Applying Heimeshoff to Plans' Contractual Limitations

By J.S. "Chris" Christie, Jr.

In *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604 (2013), the Supreme Court held that an ERISA plan's contractual limitations period can be enforced, so long as the claimant has a reasonable time after exhausting his or her administrative remedies to file suit. Under *Heimeshoff*, a plan's language can shorten the limitations period and can make the shorter limitations period start to run before the claim's administrative denial is final, if the participant still has a reasonable period to file suit after the claim is denied. Applying *Heimeshoff*'s holding often may depend on what court finds is a "reasonable" period to file suit.

To apply the *Heimeshoff* holding, the reasonableness analysis includes four possible questions: (1) Is the total time for a participant to file suit reasonable? (2) Is the time after the final claim denial reasonable for a typical participant to file suit? (3) Is the information about the limitations provision given to the participant enough to make enforcing it against him or her reasonable? And (4) is the time otherwise reasonable, under the circumstances, for the particular participant to file suit? Answering the first and second questions should be simple; one only needs a rule for how many days are sufficient for a typical plaintiff to file suit. The third question should be simple, yet is the subject of a circuit split. The fourth question cannot be answered with a simple rule, because what might be equitable would depend on the particular participant and his or her circumstances, and thus could vary case by case.

Heimeshoff: The Facts and Holding

In *Heimeshoff*, the ERISA plan's limitation provision required Heimeshoff to file any suit seeking disability benefits within three years after proof of loss was due. "Proof of loss was due" in this context meant telling the insurer within 90 days that plaintiff considered herself to be disabled and

thus to be entitled to disability benefits. Heimeshoff filed suit less than three years after the final denial of her claim but more than three years after proof of loss was due.

The contractual limitation issues in *Heimeshoff* arise frequently in ERISA cases, because many insured welfare plans are funded by insurance policies. As the Supreme Court recognized in *Heimeshoff*, the type of "limitations provision at issue is quite common; the vast majority of States require certain insurance policies to include 3-year limitations periods that run from the date proof of loss is due." *Id*. at 614; *see id.* at n. 5 (citing state statutes for 40 states).

Before the Supreme Court, Heimeshoff argued that the plan's limitations period should be tolled until the date of her final claim denial, giving her three years from the date of the final denial to file suit. Until that date, her administrative remedies had not been exhausted, her claim for ERISA plan benefits had not accrued, and she thus could not file a lawsuit. Heimeshoff further argued that the limitations period was unreasonable because it began to run during the administrative review process, in effect reducing the three-year limitations period, and could even run before the final denial of her claim.

The Supreme Court first held that her employer had the right to include a shorter contractual limitations provision in its plan: "Absent a controlling statute to the contrary, a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable." 134 S. Ct. at 610. The Supreme Court emphasized the importance of the plan documents, stating that the plan "in short, is at the center of ERISA" and "[t]his focus on the written terms of the plan is the linchpin of 'a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" *Id*. at 612.

The Supreme Court said, "[e]ven in this case, where the administrative review process required more time than usual, Heimeshoff was left with approximately one year in which to file suit." 134 S. Ct. at 612. Actually, using the dates in the Supreme Court's opinion, Heimeshoff's time left to file suit after the final denial appears to have been almost three months less than one year. Heimeshoff stopped working June 8, 2005, 90 days after June 8, 2005 would be September 7, 2005, three years after that date is September 7, 2008, and the final denial was November 26, 2007. *Id.* at 608-09. In other words, Heimeshoff apparently had nine months and ten days after the end of her administrative remedies to file suit.

Proceeding with its analysis, the Supreme Court concluded that the plan's three-year limitations period in *Heimeshoff* was reasonable. The Supreme Court declined to import into ERISA state law tolling rules when the parties adopted a contractual limitations period in the plan. Because Heimeshoff had no obstacles to bringing a timely claim within one year, the plan's limitation period was upheld as reasonable.

The Supreme Court in *dicta* noted that in "rare cases" equitable doctrines can apply to toll a plan's limitations period. *Id*. at 615. For example, the Supreme Court hypothesized that "[i]f an ERISA plan administrator's conduct causes a plan participant to miss the deadline for judicial review of an internal denial of benefits, waiver or estoppel may prevent the administrator from invoking a contractual limitations provision as a defense." *Id*. Additionally, "[t]o the extent the participant

has diligently pursued both internal review and judicial review but was prevented from filing suit by extraordinary circumstances, equitable tolling may apply." *Id*. (internal citations omitted).

Is the Total Time to File Suit Reasonable?

One question is how much total time to file suit is required for a plan's limitations provision to be reasonable? The provision held to be reasonable in *Heimeshoff* ran three years after proof of loss was due and proof of loss was due within 90 days after the start of the first disability benefit period. *Id*. at 608 n. 1. Accordingly, the total time in *Heimeshoff* for the plaintiff to file suit was 39 months (90 days plus three years) total time after her alleged disability.

Based on the Supreme Court's reasoning in *Heimeshoff*, limitations periods shorter than three years should be reasonable. As to whether the total time for a plaintiff to file suit is reasonable, one court has already applied *Heimeshoff* to hold "[a]ny civil action under Section 502(a) of the Employee Retirement Income Security Act must be filed within two years of the date of the Trustees' decision" was reasonable. *Kienstra v. Carpenter's Health and Welfare Trust*, No. 4:12-CV-53HEA, 2014 WL 562557 *1 (E.D. Mo. Feb. 13, 2014).

Pre-*Heimeshoff* cases hold that a much shorter total limitations period than the 39 months in *Heimeshoff* can be reasonable. In *Northlake Regional Medical Center v. Waffle House System Employee Benefit Plan*, 160 F.3d 1301, 1304 (11th Cir. 1998), the plaintiff argued on appeal that the limitations period was too short; the Eleventh Circuit disagreed. The plan had a 90 day limitations period that did not begin to run until after the last stage of the administrative process. The court held that "the time required by the Plan's internal appeals process (ten months here) plus the additional ninety days of the limitations period provided an adequate opportunity for Northlake to investigate the claim and file suit." *Id*. Under *Northlake*, a plan's limitation provision that results in a total time of thirteen months is reasonable. *Accord Scharff v. Raytheon Co. Short term Disability Plan*, 581 F.3d 899, 901 (9th Cir. 2009) (holding that disclosure of one year limitations period met reasonable expectations requirement); *Fetterhoff v. Liberty Life Assurance Co.*, 282 Fed. App'x 740, 743-44 (5th Cir. 2007) (holding plan's limitations period of one year deadline from proof of claim to be reasonable).

Is the Time to File Suit after the Final Denial Reasonable?

A second question is how much time after the final denial, which ends the administrative process, is required for a plan's limitations provision to be reasonable? Theoretically, for possible equitable tolling, the issue should be whether the plan's limitations period gives the plaintiff a reasonable opportunity to file suit if and after the claim is denied. As discussed above, the Supreme Court said "Heimeshoff was left with approximately one year in which to file suit," but she actually had only nine months and ten days.

The Eleventh Circuit's *Northlake* holding discussed above also ruled that the 90 days after the plaintiff exhausted administrative remedies was enough time to be reasonable. *Northlake*, 160 F.3d at 1304. Based on *Northlake* and *Heimeshoff*, if the plan participant has notice of any contractual limitations period that results in at least 90 days for a plaintiff to file suit after exhausting administrative remedies, that plan's limitations provision should be reasonable and not

subject to equitable tolling. *But see Nelson v. Standard Ins. Co.*, No. 13cv188-WQH-MDD, 2014 WL 4244048, *5-6 (S.D. Cal. Aug. 26, 2014) (*dicta* questioning whether 100 days "constitutes a reasonable period in which to file suit").

One federal Circuit Court has already applied *Heimshoff* to the question of whether the time after the final claim denial is reasonable for a typical plaintiff to file suit. In *Russell v. Catholic Healthcare Partners Employee Long Term Disability Plan*, 577 F. App'x 390, 393 (6th Cir. 2014), the Sixth Circuit affirmed a summary judgment for the employer and insurer, where the plan's limitations provision left "Plaintiff over six months to file a legal action before . . . the contractual limitations deadline." *Cf. Abena v. Metropolitan Life Ins. Co.*, 544 F.3d 880, 884 (7th Cir. 2008) (enforcing plan's limitations period when the plaintiff had only seven months to file his lawsuit after he had exhausted his administrative remedies); *Dye v. Associates First Capital Corp. Long-Term Disability Plan*, 243 Fed. App'x 808 (5th Cir. 2007) (enforcing plan requirement that suit be filed within 120 days from final denial); *Lundsten v. Creative Community Living Services, Inc. Long Term Disability Plan*, No. 13-C-108, 2015 WL 1143114, *2 (E.D. Wis. Mar. 13, 2015) (holding that "six months to file suit" was reasonable, relying on *Abena*'s holding that seven months was reasonable) (awarding defendants reasonable fees and costs); *Tuminello v. Aetna Life Ins. Co.*, No. 13-CV-938, 2014 WL 572367 (S.D.N.Y. Feb. 14, 2014) (holding that nine months to file suit after the plaintiff exhausted her administrative remedies was reasonable); *White v. Worthington Industries, Inc. Long Term Disability Income Plan*, 266 F.R.D. 178, 185 (S.D. Ohio 2010) (holding 71 days left to file suit to be reasonable); *Sheckly v. Lincoln Nat'l Corp. Employees Ret. Plan*, 366 F. Supp. 2d 140, 145-148 (D. Me. 2005) (enforcing plan requirement that suit be filed within six months from final denial).

In a pre-*Heimeshoff* case, *dicta* indicate that a plan with a limitations period of only 30 days after a final denial would be reasonable. In *Doe v. Blue Cross & Blue Shield of Wisconsin*, 112 F.3d 869, 875 (7th Cir. 1997), the plaintiff had 17 months to file suit, but Judge Posner wrote that a "suit under ERISA, following as it does upon the completion of an ERISA-required internal appeals process, is the equivalent of a suit to set aside an administrative decision, and ordinarily no more than 30 to 60 days is allowed within which to file such a suit." *Id.*; *Davidson v. Wal-Mart Associates Health and Welfare Plan*, 305 F. Supp. 2d 1059, 1069-075 (S.D. Ia. 2004) (holding that plan's limitation requiring plaintiff to file suit 45 days after denial of final appeal was reasonable) (citing *Doe*); *see also Delosky v. Penn State Geisinger Health Plan*, 4:cv-00-1066, 2002 U.S. Dist. Lexis 17188 (M.D. Pa. Apr. 23, 2002) (enforcing plan requirement that suit be filed within 60 days from final decision by state department of insurance).

What Information about the Limitations Provision Must the Participant Receive?

A third question is what information must a participant receive about a plan's contractual limitations provision for it to be enforceable? Unfortunately, the federal courts after *Heimeshoff* do not seem to be aware that two opposing lines of authority have developed as to this question.

As the following discussion of cases reflects, one line of authority is that, if a summary plan description ("SPD") distributed to the participant discloses the contractual limitations period, denials letters do not have to inform the participant of the contractual limitations period. In addition, several cases hold that the ERISA Claim Regulation does not require a contractual

limitations period to be disclosed in denial letters. A few cases hold that a motion to dismiss should be denied if the plaintiff has alleged that the contractual limitations period was not disclosed to the plaintiff in the SPD, the denial letters, or otherwise.

In *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 908 (9th Cir. 2009), the Ninth Circuit held that, under ERISA, insurers are not required to inform participants in denial letters of contractual limitations provisions disclosed in SPDs. *Id*. As the Ninth Circuit explained, "[a]t least four circuits have held that plan participants who have been provided with an SPD are charged with constructive knowledge of the contents of the document." *Id*. (citing cases from the Fifth, Sixth, Eighth and Eleventh Circuits). Based on the law of these four circuits, the Ninth Circuit reasoned that requiring denial letters to have the time limits already in the SPD "would place the Ninth Circuit out of line with current federal common law and would inject a lack of uniformity into ERISA law." *Id*.

In *Freeman v. American Airlines, Inc. Long Term Disability Plan*, No. CV-13-05161, 2014 WL 690207 (C.D. Cal. Feb. 20, 2014), after *Heimeshoff,* the plaintiff argued for tolling based on the denial letter not disclosing the plan's limitations period. The court held that "a plan administrator was not required to separately inform participants in final denial letters of time limits already contained in the SPD . . . ." *Id.* at *4 (relying on *Scharff*). *Accord Fonetot v. Intel Corp. Long Term Disability Plan*, No. 3:14-cv-00153-AA, 2014 WL 2871371 *6-8 (D. Or. June 24, 2014) (relying on *Scharff* and *Freeman*).

In *Fonetot*, the District Court explains in detail why the ERISA Claim Regulation does not require a contractual limitations period to be disclosed in denial letters. *Id*. at *7. The opinion works through the subsections of the regulation and cites other cases. It concludes that "the governing regulation, 29 C.F.R. § 2560.503-1(j), "plainly does not require plan administrators to state the contractual limitations period in final denial letters." *Id*.

In *Wilson v. Standard Ins. Co.*, No. 4:11-cv-02703, 2014 WL 358722 (N.D. Ala. Jan. 31, 2014), the plaintiff urged the court to toll the time limit to filing suit, arguing that the insurer did not provide a copy of the insurance policy to her and she was not provided an SPD or anything else advising her of the three year limitations period. The court held that the plaintiff did not demonstrate that the insurer's conduct caused her to miss the three year deadline. The denial letter informed her that the insurer would "provide you with copies of all requested documents, records or other information relevant to your LTD claim," and plaintiff did not request any documents until after the three year deadline. *Id.* at *7. The court also held that the ERISA Claim Regulation, 29 C.F.R. § 2560.503-1, "does not require a claims administrator to include in its [denial letter] to a plan participant the deadline for filing a cause of action." *Id*. at *9. *Accord McArthur v. UNUM Life Ins. Co. of Am*., 45 F. Supp. 3d 1303 (N.D. Ala. 2014) (discussing approvingly *Wilson* on these issues).

In *Walden v. Metropolitan Life Ins. Co of Am., Inc*., ___ F. Supp. 3d ___, 2014 WL 7178127 *5 (D. Col. 2014), the district court denied MetLife's motion to dismiss because the plaintiff alleged "that he has no information regarding the three-year time period imposed" in the plan documents. The court did not accept MetLife's argument that MetLife could not have waived the limitations provision because the employer as plan administrator, not MetLife as claim administrator, was

responsible for providing plan documents to plan participants. *Id*. The court held that this reason did not answer the issue of "whether equitable tolling applies." *Id*. *Accord Jacobs v. Prudential Ins. Co. of Am*., No. 13-0146, 2014 WL 2807537, *5-6 (E.D. La. June 19, 2014) (denying defendants' motions to dismiss due to plaintiff's alleging "that he relied on misrepresentations regarding his coverage" and "that he was not provided information he requested about that coverage and those rights").

In *Kienestra v. Carpenters' Health and Welfare Trust Fund of St. Louis*, No. 4:12CV53, 2014 WL 562557 (E.D. Mo. Feb. 13, 2014), the plaintiff argued that the plan's limitation period should be tolled because the plan administrator did not provide her with a copy of the policy with the denial letter. Rejecting Plaintiffs' argument and citing the ERISA Claim Regulation, 29 C.F.R. § 2560.503-1, the court said the denial letter met the regulation's requirements because "it specifically contained the applicable limitation time period within which to commence her suit for judicial review." *Id.* at *5.

The Sixth Circuit adopted a rule inconsistent with the above authority without discussing the inconsistent cases. In *Moyer v. Metropolitan Life Ins. Co.*, 762 F.3d 503, 505-06 (6th Cir. 2014), the court held that the plan's contractual limitations provision was not enforceable because it was not disclosed in the final claim denial letter. The district court had concluded that the plaintiff had constructive notice of the contractual limitations period through the plan documents. *Id*. at 504. Below and on appeal, the plaintiff argued that the SPD was inadequate to provide constructive notice. *Id*. at 507; *see id*. at 509 (dissent's explaining that the SPD issue was the only issue that the parties had briefed). The majority did not reach the SPD issue. *Id*. at 507. Instead, the majority quoted part of the ERISA Claim Regulation, 29 C.F.R. § 2560.503-1, and then said it "expressly" required applicable time limits to file suit to be stated in claim denial letters. *Id*. at 505. *Accord Spence v. Union Security Ins. Co.*, No. 6:14-cv-01612-MC, 2015 WL 1275308 *2-3 (D. Or. Mar. 15, 2015) (following *Moyer*); *Bell v. Xerox Corp*., ___ F. Supp. 3d ___, 2014 WL 4955372 *7-8 (W.D.N.Y. 2014) (citing *Moyer* as support).

In *Solien v. Raytheon Long Term Disability Plan # 590*, No. CV 07-456 TUC DCB, 2008 WL 2323915 *7 (D. Ariz. June 2, 2008), the district court said that "[j]udicial review is an appeal procedure for an adverse benefit determination, and is therefore a part of the claim procedures covered by these regulations, especially when the time limit for filing a judicial action is established contractually by the Plan." Analyzing the ERISA Claim Regulation, 29 C.F.R. § 2560.503-1, the court denied defendants' motion to dismiss and held that defendants breached their fiduciary duties by failing to give written notice in the final denial letter of the Plan's one year limitation period and that the contractual limitations provision thus could not be enforced. *Id.* at *4-7. The court also reviewed the SPD and found that, as to the one year time limit, "the required notice to the claimant . . . was not set forth in a manner calculated to be understood by her when it failed to provide notice of the time limitation." *Id*. at *8.

In *Novick v. Metropolitan Life Ins. Co*., 764 F. Supp. 2d 653, 660 (S.D.N.Y. 2011), the district court found "that MetLife's initial benefits determination letter violated the ERISA regulations by failing to include the applicable time limit for bringing a civil action pursuant to Section 1132(a) after an adverse benefits decision on appeal." In *Novick*, the plaintiff "argue[d] (1) that MetLife violated ERISA's requirements by not expressly stating the civil action requirements in its letter

upholding its termination decision and denying her appeal, . . . ; and (2) that the [Plan's] SPD's time limitation language does not disclose the requirement with reasonable clarity." *Id*. (omitting record citations). The court did not address whether the SPD was sufficiently clear. In a footnote, the court recognized MetLife's argument that the *Solien* opinion discussed above "misreads the law" by applying ERISA Claim Regulation language applicable to the initial denial letter to the final post-appeal denial letter. *Id.* at n. 9. The court said it "need not reach the issue in this opinion because the Court finds that the MetLife defendants' initial adverse benefits determination letter violated the ERISA regulations . . . by not including the civil action limitations period." *Id*.

In *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, No. 3:10cv1813, 2013 WL 171325 *5 (D. Conn. 2012), *aff'd*, 496 F. App'x 129 (2d Cir. 2012), *aff'd*, 134 S. Ct. 604 (2013), the plaintiff in the district court "relie[d] entirely on the" *Novwick* decision. In *Heimeshoff*, the district court "decline[d] to follow *Novick*," because the ERISA Claim Regulation "says nothing about time limits with respect to civil actions" and thus addresses a plan's administrative procedures and not the judicial review process. *Id*. at *6-7.

In *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 496 F. App'x 129 (2d Cir. 2012), *aff'd*, 134 S. Ct. 604 (2013), the Second Circuit recognized that the plaintiff relied upon *Novick* but said "we need not address the issue." In *Novick*, in the district court and at oral argument, the plaintiff's "counsel conceded that he had received a copy of the plan containing the unambiguous limitations provision long before the three-year period for [the plaintiff] to bring the claim had expired." *Id*. For this reason, the Second Circuit held the plaintiff "was not entitled to equitable tolling." *Id*.

In summary, the cases discussed above provide three possible different lines of authority as to whether ERISA claim denial letters must state a plan's contractual limitation provision or it will be equitably tolled. One, the contractual limitations will be equitably tolled if it is not in the final denial letter (*Moyer*, *Spence*, and *Bell*) or in the initial denial letter (*Novick*), regardless of whether the participant otherwise has notice of the limitations period. Two, the contractual limitations period will not be tolled if the participant had notice of it, whether from the SPD, a denial letter, or otherwise (*Scharff*, *Freeman*, *Fonetot*, *Walden*, *Jacobs*, *Kienestra*, *Solien*, and *Heimeshoff* in the Second Circuit). Three, the contractual limitations period will not be tolled based on its not being in the denial letters (*Wilson*, *McArthur* and *Heimeshoff* in the district court). A caveat: Perhaps the third line of authority might be essentially the same as the second, just the facts and arguments in the particular cases in the third line did not develop fully whether the participant had notice of the contractual limitations period from the SPD.

Is the Time to File Suit for the Particular Participant Reasonable?

A fourth question is when should a court equitably toll a plan's limitations provision and allow a plan participant to file suit after the limitations period has already run? As to the time reasonable for a particular plaintiff, under doctrines such as waiver and estoppel, numerous issues may change the time a court might allowed him or her to file suit. Analyzing possible issues under the traditional equitable doctrines results in a case-by-case approach.

In *Heimeshoff*, the Supreme Court emphasized the plan participant's personal responsibility to submit timely proof of loss, evidence and medical documentation, and to pursue claims diligently.

The Supreme Court drew a distinction between actions of the employer that result in delay of the claims process, which might equitably toll a plan's limitation provision, as opposed to the inaction or delay of a participant, which would not.

In *Viti v. Guardian Life Ins. Co. of Am.*, No. 10-CIV-2908, 2013 WL 6500515 *1 (S.D.N.Y. Dec. 11, 2013), the plaintiff argued that his mental incompetence "was so severe as to warrant equitable tolling." Decided days before *Heimeshoff*, the court held that (1) extraordinary circumstances did not exist, because the plaintiff filed a Social Security disability application, with his wife's assistance, during the same time period, and (2) the plaintiff did not act with reasonable diligence, even considering his mental incompetence, because he made no attempt to bring a timely action. *Id*. at *4-5. The reasoning in *Viti* is consistent with the Supreme Court's emphasis in *Heimeshoff* on the plan participant's personal responsibility.

In *Russell v. Catholic Healthcare Partners Employee Long Term Disability Plan*, 577 F. App'x 390, 392-94 (6th Cir. 2014), the Sixth Circuit rejected the plaintiff's argument that Unum's approving payment only for two twelve month periods of regular occupation benefits, and then denying any occupation disability benefits after the twenty-four months, reset the three year contractual limitations period and rejected the plaintiffs argument that UNUM's written requests for proof of continuing disability reset the contractual limitations period. Instead, the contractual limitations period was the same as if UNUM had denied all disability benefits. *Id*.

In *Upadhyay v. Aetna Life Ins. Co*., No. C 13-01368 SI, 2014 WL 883456 *5 (N.D. Cal. Mar. 3, 2014), the district court rejected the plaintiff's argument that Aetna had waived its contractual limitations defense. As required by 29 C.F.R. sec. 2560.503-1(j)(4), the denial letter had stated that the plaintiff had the right to bring a civil action under ERISA sec. 502(a). The denial letter did not state whether Aetna would waive or would not waive affirmative defenses. *Id*. The Court did not accept the plaintiff's argument that Aetna had a duty to disclose what affirmative defenses it may assert if the plaintiff filed a suit against it. *Id.*

In *Tuminello v. Aetna Life Ins. Co.*, No. 13Civ938(KBF), 2014 WL 572367 (S.D.N.Y. Feb. 14, 2014), the court considered the participant's argument that equitable tolling should apply because the participant relied on a letter sent to him concerning STD benefits over a year before he applied for the LTD benefits at issue. The court noted that reliance on a letter sent before the plaintiff even applied for LTD benefits was "not diligent pursuit of judicial review of defendant's denial of his claims that can toll the statute of limitations." *Id.* at *3. In so holding, the court stated that equitable tolling would not apply because the circumstances were not extraordinary, the participant failed to consult the provisions of his plan, and "[e]quitable tolling requires a party to pass with reasonable diligence through the period it seeks to have tolled." *Id.* (quoting *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2006)).

What Can a Plan Drafter or Fiduciary Do?

In light of *Heimeshoff*, what might a plan drafter or fiduciary do to make it more likely that the plan's contractual limitations provision is enforced? Two suggestions are (1) to word and to place carefully the plan's limitations language in the SPDs and (2) to put the limitations period in all denial letters. To avoid a court's possibly accepting arguments like those rejected in *Wilson* and

Freemen but accepted in *Moyer* and *Novick*, all denial letters should remind the claimant of the plan's limitations provision. This step should help with any possible equitable tolling arguments.

In light of *Heimeshoff,* what might a plan drafter or fiduciary do when the final denial letter is issued after the limitations deadline has run? About the same two suggestions may help. One, language might be added to the policy, SPD or other plan document requiring, if a claim is denied after the plan's limitations period has run, a participant to file suit within a certain number of days (90 days?) after the final denial. For insured welfare plans, however, such additional language might be difficult to add, because it might require regulatory approval. Two, if a final denial letter is issued after the limitations deadline has run, a claim administrator should consider including in the final denial letter a deadline for filing suit. This final denial letter language should be the same as language, if any, in the policy, SPD or other plan document. If the plan documents do not have such language, the denial letter might state that the claim administrator will consider a civil action to be timely only if it is filed within a certain number of days (90 days?) after the final denial. In practice, traditional equitable doctrines should at least consider such notice to be a factor to consider.

In conclusion, the key to enforcing a plan's limitations provision under *Heimeshoff* often might be the amount of time after final denial of a claim that a plaintiff has to file suit. A plan fiduciary might consider taking steps to make a short time be perceived as fair, such as adding carefully drafted language to the plan document and SPD and by including the plan's suit filing deadlines in denial letters.

For more information regarding the topics covered in this white paper, contact:

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