sup>2</sup>. Second, Prudential either misconstrues or misstates the purpose of an administrative review.

The purpose of an administrative review is to allow the plan participant a final chance to gather and submit further evidence of his disability to persons not involved in the initial denial that could not have been gathered previously. The time and place for the plan administrator to investigate a claim is prior to terminating benefits<sup>3</sup>. The administrative review was not designed to place further stress on a plan participant<sup>4</sup> while the plan administrator continues to "investigate" a claim after it has terminated benefits. The plan administrator has a fiduciary duty to act solely in the interest of plan participants<sup>5</sup> and fully investigate a claim<sup>6</sup>, including performing any necessary examinations.

Prudential has contended that the decision to terminate Mr. Jordan's claim would have been reversed during the administrative review and that this fact was proven when benefits were paid after Myerburg's examination. This position taken by Prudential proves its bad faith. The only information in Prudential's possession which did not fully

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<sup>2</sup> Both of these arguments were addressed in detail with citations to authority in Plaintiff's Motion for Attorney's Fees and Costs. See, Slamen v. Paul Revere Life Ins. Co., 166 F.3d 1102 (11th Cir. 1999) and Curry v. Contract Fabricators Inc. Profit Sharing Plan, 744 F.Supp. 1061 (M.D. Ala. 1988).

<sup>3</sup> Toland v. McCarthy, 499 F.Supp. 1183, 1190 (D. Mass. 1980).

<sup>4</sup> Especially one with a heart condition.

<sup>5</sup> 29 U.S.C. 1104 (a)(1).

<sup>6</sup> Booten v. Lockheed Medical Benefit Plan, 110 F.3d 1461 (9th Cir. 1997).

support Mr. Jordan's claim was an inconclusive report by Dr. Falk. If Prudential needed an examination of Mr. Jordan to fully evaluate his claim, it had a fiduciary duty to conduct this exam before it terminated benefits. This contention was never made by Prudential until after it was deeply entrenched into this litigation and contradicts its assertion of a "full and fair review" in its February 25, 1998 denial of benefits letter. See, Response, Exhibit I, p.

1. One is left with the question of whether Prudential was breaching its fiduciary obligation to fully disclose all relevant information in its denial letter or whether Prudential is now misrepresenting the true facts. In either case, Prudential's conduct was done in bad faith<sup>7</sup>.

Regarding the Myerburg examination negotiations and whether the Motion for Order Requiring Submission to Physical Examination was filed frivolously, the facts speak for themselves. Mr. Jordan did not believe that Defendant was entitled to said exam under the law<sup>8</sup>. There had been numerous discussions between the parties, both in writing and telephonically, about entering into an amicable settlement agreement regarding this issue without needlessly involving the Court. In the middle of these negotiations, Prudential drafted and filed their motion, thereby involving the Court. This Court can make its own determination as to whether the motion was unnecessary, frivolous and constitutes bad faith.

The next section of Prudential's Response addresses specific allegations made by Plaintiff that it asserts are false. Without unnecessarily furthering an argument which the

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<sup>7</sup> Plaintiff will not get into a semantical argument as to whether or not this bad faith conduct was properly characterized as a diabolical scheme.

<sup>8</sup> In an ERISA action for plan benefits, the focus of the lawsuit is on the decision to deny benefits. The plan participant's physical status after the decision has already been made is irrelevant to the cause of action.

Plaintiff believes is beneath this Court and the gravamen of this case, Plaintiff's counsel feels comfortable that each and every statement contained in Plaintiff's Motion for Attorney's Fees and Costs was warranted, justified and true. However, since this information has now been placed in the public record and before this Court, a reply seems necessary to correct certain misstatements and half-truths.

Prudential begins this section by stating that Plaintiff has made "numerous unfounded assertions concerning the conduct of Prudential in handling this claim." It bases this statement on the fact that there had been only one deposition taken. Prudential ignores the fact that there is an extensive administrative record in this case which evidences most, if not all, of the Plaintiff's allegations and the one deposition that was taken further emphasizes Prudential's bad faith conduct in handling Mr. Jordan's claim<sup>9</sup>.

Prudential then specifically addresses eleven other points. Its first points basically state that Plaintiff was not the prevailing party. Plaintiff sued for his monthly disability plan benefits. He received one hundred percent of all his past due benefits, plus interest and he continues to be paid monthly disability benefits. Mr. Jordan will let the Court decide whether a plaintiff who receives the maximum amount that could be attained is the prevailing party. Mr. Jordan will also let the Court judge the veracity of Prudential's assertion that it did not reverse its decision as a direct result of this suit<sup>10</sup>.

Mr. Jordan will also let the Court determine the veracity of Prudential's statements regarding its lack of knowledge of who Craig Hasday is. Mr. Hasday was the agent who procured the Prudential policy for Stroock, Stroock & Lavan and had numerous

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<sup>9</sup> The deposition of Dr. Falk was cited at length in Plaintiff's Motion for Attorneys' Fees and Costs.

<sup>10</sup> Is Prudential really asking this Court to believe it was Prudential's own magnanimous heart that caused its change in position?

conversations with representatives of Prudential in reference to Plaintiff's claim.

Furthermore, Mr. Hasday's address and phone number were listed in Plaintiff's Answers to Defendant's First Interrogatories served on July 15, 1998.

Prudential's next two points regard the exhaustion argument and whether Prudential should have disclosed its intent to raise this issue in the Joint Status Report. Whether Plaintiff was required to exhaust his administrative remedies in light of the futility argument is a point that has already been addressed *ad nauseam* and does not need to be addressed again here. Whether Prudential should have disclosed this defense to the Court is a matter best left to the Court's judgment.

Prudential's next three points all involve whether or not Prudential acted in bad faith<sup>11</sup>. This argument was addressed *supra*.

Prudential's next point tries to state that the Plaintiff did not benefit the plan by establishing that partners were subject to ERISA because "[i]n Prudential's opinion there was never any doubt that ERISA governs this group insurance policy." This does not make sense given Prudential's argument five pages earlier that it was under no obligation to disclose its exhaustion defense because the Court had not ruled that ERISA applies. Furthermore, Prudential's argument that it was "forced" to remove this case to Federal Court is wrong. Federal and State Court have concurrent jurisdiction in an ERISA matter. 29 U.S.C. 1132. It was their choice to remove this case to force the battle over whether

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<sup>11</sup> Prudential also characterizes itself as a "respected insurer" on p. 14, para. 6 of the Response. While this self-serving characterization has no place in this argument, Plaintiff feels it incumbent upon himself to remind the Court that Prudential recently settled a large class action within the State of Florida, as well as nationwide, for the churning of its insureds' policies which it also settled while it proclaimed its lack of wrongdoing.

ERISA applies to happen at the outset of the litigation<sup>12</sup>. While Plaintiff does not pretend to know Defendant's true intentions, Plaintiff believes that it must have had some doubt as to the proper choice of law in this matter which is why it chose to have the battle early. Establishing that the partners were governed under ERISA is an important distinction for this plan given the ever changing arena of ERISA law

The only comment Plaintiff feels required to reply to in Prudential's final point is any suggestion as to "this is why he settled." Plaintiff believes that complete capitulation by the Defendant, prior to trial, including the right to seek attorneys' fees and costs, seems like a pretty reasonable settlement in the eyes of any independent observer and, Plaintiff trusts, the Court will agree.

As far as Prudential's last attempt to detract this Court's attention from the issues of this motion, Plaintiff has only asked this Honorable Court to make a determination as to whether he is entitled to attorneys' fees and costs. Since attorneys' fees are discretionary in ERISA matters, a complete compilation of attorneys' fees and costs by two law firms would be time consuming, inefficient and potentially in vain without a determination that Plaintiff is entitled to such. Plaintiff knows the value of time to this Court and will file the appropriate documentation when the Court rules in Plaintiff's favor.

In conclusion, Mr. Jordan has asked this Court for a determination that he is entitled to attorneys' fees under the five part test set forth in Ironworkers Local #272 v. Bowen, 695 F.2d 531, 534 (11th Cir. 1983). Based upon the conduct of Prudential, both prior to and during the course of litigation, Prudential's conduct during its decision to terminate Mr. Jordan's benefits was made in bad faith and it advanced an unmeritorious

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<sup>12</sup> Prudential could have alternatively raised ERISA preemption as an affirmative defense and kept this

position. This is evident from the fact that it completely acquiesced to Mr. Jordan. Prudential's ability to satisfy an award of attorneys' fees was not questioned in the Response and must be taken as a fact. The deterrent effect that an award of attorneys' fees can have on preventing this bad faith conduct by Prudential is self evident; only by awarding more than it should have legally paid without litigation will Prudential be deterred from engaging in this conduct. Mr. Jordan absolutely benefited this plan by establishing that the partners were ERISA plan participants. Mr. Jordan has satisfied the five part test and is entitled to an award of attorneys' fees.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/faxed this \_\_\_\_ day of May, 1999 to: Paul R. Ezatoff, Esq., Katz, Kutter, Haighler, Alderman, Bryant & Yon, P.A., Highpoint Center - 1200, 106 East College Avenue, Tallahassee, FL 32301; Ralph C. Losey, Esq., Katz, Kutter, Haighler, Alderman, Bryant & Yon, P.A., Suite 900, 111 N. Orange Avenue, PO Box 4950, Orlando, FL 32801.

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