



# Benefits Claims: Litigation

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# Benefits Claims Litigation: An Overview

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- The Complaint
- Responding to the Complaint
- Initial Disclosures: Content of the “Administrative Record”
  - What do the regulations require?
- Standard of Review
  - Effect of Conflicts of Interest



# Benefits Claim Litigation: An Overview (Con't.)

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- Scope of Judicial Review
- Discovery on Conflicts of Interest
- Settlement
- Judicial Outcomes
- Attorneys' Fees
- Appeals



# The Complaint

*Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937(2009)  
and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)  
mandate

- Plead more than an accusation of harm
- Less than detailed facts
- *Practice Tip*: Better to be over-inclusive than under



# The Complaint (con't.)

- Pleading an ERISA Sec. 502(a)(1)(B) claim:
  - Claim for benefits owed under the terms of the Plan
  - Plead a concurrent (a)(3) claim? *See, e.g., Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 962 (9th Cir. 2016)
  - Entitlement to additional benefits that flow if plaintiff prevails (e.g., health care, life insurance)
  - Entitlement to pre-judgment interest, attorneys' fees, and costs. ERISA Sec. 502(g)



# The Complaint (con't.)

- Statutory or Contractual Limitations Period
  - *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013) (statute of limitations is not tolled during appeal process)
  - In *Moyer v. Metro. Life Ins. Co.*, 762 F.3d 503, 504 (6th Cir. 2014), the Sixth Circuit held that MetLife's failure to provide notice of a contractual limitations period in its final denial letter violated 29 U.S.C. § 1133 and related regulations and rendered the limitations period unenforceable against the plaintiff, sending the case back to the district court for a merits review. Also see, *Mirza v. Insur. Admin. of Am., Inc.*, 800 F.3d 129 (3d Cir. 2015); *Santana-Diaz v. Metro. Life Ins. Co.*, 816 F.3d 172 (1<sup>st</sup> Cir. 2016);
  - 29 C.F.R. § 2560.503-1(j)(4)(ii) – (applicable to claims for disability benefits filed after January 1, 2018) – requires statement of when contractual limitations period would expire



# The Complaint (con't.)

- Venue
  - ERISA (29 U.S.C. § 1132(e)(2)) permits suit to be brought in any federal district court where:
    - 1) plan is administered
    - 2) breach took place
    - 3) defendant resides or may be found.
- Forum Selection Clauses
  - Enforceable: *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014), *cert. denied*, 136 S. Ct. 791, 193 L. Ed. 2d 708 (2016); *In re Mathias*, 867 F3d 727 (7<sup>th</sup> Cir. 2017); pet. reh. filed



# Responding to the Complaint

- If brought in state court
  - State courts have concurrent jurisdiction over (a)(1)(B) claims only
  - Remove to federal court within 30 days of receipt (service or otherwise) of complaint
- Answer or Motion to Dismiss?
  - Did the plaintiff exhaust administrative remedies?
  - Did the plaintiff include preempted state law claims?
  - Potential application of statutory or contractual limitations period?
  - Duplicative Section 502(a)(3) claim? (under *Varity*) Look closely at remedies sought – extracontractual? Allowed under ERISA? Tougher motion after *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011); see also *Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 962 (9th Cir. 2016)





# Responding to the Complaint (con't.)

- Counterclaims under § 502(a)(3)
  - *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 193 L. Ed. 2d 556 (2016) (plans may not enforce a lien where the underlying assets have been dissipated on non-traceable items (i.e., food, shelter)).
  - *Practice Tip*: Before bringing a counterclaim for overpayment, consider cost of discovery into tracing of defendant's assets
  - *Practice Tip 2*: Consider moving to dismiss counterclaim for lack of prosecution.



# Initial Disclosures: Content of the “Administrative Record”

What is the Administrative Record?

All documents relevant to a claim for benefits. 29 C.F.R. § 2560.503-1(j)

- Anything considered, submitted, or generated in the course of making the determination. § 2560.503-1(m)(8)(ii)
- Materials demonstrating compliance with procedures designed to ensure compliance with plan document. § 2560.503-1(m)(8)(iii)
- Be sure to include plan documents (penalties)
- SSA decision/claim record included?



# Standard of Review

- Default SOR is de novo. *Firestone v. Bruch*, 489 U.S. 101 (1989)
- But, per *Firestone*, a plan can give the party deciding a claim “discretionary authority to determine eligibility for benefits”
  - Transforms the SOR from de novo to abuse of discretion, a/k/a “arbitrary and capricious” review
  - Placement and wording of the discretionary authority language can be key to its legal effect



# Placement of Discretionary Language: Plan or SPD?

- *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011): Operative language needs to be in the Plan, but there are exceptions. See *Bd. of Trustees of Nat. Elevator Indus. Health Ben. Plan v. Montanile*, 593 F. App'x 903, 910 (11th Cir. 2014) *rev'd on other grounds by Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016) (enforcing term found only in SPD when SPD incorporated as plan document)
- All key terms, including discretionary language, should be in the plan document; may not be able to enforce terms that are only in the SPD.
- Claim fiduciary appointment. See, e.g., *Raybourne v. CIGNA Life Ins.Co. of New York*, 576 F.3d 444 (7th Cir. 2009); but see *Barbu v. Life Ins.Co. of North America*, 987 F.Supp.2d 281 (E.D.N.Y. 2013); *Pettit v. Life Ins. Co. of N. Am.*, 2016 WL 3668022 (D. Md. 7/11/16)



# Wording of Discretionary Language

- “Satisfactory proof” –
  - Insufficient – *Gross v. Sun Life*, 734 F.3d 1 (1<sup>st</sup> Cir. 2013); *Cosey v. Prudential Ins.Co.*, 735 F.3d 161 (4th Cir. 2013); *Diaz v. Prudential Ins. Co.*, 424 F.3d 635 (7<sup>th</sup> Cir. 2005)
  - Adequate – *Prezioso v. Prudential*, 748 F.3d 797 (8th Cir. 2014); *Frazier v. Life Ins.Co. of N. Amer.*, 725 F.3d 560 (6th Cir. 2013); *Foster v. Sedgwick Claims Management Svcs., Inc.*, 812 F.3d 721 (D.C. Cir. 2016)



# Discretionary Clause Bans

- Over 20 states have adopted some form of ban on discretionary clauses.
- Three circuit courts of appeal (Sixth, Seventh & Ninth) have ruled that such laws are saved from ERISA preemption as state laws that regulate insurance. *See, e.g., Fontaine v. Metro. Life Ins. Co.*, 800 F.3d 883 (7th Cir. 2015); *Orzechowski v. Boeing Company Non-Union Long Term Disability Plan*, 856 F.3d 686 (9<sup>th</sup> Cir. 2017); BUT SEE *Williby v. Aetna Life Ins. Co.*, 867 F.3d 1129 (9<sup>th</sup> Cir. 2017) (self-funded plans not subject to state law)
- However, such laws may be challenged due to poor draftsmanship. *E.g., Hancock v. Metro. Life Ins. Co.*, 590 F.3d 1141 (10th Cir. 2009) (Utah ban on discretionary clauses excluded ERISA policies).



# Standard of Review: Effect of Conflicts of Interest

- “Dual role” is most common conflict
  - Administrator both pays benefits and makes benefit decisions
  - Sometimes the employer, sometimes the insurance company
  - LTD conflict can impute STD conflict
- Conflicts must be weighed as a factor as to whether an abuse of discretion exists

*Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)

*Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008)



# Standard of Review: Effect of Conflicts of Interest

- How is a conflict of interest “weighed?”
- Is it likely to have affected the claim decision?
- Conflict given more consideration if
  - History of biased claims administration
    - Unum/Provident Corp. disability claims scandal
  - Absence of efforts to assure accurate claim decision  
*Metro Life Ins. Ins. Co. v. Glenn*, 554 U.S. 105 (2008)
  - Evidence exists suggesting it affected the claim decision
- Conflict given less consideration if steps taken to ameliorate conflict
  - Walling off claims personnel from financial information
  - Sales separate from decision making
  - No bonuses for denials
  - In-person exams vs. just paper review
  - High number of medical reviewers





# Scope of Judicial Review

## Abuse of discretion

- Generally limited to “administrative record” and evidence relating to conflict (especially post-*Glenn*)
- May be affected by limits on discretionary authority language (plan terms, facts, law)
- May leave the door open for a trial on the conflict of interest issue. See *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009)



# Scope of Judicial Review, cont.

## De novo –

- Make sure the court actually applies de novo standard.

## Additional Evidence

- Most Circuits leave it to the discretion of the District Court whether to admit additional evidence.

*Quesinberry v. LINA*, 987 F.2d 1017 (4th Cir. 1993)

## Considerations:

- Is additional evidence necessary to conduct adequate review?
- Is the record well developed? (If not, whose fault is it?)
- Are there complex medical questions or issues regarding the credibility of medical experts?
- Did the plan's administrative review procedures allow for adequate record building?



## Scope of Judicial Review – cont.

- De Novo – trial versus record review
  - Record review - *Jewell v. Life Ins.Co. of North America*, 508 F.3d 1303 (10th Cir. 2007);  
*Orndorf v. Paul Revere Life Insur.Co.*, 404 F.3d 510 (1<sup>st</sup> Cir. 2005)
  - Trial - *Krolnik v. Prudential Ins.Co.*, 570 F.3d 841 (7th Cir. 2009)



# Discovery on Conflicts of Interest

- Following *MetLife v. Glenn*, courts allow some discovery to reveal the extent of the conflict
- *Practice Tip*: Ascertain whether there is a conflict and know the answer before the initial status hearing. May be able to head off discovery altogether or extensive discovery
- *Practice Tip 2*: Recent changes to FRCP require that objections to discovery be made with specificity



# Discovery on Conflicts of Interest, cont.

- What is sometimes allowed?
  - Completeness of record
  - Compliance with regulations
  - Financial conflict
  - Compensation of medical reviewers
  - Performance documents regarding claims handlers
  - Statistical information re: claims denied



# What plaintiffs should request

- Training documents
- Claims handling procedures
- Information about medical reviewers – *Demer v. IBM Corp. LTD Plan*, 835 F.3d 893 (9<sup>th</sup> Cir. 2016) (\$\$ earned, frequency of retention)
- CVs of medical reviewers
- Performance evaluations for claims handlers
- 30(b)(6) depositions of plan administrator and medical review companies



# Discovery on Conflicts of Interest

- What is generally not allowed?
  - Production of all reports
  - Other opinions or medical file reviews written by reviewing doctors
  - Broad requests seeking detailed records of other claimants
  - Records of individual claimants with other particular medical conditions and treatment histories
- **WATCH OUT** for the fiduciary exception to the attorney-client privilege and work product privilege.

*Stephan v. Unum Life Ins. Co.*, 697 F.3d 917 (9th Cir. 2012)

*Krase v. Life Ins. Co. of N. Am.*, 962 F. Supp. 2d 1033 (N.D. Ill. 2013)



# Settlement

- **Advantages of settlement (thanks to Magistrate Judge (ret.) Morton Denlow)**
  - Certainty
  - Creativity
  - Confidentiality
  - Control
  - Cost containment
  - Continuity of relationship
  - Closure





# Judicial Outcomes

- Typically decided on cross-motions for judgment (Rule 52) or summary judgment (Rule 56).
- Relief under ERISA is limited. Typical relief in benefit claim case:
  - Remand to Plan Administrator for “re-do” or
  - Determination of Benefit entitlement (yes or no) through date of determination



# Jury Trials

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- Disallowed – See, *Graham v. Hartford Life & Acc. Ins. Co.*, 589 F.3d 1345 (10<sup>th</sup> Cir. 2009)



# Remands

- Appealable?
  - Six circuit courts of appeal say “No.” See *Mead v. Reliastar Life Ins.Co.*, 768 F.3d 102, 108-09 (2d Cir. 2014) (collecting cases); *Stevens v. Santander Holdings USA Inc.*, 799 F.3d 290 (3d Cir. August 24, 2015)
  - Four circuit courts of appeal say “Yes, sometimes.” See, e.g., *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975 (7th Cir.1999) (analogizing to SS proceedings)



# Attorneys' Fees

- *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010) (some degree of success on the merits is enough to be eligible for fees and costs)
- *Raybourne v. CIGNA Life Ins.Co. of N.Y.*, 700 F.3d 1076 (7th Cir. 2012) – 5 factor test still viable
  - Don't have to prevail on all issues to get full compensation
- Fees due for obtaining remand - *Gross v. Sun Life Assur.Co. of Canada*, 763 F.3d 73 (1<sup>st</sup> Cir. 2014)



# Appeals

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- How did the lower court decide the motions?
- **STANDARD OF APPELLATE REVIEW -**
  - Rule 52 decisions are reviewed on appeal for clear error
  - Rule 56 decisions are reviewed on appeal de novo