

ERISA—How much weight can the Plan give to surveillance video? How the Plan can lose discretionary review by failing to properly designate claims administrators

By [Mike Reilly](#) on December 12th, 2011

Two interesting issues come up in today's case:

1. **An ERISA Plan can lose discretionary standard of review if it failed to properly delegate third parties to make benefit decisions.** How do you prove the Plan properly delegated benefit decision-making?
2. **How much weight can one give to sporadic surveillance video of a claimant?**

Here's the case of [Maher v Massachusetts General Hospital Long Term Disability Plan](#), [PDF] _-F.3d_ (1st Cir. December 7, 2011) (The Plan must (1) expressly provide for procedures to designate third parties to make benefit decisions, and (2) delegation must actually occur. The Court can look to Plan terms and affiliated documents, like trust documents and the Summary Plan Description to make that determination.)

FACTS: Maher, a nurse at Mass General Hospital("MGH"), received long term disability ERISA Plan benefits from 2001-2007. The plan contained abuse of discretion language.

Surveillance video and a Doctor's record review convinced the Plan's "claim processor" — Liberty — to conclude Maher was no longer "totally disabled." Maher appealed to Liberty and to the plan administrator — "Partners." On appeal, different doctors reviewed the claim and concluded disability had not been established. Partners then denied the appeal, and Maher sued.

TRIAL COURT: Termination of Benefits Affirmed. Plaintiff appealed.

ISSUES BEFORE THE FIRST CIRCUIT:

1. Whether the Plan properly delegated Partners authority to determine benefit eligibility?
2. Whether the plan "expressly provided for procedures" to designate Partners as a fiduciary with discretionary authority to make benefit decisions?
3. How much weight can one give to surveillance in denying a claim?

FIRST CIRCUIT REVERSES AND REMANDS, with the following rationale:

1. Absent a proper delegation of authority, the Plan cannot rely on the abuse of discretion standard of review. Op. at 6

2. The primary plan document reserves to the Hospital the authority to determine eligibility. Partners, which decided the appeal, “appears” to operate in part as a coordinating body that performs functions for member hospitals like MGH.
3. “Viewed as a conventional delegation [of authority]—the MGH Plan has not relied on affiliation or provided detailed information about it.” “[T]he treatment of Partners as a proper inheritor of ‘the Hospital’s’ discretionary authority is justified, but perhaps only by a modest margin.” Op. at 6.
4. As to whether the plan “expressly provide[s] for procedures to designate Partners as a fiduciary with discretionary authority to administer the plan, the court first looks to the primary plan document. Op. at 8. “Nothing there expressly identifies decisional authority to determine benefits as a power that can be delegated.”
5. Any uncertainty about express delegation can be “resolved by looking to associated documents” like trust agreements and the summary plan description. Op. at 8. These plan documents make clear that the plan authorized delegation to Partners, and that such delegation actually occurred. Op. at 9.
6. The court has in the past upheld termination of benefits based upon “sporadic surveillance capturing limited activity.” Op. at 13. But the weight of surveillance will depend upon the “amount and nature of the activity observed.” Op. at 14. The video evidence and failure to produce pain clinic information is overstated. Op. at 14.

HAPPY HOLIDAYS — Mike Reilly, Lane Powell PC—Seattle,Portland,Anchorage