ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
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ERISA & DISABILITY BENEFITS NEWSLETTER

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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.

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

AMARA – WHAT HAVE THE COURTS DONE?

BY R. CHANDLER WILSON

Introduction

For a long time, if an employer lied to its employees about benefits, or misinformed an employee about benefits, many courts interpreted the Employee Retirement Income Security Act of 1974 (ERISA) in a way that did not allow the employee to obtain any meaningful remedy. Employees generally could only recover the benefits actually provided in plan documents, but if an employer lied and said the benefits were different and better, the employee could not actually get the promised benefits, just what was actually in the written plan.

Court decisions varied, but all too often, early courts determined the because the applicable remedy provisions in ERISA were limited to "equitable" remedies, courts interpreted this to mean employees could not get "money damages" or any other meaningful remedy. However, the law was clarified in favor of employees five years ago, when the U.S. Supreme Court issued its decision in *CIGNA Corp. v. Amara*, 563 U.S. 421, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011), addressing the available remedies under ERISA. Under *Amara*, employees, as ERISA plan participants and beneficiaries, are much more likely to be able to recover money or another meaningful remedy when an employer lies or misinforms about benefits or when an employer violates its fiduciary duties under ERISA. This article will address the equitable remedies available to plaintiffs and how the courts have reacted to the *Amara* decision.

Background

ERISA provides three basic types of claims for private litigants: a claim for benefits under the plan (§ 502(a)(1)(B)); a claim for breach of fiduciary duty (§ 502(a)(2)) brought for the benefit of the plan; and a claim for "other appropriate equitable relief" to enforce the terms of the plan or Title I of ERISA (§ 502(a)(3)).

The first type of claim, under ERISA § 502(a)(1)(B) are limited only to those instances when a person is claiming benefits due under existing plan terms. ERISA § 502(a)(2) allows for claims against

plan fiduciaries for breaches of their fiduciary duties, but is limited to those times when the claim is brought on behalf of the plan to restore funds to the plan. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). Individuals who are harmed by a breach of fiduciary duties cannot bring a claim under section 502 (a)(1)(B) because they are not claiming the plan as written provides a remedy, and cannot bring a claim under section 502(a)(2) to obtain their own individual relief.

Therefore, individuals who have been harmed by an ERISA fiduciary's breach of duties are left with only the option of seeking a remedy for a breach of fiduciary duty under section 502(a)(3). The Supreme Court found that individuals had the right to pursue an individual claim for a breach of fiduciary duties under ERISA § 502(a)(3) because ERISA prohibits fiduciaries from breaching their duties, and section 502(a)(3) acts as "a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp. v. Howe,* 516 U.S. 489, 512 (1996).

However, even though ERISA § 502(a)(3) allows for an individual to bring a claim for fiduciary duties, one problem with the language of section 502 (a)(3) is that the remedies available are limited to "appropriate equitable remedies." The Supreme Court interpreted this to mean an individual seeking relief under § 502(a)(3) could only obtain the type of relief that has historically been available in courts of equity. *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). Courts were conflicted on just what remedies would have been available in old equity courts, so, prior to *Amara*, it was very unclear whether an individual harmed by a breach of fiduciary duties could obtain any meaningful remedy.

The *Amara* Decision

In 1998, Cigna changed the basic pension plan for its employees. The old plan had provided a retiring employee with a defined benefit in the form of an annuity calculated using the employee's pre-retirement salary and length of employment. The new plan provided most retiring employees with a lump sum cash balance based on a defined annual contribution from Cigna as increased by compound interest. The new plan ultimately made a significant number of employees worse off than they had been under the old plan despite Cigna's assurances to the contrary. The Court found that Cigna intentionally misled its employees by failing to inform them of many of the features of the new plan which made Cigna's descriptions of the plan incomplete and inaccurate. *Id.*, at 1874.

The plaintiff sought relief for the plan administrator's failure to provide an accurate summary plan description. The Court held that relief was not available to the plaintiff under a claim for benefits, but that equitable relief was available under § 502(a)(3). It discussed the availability of different types of equitable relief, including reformation of the plan document, estoppel, and surcharge. *Id*. at 1879-80.

While money damages are not allowed under a § 502(a)(3) claim, and the surcharge remedy takes the form of a monetary payment, it is considered an equitable remedy in a claim against a fiduciary, e.g. providing relief in the form of monetary compensation for a loss resulting from a trustee's breach of duty or to prevent the trustee's unjust enrichment. *Amara*, 131 S. Ct. at 1880.

The Court next had to address the correct legal standard for determining whether the plaintiffs had been sufficiently injured to have a viable § 502(a)(3) claim. It found no broadly applicable requirement that a plaintiff show detrimental reliance, although such a showing may be required for specific equitable remedies such as estoppel. *Id*. at 1881. Instead, the court found that the remedy of surcharge requires a showing of "actual harm," and that such actual harm may simply "come from a loss of [a] right protected by ERISA." *Id*.

What Remedies Are Available Post-*Amara*?

Since *Amara*, several circuits have found that monetary compensation for loss in the form of surcharge is an appropriate equitable remedy under ERISA § 502(a)(3) to redress the consequences of a fiduciary's breach of its duties as long as the plan participant can show harm and causation. ("We believe that, to obtain relief by surcharge for violations of §§ [1022 and 1024(b)], a plan participant or beneficiary must show that the violation injured him or her. But to do so, he or she need only show harm and causation. Although it is not always necessary to meet the more rigorous standard implicit in the words 'detrimental reliance,' actual harm must be shown.") *Id*. at 1881-82. *See also Silva v. Metro. Life Ins. Co*., 762

F.3d 711 (8th Cir. 2014) (surcharge is available where insurer misrepresented coverage to the plaintiff and continued to accept payment of premiums); *Kenseth v. Dean Health Plan, Inc*., 722 F.3d 869 (7th Cir. 2013) (surcharge available where fiduciary provided unclear and misleading information regarding coverage); *Gearlds v. Entergy Servs.*, 709 F.3d 448 (5th Cir. 2013) (surcharge available where fiduciary misrepresented that the plan participant continued to be eligible for benefits following early retirement); *McCravy v. Metro. Life Ins. Co*., 690 F.3d 176 (4th Cir. 2012) (following *Amara* decision, the remedies of surcharge and equitable estoppel are now available); *Brown v. United of Omaha Life Ins. Co.*, No. 15-4293, 2016 WL 4887516, (6th Cir. Sept. 14, 2016) (an equitable remedy might be appropriate if Plaintiff has asserted an injury separate and distinct from the denial of benefits.); *Stiso v. Int'l Steel Grp.*, 604 F. App'x 494, 495 (6th Cir. 2015) (plaintiff may seeks the appropriate equitable remedy where fiduciary provided a misleading summary plan description.).

District courts across the country have as well. *Horan v. Reliance Std. Life Ins. Co*., 2014 U.S. Dist. LEXIS 11427 (D.N.J. January 30, 2014) (surcharge available where insurer misrepresented amount of group insurance that could be "ported" into individual policy, then accepted and retained premiums for greater amount); *Malbrough v. Kanawha Ins. Co*., 943 F. Supp. 2d 684 (W.D. La. 2013) (surcharge available where enrollment website allowed employee to sign up for greater life insurance than eligible for given salary, and insurer accepted and retained premiums for greater amount). *See also Teisman v. United of Omaha Life Ins. Co*., 908 F. Supp. 2d 875 (W.D. Mich. 2012) (plaintiff may recover "make-whole" monetary relief where employer misrepresented to employee that he was covered by life insurance policy while laid off); *Weaver Bros. Ins. Associates, Inc. v. Braunstein*, 2014 U.S. Dist. LEXIS 78629 (E.D. Pa. June 10, 2014) (surcharge available where plan administrator failed to provide an adequate summary plan description and mislead the employee regarding her right to convert her life insurance policy); *Biller v. Prudential Ins. Co*., 2014 U.S. Dist. LEXIS 118577 (N.D. Ga. August 26, 2014) (surcharge available where employee missed window to convert life insurance policy as a result of employer's misrepresentations); *Echague v. Metropolitan Life Ins. Co*. 2014 U.S. Dist. LEXIS 118340 (N.D. Cal. August 22, 2014) (surcharge available when employee's life insurance coverage lapsed as a result of the employer's failure to provide complete and accurate information to the employee regarding the conversion of the policy).

Furthermore, case law has established that plaintiffs need not show any unjust enrichment or loss to the plan as a result of a breach of fiduciary duty in order for the surcharge remedy to be available. All that is required is a showing of actual harm to the plaintiff alone. *See Silva v. Metro. Life Ins. Co.*, 762 F.3d 711 (8th Cir. 2014); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869 (7th Cir. 2013)("An ERISA fiduciary…could be surcharged…only upon a showing of actual harm, proved by a preponderance of the evidence. That actual harm might consist of detrimental reliance, but it might also come from the loss of a right protected by ERISA or its trust-law antecedents."); *Gearlds v. Entergy Servs*., 709 F.3d 448 (5th Cir. 2013); *McCravy v. Metro. Life Ins. Co*., 690 F.3d 176 (4th Cir. 2012); all relying on *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011).

If actual harm can be shown, courts have widely held that surcharge is available to plaintiffs unless the Defendant is not an ERISA fiduciary or adequate relief can otherwise be provided as a § 502(a)(1)(B) claim for benefits. *See Moon v. BWX Techs., Inc*., 956 F. Supp. 2d 711, 720 (W.D. Va. 2013), *aff'd and remanded,* 577 F. App'x 224 (4th Cir. 2014) (surcharge not available because Defendant is not an ERISA fiduciary); *Batten v. Aetna Life Ins. Co*., No. 3:15CV513, 2016 WL 4435681 (E.D. Va. Aug. 17, 2016) (surcharge is not available because adequate relief is available under § 502(a)(1)(B).).

Once it has been established that surcharge is available, exactly how much should be rewarded? Courts have suggested that the full promised-but-unpaid insurance benefits should be awarded, plus interest and, in some cases, attorney's fees. *See McCravy*, 690 F.3d at 181 (holding that if a breach of fiduciary duties was found, plaintiff could seek "the amount of life insurance proceeds lost because of the trustee's breach of fiduciary duty."); *Winkelspecht v. Gustave A. Larson Co.*, 857 F. Supp. 2d 793 (E.D. Wis. 2012) (dismissing claims against life insurer, but ordering entire amount of unpaid life insurance paid by breaching fiduciary plan administrator). *See also Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 728 (8th Cir. 2014)("in the context of a life insurance policy, the remedy sought under § 1132(a)(3) [will] generally always be the full benefits available under the policy").

Rainey v. Sun Life

Our own firm obtained a judgment allowing a surcharge remedy for a § 502(a)(3) claim in *Rainey v. Sun Life Assurance Co. of Canada, et al.*, No. 3-13-0612 (M.D. Tenn. Dec. 15, 2014). Amy Rainey worked as a part-time pharmacist for Community Health Systems ("CHS"). When she was hired, she was erroneously classified as a Class 4 full-time employee in the payroll office. Under the terms of Sun Life's policy, the amount of available insurance benefits available to each employee is determined by their job classification. Because she was mistakenly considered a Class 4 employee, she was able to enroll in $117,000 of basic life insurance coverage and $350,000 in supplemental life and AD&D (Accidental Death and Dismemberment) insurance. These elections also included a double indemnity provision which doubled the amount of insurance benefits to a total of $934,000. Ms. Rainey received confirmation of her enrollment in the plan at these values. Thereafter, CHS deducted Ms. Rainey's share of the premiums and submitted them to Sun Life for the duration of her employment.

While employed and enrolled in the plan, Ms. Rainey was killed by her estranged husband. Under the terms of the Sun Life policy, Ms. Rainey's death was considered accidental and she was entitled to enhanced benefits. However, rather than the $934,000 in coverage that she elected, Sun Life determined that Ms. Rainey was only eligible for a maximum benefit of $150,000 due to her part-time status. The plaintiff subsequently brought a claim alleging that CHS had breached its fiduciary duty to Ms. Rainey.

The Court held that CHS had, in fact, breached its fiduciary duty to Ms. Rainey by making material representations as to her eligibility for both life and AD&D insurance. It further held that Ms. Rainey relied to her detriment on these misrepresentations and suffered actual harm as a result. As to the appropriate remedy, the Court held that surcharge is authorized under ERISA and the relevant case law and that it was appropriate under these facts. The Court further held that in order to be made whole, Plaintiff was entitled to the full, expected amount of benefits and subsequently awarded a surcharge in the amount of $784,000 (face value minus the amount already paid) against CHS.

Conclusion

Amara clarified the equitable remedies available in a § 502(a)(3) claim and allowed for the possibility of monetary equitable relief in appropriate cases. Since *Amara*, if a plaintiff can show "actual harm", the surcharge remedy will allow for monetary relief in the amount of the full benefit plus interest.

In addition to the availability of equitable remedies, the *Amara* decision raised another interesting question. Can a plaintiff bring a § 502(a)(3) breach of fiduciary duty claim in addition to a typical § 502(a)(1)(B) claim for benefits? The short answer is yes, as long as it is not merely a repackaged § 502(a)(1)(B) claim. This, however, is a topic that will be addressed more fully in a future article.

ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the upcoming Tennessee Trial Lawyers Association's 2nd Annual Paralegal Seminar in Nashville, TN on May 5th, 2017.

Topic: Subrogation Seminar

ERISA & DISABILITY BENEFITS NEWSLETTER

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 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
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