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ERISA & DISABILITY BENEFITS NEWSLETTER

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WHEN PLAN ADMINSTRATORS HIDE THE BALL: A CASE STUDY IN ERISA PLAN DOCUMENT PENALTIES

BY HUDSON ELLIS

Despite the statutory penalties and fiduciary duties under ERISA, some plan administrators continue to refuse to provide information to ERISA plan participants and beneficiaries. Fortunately, courts continue to recognize that plan administrators should not ignore their obligations, and are willing to assess significant penalties in the right case.

Our firm's recent case of *Harris-Frye v. United of Omaha Life Ins. Co.,* No. 1:14-CV-72, 2015 WL 5562196 (E.D. Tenn. Sept. 21, 2015) is a textbook example, where the Court assessed a $74,140 penalty on the plan administrator for repeatedly refusing to produce, or even acknowledge, the existence of controlling plan documents. In our case, the plan administrator's refusal to cooperate led the court to assess the penalty at the full $110 per day for 674 days. Before getting to the specific lessons we learned or confirmed through litigating this case, a basic overview of ERISA Plan documents is helpful.

ERISA plan documents are crucial to understanding the terms of any ERISA plan, and the master plan document sets out the specific rules by which an employee or beneficiary is provided employee benefits.

> "The plan, in short, is at the center of ERISA." *US Airways, Inc. v. McCutchen*, 569 U.S. ——, ——, 133 S.Ct. 1537, 1548, 185 L.Ed.2d 654 (2013). "[E]mployers have large leeway to design disability and other welfare plans as they see fit." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003). And once a plan is established, the administrator's duty is to see that the plan is "maintained pursuant to [that] written instrument." 29 U.S.C. § 1102(a)(1). This focus on the written terms of the plan is the linchpin of . . .[the ERISA system].

Heimeshoff v. Hartford Life & Acc. Ins. Co., 134 S. Ct. 604, 612, 187 L. Ed. 2d 529 (2013).

Because the actual terms of an ERISA plan, as set out in the controlling documents, are critical to understanding an employee's or beneficiary's rights, Congress has established a rule under ERISA that the plan administrator must provide the controlling plan documents when they are requested in writing. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4) states, "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated

summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated."

Giving employees, plan participants and beneficiaries access to the actual plan terms found in the plan documents is so crucial to the ERISA scheme that Congress also provided for a penalty of up to $110 per day to be assessed against any plan administrator who refuses or fails to provide plan documents after a written request. ERISA § 502(c), 29 U.S.C. § 1132(c) provides for penalties for an administrator's refusal to supply required information.[1]

In addition to statutory penalties for failing to provide plan documents, ERISA plan administrators, as ERISA fiduciaries, must communicate with plan participants and beneficiaries about the plans. For example, a plan administrator, as an ERISA fiduciary, "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection." Krohn v. Huron Memorial Hospital, 173 F.3d 542, 548 (6th Cir. 1999) (citing Restatement (Second) of Trusts). Also, a fiduciary must give complete and accurate information in response to a participant's questions. *Drennan v. General Motors*, 977 F.2d 246, 251 (6th Cir. 1992).

With that background, we return to *Harris-Frye*: The irony of this case, like other similar cases, is that this case did not start out as a "plan document" case. Rather, our client just wanted to understand the rules, and get an answer as to why benefits were being denied. In this case, we agreed to help our client find out why her father's life insurance through his union was not in effect when he passed away, despite premiums being paid through the date of his death.

In trying to determine why life insurance benefits were denied, we wrote to the administrator on behalf of our client, as a potential ERISA beneficiary, to ask that it provide the controlling plan documents. Despite sending three letters, we were stonewalled by the plan administrator. In each of our letters we requested all the controlling plan documents, and also included language warning the plan administrator that it had a duty to provide that information and could face substantial penalties if they failed to comply. Instead, the plan administrator only provided a copy of a few pages the Summary Plan Description (SPD), and did not provide us with the master plan document containing the official terms of the plan. Also, during that time, we were able to wrangle a copy of the insurance policy from the insurance company, who was not the plan administrator.

Even though the only document the plan administrator provided was an SPD (that stated it was not the controlling document, but only a summary, and referred to other documents as controlling,) the administrator continued to ignore our requests for all the controlling documents until we filed suit and were knee-deep into litigating the claim. Finally, at the party depositions, an employee of the plan administrator admitted a master plan document existed and was able to provide us a copy that happened to be readily available at the administrator's office. The plan, it turned out, had essentially identical terms to those in the SPD, but we could not know that until the document was actually produced.

In federal court briefing, the administrator argued that we did not specifically ask for the plan and that, even if we did, we were not prejudiced by their not producing it because the terms in the plan were the same as the terms in the SPD. This argument got traction with the magistrate judge, who recommended a penalty of only $12,760 based solely on the 116 days the administrator had failed to provide the insurance policy, and refused to allow penalties for withholding the plan because it did not have any different terms than the SPD and the administrator used the SPD as the governing document. Fortunately, our objection to the Report and Recommendation got the judge's attention and he overruled the magistrate judge, adding an additional 558 days of penalty by holding that we were entitled to penalties for the administrator's refusal to produce the plan document.

The judge's holding has several important points. First, he held that the administrator is not excused from providing the plan where its terms are mirrored in the SPD; the plan is a controlling document and, when it is requested, the administrator must provide it. Next, the judge gave the administrator "the benefit of the doubt" about when we had first requested the plan, finding that our third request was the first totally unambiguous request for the plan and using that request as the triggering date, rather than the date we sent in the previous requests. Finally, the court found the administrator's deliberate refusal to even reply to our second and third request justified imposing the maximum daily penalty ($110).

Beyond being an excellent war story (our client eventually was awarded the full $100,000 life insurance benefit on remand), this case cements several rules we use when we pursue plan document penalty causes of action. One rule is

to try very hard to avoid needing to bring such a claim in the first place. This sounds counter-intuitive, but let me explain: A court's decision to levy penalties is entirely discretionary, so you have a better claim for penalties after you have made a strong effort to give the administrator every warning and ample opportunity to correct their mistake. If your warnings and letters ultimately allow you to obtain the documents before too much time has passed, the good news is you get the controlling plan documents, but the bad news is that the claim for plan document penalties will be greatly reduced or not worth pursuing. But, when you make multiple requests, and remind the plan administrator of the controlling rules, and the plan administrator still fails to provide the documents, then you can have a great plan documents claim.

The reality is that most plan administrators get plan document production right the first time. Of those that do not, many will be willing to change their tune with a little pointed persuasion, and produce the documents after a second letter, and maybe after a follow-up phone call.

Generally, unless the potential client comes to you with a handful of unanswered letters to the *plan administrator*[2] requesting plan documents, you create the penalty claim by being a diligent ERISA attorney and working hard to obtain all relevant plan documents. The primary goal should be to obtain the documents and move on with the claim. However, if you are refused the records or ignored, the record you create with your letters should make it abundantly clear that the plan administrator's refusal was egregious and thereby increase the likelihood that the judge will be inclined to award the maximum penalty available.

Another rule we follow is to make our requests more specific than one would have thought necessary. There is no reason to give the court the chance to "give the administrator the benefit of the doubt" as was done in this case, where the court found our first two letters did not clearly state that we were seeking the master plan document. In our case, each of our requests asked for "ERISA plan documents that control this claim, other than the SPD," yet the judge only found the third request unambiguous enough to trigger the penalty because it specifically referred to documents that controlled "rules of eligibility." The more specific your requests are, the more likely a judge will grant a penalty. We recommend using the term "master plan document," as well as the "SPD," any "insurance policy," and then the catch-all of "any other ERISA plan documents that control this claim."

Finally, do not let a valid penalty claim drop. It can be tempting to focus on pursuing the underlying disability, life, or health claim that led you to take the case. For instance, pursuing the penalty claim can hamper settlement talks because defendants sometimes refuse to negotiate based on a demand that includes plan document penalties; in fact, I suspect this is what kept the defendants in Harris-Frye from talking settlement. Still, jettisoning or ignoring the penalty claim fails to maximize the potential recovery for your client.

While the payoff in a penalty case can clearly be significant, laying the groundwork is critical. Clearly, as seen in *Harris-Frye,* if you lay the groundwork, a well-documented penalties claim can substantially add to the value of the underlying ERISA benefits and is definitely worth pursuing to completion.

END NOTES

[1] The ERISA statute provides for a penalty of $100 per day, but the amount was increased to $110 per day as required by the Debt Collection Improvement Act of 1996. 62 Fed. Reg. 40696.

[2] An important side note is that you must send the plan document requests to the plan administrator, not the insurance company. The "plan administrator" is whoever is named in the plan documents, and if no one is named, it is deemed to be the plan sponsor (i.e. the union or employer). It most cases, the plan documents actually name the employer or union, not the insurance company. While as a matter of practice we send document requests to both the insurer and the plan administrator, current law only allows you to seek penalties against the official plan administrator for failure to respond. See e.g, *Lee v. Burkhart*, 991 F.2d. 1004 (2d Cir. 1993); *Coleman v. Nationwide Life Ins. Co*., 969 F.2d 54 (4th. Cir. 1992); *Anweiler v. American Electric Power Service Corp*., 3 F.3d 986 (7th Cir. 1993); *Moran v. Aetna Life Insurance Co*., 872 F.2d 296 (9th Cir. 1989), (the insurance company was not the "plan administrator" of an ERISA plan); *McKinsey v. Sentry*, 986 F2d 401, 404-05 (10th Cir 1993); *Davis v. Liberty Mutual Ins. Co*., 871 F.2d 1134 (D.C. Cir. 1989); and, *Addison v. Hartford Life and Accident Insurance*, 32 Emp. Ben. Cas. 1640, 2003 WL 23413737 (E.D.Tenn. 2003) (unpublished).

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Meet the Author

Hudson T. Ellis joined Eric Buchanan & Associates PLLC in 2013 and was made a junior partner in 2016. Before joining the firm, Hudson spent the first four years of his practice in civil litigation. He also acted as lead brief-writer for numerous appeals, including a successful appeal to the Tennessee Supreme Court, which led to major changes to Tennessee's insurance law (Allstate Ins. Co. v. Tarrant, 363 S.W.3d 508 (Tenn. 2011)).

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

ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the upcoming NOSSCR Social Security Disability Conference on ERISA Long-Term Disability Claims for Social Security Practitioners. The conference is scheduled for June 1-4, 2016 in Miami Beach, Florida.

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