

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY AT BOWLING GREEN
CIVIL ACTION NO. 1:06-CV-134-M
ELECTRONICALLY FILED

LYMAN POWELL

PLAINTIFF

vs.

**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR LEAVE TO TAKE DISCOVERY**

HARTFORD FINANCIAL SERVICES GROUP, INC.

DEFENDANT

Hartford's assertion that "[t]he relationship between [it] and a third party such as UDC is irrelevant to determining the insurer's bias," *Response to Plaintiff's Motion For Leave To Take Discovery at 2*, is without merit. The relationship between Hartford and UDC is material to the decision this Court must make in this case: whether Hartford acted arbitrarily in terminating Powell's benefits. The relevant authorities, *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832 (2003); *Calvert v. Firststar Fin., Inc.*, 409 F.3d 286, 292 (6th Cir.2005); *Kalish v. Liberty Mutual*, 419 F.3d 501, 508 (6th Cir. 2005), are discussed in Powell's *Motion For Leave To Take Discovery* at pages 6 – 7 and are contrary to Hartford's contention.

These authorities simply suggest the following: if Hartford routinely and regularly hires UDC for the purpose of receiving an opinion supporting denial of the claim it would suggest that more weight should be given Hartford's conflict of interest. On the other hand, if Hartford seeks to mitigate its conflict of interest by retaining and consulting independent experts and therefore it receives opinions that do not support its position, it would appear that the bias presented should be

given lesser weight. The proposed discovery is narrowly tailored to promote this assessment.

The reason why the amount of money paid by Hartford to UDC should be discoverable is because it is relevant to the issue of bias. If UDC is annually paid a large amount of money by Hartford (and it appears that UDC and Hartford have an exclusive relationship), it would tend to suggest a degree of dependency by UDC on Hartford's business and grounds therefore to motivate it to bend its conclusions to Hartford's interest. This is precisely what the Supreme Court cautioned against in *Nord*: "physicians repeatedly retained by benefits plans may have an incentive to make a finding of "not disabled" in order to save their employer[']s money and preserve their own consulting arrangements." 538 U.S. at 832. The proposed discovery is narrowly tailored to promote this assessment by the Court.

Powell has made a showing of an apparently very substantial and exclusive relationship between Hartford and UDC. This is not an instance, as Hartford erroneously suggests, where Powell urges "that the mere fact that a plan administrator compensated physicians for their services is a sufficient basis on which to permit discovery." *Response to Plaintiff's Motion For Leave To Take Discovery at 7.*

Hartford's reliance on *Schey v. Unum Life Insurance Co.*, 145 F.Supp.2d 919(N.D. Ohio 2001), is misplaced because that case precedes the Supreme Court's decisions in *Black and Decker Disability Plan v. Nord*, *supra* and the Sixth Circuit's decisions in *Calvert*, *supra* and in *Kalish v. Liberty Mutual*, *supra*. 419 F.3d 501 (6th Cir. 2005).

Hartford's argument that "the information sought in plaintiff's discovery request would be meaningless absent review in explanation of the underlying administrative records" is without merit. If UDC has given opinions contrary to Hartford's positions in a significant number of cases, it will tend to indicate that it is fair and objective. On the other hand, if it has not and certainly if it has never, it would tend to indicate the opposite. The discovery is narrowly tailored to allow that assessment through presentation of the empirical evidence.

CONCLUSION

For the foregoing reasons, the Court should **GRANT** plaintiff's *Motion For Leave To Take Discovery* and order Hartford to answer the interrogatories and produce the requested documents in the proposed discovery submitted as Exhibit A thereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 3, 2007, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send notice of electronic filing to the following: Nicholas W. Ferrigno, Jr., Luann Devine.

BY: /s Robert L. Abell
COUNSEL FOR PLAINTIFF