ERIC *FocusOn* Conference Call: Recent Developments in the ERISA Claims Area

Presented by: Anthony F. Shelley

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Overview and Agenda

- Supreme Court Developments
  - *Heimeshoff* case
  - *Thurber v. Aetna*
- Trends after *CIGNA v. Amara*
  - Circuit decisions on the availability of monetary relief under ERISA § 502(a)(3)
- The developing case law on forum selection clauses in ERISA plans

Heimeshoff

- *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 496 Fed. Appx. 129 (2d Cir. Sept. 13, 2012), *cert. granted*, No. 12-729 (April 15, 2013)
  - Unpublished Circuit decision
  - Raises the question of when does a claim accrue under ERISA for judicial review of an adverse benefit determination?
  - Claim for long-term disability benefits
  - Three-year statute of limitations stated in plan, from time that proof of loss was due
  - Heimeshoff misses that date, but files within three years of final benefits determination on administrative appeal

Heimeshoff

- General rules regarding statutes of limitations:
  - ERISA itself contains no limitations period for benefits claims
  - Courts borrow from the most analogous state limitations requirement (usually applicable for contract claims)
  - Question of when a claim *accrues* is a matter of federal common law
- Supreme Court, in effect, "reached out" to take this case, with case being an unlikely certiorari grant
- Court heard oral argument on October 15, 2013

Heimeshoff

- Heimeshoff's position:
  - An ERISA benefits claim can only accrue at the time of a final administrative denial, since only at that time would a participant know if the plan's action was "wrongful"
- Hartford's position:
  - A contractual limitations regime should not be upset absent a statutory provision or regulation requiring invalidation of the contract provision
- Solicitor General's position (supporting Heimeshoff):
  - Accrual prior to completion of the administrative process would undermine that process

Heimeshoff

- Justices' questions and concerns
  - Is this only a theoretical question presented?
    - Clerks found only *five* reported cases in the history of ERISA where the statute of limitations had expired before completion of the administrative process
  - Concern that time for judicial review could expire where administrative process is unduly long
  - Must participants now file protective lawsuits during the administrative process?
- Decision no later than June 2014, but probably much sooner

The Next Supreme Court Case?

- *Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654 (2d Cir. 2013), *petition for cert. pending*, No. 13-130
- Two questions presented:
  - Whether an ERISA plan may enforce an equitable lien where it has not identified a particular fund that is in the defendant's possession and control
  - Whether a discretionary clause in a plan mandating that an abuse-of-discretion standard for judicial review be applied is enforceable when the clause was never disclosed to the participant in any plan document
- Solicitor General's views requested

Remedies: *CIGNA* Aftermath

- *CIGNA, Inc. v. Amara*, 131 S. Ct. 1866 (2011)
  - Far-reaching opinion with many "musings"
  - Clear holding: An SPD is not a plan document
  - Dicta:
    - Suggests various remedies may be available under § 502(a)(3), including estoppel, surcharge, and reformation
    - Court states that, while monetary relief might not be available against non-fiduciaries, "appropriate equitable relief" under § 502(a)(3) may include monetary relief against fiduciaries

Remedies: *CIGNA* Aftermath

- *Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162 (9th Cir. 2012)
  - Participants sought to enforce the terms of an SPD that supposedly were at odds with the terms of the plan
  - Ninth Circuit finds no basis for reforming the plan to match the language of the SPD
  - On surcharge, the Ninth Circuit accepts *Amara*'s dicta, but finds monetary relief improper here
    - "Appellants have presented no evidence that the committee gained a benefit by failing to ensure that participants received an accurate SPD"
    - No harm, because no reliance on the SPD's language

Remedies: *CIGNA* Aftermath

- *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012)
  - Involves insurance company's acceptance of premiums for life insurance for an ineligible dependent
  - Initially, relief limited to refund of mistakenly paid premiums, but re-examined post-*Amara*
  - Fourth Circuit now says the availability of the surcharge remedy "makes sense" here
  - Fourth Circuit suggests that, absent surcharge, fiduciaries would have the incentive to accept premiums wrongfully until they get caught

Remedies: *CIGNA* Aftermath

- *Gearlds v. Entergy Servs.*, 709 F.3d 448 (5th Cir. 2013)
  - Involves fiduciary breach claim by retiree after his medical benefits were discontinued due to ineligibility
  - Pre-*Amara*, district court dismisses case because monetary relief was sought
  - Fifth Circuit reverses, applying *Amara* dicta on surcharge remedy
  - Fifth Circuit states that "make whole" relief is now available under ERISA in a § 502(a)(3) case

Remedies: *CIGNA* Aftermath

- *Kenseth v. Dean Health Plan*, 722 F.3d 869 (7th Cir. 2013)
  - Involves plan exclusion for gastric bypass surgery
  - But plan customer service agent said surgery was covered, when participant had called
  - Theory of recovery is that fiduciary erred in oral statement, and participant underwent costly surgery she would have otherwise foregone
  - Seventh Circuit accepts *Amara* dicta, finds adequate evidence of reliance, and concludes that benefit payment as a surcharge remedy may here be proper

Forum Selection Clauses

- Question is whether an ERISA plan's express statement of forum for disputes is enforceable
- ERISA contains a venue provision in § 502(e)(2):
  - Under ERISA, suit "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found"
- A forum selection clause limits the venue to the place chosen in the plan, which usually is the plan's principal place of administration
- Question: Can a plan's terms take away venue options otherwise available on the face of the statute?

Forum Selection Clauses

- Most courts have upheld forum selection clauses, notwithstanding ERISA's venue provision
- A few courts – some recently – have found these clauses to violate ERISA's "public policy" favoring various venues
  - *E.g.*, *Coleman v. Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901 (N.D. Ill. 2013)
  - Nub of the issue as one court stated: "Does *may* mean *cannot*?"
- *Heimeshoff* may address whether a plan term contrary to the "spirit" but not letter of ERISA is enforceable

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