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 UPDATE TO ERISA § 502 (c) ACTIONS: PENALTIES FOR THE FAILURE TO PROVIDE PLAN DOCUMENTS

BY: ERIC BUCHANAN & JULIE MILLER

If you represent a person who is injured and your client's employer's health insurance pays your client's medical expenses, you should probably assume that the health insurance company or plan has a right of reimbursement in the policy. However, because most such plans fall under ERISA, the insurance company's right to be reimbursed by your client is limited to the terms of the policy.

We recommend that whenever you open a new personal injury file or similar case, you should make a written request for your client's health insurance plan documents. This article will discuss what an attorney should do to obtain the documents, and under what circumstances an attorney can obtain penalties under ERISA on behalf of a client if the documents are not provided.

How to Request ERISA Plan Documents:

Technically, documents should be requested from the "Plan Administrator" of the benefit plan. The "Plan Administrator" is the person designated in the plan documents as the plan administrator, but if no one is designated in the plan, it is deemed to be the plan sponsor, which is usually the employer. See ERISA § 3(16), 29 U.S.C. § 1002(16). In most cases, the "Plan Administrator" is not the insurance company, but is usually the employer. If you don't know who the "Plan Administrator" is, the best place to start is to write your client's employer and request the documents from the employer as Plan Administrator (we say "attention: Plan Administrator" in our letters). You should also ask the employer to tell you if the employer is not the Plan Administrator, to tell you who it is so that you can request the docu-

ments from true "Plan Administrator."

The letter written on behalf of your client should be as the "Plan Administrator" to provide copies of all plan documents or other documents describing what benefits are available under the plan. Make sure to send all such letters via certified mail, and keep the record given by the post office (commonly a "green" slip). This way, you can prove that the documents were requested if you need to pursue penalties (such as the ones discussed in the next section).

II. What can you do if the "Plan Administrator" does not provide the documents?

ERISA Plan Administrators must respond to a written request for plan documents within 30 days; if the Plan Administrator does not do so, the Plan Administrator can be sued for penalties up to \$110 for each day after 30 days for each violation. See, ERISA § 502(c), 29 U.S.C. § 1132 (c) (which provides for penalties for an administrator's refusal to supply required information). The maximum penalty of \$100 per day found in the ERISA statute was increased to \$110 for violations after July 29, 1997 pursuant to the Debt Collection Improvement Act of 1996. 62 Fed. Reg. 40696.

III. Who may be sued under ERISA § 502(c)?

In most circuits, only the designated Plan Administrator is liable for a penalty under ERISA § 502(c), whether or not they actually administer the plan. *Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 584 (6th Cir. 2002) (citing *Hiney Printing*

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Co. v. Brantner, 243 F.3d 956, 960; *Vanderklok v. Provident Life & Accident Ins. Co.*, 956 F.2d 610, 618 (6th Cir. 1992); *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833, 843 (6th Cir. Tenn. 2007); see also *Mondry v. Am. Family Mut. Ins. Co.*, 557 F.3d 781 (7th Cir. Wis. 2009); *Ross v. Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 743-44 (8th Cir. 2002); *Lee v. Burkhart*, 991 F.2d 1004, 1010 (2d Cir. 1993); and *McKinsey v. Sentry Ins.*, 986 F.2d 401, 403-05 (10th Cir. 1993).

However, the First and Eleventh Circuits have been willing to agree that § 502(c)(1) allows penalties against *de facto* plan administrators, which are usually the insurance companies themselves. See, e.g., *Law v. Ernst & Young*, 956 F.2d 364 (1st Cir. 1992) and *Rosen v. TRW, Inc.*, 979 F.2d 191, 193-94 (11th Cir. 1992).

IV. How does a court determine the appropriate penalty?

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). Of the circuits that report cases involving 502(c), the five factors most commonly used 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). See *McDonald v. Pension Plan of the Nysa-Ila Pension Trust Fund*, 320 F.3d 151, 163 (2d Cir. 2003); *Huss v. IBM Med. & Dental Plan*, 2009 U.S. Dist. LEXIS 102431 (N.D. Ill. Nov. 4, 2009); *Lowe v. SRA/IBM-MacMillan Pension Plan HRSC-Retirement Plan*, 2002 U.S. Dist. LEXIS 26407, 19-20 (N.D. Ill. Dec. 11, 2002). Because courts and defense counsel often focus on prejudice as the most important factor, the Plaintiff should be prepared to show prejudice. See, e.g., *Gatlin v. Nat'l Healthcare Corp.*, 16 Fed. Appx. 283, 289 (6th Cir. 2001) (citing *Bartling*, 29 F.3d at 1068-69).

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 only a handful received the maximum penalty. 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); *Olick v. Kearney (In re Olick)*, 422 B.R. 507, 536 (Bankr. E.D. Pa. 2009); *Cohen v. Metro. Life Ins. Co.*, 485 F. Supp. 2d 339, 356-357 (S.D.N.Y. 2007). 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 other cases where courts recently have awarded § 502(c) penalties and the amounts awarded follows.

In the Second Circuit, the cases are *Mohamed v. Sanofi-Aventis Pharms.*, 2009 U.S. Dist. LEXIS 119871, 64-65 (S.D.N.Y. Dec. 18, 2009)(\$100/day for 12 days; \$1200.00 total); *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); *Cohen v. Metro. Life Ins. Co.*, 485 F. Supp. 2d 339, 356-357 (S.D.N.Y. 2007)(\$110/day for 160 days; \$14,600 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 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); *Olick v. Kearney (In re Olick)*, 422 B.R. 507, 536 (Bankr. E.D. Pa. 2009)(\$110/day for 120 days; \$13,200 total); *Colarusso v. Transcapital Fiscal Sys.*, 227 F. Supp. 2d 243, 262 (D.N.J. 2002)(\$50/day for 928 days; \$46,400 total); *Boyardjian 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,

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2004)(\$25/ day for 93 days; total of \$2325); *Chaffin v. Ni-source, Inc. d/b/a Columbia Gas Transmission Co. (& Prudential)*, NO. 3:08-0870, 2010 U.S. Dist LEXIS 27411 (S.D. W.V. Mar. 23, 2010) (awarding \$50 per day for 362 days where the Plan Administrator relied on an oral representation that the insurance company had sent the documents, when in fact they had not).

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); *Lampkins v. Golden*, 1996 WL 729136 at p. 3 (6th Cir. 1996)(\$75/day for 438 days; \$32,850 total); *Daniel v. Eaton Corp.*, 839 F.2d 263, 268 (6th Cir. 1988) (\$25/day for 278 days; \$6950 total); *Dooley v. GMC*, 1997 U.S. Dist. LEXIS 13168 at 6 (E.D. Mich. 1997)(\$1500 for a delay of about one year); *Logan v. UniCare Life & Health Ins., Inc.*, 2007 WL 1875943 (E.D.Mich. June 25, 2007) (awarding \$110 per day for 341 days); *Zirnhelt v. Mich. Consol. Gas Co.*, 2006 WL 3194018 (E.D.Mich., Nov. 1, 2006) (awarding \$100 per day for 105 days); *Shepherd v. O'Quinn*, 2006 U.S. Dist. Lexis 24252, *9-10 (E.D.Tenn. 2006) (awarding \$100 per day for 826 days); *Mitchell v. DaimlerChrysler Corp. Salaried Empl. Ret. Plan*, 2006 WL 1272566 (N.D. Ohio, May 9, 2006) (awarding \$50 per day); *Dies v. Provident Life & Accident Ins. Co.*, 2006 WL 208878 (M.D.Tenn., Jan. 25, 2006) (awarding \$25 per day per document for lengthy delays of 160 and 413 days, regardless of actual prejudice); *Weddell v. Retirement Committee of Whirlpool Production Employees Retirement Plan*, 2007 WL 452509 (N.D. Ohio, Dec. 21, 2007) (awarding \$60 per day for 237 day delay); *Shropshire v. Skilton Equipment Co. Inc.*, 2007 WL 4259608 (E.D.Ky., Nov. 30, 2007) (awarding \$100 per day for 267 days).

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); *Kripe 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. Contact Molina Haynes, Office Manager at (423) 634-2506 or via email at mhaynes@buchanandisability.com