ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

ABOUT OUR FIRM

VOLUME 8, ISSUE 6, NOVEMBER 2016

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the National Board of Social Security Disability Advocacy. For more information, visit our website at www.buchanandisability.com.

R. Chandler Wilson, R. Scott Wilson, Eric Buchanan & Hudson Ellis.

ERISA AND THE SUPREME COURT AFTER 40 YEARS

STATUTE OF LIMITATIONS, PLAN DOCUMENTS, AND ATTORNEYS' FEES UNDER ERISA

BY ERIC BUCHANAN

This is the fourth newsletter in our discussion of the important U.S. Supreme Court cases decided under the Employee Retirement Income Security Act of 1974 ("ERISA"). Our first newsletter in this series in July 2016 discussed ERISA preemption, the second, in August 2016, discussed remedies under ERISA, and the third, in October 2016 discussed the standard of review and claims rules.

In this article we examine the Supreme Court cases addressing the remaining topics of the statute of limitations under ERISA, which plan documents control ERISA issues, and ERISA attorneys' fees.

ERISA Statute of Limitations

ERISA does not contain a statute of limitations for benefits claims under ERISA § 502(a)(1)(B). Absent a statute of limitations in the statute, courts frequently adopt the analogous statute of limitations from the state law that would be applicable. The general rule is that a statute of limitations cannot begin to run until a plaintiff can bring a cause of action. However, most ERISA plans, and insurance policies providing ERISA benefits, contain "contractual periods of limitations" shortening the time to file a law suit. Typically, these provisions limit the ability to file to a certain time after proof of loss is first due, often three years. Thus, because ERISA case law and regulations require a claimant to exhaust the appeal process under the plan, a claimant will have used up part of the time to file, and will have a shorter time to file suit than the statute of limitations provides, and even a shorter period than the full three years found in the plan language.

In *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, ___ U.S. ___, 134 S. Ct. 604, 610 (2013) the Supreme Court explained that, absent a statute to the contrary, "a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable." The Court explained that a rule enforcing a contractual period of limitations as written is "especially appropriate when enforcing an ERISA plan. 'The plan, in short, is at the center of ERISA.' " *Id.* 134 S. Ct. at 611-12, *quoting from US Airways, Inc. v.*

McCutchen, 569 U.S. ——, ——, 133 S.Ct. 1537, 1548, 185 L.Ed.2d 654 (2013). The Court also explained, “employers have large leeway to design disability and other welfare plans as they see fit.” *Heimeshoff,* 134 S Ct. at 612, *quoting from Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 833, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003). Also, “once a plan is established, the administrator's duty is to see that the plan is “maintained pursuant to [that] written instrument.” *Heimeshoff,* 134 S Ct. at 612, citing 29 U.S.C. § 1102(a)(1). The Court concluded, “[w]e must give effect to the Plan's limitations provision unless we determine either that the period is unreasonably short, or that a ‘controlling statute’ prevents the limitations provision from taking effect.” *Heimeshoff,* 134 S Ct. at 612. In *Heimeshoff,* the Plaintiff had one year from the time the internal review process was completed, thus the time remaining was reasonable, and because the claim was filed beyond that time, the law suit was filed too late.

Heimeshoff argued the time for filing in court should not run until the internal appeals process is completed. Heimeshoff's argument was that, otherwise, if the time for filing in court runs simultaneously while the internal appeal process is going on, then there could be very little time left to file in court when the internal appeals process is finished. Such a rule might encourage claimants to rush through the internal claims process. The Supreme Court rejected this concern, explaining:

> even in the rare cases where internal review prevents participants from bringing § 502(a)(1)(B) actions within the contractual period, courts are well equipped to apply traditional doctrines that may nevertheless allow participants to proceed. If the administrator's conduct causes a participant to miss the deadline for judicial review, waiver or estoppel may prevent the administrator from invoking the limitations provision as a defense. See, *e.g., Thompson v. Phenix Ins. Co.,* 136 U.S. 287, 298–299, 10 S.Ct. 1019, 34 L.Ed. 408 (1890); *LaMantia v. Voluntary Plan Adm'rs, Inc.,* 401 F.3d 1114, 1119 (C.A.9 2005). To the extent the participant has diligently pursued both internal review and judicial review but was prevented from filing suit by extraordinary circumstances, equitable tolling may apply. *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (limitations defenses “in lawsuits between private litigants are customarily subject to ‘equitable tolling’”). Finally, in addition to those traditional remedies, plans that offer appeals or dispute resolution beyond what is contemplated in the internal review regulations must agree to toll the limitations provision during that time. 29 C.F.R. § 2560.503–1(c)(3)(ii).

Heimeshoff, 134 S. Ct. at 615-16. One issue not squarely addressed by the Supreme Court is what happens if a person is paid long-term disability benefits for a period of years before the claim is denied. So, for example, if a person is paid benefits for four years, and any legal action must be brought within three years of when proof of loss was first due, that three years will have already run before the claimant is denied. Further, once denied, the claimant must go through an appeal process that takes additional time. So, once the claimant has the opportunity to appeal, the time under the contract will have run long before. So, what is a claimant to do?

The Court did say that the period must be “reasonable.” *Heimeshoff,* 134 S. Ct. at 610. If there would never have been time to go to court, there must be some “reasonable” window after the final denial for the claimant to go to court. So, the good news is that *Heimeshoff* pretty clearly says there must be some “reasonable” time to file after that final denial, but the bad news is that the case leaves wide open just what that reasonable time might be. Thus, in a case where a claimant is paid for some time before being denied, claimants, their attorneys, and ERISA administrators are all left with only a vague rule that the time must be “reasonable.”

Unlike benefits claims, ERISA does contain a statute of limitations for a breach of fiduciary duties. ERISA § 413, 29 U.S.C. § 1113. A breach of fiduciary duty complaint is timely if filed no more than six years after “the date of the last action which constituted a part of the breach or violation” or “in the case of an omission the latest date on which the fiduciary could have cured the breach or violation,” but the time is only three years “after the earliest date on which the plaintiff had actual knowledge of the breach or violation." Lastly, "in a case of fraud or concealment, such action may be commenced not earlier than six years after the date of discovery of such breach or violation." Id. In *Tibble v. Edison Int'l*, ___ U.S. ____, 135 S. Ct. 1823, 1825, 191 L. Ed. 2d 795 (2015) the employees in a 401(k) plan alleged the plan fiduciaries breached their duties by including certain mutual funds in the plan when virtually identical mutual funds were available with significantly lower expenses. The issue was that some of the funds had been added within six years of the complaint being filed, but some had been added more than six year prior, and thus the claim regarding those funds were found to have been time-barred by the Court of Appeals for the Ninth circuit, focusing on when the funds were added.

The Supreme Court held that the Court of Appeals erred, because it did not consider, "the nature of the fiduciary duty" because "under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances." *Tibble,* 135 S. Ct. at 1827-28. The important analysis provided by the Supreme Court is that, when looking at a breach of fiduciary duty under ERISA, the court should look to the general law of trusts. *Id*, at 1828. Thus, "an ERISA fiduciary must discharge his responsibility 'with the care, skill, prudence, and diligence' that a prudent person 'acting in a like capacity and familiar with such matters' would use." *Id., citing* 29 U.S.C. § 1104(a)(1). The Court concluded that, "under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." *Tibble*, 135 S. Ct. 1828-9. Thus, a claim that the fiduciary failed to properly monitor the investments within the last six years was timely. *Id*. at 1829.

Plan Documents Under ERISA

The Supreme Court in *Cigna v. Amara*, 563 U.S. 421, 131 S.Ct. 1866 (2011), explained that "the summary documents, important as they are, provide communication with beneficiaries about the plan, but . . . their statements do not themselves constitute the terms of the plan."

ERISA Attorneys' Fees

ERISA contains a fee provision, that, "In any action under this subchapter [other than certain actions dealing with employer contributions to a multi-employer plan], the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1), ERISA § 503(g)(1). This provision neither requires that a party seeking fees be a prevailing party, as many statutes require, nor does it make fee awards automatic.

Before the Supreme Court weighed in on ERISA attorneys' fees, lower courts had developed a five-factor test to determine whether fees should be awarded. The five factors courts had applied are:

> (1) the degree of opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.

In *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 130 S.Ct. 2149, 2150 (2010), the Supreme Court clarified the test, requiring instead that a party achieve some degree of success on the merits, but allowing courts to apply the five factors once that threshold was met. In *Hardt*, the Court addressed the situation where a court had remanded a claim back to an ERISA administrator, and the lower court denied fees because the Plaintiff was not a prevailing party. The Supreme Court disagreed, and explained that requiring a party to be a "prevailing party" was contrary to the language of the statute: **"**We reject this interpretation as contrary to § 1132(g)(1)'s plain text. We hold instead that a court 'in its discretion' may award fees and costs 'to either party,' *ibid.,* as long as the fee claimant has achieved 'some degree of success on the merits,'" *Hardt*, 130 S.Ct. at 2152, *citing Ruckelshaus v. Sierra Club,* 463 U.S. 680, 694, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983). The Supreme Court came to this conclusion after analyzing the statutory language, and noted that the term "prevailing party" is not found in the statute, but, rather, that the statute allows a court to award fees, in its discretion, to "either party." *Id.* at 2156.

The Court went on to explain that, while a party need not be a "prevailing party" in the technical sense, a party should still obtain some success to be awarded attorneys' fees. The Court explained that, under the American Rule, parties are responsible for their own attorneys' fees unless a statute says otherwise. The Court then compared the language of many fee shifting statutes, and noted that many, if not most of them, contained language requiring a party to be a "prevailing party." However, the Court noted that, even in those few statutes, like this one, that did not require a party to be a "prevailing party," Congress did not intend for courts to abandon the American Rule. *Id.* at 2156-8.

The Court also found that, when exercising discretion under the ERISA fee statute, courts are not bound by the five-factor test previously used by the Fourth Circuit (and every other circuit). *Hardt*, 130 S.Ct. at 2158. The Court explained that "[b]ecause these five factors bear no obvious relation to § 1132(g)(1)'s text or to our fee-shifting jurisprudence, they are not required for channeling a court's discretion when awarding fees under this section." *Id.* The Court, however, did not reject the five-factor test entirely. Instead, it found that once a claimant has demonstrated "some degree of success on the merits," and thus becomes eligible for a fees award under § 1132(g)(1), a court may consider the five factors. *Id.* n. 8.

In *Hardt,* the Court clarified that it was not a holding that a remand, alone, is enough to entitle a party to fees. Instead, the Court noted that the facts "establish that Hardt has achieved far more than 'trivial success on the merits' or a 'purely procedural victory.'" *Id.* at 2159. The Court explained that "[b]ecause these conclusions resolve this case, we need not decide today whether a remand order, without more, constitutes 'some success on the merits' sufficient to make a party eligible for attorney's fees under § 1132 (g)(1)." *Id.*

END NOTES

[1] *See, e.g. Secretary of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985); *Chambless v. Masters, Mates & Pilots Pension Plan,* 815 F.2d 869, 871 (2d Cir. 1987); *Quesinberry v. LINA,* 987 F.2d 1017, 1029 (4th Cir. 1993), *Lain v. UNUM Life Ins. Co. of Am.*, 279 F.3d 337, 347-348 (5th Cir. 2002); *Hummell v. Rykoff & Co*, 634 F.2d 446, 453 (9th Cir. 1980).

ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the upcoming ACI Litigating Disability Insurance Claims Conference in Miami, Florida on Wednesday, February 1, 2017.

Topic: Penalties for Failing to Provide Plan Documents Under ERISA Section 502 (c).

Eric Buchanan & Associates, PLLC
414 McCallie Avenue • Chattanooga, Tennessee 37402
PO Box 11208 • Chattanooga, Tennessee 37401
telephone (423) 634-2506 • fax (423) 634-2505 • toll free (877) 634-2506
www.buchanandisability.com