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CONTRA PROFERNTEM'S APPLICABILITY TO ERISA INSURANCE CLAIMS

BY: PATRICK D. WRIGHT

Ambiguity in plan terms, or how courts have (in)consistently applied the doctrine of contra proferentem to ERISA litigation.

Courts across the country have been consistently inconsistent in applying the "ancient" common law doctrine of *contra proferentem* to ERISA plans. As most attorneys learned in their first year contracts class, *contra proferentem* is the common law doctrine that contracts and other written instruments should be construed against the drafter.[1] [2]ERISA is the body of law that governs employee benefit plans. One small, but important, piece of the ERISA statutory scheme applies to disability benefit insurance offered by an employer. Often, insurers acting as plan fiduciaries improperly deny claims, which is typically where a firm like Eric Buchanan & Associates steps in to help. Once the claimant has exhausted her internal appeals with the insurer, the last option is to file a civil suit. In litigation, the terms found in the claimant's "plan documents" or, essentially, her disability insurance policy, control how a court can review a claim and which standard of review is appropriate.

Congress drafted ERISA with the intention that courts would help fill in the statutory gaps. One such gap was how a court should review an ERISA case. The Supreme Court stated that a denial of benefits under Section 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[3] If there is a clear grant of discretion, courts will apply the *Firestone Tire* arbitrary and capricious review. Under the arbitrary and capricious standard, courts will essentially only look at whether the fiduciary had a reasonable basis for denying the benefits.

This issue presents itself several ways, but one classic ERISA fact pattern involves the plan document's definition of disability. Sometimes, a plan will define disability as, "your inability to perform all of the substantial and material duties of your regular job." Does this mean that a claimant must be disabled from performing every single duty of his material job? Or does it allow a claimant to perform a few duties, but not all of them? Although an insurance company might interpret the policy term in the claimant friendly manner without much of a fight, *contra proferentem* can be a powerful tool for a plaintiff's attorney.

Before fully diving into the topic, *contra proferentem* generally applies to ERISA claims arising

from an insurance policy insuring employee benefits. Still, there are two arguments that courts have accepted which can limit that general application. The first is the argument that under the *Firestone Tire* arbitrary and capricious standard of review, when the plan terms give an administrator specific deference to construe the terms of the plan, such discretionary authority trumps the common law rule. On the other hand, some plans only give the administrator the discretion to determine eligibility, which typically will not trump the use of *contra proferentem*. The second argument is that the doctrine *contra proferentem* is preempted by ERISA itself because it is not a law regulating insurance.

Contra Proferentem's General Applicability

The consensus is that *contra proferentem* applies to cases decided under the *de novo* standard of review.

The leading case in the First Circuit laid out the principle nicely in a *de novo* standard of review case. Stating, thus, "straightforward language in an ERISA-regulated insurance policy should be given its natural meaning." *Hughes v. Bos. Mut. Life Ins. Co.*, 26 F.3d 264 (1st Cir. 1994). Similarly, in keeping with the rule of contra proferentem, ambiguous terms should be strictly construed against the insurer. *Id.*; see also *Lee v. Blue Cross/Blue Shield*, 10 F.3d 1547, 1551 (11th Cir.1994) (collecting cases to establish that contra proferentem rule "has been widely adopted" among circuit courts for resolution of ambiguities in ERISA-regulated insurance contracts); *cf. Allen v. Adage Inc.*, 967 F.2d at 701 n. 6 (holding that contra proferentem principle does not apply to ERISA contracts beyond the insurance context).

Some courts, typically in the past, have even applied *contra proferentem* to cases when the administrator held a clear grant of discretion. In *University Hospitals of Cleveland* the Sixth Circuit explained, "to the extent that the Plan's language is susceptible of more than one interpretation, we will apply the 'rule of *contra proferentum*' and construe any ambiguities against Defendants/Appellees as the drafting parties." *University Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-7 (6th Cir. 2000) (citing *Perez v. Aetna Life Ins. Co.*, 150 F.3d, 550, 557 n. 7 (6th Cir.1998)). There, the Employee Benefit Committee, the administrator, had "the discretionary authority to determine eligibility for benefits or to construe the terms of the Plan." *Id.* at 845. While *University Hospitals* is a very plaintiff friendly case, it was effectively overruled by the Sixth Circuit in the 2018 *Clemons v. Norton Healthcare Inc. Retirement Plan* case discussed below.

So while the doctrine generally applies to de novo review cases, it may be worth a search through your own jurisdiction to find case law also applying it in the arbitrary and capricious context.

Contra Proferentem Curtailed by Discretionary Authority

The Sixth Circuit's most recent case on the issue makes clear that *contra proferentem* should not be applied when the administrator has clear discretion to interpret plan terms. See *Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254 (6th Cir. 2018). There the Sixth Circuit stated,

> Faced solely with a mountain of dicta, we move from law to reason. And we think that *contra proferentum* is inherently incompatible with *Firestone* deference. Thus, we hold that when *Firestone*applies, a court may not invoke *contra proferentum* to "temper" arbitrary-and-capricious review. However, when it is not clear whether the administrator has, in fact, been given *Firestone* deference on a particular issue, we think the doctrine still has legitimate force.

Id. The *Clemons* court seems to make clear that if the plan administrator has discretion to interpret the terms of the plan, *contra proferentum* does not apply; but, courts could apply the doctrine when the administrator does not have that clear discretionary authority. This also seems to be the trend across the country in recent years.

In line with the *Clemons* excerpt above, other courts have also held that *contra proferentem* can be used to argue that discretionary authority doesn't exist in the first place where the plan terms are less than clear. See *Sandy v. Reliance Standard Life Ins. Co.*, 222 F.3d 1202, n. 6 (9th Cir. 2000) (citing *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1254-58 (3d Cir. 1993) (stating that the Third Circuit (like the Ninth) follows that rule of "*contra preferentem*" and has stated that the grant of discretion should be "clear and unequivocal"). This line of reasoning is perhaps on par with the Supreme Court's after its decision in *U.S. Airways, Inc. v. McCutchen*. There, the Supreme Court, discussing whether equitable rules might help construe a reimbursement provision, found that where the plan was silent on the issue of attorney's fees, courts should use the common-fund doctrine as a default. 569 U.S. 88, 101 (2013).

Although the issue in *McCutchen* had little to

do with *contra proferentem*, the Supreme Court's second holding is instructive. The Court first held that equitable rules do not overcome plan terms. *Id.* at 106. "But second," the Court held that where a plan term did not "advert to the costs of recovery," it was properly read to retain the common-fund doctrine. *Id.* The Court reasoned that,

> Ordinary principles of contract interpretation point toward [the use of the common-fund doctrine]. Courts construe ERISA plans, as they do other contracts, by "looking to the terms of the plan" as well as to "other manifestations of the parties' intent." The words of a plan may speak clearly, but they may also leave gaps. And so a court must often "look outside the plan's written language" to decide what an agreement means. In undertaking that task, a court properly takes account of background legal rules—the doctrines that typically or traditionally have governed a given situation when no agreement states otherwise. *See Wal–Mart Stores, Inc. Assoc. Health & Welfare Plan v. Wells*, 213 F.3d 398, 402 (C.A.7 2000) (Posner, J.) ("[C]ontracts ... are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' [contrary] intent"). Indeed, ignoring those rules is likely to frustrate the parties' intent and produce perverse consequences.

Id. at 102 (citations omitted). Essentially, the Court's reasoning endorses the idea that *contra proferentem*, an ordinary principle of contract interpretation, should be used to help courts fill in the gap where plan terms are ambiguous.

Contra Proferentem Does Not "Regulate Insurance" And Therefore Is Preempted

As the United States Constitution lays out:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in this Constitution or Laws of any State to the Contrary notwithstanding.

The basic rule is that a federal law that conflicts with a state law will "preempt" that state law.[4] ERISA, being a federal law containing a broad preemption provision, therefore preempts a large body of law across the country. That said, Congress embedded within the statute "savings" and "deemer" clauses essentially stating that nothing within the preemption subchapter will be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.[5] [6]

Some courts have held that because the common law doctrine of *contra proferentem* is not a "law regulating insurance" it is preempted by the ERISA statute. See *McMahan v. New England Mutual Life Insurance Company*, 888 F.2d 426 (6th Cir. 1989). There, the Sixth Circuit stated that the general principle of contract construction (speaking specifically about *contra proferentem*) does not affect a spreading or transferring of policyholders' insurance risk and found it "clear beyond cavil" that such general principles do not "regulate insurance" even where applied to an insurance context. *Id.*

The same issue was also discussed by the Eighth Circuit in *Brewer v. Lincoln Nat'l Life Ins. Co.* There, the court needed to determine whether Missouri's rule of construction requiring that ambiguities in insurance contracts be resolved in favor of the insured, which they called the "contra insurer rule," was properly applied. 921 F.2d 150, 153–54 (8th Cir.1990) *cert. denied*, 501 U.S. 1238, 111 S. Ct. 2872, 115 L.Ed.2d 1038 (1991). The court found that while Missouri's rule affected pension plans, it did not regulate the insurance industry, and was thus preempted by ERISA. *Id.*

The Eighth Circuit also raised another interesting point in *Brewer* to bolster its opinion. It stated that in *Firestone Tire*, the Supreme Court "injected principles of trust law into ERISA and decided that a denial of benefits was to be reviewed *de novo* unless the plan specifically granted the plan administrator discretion to determine eligibility." *Id.* (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989)). It interpreted this to mean that "unless the plan language specifies otherwise, courts should construe any disputed language 'without deferring to either party's interpreta-

tion.'" *Id.*

While courts have done this analysis, these cases seem to be fewer in number and dated. The general trend across the country tends to be that *contra proferentem* applies in *de novo* cases, but not in arbitrary and capricious cases, especially where the plan administrator can interpret plan terms. As shown by the collection of cases above, courts historically were all over the place, although there are really only these three main holdings. The Sixth Circuit itself has cases stating all three arguments presented in this newsletter (although the issue seems settled as of the *Clemons* decision). As always, the best practice will always be to check your jurisdiction's decisions, using these major arguments as a guide.

End Notes:

[1]*United States v. Seckinger*, 397 U.S. 203, 210 (1970).

[2]That said, it seems apparent that most attorneys did not agree on how to spell the doctrine. This paper will attempt to consistently use "*contra proferentem*".

[3]*Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

[4]*Altria Group v. Good*, 555 U.S. 70 (2008).

[5]29 U.S. Code § 1144(a)-(b).

[6]For a larger discussion on which plans are saved and which plans are deemed, see *FMC Corp. v. Holliday*, 498 U.S. 52, 58-65 (1990).

Eric Buchanan & Associates, PLLC is a boutique plaintiffs' firm located in Chattanooga, Tennessee. We help individuals nationwide obtain disability insurance benefits and other ERISA employee welfare benefits (such as life, health or disability benefits offered through work). Attorneys are our number one source of cases. If you have a client who could use our help, we would appreciate your referral.

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The attorneys at Eric Buchanan & Associates, PLLC are available to speak to your organization regarding ERISA long term disability, group long term disability, private disability insurance, ERISA benefits, denied health insurance claims and life insurance claims.

We appreciate the opportunity to work with you on any of these cases.

Contact our Intake Team at intaketeam@buchanandisability.com.

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