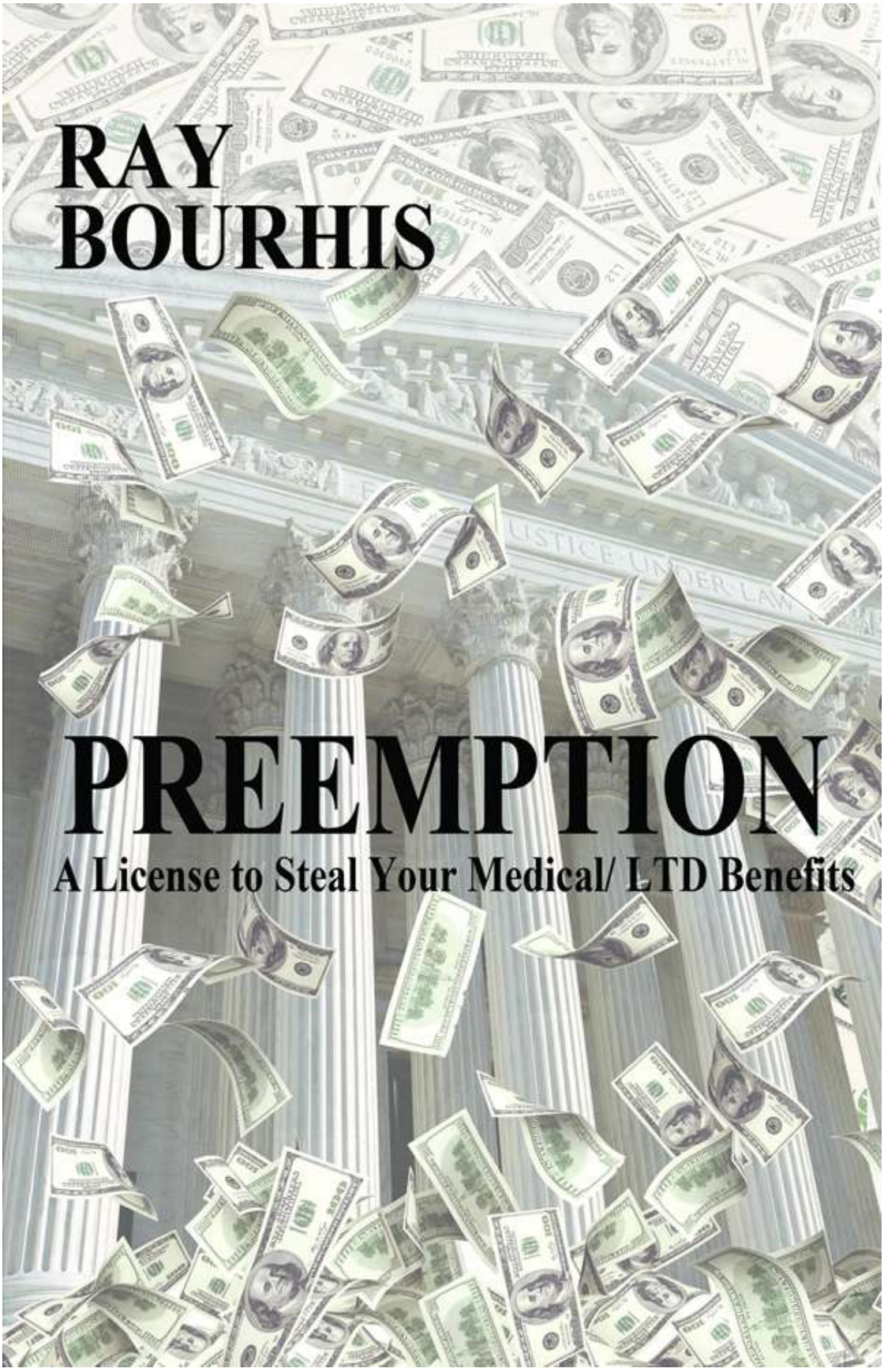
RAY
BOURHIS
PREEMPTION
A License to Steal Your Medical/ LTD Benefits

PREEMPTION: A License to Steal Your Medical/LTD Benefits

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Summary:

"ERISA PREEMPTION" is a shorthand way of saying: "The Supreme Court has given insurance companies a license to steal." From you. Immunizing them from legal action, even for the most outrageous claims denials imaginable.

Believe it or not, if you get your health and disability insurance from your workplace (such as Kaiser doctors do from Kaiser), you lose all of your legal protections against fraudulent or bad faith claims denials.

Even if you lose everything, your home, your assets, your life savings, due to being cheated out of the insurance benefits you needed to keep that from happening, federal law prevents you from getting even a dime of those losses back.

Joan Hangarter did, in fact, lose everything as a result of the denial of her insurance benefits. But when Joan's insurance company told her that her claim was "ERISA Preempted," her story was just beginning.

PREEMPTION: A License to Steal Your Medical/LTD Benefits
Ray Bourhis
Excerpt

Preface

In decades of representing policyholders in long term disability insurance matters, I have seen the tremendous toll that unfair and bad faith claims denials can take on innocent people: foreclosures, bankruptcies, uprooted families, destroyed lives . . . .

It's bad enough when the remedies for these problems take years to obtain; but it's much worse when there are no adequate remedies under the law at all. That is exactly what the legal doctrine called ERISA Preemption has done. It has eliminated all of the rights policyholders have under the *Unfair Claims Practices Acts* enacted by states like California, Arizona, Nevada and Florida and has nullified or displaced them with federal laws—which provide no adequate remedies or protections whatsoever.

In writing *Preemption*, it is my hope that policyholders and policymakers alike would be able to better understand what is going on in the world of insurance.

Chapter One

FALSE PROFITS

A few years earlier, Joan Hangarter had everything going for her. She had a successful chiropractic practice; two great kids; a nice house in upscale Novato, in Marin County, California,
and a solid relationship with her fiancé, Bruce Wexler.

Health conscious and fit, Joan became a chiropractor in the first place because of an experience she had at the age of thirteen. After being diagnosed with scoliosis, a deformity of the spine, and after being told that she would have to either have surgery or wear a brace for sixteen hours a day until the spine straightened; her father instead took her to a chiropractor. Two years later, the problem was resolved completely, without any other treatment.

Having put herself through chiropractic school working as a waitress, Joan passed the State Boards, borrowed $10,000 to start her business and began the long hard task of building her practice. Working from 6am to 7pm daily, she built a solid referral network from the ground up. She was loved by her patients – who ranged from children with sports injuries to adults with back problems - and by other professionals who steadily sent their patients to see her.

Beyond enjoying the feeling of success that came from the solid growth of her practice, Joan was truly fulfilled by the work she was doing. She was treating people who were in pain as she had been as a child, and she was making them well. Little else could have provided her with the satisfaction she was getting from her practice.

* * *

Thomas L. Sejac was no lightweight. At 247 pounds in his bare feet, moving him would have proved a challenge to an NFL lineman.

While you don't need the ability to bench press an RV to be a chiropractor, power, force and upper body strength are required. Manipulations are performed on the pelvic region and on the cervical, thoracic and lumbar spine. Procedures include a lot of pulling, twisting and pressing, and bending. A chiropractor can't merely tell patients to position themselves on the treatment table. He or she has to do it.

Sejac was not an easy man to maneuver. As Joan Hangarter grappled with his hips, trying to position his lower back, she felt a jolt in her right arm followed by a sharp pain in her upper spine. She shook her head. She would probably be making an appointment with a chiropractor herself.

When the pain worsened, Joan sought treatments from a fellow practitioner. But she experienced no improvement. Finally, she sought relief from Dr. Steven Isono, an orthopedist. The persistent pain was now in her upper arm, forearm, neck and shoulder. Dr. Isono ordered an MRI (Magnetic Resonance Imaging) scan. It showed that Joan was suffering from cervical disc disease. Subsequent MRIs showed a deteriorating condition.

Despite this, Joan continued working. She didn't want to let her patients down and didn't want to lose them. Sometimes she wore a shoulder brace, but the pain persisted. If she was inactive, it was deep and nagging. During

manipulations, it would become very sharp and, as Joan described it, "stabbing". "Sometimes," she said, "it felt like (the) muscle was coming off the bone. Like it was ripping."

Joan tried another chiropractor. She went to physical therapy twice a week for two months. But it didn't do any good. It got worse.

Finally, on the recommendation of her doctors, Joan asked a former employee and fellow chiropractor, Parissa Peymani, to temporarily take over her practice. Joan's doctors hoped that with rest her condition would improve. It didn't.

A month later, she filed a claim with her long term disability insurance company, PAUL REVERE, of Worchester, Massachusetts. She filled out stacks of forms, signed medical and financial releases, and answered a battery of questions from company claims officials.

After a lengthy investigation, PAUL REVERE approved the claim. Joan would receive benefit payments of $8,100 per month.

Naturally, Joan was worried about her condition, but she had her safety net, the disability policy. Patricia Meyers, the PAUL REVERE agent who had sold her the policy, may have been persistent to the point of annoying, but Joan was glad she had listened. As a single mother with two young children and not much in the way of savings following a bad investment in her fiance's dot com company, if it hadn't been for the policy, Joan would have been in serious trouble.

Two years went by, but Joan's condition did not improve. Finally, she bit the bullet and sold her practice for $134,000 to a Dr. Leonard Sugerman. Sugerman put $25,000 down and gave Joan an unsecured note for the balance, to be paid in monthly installments over the next three years. Joan and her fiancé, Wexler, put the $25,000 down as a deposit to buy the house they had been renting.

Suddenly, PAUL REVERE was bought out by Provident Life and Accident of Chattanooga, Tennessee. Joan found herself dealing with a new claims adjuster, Joseph Sullivan.

Sullivan ordered Joan to attend an independent medical exami- nation to be performed by a Dr. Aubrey Swartz, an orthopedist.

Joan appeared at her appointment, answered Dr. Swartz's questions and submitted to his testing. Swartz said nothing to Joan following the examination, which Joan assumed would confirm her injuries and disabilities.

But a few weeks later, Joan had a visitor from her new insurance company: Ken Seaman. Seaman shocked Joan by informing her that after reviewing Dr. Swartz's report the Company had decided that she *could* perform her professional duties after all. It was therefore terminating her benefits immediately.

Joan was stunned. "There must be some mistake," she protested. I've tried and tried. There's no way I can do the work." Couldn't the Company at least pay some benefits while she tried to learn something else?

Seaman was adamant. The answer was no.

"But I've sold my practice. I have no money. I have two children. Can't you do something?"

Seaman shook his head. The decision had been made.

Joan threatened to sue for her damages and to haul Seaman and his company before a jury.

But she was told she couldn't do that. That she had no right to file such a case because of something called ERISA.

A few days later Joan received a termination letter signed by Joseph Sullivan. Quoting line and verse from the policy the letter told her that its decision was based on the wording of the policy, the facts of the case and the IME report. Joan had received her last check.

With her safety net yanked from under her, Joan's life spiraled downward. Dr. Sugerman defaulted on his note. Joan and Wexler were evicted from the house they were intending to buy, losing their down payment. Joan's furniture, clothes – everything – had to be put in storage. Then Wexler became abusive. He slapped Joan on several occasions and finally shoved

her during a particularly violent fight, threatening – in front of her children - to throw her through a plate glass window. The kids called 911, and Wexler was arrested.

* * *

Now seated before me, Joan had pain and sadness etched deeply into her face. Her eyes were dark and hollow; her gray-brown hair tired and stiff. The corners of her mouth were fixed in a dry frown. She had the look of a frightened, skittish animal, in shock and immensely fragile. She appeared on the verge of just getting up and lunging for the door, poised to make a run for it without saying a word. Watching her as she fidgeted with the papers on her lap, struggling to maintain her composure, I felt an air of uneasy tension settling in between us.

Joan was in my office now because, a week ago, sitting in the kitchen of her younger sister's tiny cottage in Encinitas – where she was basically camping out with her children—she happened to see an article in the Wall Street Journal. The article, about long term disability insurance, quoted me accusing Provident, and its recent acquisition, PAUL REVERE, of cheating insureds out of their benefits. After reading the article, Joan looked me up and called me at my office in San Francisco.

After describing what had happened to her in detail, she suddenly switched gears. "What is this business about ERISA?" she asked. "Is it true what they said about that? That I can't sue for fraud or to collect my damages?"

"If your claim is governed by ERISA, I'm afraid it is true. It's called ERISA Preemption. But from what you've told me, ERISA might not apply to you. We'll have to see."

Joan was shocked. She never thought companies behaved like this. And she had never even heard of ERISA. I saw before me a defeated person, a woman with one foot out. She seemed almost ready to call it quits, until I asked about her children. Then, her demeanor turned on a dime. The hint of a smile came across her face. She talked animatedly about Jennifer and Anthony, their personalities, their hobbies, their school activities.

After questioning her in greater detail about what her insurance company had done I thought Joan probably had a good case - if her recitation of the facts held up and if ERISA didn't apply. Unfortunately, good cases don't always come out the right way. I wasn't about to give this woman who had been kicked so hard any inflated hopes.

"If you sue this company," I said, "if you take them on, they will try to crush you. They have billions of dollars. They will spend whatever it takes to fight you. They will try to destroy you and your case, any way they can."

I watched her carefully to see if my words were sinking in.

"They will spy on you. They will call you names. They will say you are trying to blame them for problems they did not cause. They will contact your colleagues; dig into your former relationships. . ."

I wasn't making any of this up or exaggerating in the slightest. I had seen more than one insurance company use just such tactics with other clients over the years.

"They will send investigators to film your every move. They will take your deposition for days at a time. They will subpoena your tax records. They will accuse you of insurance fraud."

"These are unfair people," she interrupted. "They are *really* unfair." I heard an intense firmness in her voice. "I'm disabled and they know it. I can't *be* a chiropractor anymore. They know that as well. They were wrong in cutting me off. If they hadn't done that, we wouldn't have been ruined. I wouldn't have lost my home. I wouldn't be living like this."

"Yesterday," she said, her eyes welling up, "my son, Anthony, was looking at some old photos from the good days. He turned to me and asked, 'Mommy, will we ever be normal again?'"

"Mr. Bourhis," Joan said, now sounding more determined than defeated, "I don't care what they do to me. They can't be allowed to get
away with this."

* * *

The concept of insurance is nothing new. It dates back to the maritime industries of ancient China and Babylonia. The Chinese had a system to lessen the loss of cargo in the treacherous Yangtze River. A group of ship owners threw money into a pot (the birth of premiums) to cover the loss of goods on a single boat.

The Babylonians developed an interesting variation, called "bot- tomry contracts." Ship owners negotiated loans on their vessels. If the ships didn't make it back to port, the debt was wiped clean. Insuring, in one form or another, against maritime loss, carried through to the Greeks, Romans, and Byzantines.

A catastrophic occurrence in London in 1666 made it abundantly apparent that a new type of insurance was needed—for fire. The Great Fire of London raged for four days, destroying more than thirteen thousand buildings and leveling 436 acres. An enterprising gentleman named Nicholas Barbon promptly started a business to protect against future fire loss.

One hundred years later, the always-enterprising Benjamin Franklin founded one of the first fire insurance companies in the United States, the Philadelphia Contributorship, which is still in existence today.

Variations and nuances progressed through the centuries. Otto Bismarck instituted a social insurance in Germany as an end run against socialism. Its basic tenet was that for the good of all society, the individual must be protected. (Bismarck's creation worked so well that despite the upheavals following the world wars, Germany's national health insurance never stopped functioning.)

As time passed, creative minds developed ever more creative types of insurance products to sell. All of them based on the same revenue model: sell fear, price coverage carefully, accumulate premiums, spread risk, control claims and invest the cash for big profits.

This revenue model became so profitable that more and more types of insurance were created, to the point that today virtually everything and everyone you see has an insurance policy on it: cars, boats, houses, products, land, businesses, people.

One of the many types of insurance is what is known as Long Term Disability (LTD) insurance. This coverage was aimed at people earning high incomes, and who were at risk of disaster if they lost their ability to practice their profession or business. Such individuals could afford to pay high premiums over the course of many years to protect against the unlikely situation that injury or illness might someday destroy their income generating power.

Interest rates were high, therefore, profit potential was off the charts. Dozens of disability insurers jumped on the bandwagon, all of them with billion dollar portfolios.

Their pitches were almost identical: Buy ours; it's non-cancelable.

No, buy ours; the premiums can never be raised.

No, buy ours; it will pay benefits for life, not just to age sixty-five. Wait; we'll throw in annual cost-of-living adjustments to cover
inflation.

The promotional material contained shocking statistics on the number of people seriously injured every year. This was accompanied by dire warnings about what could happen to someone who could no longer work. Auto accidents, sports injuries, illnesses, diseases—the litany of potential calamities went on and on.

"Don't think it can't happen to you," the sales agents warned. "That's what everybody thinks. Then it happens. And your life is ruined, along with the lives of all of those who are depending on you. But if you buy this policy, it will protect you if you are ever unable to perform your specific job. Your *specific* occupation."

Policy after policy was sold. Hundreds of thousands of them. Happy projections came into the boardrooms.

Double-digit interest rates—so good for insurance companies, so bad for mortgage seekers—would continue into the foreseeable future. Premiums were priced accordingly and *could not be raised*.

Of course, claims would be made on these policies—people would be injured or would develop covered illnesses—but claims payments would be far surpassed by the fat investment revenues.

Profits were just sitting there, waiting to be plucked, like juicy, fat little plums in a vast, glorious orchard that stretched from sea to shining sea—plums worth billions of dollars. So long as the interest rate projections that formed the basis for all of this continued to be correct, the cash would continue to flow. You would need an army of counters just to keep tabs on how much money you were making.

But what if?

What if the projections were wrong?

* * *

Chapter Two
ERISA PREEMPTION

In 1945, as a result of insurance industry lobbying, in concert, I am sure, with the usual 'campaign contribution' scenario, Congress enacted the McCarran-Ferguson Act. This act prevented the federal government from regulating insurance.

Today, believe it or not, out of the millions of words and pages of federal statutes, codes, guidelines, requirements, and standards - regulating everything from the size of mud flaps on trucks to the use of foul language on the radio – there is not a single provision, a single sentence, or a single word anywhere, that prohibits fraudulent business practices by insurance companies. As a result, insurance companies from Maine to California can scam policyholders with things like false coverage promises, outrageous claims denials, and intimidating policy cancellations without the slightest concern that federal insurance regulators might crack down on them. They won't. They can't. There are no federal insurance regulators. There are no federal insurance regulations.

Parenthetically, many observers argue persuasively that the lack of federal involvement in insurance regulation these days is not a a bad thing. Why? Because given the current composition and orientation of Congress, if the federal government *were* to suddenly become involved, that would not likely be a good thing for consumers.

In any event, given the long-standing absence of federal oversight, the states had to step in. And so most states enacted what are called "unfair insurance practices acts"—legislation, modeled after uniform standards that made it illegal for insurance companies to do things such as:

- engaging in unreasonable delay in claims handling
- refusing to pay claims when liability is reasonably clear

- underpaying, terminating, or denying valid claims
- misrepresenting policy provisions
- concealing benefits from claimants and
- forcing policyholders to sue them in order to obtain benefits due.

In addition to having such regulations all states also have state insurance departments—agencies theoretically responsible for en- forcing these and other insurance regulations.

States also have what are called common law protections. These are laws resulting from state appellate court Rulings on insurance cases arising within their boundaries.

In addition to the legal standards governing the *conduct* of insurers, there is the crucial issue of what *remedies* are available to an insured damaged by such conduct. In one state, a policyholder who has lost his home and been bankrupted by the fraudulent denial of a valid claim may only be able to recover contract damages (the amount of the benefits that were wrongfully withheld); in another state, that same person may be able to recover tort damages for *all* of the damage that resulted from the claim denial.

In considering this, one thing is certain. The body of law and the policyholder protections arising out of state legislation, insurance regulations and court rulings in a policyholder's state, constitute the only protections insureds have against fraudulent or unfair insurance practices. These protections can be enforced in either state or federal court, but the point is that the substantive law – the substantive rules - come only from state, not federal, law.

Enter ERISA

ERISA, an acronym for the Employee Retirement Income Security Act of 1974, is a federal law that was originally intended to protect the retirement benefits of employees against mergers, acquisitions, and other corporate activities that might otherwise have endangered such funds. The only original connection between ERISA and insurance was that it expressly *approved* of the use of state laws to regulate insurance practices.

That was the situation until the U.S. Supreme Court, in a case entitled *Pilot Life v. Dedeaux*, eliminated all of the state insurance laws and regulations mentioned above, saying that those laws were preempted by ERISA – a federal law.

The Supreme Court in *Pilot Life* sided with insurance industry lawyers ruling that any insurance regulations as to policies purchased in the workplace were to be governed exclusively by federal law. Thus, state laws, state insurance department rulings and state court decisions, are all eliminated as preempted by federal law—by ERISA.

What workplace insureds are left with is no state regulation and no federal regulation.

Without being overly dramatic, this basically gives insurance companies a license to steal. They can simply profile and target high- value claims and deny or underpay them with impunity. People with ERISA governed claims, involving everything from neck and spinal injuries to diabetes and heart conditions, are routinely sent long- winded letters from their insurance companies offering them from zero to a fraction of the benefits they are entitled to under their policies.

Why haven't Congress and the White House done something about this?

Good question. In 2006 I met with then Senator Barack Obama for close to an hour in his Senate office about this very topic. He got it. It was a big deal and it affected the millions of Americans and their families that got their health or long term disability insurance at work. Senator Obama agreed that ERISA Preemption needed to be reformed so that it deferred to state laws, rather than eliminating them.

He blamed the absence of ERISA reform on Republican control of the White House. And he gave me his word that if that situation changed the problem would be addressed.

The situation did change. And starting in 2008 I began an effort to remind President Obama of his commitment; sending letters and placing calls to key members in his Administration. So far, I have yet to receive a response.

Such is the Wonderland world of ERISA Preemption. And until we see meaningful ERISA reform, the one and only thing you can do to protect yourself from this potentially devastating nonsense is to avoid

– at any cost - purchasing health or disability insurance through your workplace.

~

About Ray Bourhis:

From the streets of Queens, New York, and Cliffside Park, New Jersey, to the hills of Appalachia and the farmworker fields of Central California, and from the halls of his beloved Boalt Hall at U.C. Berkeley, to his law practice of thirty-five years representing policyholders in battles with their insurance companies, Ray Bourhis has long been a man on a mission.

Lawyer, writer, political pundit, advocate and self-proclaimed pain in the assets to the current generation of robber barons, Bourhis, in Preemption, takes on the insurance industry, corrupt politicians, and the U.S. Supreme Court. "An uphill battle," he concedes, but one he fully intends to win.

Long Term Disability – Lead Counsel in Landmark Cases

AVAILABLE FOR SPEAKING ENGAGEMENTS:

Author:
Insult to Injury
Preemption
Consultant: To Medical Assoc.'s & Physicians Regarding LTD Issues
Profiled: On 60 Minutes
Landmark Cases: The Subject to Reports in the:
Wall Street Journal, L.A. Times, San Francisco Chronicle,
Miami Harold, & in Numerous Print and Broadcast Media
Obtained: Record Verdicts & Settlements in LTD & Bad Faith Cases.

TOPICS:

- Long Term Disability for Medical Professionals and Their Patients.
- The Top 10 Things Insurance Companies Don't Want You to Know.
- Disability Insurers Tactics in Profiling and Targeting Medical Professionals.
- Policy Definition vs. State Law: Why some Insurance Policies Sold in California Violate the Law.
- Favorite Tricks by Insurers used to Underpay Lump Sum Buyouts.
- The Use of Biased Medical and Vocational Evaluations by Insurance Companies.
- How Insurers Feed False Information to Attending Physicians.
- Relevant and Interesting Case Studies.
- Neurosurgeons, Orthopedic Surgeons, Micro Surgeons, Anesthesiologists, Periodontist, Dentists, Chiropractors, CEO's and others.
- Understanding Total Disability and Partial Disability.

- Tactics such as those referenced above are the tip of the iceberg – Resulting in large differences in benefit amounts. Ray Bourhis

BACKGROUND:

Born: New York City
Ohio State University, BA 1966
Taught High School in Appalachia 1967-68
Presidential Campaign Staff, Senator, Robert F. Kennedy 1968
Domestic Peace Corps (VISTA) (Worked with Central Valley Farm Workers) 1969
Boalt Hall, University of California, Berkeley J.D. 1972
Founder Cal Advocates at UC Berkeley (now known as CALPIRG at UC Berkeley) 1972-73
Private Practice Specializing in representing policy holders in insurance disputes 1973 – Present

PROFESSIONAL:

Martindale Hubbell AV (highest rating)
Worked with White House staff during the Clinton Administration on issues related to insurance reform.
Founder: www.InsuranceConsumers.com
Special Master, Department of Insurance: Appointed by San Francisco Superior Court Judge John Dearman to oversee reforms in California Department of Insurance.
Subject of a "60 Minute" report concerning insurance abuses and unfair claims and underwriting practices.
Appointed by U.S. Senator Barbara Boxer to Federal Judicial Selection Advisory Committee. Reviews and recommends applicants for federal court judgeships for recommendations to the President.
Lead counsel in: *Bourhis v. Galespi*, *Hangarter v. Unum, McGreggor v. Paul Revere* and dozens of precedent and record setting verdicts and settlements in insurance bad faith cases.

2005 to 2014 Authored:
www.DoctorsAndDisability.com
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www.RayBourhis.com

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Medical Professional – Women as claimants.
Medical Professionals and Fibromyalgia.
Medical Professionals and Arthritis.
Medical Professional and Chronic Fatigue Syndrome.
What is Bad Faith? Examples of Bad Faith conduct.
Understanding Present Value Calculations.
The Real Definition of Total Disability.
LTD Policy Rescissions Based On non-Disclosure of Prior Existing Conditions. How Accepting Benefits Payments Subject to a Reservation of Rights Can Harm a Claimant.
Substance Abuse as a Disabling Condition.
Policy Financial Information: Premiums, Taxes and Fees… What you Need to Pay Now, and after LTD.

Non-Cancellable and Guaranteed Renewable LTD Policies.
The Dangers of Shared Cost LTD Plans.
Long-Term Disability and Long-Term Care Insurance Policies.
"Other Income Benefits" and LTD Insurance Policies.
Understanding Punitive Damages.
An Explanation of Malingering and Exaggerating Symptoms.
Common Impairments Amongst Dental Professionals.
Surgeons and Disability: Better Understanding the Meaning of Total Disability in the Context of a LTD Insurance Policy.
Cancer and Long-Term Disability
Athletes and LTD Insurance
Premiums, Taxes and Fees…What You Need to Pay Now, and After LTD Payments Begin.
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