No. 17-14947

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SANDRA MALAVE,
Plaintiff-Appellant,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

KATE S. O'SCANNLAIN
Solicitor of Labor

THOMAS TSO
Counsel for Appellate and Special Litigation

G. WILLIAM SCOTT
Associate Solicitor for Plan Benefits Security

STEPHEN SILVERMAN
Senior Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
(202) 693-5623

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CERTIFICATE OF INTERESTED PERSONS
PURSUANT TO 11th Cir. R. 26.1-1

Acosta, R. Alexander, Secretary of U.S. Department of Labor

Francisco, Noel J., Solicitor General of the United States

Hinshaw & Culbertson, LLP

Kovachevich, Elizabeth A., United States District Court Judge

Lehner, Steven Douglas

Life Insurance Company of North America

Malave, Sandra

Michael Steinberg and Associates, P.A.

O'Scannlain, Kate S., Solicitor of Labor

Scott, G. William, Associate Solicitor, U.S. Department of Labor

Silverman, Stephen A., Senior Trial Attorney, U.S. Department of Labor

Steinberg, Michael A.

Tso, Thomas, Counsel for U.S. Department of Labor

No publicly traded company or corporation has an interest in the outcome of this matter

TABLE OF CONTENTS

TABLE OF CONTENTS-(continued)

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases-(continued):

Federal Cases-(continued):

Federal Cases-(continued):

Federal Statutes:

Miscellaneous:

Miscellaneous-(continued):

STATEMENT OF THE ISSUES

The Employee Retirement Income Security Act of 1974 (ERISA) states that "[i]n accordance with regulations of the Secretary [of Labor], every employee benefit plan shall . . . provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied." ERISA section 503(1), 29 U.S.C. § 1133(1). The Secretary's claims regulation states that notice of a claims denial "shall set forth, in a manner calculated to be understood by the claimant . . . [a] description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act." 29 C.F.R. § 2560.503-1(g)(1)(iv). This case presents the following issues:

(1) Whether the claims regulation requires a plan administrator to notify a plan participant or beneficiary in a benefit-denial letter of the plan's contractual time limit for filing an ERISA civil action to recover plan benefits.

(2) Assuming the claims regulation requires notice of the plan's contractual time limit, whether a plan administrator's failure to provide such notice renders the time limit unenforceable or, alternatively, equitably tolls that limit.

INTEREST OF THE SECRETARY

The Secretary of Labor has primary authority to interpret and enforce Title I of ERISA. See 29 U.S.C. §§ 1132, 1133, 1135; Herman v. South Carolina Nat'l Bank, 140 F.3d 1413, 1423 (11th Cir. 1998). In doing so, the Secretary ensures that the country's more than three million ERISA-covered employee benefit plans are administered in compliance with the statute and the Secretary's regulations. Congress expressly authorized the Secretary to issue regulations specifying "full and fair" review procedures for denied benefit claims that would protect the rights of plan participants and beneficiaries to promised plan benefits. 29 U.S.C. § 1133. The Secretary has an interest in ensuring that his claims regulation is interpreted correctly and effectively enforced in order to further the congressional policy of providing benefit claimants with "appropriate remedies" and "ready access to the Federal courts." 29 U.S.C. § 1001.

The Secretary also has an interest in uniform standards of plan administration. This Court previously confronted both issues presented in its unpublished decision in Wilson v. Standard Ins. Co., 613 F. App'x 841 (11th Cir. June 3, 2015). Wilson considered but did not rule on the question of whether the claims regulation requires a benefit-denial letter to inform the claimant of the plan's contractual time limit to sue for benefits. Instead, the panel concluded that the time limit must be enforced even assuming arguendo that notice of the time

limit was required, unless a participant can establish grounds for equitable tolling. Id. at 844. Unpublished decisions leave undisturbed this panel's authority to independently consider the same legal issues. Collado v. J. & G. Transport, Inc., 820 F.3d 1256, 1259 n.3 (11th Cir. 2016) (citation omitted). To further his interest in uniformity, the Secretary urges this Court to align with every other circuit to consider these issues and hold that the claims regulation requires notice of a plan's time limit and that the limit is unenforceable if the notice is not given.

This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a).

BACKGROUND

On June 30, 2017, Plaintiff Sandra Malave filed her complaint against Defendant Life Insurance Company of North America (LINA), challenging LINA's denial of her claim for long-term disability benefits under her ERISA-covered plan. Malave v. Life Ins. Co. of N.A., No. 8:17-cv-1583, slip op. at 2 (M.D. Fl. Oct. 26, 2017). LINA moved to dismiss Malave's complaint, arguing that her claim was "time-barred based on the three year statute of limitations contained in the ERISA plan." Id. The plan states that "'[n]o action at law or in equity may be brought to recover benefits . . . more than 3 years after the time satisfactory proof of loss is required to be furnished.'" Id. (citation omitted). Malave agreed that "she filed this action outside of the plan-imposed statute of limitations," but she "contend[ed] that [the plan's] limitations period is

unenforceable because, when [LINA] initially denied her claim, it failed to advise her of the plan-imposed limitations period in contravention of [the Secretary's claims regulation,] 29 C.F.R. § 2560.503-1(g)(1)(iv)." Id. at 2-3.

The district court dismissed Malave's complaint. It acknowledged that "when an ERISA claim is denied, the plan administrator must provide the claimant" with "'a description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act.'" Malave, slip op. at 4 (citation omitted). But, the court explained, "the Eleventh Circuit enforces contractually agreed to limitations provisions notwithstanding the plan administrator's failure to comply with [the notice requirements set forth in] Section 2560.503-1(g)(1)(iv)." Id. (citing Wilson, 613 F. App'x at 844). "In fact, unlike the Third and Sixth Circuits, . . . the Eleventh Circuit enforces [contractual limitations periods] unless the claimant 'can establish that she is entitled to equitable tolling' of the statute of limitations." Id. (citation omitted). Under Wilson, "a claimant who had access to a copy of her ERISA plan and, as a corollary, could have ascertained the statute of limitations before it expired, is not entitled to equitable tolling of the limitations period." Id. at 4-5 (citation omitted).

The denial letter LINA sent to Malave did not state whether the plan had a contractual limitations period, much less what that period was, but the letter did

generally advise her of her right to request a copy of her ERISA plan. Malave, slip op. at 2-3, 5; see Defs.' Mot. to Dismiss [Dkt. 16] at 6. According to the district court, "[h]ad the Plaintiff requested, obtained, and carefully reviewed the plan upon receiving the denial letter, she ostensibly would have learned of the limitations period before it expired." Id. at 5. Thus, the district court ruled that, "like in Wilson, the Plaintiff cannot satisfy the 'extraordinary' burden necessary to obtain equitable tolling" of the contractual limit, and her claim is time-barred. Id.

SUMMARY OF THE ARGUMENT

1. Congress granted the Secretary discretion to issue regulations that ensure that participants and beneficiaries in ERISA plans receive necessary information if their benefit claims are denied. Pursuant to that authority, the Secretary issued his claims regulation with the stated goal of clearing up "widespread misunderstanding[s] among benefit claimants of their rights" concerning adverse benefit determinations. To that end, the Secretary's claims regulation requires the plan administrator's written notice of claims denials to contain "[a] description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act." 29 C.F.R. § 2560.503-1(g)(1)(iv).

The Secretary's regulation requires a denial letter to contain a plan's contractual time limit for seeking judicial review. The plain meaning of the

regulation's text is that a plan's time limit for bringing a civil action is one of the "time limits applicable to . . . the plan's review procedures" that must be disclosed. This reading is supported by the preamble to the regulation, the provision's location among other provisions that ensure claimants receive information about the necessary steps to challenge a denial, and the fiduciary duty to disclose material information. All three circuits that have ruled on this issue have adopted this reading. In the event that this Court deems the regulation ambiguous, the Secretary's interpretation is entitled to controlling deference.

2. This Court should likewise follow the three circuits that do not enforce the plan's contractual time limit when the denial letter fails to advise a claimant of the limit. In doing so, this Court should decline to follow Wilson, which renders the Secretary's regulation nugatory. Refusing to enforce the contractual time limit in this instance would be consistent with this Court's refusal to enforce plan deadlines in the administrative appeals process when the administrator fails to notify the claimant of those deadlines in violation of the claims regulation. In the alternative, this Court should hold that a failure to provide the requisite notice justifies the application of equitable tolling.

ARGUMENT

I. When A Plan Administrator Denies A Benefits Claim, The Secretary's Claims Regulation Requires It To Inform The Claimant Of The Plan's Contractual Time Limit To Sue For Benefits.

Congress authorized the Secretary to promulgate regulations detailing the claims denial procedures for ERISA-covered plans: "In accordance with regulations of the Secretary, every employee benefit plan shall provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied." ERISA section 503(1), 29 U.S.C. § 1133(1). The Secretary issued a regulation that requires a plan administrator's written notice of a claims denial to contain "[a] description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act." 29 C.F.R. § 2560.503-1(g)(1)(iv). Section 502(a), in turn, states that "[a] civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan." ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

Congress did not enact a limitations period for filing a civil action under section 502(a)(1)(B). Heimeshoff v. Hartford Life & Accident Ins. Co., 134 S. Ct. 604, 608, 610 (2013). Accordingly, "the settled practice is for federal courts to borrow the forum state's limitations period for the most analogous state law cause of action." Harrison v. Digital Health Plan, 183 F.3d 1235, 1238 (11th Cir. 1998).

Alternatively, a participant and a plan may contract for a particular limitations period, as long as the period is reasonable. Heimeshoff, 134 S. Ct. at 610. In this case, Malave's plan required her to file a civil action for benefits within "'3 years after the time satisfactory proof of loss is required to be furnished,'" Malave, slip op. at 2 (citation omitted). However, when LINA issued its benefit-denial letter to Malave, LINA did not advise her of this time limit. Id. at 5.

As argued below, the Secretary's claims regulation requires benefit-denial letters to notify claimants of a plan's time limit for filing a civil action for benefits. First, the plain meaning of the regulation's text dictates such notice. See Gardebring v. Jenkins, 485 U.S. 415, 425-29 (1988); Cremeens v. City of Montgomery, 602 F.3d 1224, 1227 (11th Cir. 2010) ("We apply the canons of construction to regulations as well as statutes."). Second, assuming arguendo that the text is ambiguous, the Secretary's interpretation of an ambiguity in his own regulation in this amicus brief is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" Auer v. Robbins, 519 U.S. 452, 461-63 (1997) (citation omitted); accord, e.g., Chase Bank USA v. McCoy, 562 U.S. 195, 210-11 (2011).

A. The Plain Meaning Of The Regulation Requires Notice Of The Plan's Time Limit.

The plain meaning of the claims regulation requires plan administrators to disclose contractual limitations periods in their benefit-denial letters. The

regulation requires a denial letter to include a "description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act." 29 C.F.R. § 2560.503–1(g)(1)(iv) (emphasis added). The word "including" is critical, because its dictionary definition refers to "a constituent, component, or subordinate part of a larger whole." Merriam-Webster's Collegiate Dictionary 588 (10th ed. 1999); see Webster's Third New International Dictionary 1143 (1963) ("include" means "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate"). In the context of the regulation, "including" means that a plan's time limit on the claimant's right to file a civil action under section 502(a)(1)(B) is a part or a subset of "the plan's review procedures and the time limits applicable to such procedures." See 29 C.F.R. § 2560.503–1(g)(1)(iv) (emphasis added). In other words, the regulation sets forth the "general principle" that a benefit-denial letter must include a plan's time limits, and a plan's time limits for section 502(a)(1)(B) claims are an "illustrative application" of that principle. See e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994); Bautista v. Star Cruises, 396 F.3d 1289, 1298 (11th Cir. 2005).

Indeed, other readings are contrary to the text. The alternative interpretation mentioned in Wilson, 613 Fed. App'x at 833-34, would require reading subsection (g) to impose two different notice requirements: (1) notice describing "the plan's

review procedures and applicable time limits for those procedures" (specified before "including") and (2) notice of the right to sue (specified after "including"). But interpreting the regulation that way effectively erases the word "including" from the sentence and replaces it with "and," such that the regulation would read: "The notification shall set forth . . . a description of the plan's review procedures and the time limits applicable to such procedures, ~~including~~ [and] a statement of the claimant's right to bring a civil action." 29 C.F.R. § 2560.503–1(g)(1)(iv). That is neither what the regulation says nor what it means.

The First, Third, and Sixth Circuits have all reached the same conclusion. In Ortega Candelaria v. Orthobiologics LLC, 661 F.3d 675, 680 (1st Cir. 2011), the First Circuit stated that the plan administrator was "required by federal regulation to provide Ortega with notice of his right to bring suit under ERISA, and the time frame for doing so, when it denied his request for benefits." The First Circuit explained that the regulation's use of "the term 'including' indicates that an ERISA action is considered one of the 'review procedures' and thus notice of the time limit must be provided." Id. at 680 n.7. The Sixth Circuit later cited Ortega in support of its conclusion that "[t]he claimant's right to bring a civil action is expressly included as a part of those procedures [referenced in the regulation] for which applicable time limits must be provided." Moyer v. Metro. Life Ins. Co., 762 F.3d 503, 505 (2014).

The Third Circuit subsequently agreed with both Ortega and Moyer in holding that the claims regulation "requires that adverse benefit determinations set forth any plan-imposed time limit for seeking judicial review." Mirza v. Insurance Adm'r of America, Inc., 800 F.3d 129, 136 (3d Cir. 2015). "For purposes of interpretation, the most important word in the sentence [in the regulation] is 'including.' 'Including' modifies the word 'description,' which is followed by a prepositional phrase explaining what must be described – the plan's review procedures and applicable time limits for those procedures." Id. at 134. And "civil actions are logically one of the review procedures envisioned by the Department of Labor." Id. A contrary reading "reads the word 'including' out." Id. at 134-35.

The First Circuit surveyed the foregoing decisions, and it again held that the plan administrator "had a regulatory obligation to provide notice of the time limit for filing suit in its denial of benefits letter." Santana-Diaz v. Metro. Life Ins. Co., 816 F.3d 172, 179-82 (1st Cir. 2016). The First Circuit agreed with the Third and Sixth Circuits that the regulatory provision plainly utilizes "the term 'including' [to] indicate[ ] that an ERISA action is considered one of the 'review procedures' and thus notice of the [contractual] time limit must be provided." Id. at 180. Interpreting the regulation another way "would require us effectively to erase the word 'including' from the sentence and to replace it with 'and' . . . ." Id. "It would then further require us to determine that a plan's time limit for filing [and a

civil action] could not otherwise be included as one of the 'plan's review procedures,' for which time limits must be included." Id. Such reading would "contravene[ ] the text" in a manner that "not even the Eleventh Circuit in Wilson" has endorsed. Id.

B. Assuming Arguendo That The Regulation Is Ambiguous, The Secretary's Interpretation, Which Accords With ERISA's Structure And Purpose And The Regulation's Preamble, Is Controlling.

In Wilson, this Court opined that the regulation is "anything but clear" on this issue, and "face[d] with that ambiguity," it did not decide whether a benefit-denial letter must notify the claimant of a plan's contractual time limit for filing suit under ERISA section 502(a). 613 F. App'x at 843-44. Assuming arguendo that there is an ambiguity, the Secretary's reading is entitled to controlling deference under Auer.

In Auer, the Supreme Court accorded deference to another regulatory interpretation by the Secretary in an amicus brief, noting that it reflected "the agency's fair and considered judgment on the matter in question." 519 U.S. at 462. The Secretary's interpretation set forth in this brief is controlling because it is not "plainly erroneous or inconsistent with the statute" and "simply cannot be said to be unreasonable." Id. at 458, 461.[1]

[1] The Secretary also set forth his reading of his claims regulation in the preamble to recent amendments to the regulation for disability benefit claims. 81 Fed. Reg.

1. *The Secretary's Reading Is Supported By The Preamble To The Claims Regulation.*

The Secretary's interpretation is directly supported by statements in the preamble to his proposed claims regulation. See 63 Fed. Reg. 48390-01 (Sept. 9, 1998); see also Halo v. Yale Health Plan, 819 F.3d 42, 52-53 (2d Cir. 2016) (granting "substantial deference" to the preamble); Watkins v. City of Montgomery, Ala., 775 F.3d 1280, 1284 (11th Cir. 2014) (preamble can provide "guidance"). The preamble described a participant's right to file a section 502(a)(1)(B) claim as part of "a full description of the plan's review processes." See 63 Fed. Reg. at 48395; see also White v. Sun Life Assurance Co. of Canada, 488 F.3d 240, 247 n.2 (4th Cir. 2007) (quoting claims regulation in support of finding that civil actions are an "integral part" of a plan's review processes). The preamble's description of a "plan's review processes" logically supports the conclusion that notice of the "applicable time limits for . . . the plan's review

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92316 (Dec. 19, 2016) (to be codified at 29 C.F.R. § 2560.503-1) (effective April 1, 2018). The preamble states that "the Department agrees with the conclusion of those federal courts that have found that the current [claims procedure] regulation fairly read requires some basic disclosure of contractual limitations periods in adverse benefit determinations." Id. at 92331. The amendments require fiduciaries to provide a "statement of the claimant's right to bring an action under section 502(a) of the Act [which] shall also describe any applicable contractual limitations period that applies to the claimant's right to bring such an action, including the calendar date on which the contractual limitations period expires for the claim." 81 Fed. Reg. 92316 (to be codified at 29 C.F.R. § 2560.503-1(j)(4)(ii)). These amendments, however, only deal with disability claims after April 1, 2018. The provision at issue in this case applies to all benefit claims.

procedures" includes the plan's "time limits" for filing a civil action for judicial review of the denial. 29 C.F.R. § 2560.503–1(g)(1)(iv).

In the same preamble, the Secretary also noted that "employers, plan representatives, and claimants alike requested that the disclosure be amplified to include fuller descriptions of . . . the possibility of court review." 63 Fed. Reg. at 48395. The Secretary found "widespread misunderstanding among benefit claimants of their rights to appeal adverse benefit determinations." Id. "The Department agree[d] that claimants whose benefit claims are denied need to understand fully . . . their avenues of appeal," and that they have an "immediate need" for such information "in the notification of an adverse benefit determination." Id. The contractual time limit for filing a legal claim is certainly part of claimants' "understand[ing] fully . . . their avenues of appeal." Accordingly, the Secretary's reading of the regulation's notice requirements is fully supported by the statements he made when he proposed the regulation, and the final regulation was identical to the proposal in this respect.

2. *The Secretary's Reading Furthers The Statutory Purpose And Is Consistent With The Context Of The Claims Regulation.*

The Secretary's reading is consistent with the statutory purpose and the context of the regulation. ERISA section 503(1) mandates "provid[ing] adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied." 29 U.S.C. § 1133(1). Section 503(1) thereby

"'enable[s] the claimant to prepare adequately for any further administrative review, as well as appeal to the federal courts.'" Witt v. Metro. Life Ins. Co., 772 F.3d 1269, 1280 (11th Cir. 2014) (citation omitted). To that end, the Secretary's claims regulation was issued to "improve[ ] notice and disclosure protections and strengthen[ ] standards of conduct on review." 65 Fed. Reg. 70246-01, 70247 (Nov. 21, 2000). Construing the specific provision at issue in this case ((g)(1)(iii)) to require more robust disclosure to participants is consistent with its location among three other provisions that require the plan administrator to provide more information about the necessary steps to challenge a benefit denial "in a manner calculated to be understood." 29 C.F.R. § 2560.503-1(g)(1)(i), (ii), (iii).

Construing the claims regulation to require disclosure of contractual time limitations in benefit-denial letters advances the statute's stated purpose of providing "appropriate remedies" and "ready access to the Federal courts." 29 U.S.C. § 1001; Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1263 n.15 (5th Cir. 1980) ("ERISA should be given a broad construction in order to carry out its purposes of protecting the interests of Plan participants and beneficiaries."). It also fulfills the claims regulation's stated objective of correcting "widespread misunderstanding among benefit claimants of their rights to appeal adverse benefit determinations," 63 Fed. Reg. at 48395. Consistent with these principles, the Secretary recognized in his regulatory preamble that, in the event that a plan

administrator does not comply with the regulation's time limits for its review of a claim, a participant may agree to either give the administrator an extension of time for additional review or "proceed to court" directly. 63 Fed. Reg. at 48394. Obviously, a participant needs to know his plan's own time limits for filing suit when a claim is initially denied in order to decide whether to grant extensions to the administrator during the administrative appeals process and whether to pursue any optional appeals. Requiring initial denial letters to include the contractual time limit therefore advances the statutory and regulatory purpose of allowing participants to make informed decisions when exercising important ERISA rights during the benefits review process.

3. *The Secretary's Reading Is Practical For Participants And Plans Alike.*

Although Wilson correctly noted that a plan's contractual limits are found in the plan document itself, 613 F. App'x at 845, plan administrators are not required to provide the plan document to participants except on written request. See ERISA section 104(b)(4), 29 U.S.C. § 1024(b)(4). Absent notice of a plan's contractual limit, a participant will naturally assume the analogous state-law limit applies by default. See Ortega, 661 F.3d at 681. Notice of the plan's contractual limits protects participants from unknowingly forgoing their rights to judicial review. See Mirza, 800 F.3d at 135-36.

Moreover, even if a claimant obtains the plan document, it is unlikely that the average plan participant would wade through the voluminous document written "in the language of lawyers" and locate and understand the applicable contractual time limit. See CIGNA v. Amara, 563 U.S. 421, 437 (2011) (plan terms are written "in the language of lawyers"); see also Mirza, 800 F.3d at 135 ("The one-year time limit is buried on page seventy-three of the [ninety-one page] plan."); Silva v. Metro. Life Ins. Co., 762 F.3d 711, 721 (8th Cir. 2014) ("The Plan in this case is nearly 100 pages long and contains technical language unlikely to be read or understood by 'the average plan participant.'") (citation omitted); Heffner v. Blue Cross and Blue Shield of Alabama, Inc., 443 F.3d 1330, 1341 (11th Cir. 2006) (plan documents are "voluminous and complex document[s]" that must be "simplif[ied] and explain[ed]" to be understood). After all, the claims regulation itself was animated by concern about participants' inability to understand their appeal rights. See supra 16-17. If plan administrators are not required to state the contractual limitations period in the denial letter, they "could easily hide the ball and obstruct access to the courts." Mirza, 800 F.3d at 135; Santana-Diaz, 816 F.3d at 181 n.10 (noting importance of the notice requirement where "plan contains a contractual limitations period that . . . seems designed to confuse"). The Secretary's regulation offers a simple, pragmatic solution to protect participants: require plan administrators to inform claimants of any contractual limits for claims

in letters that they are already required to send and which claimants are most likely to actually read. See Mirza, 800 F.3d at 134-36.

4. *Three Courts Of Appeals Support The Secretary's Interpretation.*

As noted earlier, the First, Third, and Sixth Circuits all agree that the regulation's plain text requires the described notice, and these courts have also concluded that the Secretary's reading is consistent with the regulation's purposes.[2] The First Circuit agreed that reading the regulation to require the inclusion of plan-imposed time limits is consistent with "full and fair" review mandated by ERISA section 503(2), 29 U.S.C. § 1133(2), and protecting claimants' rights during the review. Santana-Diaz, 816 F.3d at 180. The Third Circuit similarly determined that "disclos[ing] a reduced time limitation in a denial letter ensures a fair opportunity [for judicial] review . . . before the courthouse doors close," a goal embodied by ERISA section 503. Mirza, 800 F.3d at 136. A contrary reading would allow plan administrators to bury the contractual time limit in the plan document, and leave participants with the assumption that the analogous state law limits apply. Id. at 135-36. "[T]he Department of Labor obviously thought it important to make sure claimants were aware of these

[2] In McGowan v. New Orleans Employers Int'l Longshoremen's Ass'n, AFL-CIO, 538 F. App'x 495, 498 (5th Cir. Aug. 12, 2013) (unpublished), the Fifth Circuit indicated agreement with the Secretary's view when it found that a denial letter's reference to the "right to file suit under § 502(a) of ERISA, as well as the one-year time limit" in the plan document complied with section 2560.503-1(g)(1)(iv).

substantially reduced limitations periods," and "one very simple solution, which imposes a trivial burden on plan administrators," is to require the disclosure of contractual deadlines in the benefit-denial letter. Id. at 136. And the Sixth Circuit likewise concluded that "[t]he exclusion of the [plan's contractual] time limits from the adverse benefit determination letter was inconsistent with ensuring a fair opportunity for review and rendered the letter not in substantial compliance." Moyer, 762 F.3d at 507.

5. Disclosure Of Plan Time Limits Is Consistent With Fiduciary Duties.

The Secretary's reading is also consistent with the law of trusts and ERISA's fiduciary duties. Cf. Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan, 555 U.S. 285, 292-94 (2009). This Court recognizes that "an ERISA participant has a right to accurate information, and that an ERISA plan administrator's withholding of information may give rise to a cause of action for breach of fiduciary duty." Jones v. Am. Gen. Life & Acc. Ins. Co., 370 F.3d 1065, 1072 (11th Cir. 2004) (citing Ervast v. Flexible Prods. Co., 346 F.3d 1007, 1016 n.10 (11th Cir. 2003)). Both Ervast and Jones favorably quoted Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300–01 (3rd Cir.1993), which cited the law of trusts in support of its holding that an ERISA fiduciary's duty to provide "complete and accurate information to its beneficiaries" "entails not only a negative duty not to

misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful."

The Supreme Court has explained that "ERISA imposes higher-than-marketplace quality standards on insurers. It sets forth a special standard of care upon a plan administrator, namely, that the administrator 'discharge [its] duties' in respect to discretionary claims processing 'solely in the interests of the participants and beneficiaries' of the plan." Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 115 (2008) (citation omitted) (ERISA "supplements marketplace and regulatory controls with judicial review of individual claim denials"). The claims regulation requires fiduciaries to provide a "statement of the claimant's right to bring an action under section 502(a) of the Act." 29 C.F.R. § 2560.503-1(g)(1)(iv), (j)(4). An "accurate" statement should include, at least, some reference to the plan's own contractual limits on that right. Cf. Jones, 370 F.3d at 1072. A fiduciary's silence in this context will harm participants who will otherwise assume that default state time limits apply; fiduciary disclosure is therefore necessary at some point during the claims review. The Secretary noted in its new disability amendments to the regulation, see supra n. 1, that "the statement of the claimant's right to bring a civil action under section 502(a) of ERISA following an adverse benefit determination on review would be incomplete and potentially misleading if it failed to include

limitations or restrictions in the documents governing the plan on the right to bring such a civil action." 81 Fed. Reg. at 92331.

II. Failure To Abide By The Claims Regulation's Notice Requirement Renders A Plan's Contractual Time Limit Unenforceable.

This Court should decline to follow its unpublished opinion in Wilson holding that a plan administrator's violation of the requirement to provide notice of a plan's contractual limits has no consequences – and a claimant is barred from judicial review if he misses that deadline – unless a claimant establishes the elements for equitable tolling. 613 F. App'x at 844. Instead, this Court should follow the First, Third, and Sixth Circuits.

A. This Court Should Not Enforce The Plan's Time Limit If The Plan Administrator Violated The Claims Regulation By Failing To Give The Claimant Notice of That Time Limit.

Wilson's approach is problematic because it would effectively render the Secretary's notice requirement nugatory. Wilson bars judicial review of claim denials where suit is filed outside of the plan's time limit, unless a participant can demonstrate "extraordinary circumstances" and "diligence in pursuing her rights" to establish equitable tolling. See 613 F. App'x at 844-45. The main purpose of the claims regulation and requiring notice of time limits in the denial letter was to address a "widespread misunderstanding among benefit claimants of their rights to appeal adverse benefit determinations." 63 Fed. Reg. at 48395. Wilson's stringent

rule defeats that purpose because the undisclosed contractual time limit would be enforceable as long as claimants had an opportunity to request and read the governing plan document and to perhaps discover the contractual time limit on their own – even if they had no reason to believe the plan had such a deadline in the first place. 613 F. App'x at 845.

Adopting Wilson's approach would create a conflict with the First, Third, and Sixth Circuits. The Sixth Circuit addressed this issue first and concluded in Moyer that if a denial letter fails to comply with the claims regulation, the denial "'does not trigger a time bar contained within the plan'" for filing a judicial action. 762 F.3d at 507 (quoting Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 107 (2d Cir. 2003) (related issue)). Wilson, however, was "not persuaded by" Moyer and decided to follow equitable tolling principles instead. 613 F. App'x at 844 & n.3.

After Wilson, the Third and First Circuits rejected the application of equitable tolling principles, and decided to follow Moyer's holding that a violation of the regulation justified the refusal to enforce the contractual limitations provision. The Third Circuit concluded that "the doctrine of equitable tolling should not bear on [the claimant]'s case," and it instead determined that "[t]he better course here is to set aside" the plan's deadline due to the violation of the Secretary's regulation. Mirza, 800 F.3d at 137. The First Circuit agreed that "[t]he courts' reasoning in Moyer and Mirza makes sense," and "conclude[d] that [the]

failure to include the time limit in the final denial letter rendered, as a matter of law, the contractual . . . limitations period altogether inapplicable." Santana-Diaz, 816 F.3d at 183. The First Circuit rejected Wilson as unpersuasive. Id. at 180.

The Third and First Circuits reasoned that the claims regulation should not be rendered void by removing any consequences for non-compliance. The Third Circuit explained that "plan administrators would [otherwise] have no reason at all to comply with their obligation to include contractual time limits for judicial review in benefit denial letters." Mirza, 800 F.3d at 137. They would "invariably argue that the contractual deadline was in the plan documents and that claimants are charged with knowledge of this fact." Id. "But that approach would render hollow the important disclosure function of § 2560.503-1(g)(1)(iv)." Id. The First Circuit elaborated that plan administrators know their plans' time limits and including such information in their denial letters is "the most minimal of burdens. To accept that plan administrators may nevertheless dodge this simple regulatory obligation so long as claimants have received the plan documents at some point during their tenure as employees would . . . effectively make 2560.603-1(g)(1)(iv) a 'dead letter.'" Santana-Diaz, 816 F.3d at 184; see William v. United Healthcare, 2017 WL 2414607, at *9 (D. Utah June 2, 2017) (Wilson's "approach would make Subsection (g)(1)(iv)'s disclosure requirements irrelevant [and] requiring extraordinary circumstances [for equitable tolling] is inconsistent with ERISA's

purpose of affording claimants 'a reasonable opportunity . . . for a full and fair review[,]' including in federal court.") (citation omitted). For these reasons, this Court should reject Wilson.

Declining to enforce a plan's deadline for filing a civil action (where the benefit-denial letter violates the claims regulation) is also "in keeping with analogous ERISA cases in the administrative review context where courts have declined to enforce contractual limitations periods on account of a non-compliant termination of benefits letter." Santana-Diaz, 816 F.3d at 184; Mirza, 800 F.3d at 137. "In those cases, the courts reasoned that a plan administrator's failure to comply with the ERISA regulations by not providing notice of the time limit for filing an administrative appeal rendered the limitations period for administrative review un-triggered" and unenforceable. Santana-Diaz, 816 F.3d at 184 (citing cases). This Court recognizes this generally accepted rule for administrative appeals that "[t]he consequence of an inadequate benefits termination letter is that the normal time limits for administrative appeal may not be enforced against the claimant." Counts v. Am. Gen. Life & Acc. Ins. Co., 111 F.3d 105, 108 (11th Cir. 1997) (citations omitted); accord, e.g., Burke, 336 F.3d at 107; see also Chappel v. Lab. Corp. of Am., 232 F.3d 719, 727 (9th Cir. 2000) (notice of arbitration provisions). Since the claims regulation requires notice of a plan's time limits for

both administrative appeals and judicial review, this Court should impose similar consequences for noncompliance: plan deadlines cannot be enforced.

To justify its contrary approach, Wilson stated that it "cannot simply assume unenforceability" and cited to Heimeshoff. 613 F. App'x at 844. Heimeshoff focused on whether and how ERISA may prevent a plan from contractually limiting the time for judicial review of benefits claims. 134 S. Ct. at 610. This case asks a different question: whether contractual time limits are enforceable where the plan administrator violates the claims regulation promulgated under ERISA section 503 by failing to disclose those limits. Heimeshoff recognized that the claims regulation may impose a "penalty" for violations of its regulatory requirements during the benefit review process. 134 S. Ct. at 614 (citation omitted). The same principle applies here, because the claims regulation requires "[e]very employee benefit plan [to have] reasonable procedures governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations," and the "claims procedures for a plan will be deemed to be reasonable only if [they] comply with the requirements of paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of this section." 29 C.F.R. § 2560.503–1(b)(1) (emphasis added). Accordingly, under the claims regulation, LINA's failure to comply with paragraph (g) renders the application of the plan's contractual limit (a "procedure[ ] governing . . . appeal of adverse benefit determinations")

unreasonable. See id. Where plans fail to provide notice of contractual time limits, the application of those limits would impede judicial review of a claim and undermine a right guaranteed by ERISA. See id.; Santana-Diaz, 816 F.3d at 182-83 & n.11; Mirza, 800 F.3d at 136; Cromer-Tyler v. Teitel, 294 F. App'x 504, 508 (11th Cir. Sept. 24, 2008) (granting participant leave to make out-of-time appeal based on inadequate benefit determination letter). Such a violation justifies a court's refusal to enforce the contractual limits for judicial review.

B. Alternatively, A Plan Administrator's Failure To Comply With The Notice Requirement Justifies Equitable Tolling.

Courts have held that a plan administrator's failure to comply with regulatory notice requirements concerning the plan's time limits can alone subject the plan's limitation period to equitable tolling. See, e.g., Ortega, 661 F.3d at 680. In Ortega, the First Circuit granted equitable tolling after the court considered the Secretary's claims regulation and explained that "we do see misleading conduct" because the defendant "was required by federal regulation to provide [the plaintiff] with notice of his right to bring suit under ERISA, and the time frame for doing so, when it denied his request for benefits." Id. Similarly, in Veltri v. Bldg. Serv. 32B–J Pension Fund, the defendants denied benefits to the claimant, but failed to notify him of his right to an administrative appeal and to bring a civil action in court in accordance with the Secretary's claims regulation, 29 C.F.R. § 2560.503-1(g)(1)(iv). 393 F.3d 318, 322-23 (2004). The Second Circuit applied equitable

tolling "in light of the regulatory notice requirement and of Congress's policy of protecting the interests of pension plan participants by ensuring 'disclosure and reporting to participants' and 'ready access to the courts.'" Id. at 323-24. The Third Circuit has likewise affirmed the application of equitable tolling to a section 502(a)(1)(B) action "where [the] plan administrator has failed to comply with the regulatory notice requirement [set forth in the Secretary's claims regulation] in denying a plan participant's claim for benefits." Campbell v. Sussex Cty. Fed. Credit Union, 602 F. App'x 71, 75-76 (3d Cir. Feb. 19, 2015) (unpublished).[3] If this Court holds that a plan administrator's failure to comply with the claims regulation's notice requirement does not render the plan time limit unenforceable, it should also hold that the administrator's failure alone establishes grounds for equitable tolling.

CONCLUSION

The Secretary respectfully asks this Court to reverse the district court's dismissal order.

[3] Two district courts in this circuit recognize the availability of such equitable relief based on "[c]ommon sense and basic fairness." Turbville v. Metro. Life Ins. Co., 2012 WL 5379104, *4-5 (N.D. Ala. Oct. 26, 2012); Jeffries v. Trs. of the Northrop Grumman Sav. & Inv. Plan, 169 F. Supp. 2d 1380, 1383 (M.D. Ga. 2001).

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

THOMAS TSO
Counsel for Appellate
and Special Litigation

/s/ Stephen Silverman
STEPHEN SILVERMAN
Senior Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Avenue, N.W. N-4611
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax
Silverman.stephen@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically using the CM/ECF system, which will send notification of such filing to the following:

s/ Stephen Silverman
Stephen Silverman
Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
200 Constitution Avenue, N.W., N-4611
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax
silverman.stephen@dol.gov

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 6498 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii)

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/s/ Stephen Silverman
Counsel for the Secretary
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