

The Basics of ERISA Benefits Claims

- Counseling the ERISA Claimant
- Five Stepping Stones to Cross the Serbonian Bog Safely

Session I: Counseling the ERISA Claimant

POLL CODE 1: ERISA
POLL CODE 2: FLA

- First Step
- The claimant calls.
 - What does the claimant want?
 - Can ERISA provide it?

- What does ERISA say?
- Can you rely on the text of the Act alone?

Second Step. What does ERISA say?
Can you rely on the Act itself?

- Third Step

- Can the erstwhile claimant “perfect the claim”?

Third Step. Can the claimant “perfect the claim”?

Fourth Step. What do the courts do with ERISA benefit claims?

Fifth Step. Where does it all end?

POLL CODE 1: ERISA

First Step. The call for help.

- The claimant calls.
- “I’ve been denied my benefit. Can you help me?”

ERISA's Cookie Jar

- What does ERISA provide?
- What does it not provide?
- Where does it set forth its remedies?

- ERISA's remedial provision is 29 U.S.C. sec. 1132.
- In this presentation we will look at the (a)(1)(B) provision and save consideration of its "other appropriate equitable relief" provision for another day. It cannot be ignored, of course, that equitable relief must be the focus of a given case. Nevertheless, the equitable relief available and whether it is available at all simply takes us beyond the scope of this basic benefits claim denial scenario and deserves attention. Suffice it to say, it cannot be ignored at any stage that the relief available may be found outside (a)(1)(B) and in the form of appropriate equitable relief under the (a)(3) provision exclusively.

“Under the terms of the plan”

- The (a)(1)(B) provision focuses on “the terms of the plan.”
 - Benefits, clarification of the right to future benefits and enforcement of the terms of the plan are the three kinds of (a)(1)(B) relief provided.

POLL CODE 2: FLA

- What are the terms of the plan?
 - The terms of the plan are summarized in a document distributed to participants called a Summary Plan Description.
 - The plan document itself may be and generally is separate. How it relates to the SPD can be important, for example, by the one incorporating the other.

WYSIWYG

- The grantor or sponsor function is not restricted by ERISA generally (although it may play a role in which judicial standard of review applies to the claim).
- The terms may shorten the applicable statute of limitations. In practice that may mean a year or less to file suit.
- They may suffice to afford the plan deferential review in court, although de novo review remains the default mode if they do not.

Is it an ERISA-governed plan?

- Governmental and “church” plans are not governed by ERISA.
- Workers’ compensation laws are excluded expressly.
- Self-insured short-term disability benefits programs may also be considered “payroll practice programs” and be excluded.

The penalty provision

- ERISA sets forth the obligation of the plan administrator to respond to a written request by the participant or beneficiary for the plan document or “other instruments governing the operation of the plan” by furnishing copies within 30 days of receipt of that request or face a daily penalty in the discretion of the court of up to \$110 a day.
- The courts consider the “personal liability” to be in the nature of a penalty and do not require prejudice. They often do consider prejudice in determining whether to assess a penalty.

ERISA provides for the recovery of benefits, clarification of the right to future benefits and enforcement of the terms of the plan in § 1132 (a)(1)(B).

The “terms of the plan” can look to state law. State law cases can determine which state’s law applies.

welfare benefit plans. Note that not every benefit program is necessarily an ERISA plan. Short-term disability benefits paid from the employer's own assets may be a so-called "payroll practice," as defined by the Secretary of Labor. Despite their appearance, payroll practices are not ERISA plans. Similarly, severance benefit plans may or not be ERISA plans.

What happens when an ERISA plan is converted to an individual life insurance policy and whether ERISA governs can also be unclear.

COBRA continuation benefits are tacked on at the end of ERISA and enforced through ERISA's remedial provision.

In *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) the court set out the general definition of an ERISA plan.

As you make your way through sect. 1132, you will find that 29 U.S.C. § (a)(1)(A) refers you to a right to sue under 29 U.S.C. § (c)(1), below.

- Penalties range up to the maximum of \$110 a day. This provision requires a written request to the plan administrator for the plan document or other instruments governing the operation of the plan, under sect. 1024(b)(4).

- Once there the “ripeness doctrine” of the federal courts means that they are not “ready” to hear your case yet. You have to exhaust your administrative remedies. What administrative remedies? Those that the claims procedures of the plan provide you and the claims procedure regulation of the Secretary of Labor promulgates.

- Third, can you “perfect the claim”? In tort terms, we have now left “damages” and entered the realm of “liability.” The claims procedure regulation implements ERISA’s full and fair review provision, 29 U.S.C. § 1133.

claim. You need to study it carefully. You need to know which version applies to your caller's claim. You need to know what the plan did before you can challenge it. The regulation gives you your best and possibly only chance to do that before filing your so-called "administrative appeal" to the plan or its administrator.

making, as requiring some sort of verification that they have been applied in your claimant's case, etc., in order to assure that your claimant has and will enjoy a full and fair review of a claim that is denied in whole or in part.

- Generally, your caller will have received a written notification. That written notification itself must meet certain criteria and provide certain information, in order to fulfill the claims regulation's requirements. In general, it will not.

- Especially some idea about what to submit and why are the most often absent aspects.

A mere description of a list of medical tests, laboratory results, office visits to the doctor and so on is insufficient.

Note also that the time frame to reference is the time frame beginning with the termination of benefits, if a termination is involved, not the time after that.

- The claims procedure regulation functions procedurally as well as structurally. Sufficient procedural violations may give rise in and of themselves to a right to relief according to case law. More recent case law casts doubt on the effectiveness of arguing that point, however. Presumably the violations are then considered not sufficient or egregious enough to allow the courts to grant substantive relief.

- Other terms in the Act can cause confusion as well. The term “administrator,” as noted above does not mean “administrator” in the context of the penalty provision. Rather it means the plan administrator named in the plan document.

- An award of attorney's fees means the lodestar calculation of a reasonable number of hours times a reasonable hourly rate. Whose rate? The rate where the case is heard? The rate where the plaintiff's attorney has his or her office? What is necessary for there to be an award at all? What considerations did the Supreme Court in *Hardt* say were unnecessary and bore little or no relation to the test for making an award? What guidelines do the courts nevertheless persist in requiring? Does a plaintiff even have to win the particular issue in question?

Are we there yet?

- To summarize, relief under ERISA (a)(1)(B) includes an award of benefits due, clarification of the right to future benefits, and enforcement of the terms of the plan.
- All other relief under (a)(1)(B) is generally in the discretion of the court. That includes interest on past amounts and the attorney fee award provision.
- It also appears to apply to the penalty provision.
- An award may consist in a remand to the plan for further clarification as well, although not provided for in the Act itself.
- The exhaustion of administrative remedies applies but there is case law relaxing that requirement and in some circuits restricting its application to the benefits provision. In the 11th Circuit it applies to all ERISA relief it seems.

- One final note is that the claimant may have waited to call you. There may be deadlines looming or even past and even have appealed pro se to the plan. All these issues can cloud the situation mightily.
- There may also be other ERISA plans the claimant failed to note. It is particularly important to go over other plans which might apply but which the claimant failed to note or was unaware of – especially if the participant was not the claimant, as in a life insurance situation.
- ERISA courts do look to state law in some situations. So it may be worth considering which state's law might be the one to be applied.

The Final Step

- Congratulations!
- The Serbonian Bog is behind you. You have safely crossed to the other side.
- Now it gets interesting!

