April 29, 2010 Volume 21 Issue 1

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ERISA Claim Regulation Documents: Statutory Penalties For Not Furnishing?

by J.S. ("Chris") Christie, Jr.

ERISA requires, by regulation, plans to furnish "relevant" documents to claimants when requested and imposes, by statute, penalties for an administrator's not furnishing certain documents to claimants when requested. With one exception, in reported decisions, every court that has considered the issue has held that a plaintiff cannot claim statutory penalties for all documents that the ERISA claim regulation requires a plan to furnish when requested. In light of the overlap between the two types of documents and of ERISA's requiring both types of documents to be furnished upon request, an additional related issue is what might distinguish documents for which penalties may be awarded for not being furnished from those documents for which penalties may not be awarded even though ERISA requires them to be furnished?

A. Background of the Claim Regulation and Document Requests

Pursuant to ERISA § 503, 29 U.S.C. § 1133, the Secretary of Labor has promulgated a detailed regulation that "sets forth minimum requirements for" plan claim procedures. 29 C.F.R. § 2560.503-1 (a). Under this claim regulation, plan claim procedures do not provide the "full and fair review" required by § 503 unless they "[p]rovide that a claimant shall be provided, upon request and free of charge, reasonable access to, and copies of, all documents, records and other information relevant to the claimant's claim for benefits." 29 C.F.R. § 2560.503-1(h)(2)(iii). "A document, record, or other information shall be considered 'relevant' to a claimant's claim if such document, record or other information" either was "relied upon" or was "submitted, considered, or generated in the course of making the benefit determination . . . ." *Id.* at § 2560.503-1(m)(8). Accordingly, ERISA by regulation requires that a claimant be given all relevant documents when requested.

B. Background of Civil Penalties under ERISA

Pursuant to ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), the administrator of a plan must provide a plan participant certain documents when the participant requests the documents in writing:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, [sic] plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or

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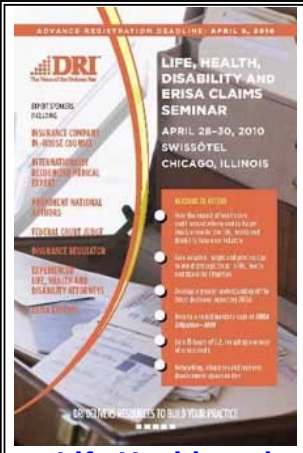

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> other instruments under which the plan is established or operated.

See 29 C.F.R. § 2520.101-1; 29 C.F.R. § 2520.104b-1; 29 C.F.R. § 2520.104b-30 (regulations as to how administrators are to comply with § 104(b)).

Congress gave teeth to this disclosure requirement by providing a plaintiff with a statutory claim for civil penalties. Under ERISA § 502 (c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), a plan participant can sue an administrator who, within 30 days of the request, fails to provide requested plan documents:

> Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B) (the phrase "this subchapter" refers to "Subchapter I – Protection of Employee Benefit Rights," which is 29 U.S.C. §§ 1001-1191c). By regulation, the Department of Labor increased the maximum penalty under section 1132(c)(1) to $110 per day. 29 C.F.R. § 2575.502c-3.

An issue is whether plaintiffs can assert statutory penalty claims based on the argument that "relevant" documents required to be provided under the claim regulation are also documents for which a plaintiff can claim statutory penalties under § 502(c)(1). Statutory penalties are available for documents required to be furnished by "this subchapter," 29 U.S.C. §§ 1001-1191c, which includes § 503, 29 U.S.C. § 1133, and the claim regulation was adopted under the Secretary's express authority under § 503. Arguably, by authorizing the imposition of penalties for not furnishing documents required to be furnished by "this subchapter," the documents for which penalties might be available under § 502(c) could include both the documents that the statute itself requires to be furnished and the documents that the regulation promulgated pursuant to the same statute require to be furnished.

C. Are Claim Regulation Documents Also Statutory Penalty Documents?

1. One District Court Holds Yes

One reported decision was found that imposed statutory penalties for failing to provide documents required to be provided by the claim regulation. In *Hamall-Desai v. Fortis Benefits Ins. Co.*, 370 F.Supp.2d 1283, 1313-14 (N.D. Ga. 2004), *aff'd without opinion*, 164 F.Appx. 963 (11th Cir. 2006), the district court awarded $6,100 in statutory penalties under § 502(c), holding that a defendant was liable for not furnishing documents required to be provided by the claim regulation. The district court found that the plaintiff requested physician reports obtained by the insurer during the administrative

appeal, that the physician reports (and arguably other documents) were "pertinent" documents under the claim regulation, and that the insurer was thus liable for statutory penalties for not furnishing the documents. *Id.*; see *id*. at 1292 n. 19 (applying the 1977 version of the claim regulation, before amendments in 2000, which used the word "pertinent" rather than "relevant" to describe the documents required to be furnished).

The *Hamall-Desai* opinion included extended discussion of the claim regulation and the penalty statute (§ 502(c)), but cited only one unreported district court case in its analysis of the statutory penalty issues. *Id.* (citing *Russo v. Hartford Life and Accident Ins. Co.,* No. 00-938, 2002 WL 32138296, at *4 (S.D. Cal., Feb. 5, 2002)). From the *Hamall-Desai* opinion, it appears that the parties in *Hamall-Desai* did not raise the available arguments and reported decisions. See *Brucks v. Coca-Cola Co.*, 391 F.Supp.2d 1193, 1211-12 & n.16 (N.D. Ga. 2005) ("The court in *Hamall-Desai* did not expressly address whether a failure to provide 'pertinent' documents under ERISA's implementing regulations constituted a failure to provide information 'required by this subchapter' authorizing an award under [§ 502(c)]."") (expressly rejecting *Hamall-Desai* on this statutory penalty issue); see also *Montgomery v. Metropolitan Life Ins. Co.*, 403 F.Supp.2d 1261, 1265-66 (N.D. Ga. 2005) (following *Brucks* and rejecting *Hamall-Desai*). In a more recent case, the Eleventh Circuit stated as follows: "the regulations that [the plaintiff] relied on as authority for her request do not apply to [§ 502(c)(1)], but rather apply to § 1133, which establishes the types of claims procedures that administrators are required to maintain." *Byars v. Coca-Cola Co.*, 517 F.3d 1256, 1270 (11th Cir. 2008). Therefore, *Hamall-Desai* would not seem to be good law even in the Northern District of Georgia (which is in the Eleventh Circuit).

2. Circuit Courts of Appeals Hold No

Every federal Circuit Court of Appeals that has considered the issue has held that a § 502(c) claim for statutory penalties cannot be based on a failure to comply with the claim regulation. *E.g.*, *Brown v. J.B. Hunt Transport Services, Inc.*, 586 F.3d 1079, 1089 (8th Cir. Nov. 17, 2009); *Wilczynski v. Lumbermens Mut. Cas. Co.*, 93 F.3d 397, 401 (7th Cir. 1996); *Stuhreyer v. Armco, Inc.*, 12 F.3d 75, 79 (6th Cir. 1993); *Walter v. International Ass'n of Machinists Pension Fund*, 949 F.2d 310 (10th Cir. 1991); *Groves v. Modified Ret. Plan for Hourly Paid Employees of Johns Mansville Corp. & Subsidiaries*, 803 F.2d 109, 117 (3d Cir. 1986); see also *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 60 (1st Cir. 1999) (expressing doubt that § 502(c) penalties could be assessed for violating the claim regulation requirement, but reversing the statutory penalty award on other grounds).

3. Strict Construction of Penalties Supports No Penalty Claim

Statutory penalty provisions are to be strictly construed. *Ivan v. United States*, 422 U.S. 617, 626 (1975); *Commissioner v. Acker*, 361 U.S. 87, 91 (1959); see *Groves v. Modified Ret. Plan for Hourly Paid Employees of Johns Mansville Corp. & Subsidiaries*, 803 F.2d 109, 117-18 (3d Cir. 1986) (applying this strict construction rule to penalties under § 502(c)); cf. *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1231-32 (11th Cir. 2002) ("The penalty under [§ 502] is meant to be in the nature of punitive damages, designed more for the purpose of punishing the violator than compensating the

participant or beneficiary.").

One reasonable interpretation, and perhaps the most reasonable interpretation, of ERISA's statutory penalty provision is that an administrator cannot be liable for penalties under § 502(c) for failure to comply with a claim regulation. On its face, the penalty statute applies only when the "administrator is required by [29 U.S.C. §§ 1001-1191c] to furnish to a participant" certain plan documents. 29 U.S.C. § 1132(c). The current claim regulation is not (and the prior 1977 version was not) part of the United States Code. Therefore, based on the plain language of the statute and the rule that penalty provisions are to be strictly construed, an administrator should not be liable for penalties under § 502(c) for failure to comply with the claim regulation.

4. The Secretary's Regulations Support No Penalty Claim

The Secretary's regulations under § 104(b)(4) are inconsistent with having "relevant" documents required to be furnished under the claim regulation also being documents subject to a § 502(c) penalty claim. A court should defer to the Secretary's interpretation. See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (holding that court's must defer to an agency's reasonable interpretation of ambiguous statute); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (requiring deference to administrative interpretations of an agency's own regulations); cf. *United States v. Mead Corp.*, 533 US 218, 226-227 (2001) (holding that rules made under delegated authority qualify for full *Chevron* deference).

ERISA § 104(b)(4) provides that a plan "administrator may make a reasonable charge to cover the cost of furnishing such complete copies." 29 U.S.C. § 1024(b)(4). The Secretary has set the maximum charge for copies at "25 cents per page." 29 C.F.R. § 2520.104b-30. In contrast, the claim regulation requires documents to be provided "free of charge." 29 C.F.R. § 2560.503-1(h)(2)(iii). Therefore, the Secretary has promulgated regulations indicating that the documents required to be provided by the claim regulation (for free) are not documents required to be furnished under § 104(b)(4) (for "25 cents per page").

In addition, neither the claim regulation itself nor the commentary that accompanied the amendments to the claim regulation suggests that it may be enforced with the statutory penalties. 29 C.F.R. § 2560.503-1; 65 Fed. Reg. 70265 (Nov. 21, 2000), as amended, 66 Fed, Reg. 35887 (July 9, 2001). Instead, under the claim regulation, the remedy for non-compliance is to deem a plan's administrative remedies exhausted. 29 C.F.R. § 2560.503-1(l).

Therefore, the Secretary's interpretation of her own claim regulation is inconsistent with assessing § 502(c) penalties for any and all documents that the claim regulation requires to be furnished. For this reason, a plaintiff should not be able to claim statutory penalties under § 502(c) based on documents required to be furnished under the claim regulation, but not also required to be furnished by § 104(b)(4).

D. What Documents are Statutory Penalty Documents

Accepting *arguendo* that a plaintiff cannot claim § 502(c) penalties for

all documents that ERISA requires by regulation to be furnished when requested, what documents might be the basis for a claim for statutory penalties? The claim regulation documents and the statutory penalty documents obviously overlap considerably and ERISA requires both types of documents to be furnished upon request. An additional issue thus is what might distinguish documents for which penalties may be awarded for not being furnished from those documents for which penalties may not be awarded even though ERISA by regulation requires them to be furnished.

What documents might be the basis for a § 502(c) claim for statutory penalties depends on a court's interpretation of § 104(b)(4), which unavoidably leaves some uncertainty for some documents. The different results courts have reached when considering specific documents in § 502(c) penalty cases are too numerous and mixed to catalogue here. See generally ABA Section of Labor and Employment Law, Employee Benefits Law (Steven J. Sacher, et al., eds., 2d ed. 2000) at 67-74 (2009 Cumm. Supp.) (discussing many cases and related issues).

As discussed above, § 104(b)(4) requires an administrator to "furnish a copy of the latest updated summary, [sic] plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." The ambiguity primarily rests with what is meant by "*other instruments*," with a second ambiguity resting with what is meant by "under which the plan is established or operated."

While "other instrument" is not defined by statute, courts considering the definition have unanimously held that not every plan-related document is an "instrument," with possibly different shades of meaning among the courts. See, e.g., *Brown v. J.B. Hunt Transport Services, Inc*., 586 F.3d at 1089 (8th Cir. 2009) (citing and quoting *Brown v. Am. Life Holdings, Inc*., 190 F.3d 856, 861-62(8th Cir. 1999) as "construing 'other instruments' in [§ 104(b)(4)] to include 'only formal documents that establish or govern the plan'"); *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1202 (9th Cir. 2003) ("other instruments" are documents that are "similar in nature to the class of objects that specifically precedes it" and are "only legal documents that describe the terms of the plan, its financial status, and other documents that restrict or govern a plan's operation," but not documents that "relate only to the manner in which the plan is operated"); *Allinder v. Intercity Products Corp.*, 152 F.3d 544, 549 (6th Cir. 1998) ("instrument" is "properly limited to those class of documents which provide a plan participant with information concerning how the plan is operated"); *CWA/ITU Negotiated Pension Plan Board of Trustees v. Weinstein*, 107 F.3d 139, 142 (2d Cir. 1997) (an "instrument" is "a document that sets out rights, duties, or obligations, or has some other legal effect"); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir. 1996) ("instrument" is limited to the "formal or legal documents under which the plan is managed"); cf. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995) (paraphrasing § 104(b)(4) as requiring administrators to "furnish beneficiaries with copies of *governing plan documents* for a reasonable copying charge") (emphasis added).

Accordingly, one can say that what documents are statutory penalty documents are not the same as "relevant" documents under the claim regulation. Whether such relevant documents are also § 502(c) penalty documents depends on whether the documents are among those listed in § 104(b)(4), including whether the documents are "*other instruments* under which the plan is established or operated," as that phrase might be interpreted by a court.

E. Internal Guidelines as "Other Instruments" under § 104(b)(4)

Discussing internal guidelines can illustrate some of the practical issues that arise when litigating a § 502(c) penalty claim. When applying § 104(b)(4), courts have reached differing conclusions on whether rules, guidelines, or similar documents that were considered as part of a benefits decision may be the basis for a claim under § 502(c) for statutory penalties. Compare *Mondry v. American Family Mut. Ins. Co.*, 557 F.3d 781, 795-803 (7th Cir. 2009) (holding that a plaintiff could claim § 502(c) penalties based on guidelines that an insurer used to determine medical necessity), with *Doe v. Travelers Ins. Co.*, 167 F.3d 53, 60 (1st Cir. 1999) (holding that a plaintiff could not claim § 502(c) penalties based on guidelines that an insurer used to determine medical necessity).

The Department of Labor's position is that such documents are required to be disclosed under § 104(b)(4), if the documents are "applied" or used when deciding to deny a claim. Preamble to 29 C.F.R. § 2560.503-1, 65 Fed. Reg. 70250-51 & n. 24 (Nov. 21, 2000) (asserting that internal rules, guidelines, and protocols "that serve as a basis for an adverse benefit determination" are instruments under which the plan is established or operated and must be disclosed under § 104(b)(4)); U.S. Dep't of Labor Adv. Op. 96-14A (July 31, 1996) ("any document or instrument that specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement under an employee benefit plan would constitute an instrument under which the plan is established or operated"); U.S. Dep't of Labor, "FAQs about the Benefit Claims Procedure Regulation," (http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html, visited on Dec. 3, 2009), C-17 ("The department also has taken the position that internal rules, guidelines, protocols, or similar criteria would constitute instruments under which a plan is established or operated within the meaning of section 104(b)(4) of ERISA") (citing Adv. Op. 96-14A).

F. *Mondry* Illustrates Issues for Requested Documents

The Seventh Circuit's recent *Mondry* opinion illustrates some of the § 502(c) penalty issues that arise when documents that the regulation requires to be furnished are not provided upon request. In *Mondry*, 557 F.3d at 783, the insurer, which also was the claim administrator, expressly relied on internal guidelines to deny the plaintiff's claim for plan benefits. For sixteen months, the plaintiff asked the employer, which was the administrator, and asked the insurer for those guidelines. *Id*. at 784. When the relevant documents were finally produced, it was "patently clear that the provisions of these documents were inconsistent with" the governing plan language and the insurer as claim administrator had inappropriately denied the claim. *Id.* The plaintiff then filed suit for § 502(c) penalties against the employer and the insurer. *Id.*

First, the Seventh Circuit held that only the employer as the administrator, not the insurer who was the claim administrator, could be liable under § 502(c) for statutory penalties. *Id.* at 792-96. Next, it held that the claim administration agreement was a contract "under which the plan is operated or established" such that it "falls within the scope of [§ 104(b)(4)]." *Id*. at 796. It recognized that not all claim administration agreements were such documents. *Id*. (citing

cases). The Seventh Circuit said that this claim administration agreement "nonetheless governs the operation of the Plan in the sense that it defines the respective roles of [the employer] and [the insurer] as the plan and claim administrators, respectively." *Id*. "In that respect," the Seventh Circuit held that the claim administration agreement "qualifies as a contract under which the plan was operated, and [the plaintiff] was entitled to its production under [§ 104 (b)(4)]." *Id.*

As to the internal guidelines, the Seventh Circuit held that the employer as the administrator could be liable under § 502(c) for not furnishing the guidelines. *Id.* at 797-803. It quoted the Department of Labor's position from Dep't of Labor Adv. Op. 96-14a and cited numerous examples of courts that had reached different holdings on whether guidelines could be the basis for a § 502(c) penalty claim. *Id.* at 797-98. It described the holdings of courts that have not held guidelines to be within the scope of § 104(b)(4) as having "reasoned that however relevant such guidelines" might be, they were "internal interpretive tools" that were "not binding on the claims administrator and therefore do not formally govern the operation of the plan." *Id.* at 798 (as an example, citing *Doe*, 167 F. 3d at 60). The Seventh Circuit "assume[d], without deciding, that had the [claim administrator] privately relied on the [guidelines] as reference materials to guide its interpretation and application of the plan language, these documents would not have come within the scope of § 104(b)(4)]." *Id*. at 799. The Seventh Circuit held that "when a claims administrator expressly cites an internal document and treats that document as the equivalent of plan language in ruling on a participant's entitlement to benefits, the administrator renders that document one that in effect governs the operation of the plan for purposes of [§ 104(b)(4)], and production of that document is required." *Id.* at 801.

In *Mondry*, the Seventh Circuit did not discuss or cite 29 C.F.R. § 2560.503-1(g)(1)(v). This part of the claim regulation requires a claim administrator's initial denial notice to include, "[i]f an internal . . . guideline . . . was *relied upon* in making the adverse benefits determination, either the specific . . . guideline or a statement that such a . . . guideline . . . was relied upon in making the adverse benefit determination and that a copy . . . will be provided free of charge upon request." *Id*. (emphasis added); *see id*. at § 2560.503-1 (j)(5)(i) (requiring same for appeal denial notice); *cf. id*. at § 2560.503-1(m)(8) (as related to guidelines, defining "relevant" documents as those that are "relied upon" or "considered"). Therefore, if a claim administrator relied upon an internal guideline, the claim regulation requires a claim administrator to cite the guidelines in any initial denial notice and in any appeal denial notice. For a denied claim, the question, under *Mondry*, thus should be whether a claim administrator treated an internal guideline "as the equivalent of plan language in ruling on a participant's entitlement to benefits."

The *Mondry* court recognized that a "final wrinkle here is that [the claim administrator] rather than [employer as the administrator] had possession of the [guidelines], and yet the [claim administrator] was not the plan administrator with the statutory obligation to produce plan documents." *Id.* Moreover, the employer attempted to obtain a copy of the guidelines from the claim administrator, but was told that the guidelines were a "proprietary document" that the claim administrator was unwilling to produce. *Id*. The Seventh Circuit held that "[a]ny dilemma this may have posed for the [employer] did not excuse its statutory obligation to" the plaintiff. *Id.* at 802. Accordingly, the Seventh Circuit remanded the case to the district court "with directions to enter summary judgment in favor of [the plaintiff and for] determination of the appropriate amount of the penalty." *Id.* at 803.

G. Conclusion

A plaintiff should not be able to claim statutory penalties under ERISA § 502(c) for all documents that ERISA requires a plan by regulation to provide to a claimant when requested. Nonetheless, a large overlap exists for the "relevant" documents the ERISA claim regulation requires plans to provide to claimants when requested and the listed documents for which ERISA imposes statutory penalties on administrators for not furnishing to claimants when requested. Whether a plaintiff can recover penalties for particular documents will likely depend on specific facts related to each document and to the interpretation of the relevant ERISA statutes by the particular court deciding the issue.

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