

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.

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ERISA § 502© ACTIONS: PENALTIES FOR THE FAILURE TO PROVIDE PLAN DOCUMENTS PART 2 BY: ERIC BUCHANAN

Whenever an attorney is helping a client fight a denial of ERISA benefits, obtaining the controlling plan documents is a crucial step, because the plan documents set out the “rules of the game” under which an employee benefit plan is run. Also, whenever a PI attorney is faced with a subrogation or repayment claim from a client’s medical insurer or employer health-plan, obtaining the plan documents is critical to determining just what rights an ERISA health-care plan has to recover.

In our previous issue, we discussed the basic rule that ERISA plan administrators must provide their beneficiaries with a copy of any controlling plan documents within 30 days of a written request from the beneficiary. If the plan administrator fails to do so, the administrator may be sued for penalties of up to \$110 per day. This issue continues the discussion where we left off. If you would like another copy of our previous issue, it is on our website at www.buchanandisability.com, or you may request a new copy be e-mailed to you by e-mailing mhaynes@buchanandisability.com.

III. Who must provide documents and may be sued under ERISA § 502(c) for failing to provide plan documents?

D. Sometimes, a *de facto* plan administrator may be liable for a penalty.

Part of our article in our previous issue, explained that, in most circuits, only the official “Plan Administrator” may be liable for penalties. However, at least two circuits have been willing to agree that § 502(c)(1) allows penalties against *de facto* plan administrators. In Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992), the First Circuit held that the party that actually controls distribution of plan

documents may be liable for penalties, even if the party is not the official “Plan Administrator; the court reasoned, “To hold that an entity not named as administrator in the plan documents may not be held liable under § 1132(c), even though it actually controls the dissemination of plan information, would cut off the remedy Congress intended to create.” 956 F.2d at 373. The key factor in finding a *de facto* plan administrator, according to Law, is control: both control over the plan generally; and specifically, control over dissemination of the information and documents underlying the § 502(c)(1) claim.

The Eleventh Circuit has explicitly noted its agreement with the First Circuit’s holding in Law. See Rosen v. TRW, Inc., 979 F.2d 191, 193-94 (11th Cir. 1992) (“We agree with the reasoning of the First Circuit and we hold that if a company is administering the plan, then it can be held liable for ERISA violations, regardless of the provisions of the plan document”). Additionally, the Fifth Circuit has stated the idea that someone other than the statutory administrator could be liable for § 502(c) penalties has “intuitive appeal.” Fisher v. Metropolitan Life Ins. Co., 895 F.2d 1073 (5th Cir. 1990).

Insurance companies often act as the “plan administrators.” For example, by regulation, decisions and notices regarding ERISA rights are required to be sent by the plan administrator. 29 C.F.R. § 2560.503-1(f), (j). This information is usually provided to a claimant by the insurance company when they deny a claim, which give the appearance that the insurance company has taken on many of the roles and attributes of a plan administrator.

IV. How does a court determine the appropriate penalty?

ERISA & DISABILITY BENEFITS NEWSLETTER

A. Factors in Determining Awards and Amounts Awarded

It is up to the discretion of the district courts to award penalties under 29 U.S.C. § 1132(c). While some circuits have no reported cases involving § 502(c) penalties, the federal circuits which have addressed these claims use a variety of factors to decide whether to award penalties under § 502(c).

The five factors most commonly used by the courts in assessing § 502(c) penalties are: "(1) bad faith or intentional conduct of the plan administrator, (2) length of delay, (3) number of requests made, (4) documents withheld, and (5) prejudice to the participant." Gorini v. AMP Inc., 94 Fed. Appx. 913, 919-920 (3d Cir. 2004). The Second and Third Circuit Courts have adopted these factors, as have several district courts in the Seventh Circuit. See McDonald v. Pension Plan of the Nysa-Ila Pension Trust Fund, 320 F.3d 151, 163 (2d Cir. 2003); Jackson v. E.J. Brach Corp., 937 F. Supp. 735, 741 (N.D. Ill. 1996); Blazejewski v. Gibson, 1999 U.S. Dist. LEXIS 18028 at 9-10 (N.D. Ill. 1999). Other circuits use some of these factors to varying degrees. The Eleventh Circuit, for example, has cited these five factors, but noted that they are not prerequisites for imposing civil penalties. Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, 847 (11th Cir. 1990). In the Fourth Circuit, the Eastern District of Virginia has considered bad faith and length of delay, but awarded penalties even though neither of these factors was in the plaintiff's favor. Freitag v. Pan Am. World Airways, Inc., 702 F. Supp. 128, 132 (E.D. Va., 1988).

The First, Fifth, and Sixth Circuits focus on bad faith and prejudice to the plaintiff. Bartling v. Fruehauf Corp., 29 F.3d 1062, 1066-1067 (6th Cir. 1994); Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580, 588-89 (1st Cir. 1993); Godwin v. Sun Life Assurance Co. of Canada, 980 F.2d 323, 328-29 (5th Cir. 1992).

However, in these circuits, neither bad faith nor prejudice is required; they are merely considerations in determining the amount of penalties awarded. Bartling, 29 F.3d at 1066. In fact, the Sixth Circuit has affirmed a penalty against a plan administrator when neither prejudice nor bad faith was present. McGrath v. Lockheed Martin Corp., 48 Fed. Appx. 543, 557 (6th Cir. 2002).

However, because courts and defense counsel often focus on prejudice as the most important factor, the Plaintiff should be prepared to show prejudice. Many courts have stated that prejudice is at least an "important factor" to consider when determining the applicability of § 502(c) penalties. See, e.g., Bartling v. Fruehauf Corp., 29 F.3d 1062, 1067 (6th Cir. 1994). For most courts, however, it is not determinative. Even so, some courts refuse to impose penalties or give "token" penalties in the absence of prejudice. Patterson v. Ret. & Pension Plan for Officers & Employees of the N.Y. Dist. Council of Carpenters and Related Orgs., 2001 U.S. Dist. LEXIS 15949 at 22 (S.D.N.Y. 2001); Hackett v. Xerox Corp. Long-Term Disability Income Plan, 2001 U.S. Dist. LEXIS 21305 at 68-70 (N.D. Ill. 2001).

Fortunately, prejudice is not a particularly difficult thing to show. In addition, some circuits, the burden is on the plan administrator to prove that there is no prejudice. See, e.g. Knickerbocker v. Ovako-Ajax, Inc., 1999 U.S. App. LEXIS 16982 at 20 (6th Cir. 1999). Often the fact that the plaintiff had to seek the advice of counsel and institute a lawsuit in order to determine his or her rights under the plan is sufficient "prejudice." Courts imposing penalties under this interpretation of "prejudice" often focus on the time and effort expended and the aggravation experienced by the plaintiff in hiring a lawyer or bringing the suit. Almonte v. GMC, 1997 U.S. Dist. LEXIS 9271 at 14-16 (S.D.N.Y. 1997); Jackson v. E.J. Brach Corp., 937 F. Supp. 735, 742 (N.D. Ill. 1996). Another way to look at this interpretation is that if the suit commences before the administrator has furnished the requested information, the plaintiff may have brought a suit for benefits without knowing the merits of his or her position. Patterson, 2001 U.S. Dist LEXIS 15949 at 22. On the other hand, the plaintiff should not argue prejudice merely as a result of hiring an attorney, since attorney's fees can be recovered under ERISA. Geary v. Chicago Tile Inst. Welfare Trust, 1995 U.S. Dist. LEXIS 4921 at 19 (N.D. Ill. 1995). In addition, courts have found seeking counsel and filing suit to be inadequate prejudice when the case was primarily based on other grounds such as interpretation of the plan or discrimination by the former employer. Patterson, 2001 U.S. Dist LEXIS 15949 at 22; LaCoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 230 (S.D.N.Y. 1997).

B. Sample Penalties that are Awarded.

When courts do award penalties, they seldom award the maximum amount. In fact, out of fifty or so reported cases in which courts have awarded statutory penalties, the plaintiffs received the maximum penalty only three times. See Keogan v. Towers, 2003 U.S. Dist. LEXIS 7999 at 35 (D. Minn. 2003); Freitag, 702 F. Supp. at 132; Villagomez v. AT&T Pension Plan, 1991 U.S. Dist. LEXIS 1788 at 5 (N.D. Ill. 1991). Awards typically range from ten to fifty dollars a day, with an average award of about \$33.63/day. Kascewicz v. Citibank, N.A., 837 F. Supp.1312, 1323-24 (S.D.N.Y. 1993).

A breakdown of the cases where courts have awarded § 502(c) penalties and the amounts awarded follows.

In the Second Circuit, the cases are McDonald v. Pension Plan of the Nysa-Ila Pension Trust Fund, 320 F.3d 151, 163 (2d Cir. 2002)(\$15/day for 71 days; \$1065 total); Reid v. Local 966 Pension Fund, 2004 U.S. Dist. LEXIS 18600 at *32 (S.D.N.Y. Sept. 14, 2004)(\$20/day for 151 days; \$3020 total); Patterson v. Ret. & Pension Plan for Officers & Employees of the N.Y. Dist. Council of Carpenters and Related Orgs., 2001 U.S. Dist. LEXIS 15949 at 22 (S.D.N.Y. 2001)(token penalty of \$0.10/day for an unspecified number of days); Proujansky v. Blau, 2001 U.S. Dist. LEXIS 12694 at 41 (S.D.N.Y. 2001)(\$20/day for 2272 days; total penalty of \$45,440); Almonte v. GM Corp., 1997 U.S. Dist. LEXIS 9271 at 16 (S.D.N.Y. 1997)(\$10/day for 235 days; \$2350 total); Scarso v. Briks, 909 F. Supp. 211, 215 (S.D.N.Y. 1995)(\$50/day for approxi-

ERISA & DISABILITY BENEFITS NEWSLETTER

v. Local 966 Pension Fund, 2004 U.S. Dist. LEXIS 18600 at *32 (S.D.N.Y. Sept. 14, 2004)(\$20/day for 151 days; \$3020 total); Patterson v. Ret. & Pension Plan for Officers & Employees of the N.Y. Dist. Council of Carpenters and Related Orgs., 2001 U.S. Dist. LEXIS 15949 at 22 (S.D.N.Y. 2001)(token penalty of \$0.10/day for an unspecified number of days); Proujansky v. Blau, 2001 U.S. Dist. LEXIS 12694 at 41 (S.D.N.Y. 2001)(\$20/day for 2272 days; total penalty of \$45,440); Almonte v. GM Corp., 1997 U.S. Dist. LEXIS 9271 at 16 (S.D.N.Y. 1997) (\$10/day for 235 days; \$2350 total); Scarso v. Briks, 909 F. Supp. 211, 215 (S.D.N.Y. 1995)(\$50/day for approximately 450 days); Pagovich v. Moskowitz, 865 F. Supp. 130, 138 (S.D.N.Y. 1994)(\$75/day for 187 days; \$14,025 total); Kascewicz v. Citibank, N.A., 837 F. Supp. 1312, 1324 (S.D.N.Y. 1993)(\$25/day for 891 days; \$22,275 total); Kulchin v. Spear Box Co., 1978 U.S. Dist. LEXIS 16265 at 7 (S.D.N.Y. 1978)(\$10,000 total penalty); and Austin v. Ford, 1998 U.S. Dist. LEXIS 2157 at 19 (S.D.N.Y. 1998)(\$10/day; \$3870 total penalty).

In the Third Circuit, Gorini v. AMP, Inc., 94 Fed. Appx. 913, 916 (3d Cir. April 16, 2004)(award of \$160,780 for an unnamed amount of time); Colarusso v. Transcapital Fiscal Sys., 227 F. Supp. 2d 243, 262 (D.N.J. 2002)(\$50/day for 928 days; \$46,400 total); Boyadjian v. CIGNA Cos., 973 F. Supp. 500, 507 (D.N.J. 1997)(\$75/day for 773 days; total of \$57,975); Porcellini v. Strassheim Printing Co., 578 F. Supp. 605, 616 (E.D. Pa 1983)(\$25/day for 60 days; \$1500 total); Henczel v. Amstar Sugar Corp., 1991 U.S. Dist. LEXIS 10740 at 12-13 (E.D. Pa. 1991) (\$100/day; total of \$18,800); and Conowall v. Admin. Comm. for General Instrument Corp. Pension Plan, 1989 U.S. Dist. LEXIS 7997 at 11 (E.D. Pa. 1989)(\$5/day penalty for nearly five years; total of \$8790).

In the Fourth Circuit, Faircloth v. Lundy Packing Co., 91 F.3d 648, 659 (4th Cir. 1996)(\$2500 for each of three plaintiffs for a delay of about 90 days); Shade v. Panhandle Motor Serv. Corp., 1996 U.S. App. LEXIS 16703 at 12 (4th Cir. 1996)(\$5/day; total of \$4035); Freitag v. Pan Am. World Airways, Inc., 702 F. Supp. 128, 132 (E.D. Va. 1988)(\$100/day for 100 days; \$10,000 total); Jackson v. Coyne & Delany Co., 2004 U.S. Dist. LEXIS 11230 (W.D. Va. June 17, 2004)(\$25/ day for 93 days; total of \$2325).

Cases in the Sixth Circuit include McGrath v. Lockheed Martin Corp., 48 Fed. Appx. 543, 550 (6th Cir. 2002)(\$50/day for 154 days; \$7700 total); Bartling v. Fruehauf Corp., 29 F.3d 1062, 1067 (6th Cir. 1994)(\$25,200 for a group of

78 plaintiffs); Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir. 1988)(\$25/day for 278 days; \$6950 total); and Dooley v. GMC, 1997 U.S. Dist. LEXIS 13168 at 6 (E.D. Mich. 1997)(\$1500 for a delay of about one year).

In the Seventh Circuit, Blazejewski v. Gibson, 1999 U.S. Dist. LEXIS 18028 at 14 (N.D. Ill. 1999)(\$10/day for about 400 days); Jackson v. E.J. Brach Corp., 937 F. Supp. 735, 742 (N.D. Ill. 1996)(\$10/day for 692 days; 6920 total); Harsch v. Eisenberg, 1994 U.S. Dist. LEXIS 21235 at 22 (E.D. Wis. 1994)(\$4089 total penalty for four plaintiffs); Thomas v. Jeep-Eagle Corp., 746 F.Supp. 863, 864-865 (E.D. Wis. 1990)(\$50/day for 129 days; \$6450 total); Mitchell v. Am. Hardware Mfrs. Ass'n, 1985 U.S. Dist. LEXIS 15990 at 33 (N.D. Ill. 1985)(\$1000 total penalty); Lowe v. SRA/IBM Macmillan Pension Plan, 2003 U.S. Dist. LEXIS 4519 at 10 (N.D. Ill. 2003)(\$50/day; \$35,050 total); Knipe v. Reuters Am., 1997 U.S. Dist. LEXIS 4675 at 6 (N.D. Ill. 1997)(penalty of \$2000); Villagomez v. AT&T Pension Plan, 1991 U.S. Dist. LEXIS 1788 at 5 (N.D. Ill. 1991)(\$100/day for 144 days; \$14,400 total); and Piggot v. Livingston Co., 1989 U.S. Dist. LEXIS 11155 at 8 (N.D. Ill. 1989)(nominal penalty of \$2/day for 309 days).

In the Eighth Circuit, Keogan v. Towers, 2003 U.S. Dist. LEXIS 7999 at 34 (D. Minn. 2003)(\$100/day for 649 days; \$64,900 total); Garred v. General American Life Ins. Co., 774 F. Supp. 1190, 1201 (W.D. Ark. 1991)(\$25/day; total penalty of \$15,775).

In the Ninth Circuit, Advisory Comm. for Stock Ownership & Trust for Employees of Montana Bancsystem, Inc. v. Kuhn, 1996 U.S. App. LEXIS 2273 at 22-23 (9th Cir. 1996) (\$33/day for 586 days; total of 19,338); Paris v. F. Korbel & Bros., Inc., 751 F. Supp. 834, 840 (N.D. Ca. 1990)(\$10/day); Chaganti v. Sun Microsystems, 2004 U.S. Dist. LEXIS 24243 at 19 (N.D. Ca. Nov. 23, 2004)(\$12/day for 191 days; \$2292 total); Berry v. Wise, 2004 U.S. Dist. LEXIS 16897 at 1 (D. Or. Aug. 17, 2004)(total award of \$2640).

In the Tenth Circuit, Dehner v. Kansas City S. Indus., Inc., 713 F. Supp. 1397, 1402 (D. Kan. 1989)(\$20/day for 84 days; \$1680 total).

In the Eleventh Circuit, Curry v. Contract Fabricators, Inc. Profit Sharing Plan, 891 F.2d 842, 848 (11th Cir. 1990) (\$3/day for 240 days; \$800 total); Hamilton v. Mecca, Inc., 930 F. Supp. 1540, 1557 (S.D. Ga. 1996)(\$5000 penalty awarded).

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates 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.