Team 2

DOCKET NO. 01-2020

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

Jean Luc PICARD,

Plaintiff/Appellant

v.

ENTERPRISE PERMANENTE,
ENTERPRISE LIFE INSURANCE PLAN,
and BORG LIFE ASSURANCE CO.,

Defendants/Appellee

On Appeal from the United States District Court For the District of Columbia

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APPELLEE'S BRIEF

Respectfully submitted,

Council for Enterprise Permanente,
Enterprise Life Insurance Plan,
and Borg Life Assurance Company

Oral Argument is Requested.

January 17, 2020

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PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

A. U.S. District Court for the District of D.C. Jurisdiction Basis

Plaintiff brought a claim against Defendant under §§ 502(a)(1)(B) and 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. § 1132(a) (2019). ERISA, a federal statute, establishes a cause of action to any plan participant or beneficiary with a claim "to recover benefits due under the terms of the plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan" therefore giving subject matter jurisdiction to the District Court. 29 U.S.C. § 1132(a)(1)(B) (2019). The Court maintained personal jurisdiction over Defendants pursuant to 28 U.S.C. § 1332(a)(1) which states "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 ... and is between citizens of different States." 28 U.S.C. § 1332(a)(1) (2011). Defendants maintain citizenship in Maryland, while Plaintiff was domiciled in the District of Columbia during the relevant period of time. (R. at 1.) Additionally, the sum in controversy includes a claim for $350,000 in life insurance benefits as well as a $1,000,000 in accidental death benefits satisfying the $75,000 statutory minimum. (R. at 1.) The diversity of citizenship and amount in controversy thereby gives the U.S. District Court for the Thirteenth Circuit jurisdiction over the action. 28 U.S.C. § 1332(a)(1) (2011).

B. Basis for Appellate Court's Jurisdiction

There is appellate jurisdiction over the action pursuant to 28 U.S.C. §1291 which states "the courts of appeals … shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. §1291 (2012). The action's prior history within the U.S.

District Court for the District of Columbia places it within the necessary appellate jurisdiction for the United States Court of Appeals for the Thirteenth Circuit to review the judgment. (R. at 5.)

C. Timeliness of Appeal

The District Court granted "Defendant's Motion for Summary Judgment" on Nov. 9, 2019. (D.D.C. Op. at 10.) Plaintiff filed a Notice of Appeal on Nov. 22, 2019 satisfying the thirty-day appeals period outlined in Rule 4 of the Federal Rules of Appellate Procedure. Fed. R. App. P. Rule 4(a)(1)(A). Defendants filed a Notice of Cross-Appeal on Nov. 22, 2019 satisfying the fourteen-day period after the initial appeal to file a subsequent appeal under Rule 4 of the Federal Rules of Appellate Procedure. Fed. R. App. P. Rule 4(a)(3).

D. Assertion that the Appeal is from a Final Order

"Judgment" is defined as "any order from which an appeal lies." Fed. R. Civ. P. 54(a). "A 'final decision' generally is one which ends litigation on the merits and leaves nothing for the court to do but execute the judgment." Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199 (1988). A grant of Summary Judgment generates the necessary finality for appeal since it ends the litigation and leaves only the execution of the judgment.

ISSUES PRESENTED

I. Under Common Law for the District Court for the Thirteenth Circuit, did Dr. Crusher violate § 8.2 of the Borg Life Insurance Policy, which compels arbitration for all claims related to the policy, when Plaintiff brought an ERISA action against Defendants in the District Court for the District of Columbia prior to initiating arbitration?

II. Under § 2.2 of the Enterprise Permanente Life Insurance Plan, did the District Court err when it found that the Plan administrator reasonably concluded that Dr. Crusher was engaged in the commission of a crime at the time of her death.

STATEMENT OF THE CASE

A. Procedural History

Plaintiff timely filed two claims under the Enterprise Permanente Life Insurance Plan ("Plan") for (1) $350,000 in life insurance benefits and (2) $1,000,000 for Dr. Crusher's accidental death in the line of duty. (R. at 5.) Defendant rendered an initial decision finding Plaintiff entitled to $250,000 in life insurance benefits and denial of all accidental death benefits. Plaintiff appealed the denial of accidental death benefits pursuant to Defendant's internal appeals process. (R. at 5.) On Sept. 1, 2019, Defendant affirmed its initial holding and notified Plaintiff of his right to pursue arbitration for further action. (R. at 5.) On Oct. 1, 2019, Plaintiff filed suit against Enterprise Permanente, Enterprise Life Insurance Plan, and Borg Life Assurance Company (collectively, "Defendants") in the District Court for the District of Columbia. (R. at 5.) Defendants subsequently filed a Motion for Summary Judgement ("Motion"). (R. at 5.)

B. Court Ruling

The District Court denied in part and granted in part Defendants' Motion on November 9, 2019 finding that Plaintiff was not compelled to enter into arbitration and that Plaintiff was entitled to accidental death benefits under the Plan's crime exclusion provision. (D.D.C. Op. at 10.) Plaintiff appealed the judgment, and Defendants subsequently cross-appealed on Nov. 22, 2019. (R. at 6.)

RELEVANT FACTS FOR ISSUES REVIEWED

Dr. Crusher was a resident of Washington, D.C. and participated in Defendants' Plan due to her status as a cardiologist for Enterprise Permanente Hospital in Bethesda, Maryland. (R. at 1.) At the time of her death, Dr. Crusher had been an active participant of the Plan for approximately ten years. (D.D.C. Op. at 2.)

The Plan was administered by Enterprise Permanente but was funded by a group life insurance policy ("Policy") Enterprise purchased from Borg Life Assurance Company headquartered in Baltimore, Maryland. (R. at 1.) The Policy provides two potential benefits at a participant's death: (1) a life insurance pay-out equal to the Participant's annual salary and (2) compensation to those who experience accidental death in the line of duty ("accidental death benefit"). (R. at 1.) The life insurance pay-out is payable at the participant's death with rare exceptions. (R. at 1.) However, the accidental death benefit is only payable when the participant "dies as a result of an accident while in the workplace, while representing, or while otherwise performing his or her official duties." (D.D.C. Op. at 2.) Furthermore, the accidental death benefit is subject to certain exclusions under § 2.2 of the Policy such as death "caused by, contributed to by, or resulting from an insured's attempt to commit or commission of a crime" ("commission of crime clause"). Policy § 2.2; (D.D.C. Op. at 2.) The commission of crime clause has previously been strictly enforced. (R. at 3.)

The Plan named Enterprise as the plan administrator and named fiduciary with authority to "interpret and administer the Plan and to make all factual determinations, including whether the claimant is entitled to benefits under the Plan" pursuant to §10.1. (R. at 2.) Under Section §10.2 and §10.3 of the Plan, Enterprise may delegate its fiduciary duties and any person so delegated shall have discretionary authority to "determine eligibility for claims and to construe the terms of

the Plan." Id. Therefore, pursuant to Section 10.3, Enterprise delegated to Borg the ability to administer claims such that Borg was given authority in deciding Plaintiff's claims under the Plan. (D.D.C. at 2; R. at 3.) Subsequently, under § 3.1 of the Policy, Borg agreed to act as Enterprise's agent for purposes of processing all claims for benefits brought under the Plan. (R. at 2.) Furthermore, §8.1 of the Policy provides that Borg shall be a fiduciary for purposes of making decisions regarding claims filed under the Plan. (R. at 2.).

In conjunction with the claim procedure outlined in the Plan, the Policy notes that Borg will provide expertise and make all initial and final decisions regarding claims filed under the Plan pursuant to §3.2(a) and §3.2(b) respectively. (R. at 2.) Under §8.2 of the Policy, "Any controversy or claim arising out of or relating to [the] Policy… shall be settled by arbitration administered by the American Arbitration Association in accordance with its Employment Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." (R. at 2.) Since 2019, the arbitration clause of the Policy has been strictly enforced. (R. at 3.)

On December 31, 2017, Dr. Crusher was celebrating New Year's Eve at the Kennedy Center in Washington, D.C. while also being the "on-call" cardiologist for Enterprise Hospital. (R. at 3.) Dr. Crusher received a text message stating that patient William Riker was experiencing severe chest pains, shortness of breath, and had been admitted to the Enterprise Hospital in Bethesda. (D.D.C. Op. at 3.) Dr. Crush then sent a text, using her 2007 Nokia 6102 "flip phone", stating that Dr. Crusher was at the Kennedy Center and would leave for the hospital immediately. (R. at 3; D.D.C. Op. at 3.) While driving, Dr. Crusher received two text messages at 12:09am: one from the hospital's automated patient record-keeping system and one from Nurse Chapel. (R. at 3; D.D.C. Op. at 3.) Both messages alerted Dr. Crusher that Patient Riker had stopped breathing and

was in full cardiac arrest. Id. Dr. Crusher responded to the messages at 12:10am stating that CPR should be performed, and that Dr. Crusher was approximately 15 minutes away from the hospital. (R. at 4; D.D.C. Op. at 3.) One minute later, at 12:11am on January 1, 2018, Dr. Crusher, as the driver and sole passenger in her 1969 VW Beetle, collided with a utility pole and died instantly. (R. at 3-4; D.D.C. Op. at 3.)

Washington, D.C. Metropolitan Police Department ("MPD") determined that Dr. Crusher had been simultaneously traveling at an excessive rate of speed and texting with a device not equipped with hand-free accessories. (R. at 4;D.D.C. Op. at 3-4.) As a result, Dr. Crusher was found in violation of D.C.'s law against distracted driving and fined $100. (R. at 4; D.D.C. at 4.)

SUMMARY OF THE ARGUMENT

The Appellate Court should reverse the lower court's holding that Petitioner is not compelled to arbitration under §8.2 of the Policy because, in failing to arbitrate, Petitioner has failed to exhaust his administrative remedies prior to seeking judicial review. Arbitration is applicable in the present case since petitioner was put on notice of the Policy's required binding arbitration through Defendant's final determination letter. Furthermore, arbitration does not violate Petitioner's statutory rights provided for under ERISA. Finally, because MPD determined that Dr. Crusher was texting while driving in violation of D.C. Code § 50-1738.04 regarding distracted driving, the Appellate Court should affirm the lower Court's holding that Petitioner is not entitled to accidental death benefits pursuant to §2.2 of the Policy.

ARGUMENT

I. *DE NOVO* AND SUMMARY JUDGMENT STANDARD OF REVIEW

An appeal for a grant of summary judgment is reviewed *de novo*, meaning "anew," while "drawing all reasonable inferences and resolving all factual disputes in favor of the non-moving party." Birch v. Polaris Indus., 812 F.3d 1238, 1251 (10th Cir. 2015). The Appellate Court reviews the record "from the perspective of the District Court at the time it made its ruling, ordinarily limiting [Appellate] review to the materials adequately brought to the attention of the District Court by the parties." Id. at 1251. However, in an ERISA context, "'any dispute over the precise terms of the plan is resolved by a court under a *de novo* review standard, unless the terms of the plan give the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.'" Stewart v. Nat'l Educ. Ass'n, 404 F. Supp. 2d 122, 130 (D.C. Cir. 2005) (quoting Firestone Tire & Rubber Co. v. Brunch, 489 U.S. 101, 115 (1989)).

The standard of review for summary judgement states "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which "might affect the outcome of the suit under the governing law" but overall materiality is determined by substantive law. Carey v. United States Postal Serv., 812 F.2d 621, 623 (10th Cir. 1987). Summary judgment will not granted if there is a "genuine" dispute of fact "such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The burden of showing that no genuine issue of material fact exists is borne by the moving party" and the Court reviews the facts in the light most favorable to the non-movant." Zamora v. Elite Logistics, Inc., 449 F.3d 1106, 1112 (10th Cir. 2006). Thus, the lower Court's grant of Summary Judgment should be affirmed in part and reverse in part because there are no genuinely disputed material facts necessitating a trial.

II. THE APPELLATE COURT SHOULD REVERSE THE LOWER COURT'S HOLDING AND COMPEL ARBITRATION BECAUSE PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE DISPUTE-RESOLUTION MECHANISMS PROVIDED BY THE PLAN'S CLAIM PROCEDURE.

A. Plaintiff Was Put On Notice That He Was Required To Initiate Arbitration For All Claims Pursuant To § 8.2 of The Policy.

At the time of Dr. Crusher's death on January 1, 2018, she had been a participant of the Plan purchased from Borg by Enterprise for approximately ten years. (D.D.C. Op. at 2.). During that time, Enterprise exercised its ability to delegate its fiduciary duties to Borg, including discretionary authority for the determination of claims brought under the Plan, pursuant to § 10.3 of the Policy. (R. at 1.) Furthermore, and withstanding Enterprise's delegation under §10.3, Borg maintains its fiduciary role in the processing of claims arising under the Plan pursuant to § 8.1 which notes that "Borg shall be a fiduciary for purposes of making decisions regarding claims that are filed under the plan. (R. at 1.).

Under the terms of the Policy, § 3.2(a) states that Borg will provide "expertise and make all initial decisions regarding claims that are filed" under the Plan. (R. at 2.) An initial decision is defined as a decision which then becomes the action of the organization unless otherwise reviewed by the organization. *See* Lanphier v. Dep't of Pub. Health & Env't, 179 P.3d 148, 150 (Colo. App. 2007). Plaintiff submitted two claims under the Plan for Borg's consideration following Dr. Crusher's death; one claim for $350,000 in life insurance benefits and a second claim for $1,000,000 in accidental death benefits. (R. at 5.) In their initial decision, Borg determined that Plaintiff was entitled to life insurance benefits amounting to $250,000 but denied accidental death benefits due to applicable exclusions pursuant to § 2.2 of the Policy. (R. at 5.)

Following an initial decision, ERISA mandates "every employee benefit plan shall … afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. §1133 (2019). In doing so, ERISA "requires a plan fiduciary to retain ultimate control, and ultimate responsibility for, all final decisions." Shelby Cty. Health Care Corp. v. Majestic Star Casino, LLC Grp. Health Benefit Plan, 581 F.3d 355, 381 (6th Cir. 2009). Borg maintained authority to "make all final decisions regarding claims filed under the Plan" pursuant to §3.2(b) of the Policy. A final decision in the ERISA context involves a decision by a plan fiduciary which marks the "exhaust[ion] of administrative remedies." Vaught v. Scottsdale Healthcare Corp. Health Plan, 546 F.3d 620, 630 (9th Cir. 2008). Here, Borg's final determination issued to Plaintiff noted that "[Plaintiff had] exhausted the internal appeals process" and "[could] initiate arbitration in accordance the rules of the American Arbitration Association." (R. at 5.) As such, Borg has sufficiently notified Plaintiff that "[m]andatory arbitration is an additional step in the plan's claim procedure." Chappel v. Laboratory Corp. of Am., 232 F.3d 719, 724 (9th Cir. 2000). The final determination therefore did not signify the exhaustion of administrative remedies. Instead, Borg alerted Plaintiff to the next step for appropriate administrative resolution.

In *Chappel v. Laboratory Corporation of America,* the court held that a plaintiff bringing an ERISA claim governed by contractual terms "must first exhaust the administrative dispute-resolution mechanisms of the benefit plan's claims procedure" before they seek a private right of action. Id. at 724. "Thus, if the plan contains an arbitration clause, the plaintiff must arbitrate the dispute in accordance with the clause in order to exhaust his administrative remedies before filing suit in federal court." Id. In *Chappel*, plaintiff argued that he was unaware of the arbitration requirement because Laboratory Corporation of America (Lab Corp) had failed to bring to

plaintiff's attention "that his sole means of redress was arbitration." Id. at 723. Recognizing that a participant may not be appraised of an arbitration clause through its sole presence in a contractual agreement, the court in *Chappel* found Lab Corp to have breached its fiduciary duty in not actively notifying the claimant of the arbitration mandate. Id. at 726-27. The situation at present is therefore factually distinguished from *Chappel* because Borg explicitly notified Plaintiff of his requirement to arbitrate in the letter from its final determination. (R. at 5.) As noted in *Chappel*, when Borg notified Plaintiff of the arbitration clause and its required procedures at the same time as notifying him of his denied appeal, Borg "fulfilled its fiduciary duty to [plaintiff]." Id. at 727. In doing so, Plaintiff has failed to exhaust his administrative remedies and the lower court should be reversed so as to compel Plaintiff to arbitrate his claim in accordance with the Policy.

B. Arbitration Should Be Compelled Because Defendants Have Not Waived Their Right to Arbitration.

Defendants concede that they have not initiated arbitration at this time. **(**D.D.C. Op. at 6.) Lack of initiation on Defendants' part does not, however, signify waiver of their right to arbitrate. The courts are not quick to assume waiver of such a right and instead, as noted in the Federal Arbitration Act ("FAA"), "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 756 (9th Cir. 1988). Defendants in the current case responded to Plaintiff's suit with a Motion for Summary Judgment for failure to arbitrate. In accordance with precedent, Defendants did not waive their right to arbitrate because there is "no inconsistency between the right to arbitrate and a litigation defense premised on that right." Chappel, 232 F.3d at 724.

Additionally, inconsistency regarding the enforcement of the arbitration clause prior to 2019 does not indicate Defendants' waiver of arbitration in the present case. This is because past behavior does not necessarily implicate current practices. At worst, Defendant's enforcement of the arbitration clause in the present case would be "more aptly described as reemphasizing, or recommitting to, an existing policy of consistent enforcement." Rosebrock v. Mathis, 745 F.3d 963, 973 (9th Cir. 2014). Furthermore, "recommitment to strict enforcement makes it particularly unlikely that [Defendants] will change [their] policy in the future." Id. As such, to hold past practices against the Defendants in the current case would set precedent that forecloses specific remedies from Defendants in the future. Finally, regardless of whether or not the Policy was consistently enforced in the past, Plaintiff was still put on notice of the provision pursuant to the final determination and therefore should have been aware of the necessity to pursue arbitration regardless of past enforcement practices. Thus, Defendants have not waived their right to arbitration and Plaintiff should be compelled to arbitration in the current case.

C. Arbitration Offers Sufficient Review and Relief to Plaintiff.

A claim arising out of, or relating to, ERISA is not exempt from arbitration simply based on its statutory nature. Following *American Express Company v. Italian Colors Restaurant,* "[c]laims alleging a violation of a federal statute such as ERISA are generally arbitrable absent a 'contrary congressional command.'" Dorman v. Charles Schwab Corp., 780 Fed. App'x 510, 513 (9th Cir. 2019) (quoting Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013)). "As every circuit to consider the question has held, ERISA contains no congressional command against arbitration, therefore an agreement to arbitrate ERISA claims is generally enforceable." Id. at 513-14. To date, arbitration clauses have been upheld in claims arising out of a myriad of statutory rights including, but not limited to, the Sherman Act, Securities Exchange Act, and the

Securities Act of 1933. Gilmer v Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). Furthermore, on various occasions, the Secretary of Labor has proposed revised regulations "that would forbid ERISA plans to use arbitration clauses," however, such stipulations have not surmounted congressional approval. Chappel, 232 F.3d at 724 n.3. As such, absent a showing of Congress's "intent[ion] to preclude a waiver of a judicial forum," arbitration is not at odds with the values of the statutory right provided for through ERISA and arbitration should be compelled. Gilmer, 500 U.S. at 26; *see also* Shearson/American Express v. McMahon, 482 U.S. 220, 238 (1987).

Additionally, arbitration is sufficiently equipped with the necessary remedial authority to address the claim presented by Plaintiff. As has consistently been recognized, "[I]n agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). Such substantive rights include the equitable relief sought by Plaintiff. *See* Gilmer, 500 U.S. at 32 (noting that "arbitrators do have the power to fashion equitable relief" and such relief is not arbitrarily restricted but rather, referred to as "damages and/or other relief"). To believe "that an arbitrator would be less equipped than a court to resolve ERISA claims, or less willing to find against Plan fiduciaries" is to perpetuate "precisely the type of 'judicial hostility' towards arbitration that the FAA was designed to eliminate." Dorman, 780 Fed. App'x at 513. An "arbitrator's deferential standard of review is consistent with the standard of review that a district could would use, in an appropriately drafted plan, in determining [Plaintiff's] right to benefits." Chappel, 232 F.3d at 725. Therefore, the relief necessary to address Plaintiff's claim is satisfied in an arbitral setting. Given that there is no

overwhelming disadvantage to Plaintiff regarding relief sought, or impartiality of the process pursued, Plaintiff should be compelled to arbitration.

III. THE APPELLATE COURT SHOULD AFFIRM THE LOWER COURT'S HOLDING AND DENY ACCIDENTAL DEATH BENEFITS TO PLAINTIFF IN ACCORDANCE WITH § 2.2 OF THE POLICY.

A. D.C. Municipal Code Designates "Texting While Driving" a Crime

Although the crime exclusion in § 2.2 of the Policy does not define the term 'crime', the plan administrator has the power to construe disputed or doubtful terms. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). The plan administrator's interpretation will not be disturbed so long as it is reasonable. Id. In order to define 'crime' for purposes of the Policy, one may look to Black's Law Dictionary, which defines a "crime" as "an act that the law makes punishable." *Crime*, Black's Law Dictionary (11th ed. 2019). Another meaning of the term 'crime' could be found within Merriam-Webster Dictionary, which defines crime as "an illegal act for which someone can be punished by the government." *Crime*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/crime (last visited Jan. 14, 2020). Regardless of which interpretation Plaintiff relies upon, the meaning of the word 'crime' is clearly understood by the insurance agents who worked on this case, as well as MPD, to be a violation of the law. MPD concluded, and Defendants agreed, that Dr. Crusher had violated the law against distracted driving when she was found to have been texting while driving prior to her fatal crash. MPD concluded that Dr. Crusher's "final deliberate act, [which included texting] that she was '[a]pprox. 15 minutes out,'" confirms that she was in fact distracted while driving. (D.D.C. Op. at p. 9.) Because the mobile phone with which Dr. Crusher was texting, a Nokia 6102 "flip-phone," was not equipped with a hands-free accessory as required by law, Dr. Crusher committed a crime in violation of D.C.'s distracted

driving laws. D.C. Code § 50-1731.04. states: "No person shall use a mobile telephone or other electronic device while operating a moving motor vehicle in the District of Columbia unless the telephone or device is equipped with a hands-free accessory." D.C. Code § 50-1731.04 (2004).

Upon determining that Dr. Crusher violated D.C. Code § 50-1731.04, MPD fined Dr. Crusher $100 pursuant to the accompanying enforcement code. *See* D.C. Code § 50-1731.06 (2004). Because Dr. Crusher's distracted driving caused her fatal crash, Borg determined that the crime exclusion prevented Plaintiff from recovering accidental death benefits in the amount of $1,000.000. (D.D.C. Op. at 10.) The plan administrator's application of the crime exclusion to Dr. Crusher's case was consistent with the determination made by MPD and enforcement of D.C.'s law against distracted driving.

B. Plaintiff Does Not Meet Any of the Exemptions to the Crime Exclusion Clause.

D.C.'s law against distracted driving carves out a few narrow exceptions for cellphone users who make telephone calls in order to summon emergency assistance. D.C. Code § 50-1731.04(b) (2004). However, none of the exemptions within D.C. Code § 50- 1731.04(b) provide exemptions for the sending of *text* messages. Although petitioner argues that D.C.'s exemption regarding emergency personnel should apply in the current case, Dr. Crusher's violation fails to meet the criteria necessary in order to satisfy the exemption. The code states:

> The provisions of this section shall not apply to the following: (1) Emergency use of a mobile telephone, including calls to 911 or 311, a hospital, an ambulance service provider, a fire department, a law enforcement agency, or a first-aid squad; (2) Use of a mobile telephone by law enforcement and emergency personnel or by a driver of an authorized emergency vehicle, acting within the scope of official duties; or (3) Initiating or terminating a telephone call, or turning the telephone on or off.

D.C. Code § 50- 1731.04(b) (2004).

Dr. Crusher's violation does not qualify for any of the exceptions to the crime exclusion. The first provision is not applicable because Dr. Crusher's distracted driving did not involve a call to any of the emergency service providers listed by the statute. Had Dr. Crusher placed a phone call to the hospital, as opposed to sending a text, MPD could have made an alternative decision regarding her exemption. As a result, Dr. Crusher's infraction falls outside the scope of the exemption in subsection (1).

Dr. Crusher's status as an on-call physician, coupled with the fact that she was responding to an emergency, is not sufficient to categorize her duty as one performed by an emergency personnel under subsection (2) of the exemption. "A person acts within the scope of his authority when he performs his official duties" Koerselman v. Rhynard, 875 S.W.2d 347, 350 (Tex. App. 1994). Texting the nurse her estimated time of arrival does not fall within the scope of Dr. Crusher's official duties. On the contrary, distracted driving is often a fatal act of negligence that doctors, the American Medical Association, and the Center for Disease Control uniformly advise against. *See Injury Prevention & Control: Motor Vehicle Safety*, CENTERS FOR DISEASE CONTROL AND PREVENTION, www.cdc. gov/motorvehiclesafety/distracted_driving (last visited January 16, 2020).

Finally, Dr. Crusher was not initiating or terminating a phone call, nor was she turning her mobile phone on or off as required by the exemption necessary to satisfy subsection (3). Instead, Dr. Crusher was actively communicating with the hospital and the nurse through text. For the forgoing reasons, Dr. Crusher is not exempt from D.C.'s distracted driving law and Plaintiff is not entitled to accidental death benefits.

C. Defendant's Final Determination Barring Petitioner's Accidental Death Benefits is Neither Arbitrary Nor Capricious Based on Public-Policy Concerns.

Within the Policy, § 2.2 excludes claims for accidental death benefits if the loss is "caused by, contributed to by, or resulting from an insured's attempt to commit or commission of a crime." (R. at 5.) For ERISA purposes, a plan administrator has discretion to determine a claimant's eligibility for benefits and their decision is subject to review under an arbitrary and capricious standard.

> An agency decision is arbitrary or capricious if: the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Lion Oil Co. v. E.P.A., 792 F.3d 978, 982 (8th Cir. 2015).

A decision is neither arbitrary nor capricious if it is based on substantial evidence and is not the result of a mistake of law. Sandoval v. Aetna Life & Cas. Ins. Co., 967 F.2d 377, 380 n.4 (10th Cir. 1992). In the case of *Caldwell v. UNUM Life Insurance Company*, beneficiaries brought an ERISA action against the insurer seeking to recover accidental death benefits arising out of plan participant's death in a car accident. Caldwell v. UNUM Life Ins. Co. of Am., 786 F. App'x 816, 817 (10th Cir. 2019). There, the court held that the denial of benefits based on the policy's definition of a crime was reasonable and made in good faith. As a result, the decision to withhold accidental death benefits was neither arbitrary nor capricious. As in *Caldwell*, the issue at present is whether the interpretation of 'crime' to include texting for purposes of the Plan was reasonable and made in good faith. In interpreting an ERISA plan, the Court must look to the terms of the plan and, if unambiguous, construe them as a matter of law. Id. at 818. "In making this

determination, [the] court 'consider[s] the common and ordinary meaning as a reasonable person in the position of the plan participant would have understood the words to mean." Scruggs v. ExxonMobil Pension Plan, 585 F.3d 1356, 1362 (10th Cir. 2009). Even if Plaintiffs' interpretation suggests ambiguity in the term, ''[a] decision denying benefits based on an interpretation of an ERISA provision survives arbitrary and capricious review so long as the interpretation is reasonable." Caldwell, 786 F. App'x at 821. The decision ''need not be the only logical one nor even the best one. It need only be sufficiently supported by facts within [its] knowledge to counter a claim that it was arbitrary or capricious. The decision is to be upheld unless it is not grounded on any reasonable basis." Woolsey v. Marion Labs., Inc., 934 F.2d 1452, 1460 (10th Cir. 1991). When a plan administrator "is given authority to interpret the plan language, and more than one interpretation is rational, the administrator can choose any rational alternative." Caldwell v. Unum Life Ins. Co. of Am., 271 F. Supp. 3d 1252, 1263 (D. Wyo. 2017), aff'd, 786 F. App'x 816 (10th Cir. 2019). Here, the plan administrator grounded their conclusions on a rational basis as related to highway safety.

Empirical evidence regarding the deadly effects of distracted driving is abundant. Each day in the United States, 8 people are killed and 1,161 are injured in crashes that involve a distracted driver. *See* Nat't Highway Traffic Safey Admin., *Summary of Motor Vehicle Crashes: Final Edition,* DEP'T OF TRANSP., https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812376 (last visited Jan. 14, 2020). "Distracted driving can cause vehicle operators to miss stop signs, pedestrians, and other cars because their minds are not fully focused on the road ahead, often with devastating results." Council of D.C. Comm. on Transp. and the Env't., Bill 21-021: "Enhanced Penalties for Distracted Driving Amendment Act of 2016" S. 21, at 2 (2016). D.C. Council chose to address the dangers of distracted driving by enhancing the penalties against the practice of

texting while driving. *See* D.C. Code § 50-1731.04. When MPD investigated the cause of Dr. Crusher's death, they concluded that she had violated the law. (D.D.C. Op. at 9). The plan administrator's decision to deny accidental death benefits relied on the factual determinations made by MPD at their initial investigation. In the plan administration's recognition of the need to emphasize highway safety, the authority of MPD in upholding the laws of the city, and ensuring the accurate application of the Plan, the administrator sufficiently grounded their determination in a rational basis. Therefore, the lower court's decision, finding that Dr. Crusher had committed a crime and Plaintiff was not entitled to accidental death benefits, should be affirmed.

CONCLUSION

Based on the arguments presented and that there is no genuine dispute of material fact, the lower court's decision should be reversed in part and affirmed in part. At present, Plaintiff has failed to exhaust his administrative remedies prior to initiating a private action and therefore, the Appellate Court for the Thirteenth Circuit should reverse the District Court's judgment and compel Petitioner to arbitration. Additionally, since Dr. Crusher was found to have violated D.C.'s distracted driving law, this Court should affirm the lower court's judgment that Plaintiff is not entitled to accidental death benefits.

REQUEST FOR ORAL ARGUMENT

Defendant requests an oral argument given that Rule 34(a)(2) of the Federal Rules of Appellate Procedure establishes that an "oral argument must be allowed in every case" unless the " (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. Rule 34 34(a)(2). As such, Defendant asserts that the appeal is not frivolous, there has been no authoritative decision upon the issues on appeal, and that an oral argument would significantly aid the decisional process by allowing for further clarification and explanation of Defendants' position that were addressed in the brief.

Date: April 2, 2019

Respectfully submitted,

Team 2

Council for Enterprise Permanente,
Enterprise Life Insurance Plan,
and Borg Life Assurance Company

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Date: January 16, 2020

Respectfully submitted,

Team 2

Council for Enterprise Permanente,
Enterprise Life Insurance Plan,
and Borg Life Assurance Company

CERTIFICATE OF SERVICE

PARTICIPANTS HEREBY CERTIFY the following:

i. The accompanying brief and oral argument are, in fact, the work product of the team members alone;
ii. Team participants have complied fully with the REDACTED REDACTED honor code; and
iii. Team participants have complied with all Rules of the Competition.

Respectfully submitted,

Team 2
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