Proskauer

The ERISA Litigation Newsletter

April 2012

Editor's Overview

This month, we discuss the Ninth Circuit's recent decision in *Skinner v. Northrop Grumman Retirement Plan B*, 2012 WL 887600 (9th Cir. March 16, 2012), which applied the Supreme Court's decision in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), to hold that employees who received a flawed summary plan description, which did not adequately explain that their benefits would be offset, were not entitled to equitable remedies under Section 502(a)(3) of ERISA. In so doing, the Ninth Circuit became one of the first circuit courts to actually analyze reformation and surcharge as equitable remedies after *Amara*. The article discusses the practical significance of the Ninth Circuit's decision in ERISA claims arising from allegedly deficient SPDs, as well as the decision's insight as to how courts will apply *Amara*'s observations on ERISA's equitable remedies and as to what a plaintiff must prove to obtain reformation of a plan or a surcharge award.

Next, we provide a follow-up discussion on the federal discovery rule's application to contractual provisions in a plan document that not only narrow the limitations period to bring an ERISA claim for benefits, but also prescribe when the claim accrues for limitations purposes. Although most circuits enforce such contractual provisions, there are some holdouts. As discussed below, courts that have invalidated contractual accrual provisions do so out of the misplaced belief that because federal law, rather than state law, governs the accrual of a cause of action, a contractual limitations period cannot apply.

As always, be sure to review the section on Rulings, Filings, and Settlements of Interest.

Ninth Circuit Issues Significant Post-*Amara* Ruling on Equitable Remedies[1]

Contributed by Stacey Cerrone

In *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 50 EBC 2569 (2011), the U.S. Supreme Court stated in dicta that the "equitable relief" authorized under ERISA Section 502(a)(3) included a broader range of remedies than previously recognized.[2] Less than a year later, the U.S. Court of Appeals for the Ninth Circuit applied *Amara* to claims arising from a flawed summary plan description (SPD) in *Skinner v. Northrop Grumman Retirement Plan B*, 2012 WL 887600, 52 EBC 2089 (9th Cir. March 16, 2012). [3] The *Skinner* court held that employees who received an SPD that did not adequately explain that their benefits would be offset were not entitled to equitable remedies under Section 502(a)(3) of ERISA. In so doing, the Ninth Circuit became one of the first circuit courts to actually analyze reformation and surcharge as equitable remedies under *Amara*.

Facts of the Case

The Plan. In 2001, Northrop Grumman Corp. (Northrop) acquired Litton Industries, Inc., (Litton). At the time of the acquisition, Litton sponsored a qualified defined benefit pension plan, Litton Plan B. During the time that Litton was acquired, Northrop had also acquired a number of other companies and thus had many different pension plans with many different plan structures. As a result, Northrop designed a new pension plan, the Northrop Grumman Pension Plan, effective July 1, 2003, which included all of the various retirement plans and transitioned all of those plans to a cash balance plan. As part of this redesign, Litton Plan B became Northrop Plan B and its participants were provided with a five-year transition benefit, which included an offset.

Plan Communications. The 2003 Northrop SPD disclosed the transition benefit and was made available to participants in early 2003, before the effective date of the plan. The Northrop SPD summarized the various changes, described the transition benefit (including the offset), and explained that the offset would be applied to *all* participants. The language describing the offset as applying to all participants was consistent with a Litton SPD from the 1980s but appeared to conflict with a Litton SPD from 1998, which stated that the offset only applied to participants choosing lump-sum distributions. Noting it was only a summary, the Northrop SPD went on to refer participants to historical plan documents for the ''specific rules and provisions'' and explained that the transition benefit would be calculated according to the terms of prior plans.

In May 2003, Northrop sent all participants a notice of plan amendments, pursuant to ERISA Section 204(h), that also disclosed changes in the retirement plan formulas. This notice referenced the prior benefit formula from Litton Plan B, reminded participants that their prior Litton Plan B benefit also contained an offset, and explained that the five-year transition benefit would be the greater of each participant's historical plan formula—which, for Litton Plan B, included the offset—and the new cash balance formula.

Northrop benefits representatives also conducted meetings for employees who were affected by the plan changes. During the meetings, a PowerPoint presentation described and highlighted changes to the plans and a so-called ''Glossy Overview" was distributed. The Glossy Overview also described the transition benefit. In 2005, the company also provided a Summary of Material Modifications (SMM) to participants that specifically explained the application of the offset.

Plaintiffs. Plaintiff Stratton retired on July 31, 2006. He received an estimated pension calculation in February 2005 and an updated pension calculation shortly before his retirement. During his deposition, Stratton testified that he reviewed the 2003 SPD and received both the 1988 and 1998 SPD for the Litton Plan B. He also testified that he was aware of the offset and correctly understood how the offset would affect his pension.

Prior to his retirement, he submitted an administrative claim to the Northrop Administrative Committee claiming that defendants had not administered the plan in accordance with the SPDs regarding the calculation of the Part B transition benefit. The committee denied his claim.

Plaintiff Skinner retired May 31, 2005. In both June 2004 and December 2004, Skinner received estimated pension calculations. Both calculations showed how his Part B transition benefit would be calculated and included a correct application of the offset. In deposition, Skinner acknowledged reviewing the estimates and understanding how Northrop would calculate the transition benefit, including the offset.

After his review, Skinner asked the Northrop Benefits Center to clarify the calculations and advised coworkers regarding the use of the offset. Skinner also stated that he understood there was a master plan document outlining the formula in detail but that he did not review it. He testified that he did receive the 1988 and 1998 Litton Plan B SPDs.

Before retiring, Skinner also submitted an administrative claim to the Northrop Administrative Committee claiming that the defendants had not administered the plan in accordance with the SPD provisions regarding the transition benefit. The committee denied his claim.

Procedural History

The plaintiffs filed suit June 15, 2007, alleging that Northrop violated ERISA by miscalculating their benefits. They challenged the use of the offset in determining their pension benefits, arguing that the 2003 SPD did not give them notice of the offset, because it merely told participants that their transition benefit would be determined under their prior plan, and since the 1998 SPD for the Litton B Plan did not give adequate notice that the offset would apply to all participants.

The plaintiffs further argued that, because their expectation of the offset was based on the 1998 SPD's description, the 1998 SPD controlled over the general offset described in the 2003 SPD. In March 2008, the district court granted summary judgment dismissing the claims.[4]

In 2009, the Ninth Circuit reversed, holding that the 998 Litton SPD's description of the offset (i.e., limiting application to individuals taking lump-sum distributions) controlled over the 2003 Northrop SPD's offset description (i.e., extending the offset to all participants), because the 2003 SPD's incorporation of the earlier Litton SPD did not adequately notify plaintiffs that the offset would apply to their transition benefits.[5]

The Ninth Circuit held that this ambiguity between the plan and SPD created a triable issue of fact in light of prior precedent dictating that a more-employee favorable SPD controls over a conflicting and ambiguous plan document.

On remand, the parties filed cross-motions for summary judgment. The district court again ruled for the defendants, holding that the plan participants did not rely on the faulty SPD. Accordingly, the plaintiffs were not entitled to recover greater benefits than those provided in the plan simply because of the faulty SPD.[6]

Ninth Circuit Affirms Dismissal of Claims

The plaintiffs appealed again, arguing that they did not need to prove reliance on the SPD to prevail on their claim. After initially staying the case while the Supreme Court considered *Amara*, the Ninth Circuit asked for supplemental briefing on *Amara*'s impact on the appeal.

On supplemental briefing, the plaintiffs argued the disclosures to participants were not adequate and, consistent with the Supreme Court dicta in *Amara*, sought to ''obtain other appropriate equitable relief'' to redress ERISA violations under Section 502(a)(3).

Since the appeal arose from a summary judgment, the Ninth Circuit viewed the facts in the light most favorable to the plaintiffs. Thus, the court accepted that the Northrop administrative committee failed to ensure that plan participants received an accurate and comprehensive SPD that included ''a statement clearly identifying circumstances which may result in ... offset [or] reduction ... of any benefits'' that a participant would reasonably expect.[7]

The court then turned to whether the plaintiffs' claims for equitable relief under one or more of the three possible forms of equitable relief identified in *Amara*: estoppel, reformation, and surcharge.

In the supplemental briefing, the plaintiffs conceded that they had no evidence that any participants relied on the inaccurate SPD and thus did not claim estoppel. However, the plaintiffs did claim entitlement to the equitable remedies of reformation and surcharge, as suggested in *Amara*.

Reformation. With respect to their claim for reformation, the plaintiffs argued that the Northrop Plan B master documents should be reformed to match the terms of the 2003 SPD. The court analyzed this argument under both trust and contract law, and concluded that reformation was only appropriate in cases of fraud and mistake. The Ninth Circuit held that, in the instant case, there was no mistake because plaintiffs presented no evidence that the Northrop Plan B master plan document failed to reflect the settlor's true intent.

Turning to the fraud theory, the court found that the plaintiffs did not present any evidence that the Northrop Plan B contained terms that were motivated by fraud or an intent to mislead. In so ruling, the court held that the facts in *Amara* — namely, that the employer had intentionally misled its employees — were materially distinguishable from the instant case, since the Skinner plaintiffs adduced no evidence that Northrop materially misled its employees, nor any evidence that the employees had relied on the allegedly misleading information.

Surcharge. The court next considered whether the plaintiffs could obtain monetary relief in the form of equitable surcharge.[8] The plaintiffs argued that the Northrop administrative committee breached its fiduciary duty by failing to enforce the terms of the 2003 SPD rather than the plan document. The court rejected this argument, based on *Amara*'s holding that the SPD is merely a summary of plan terms and thus its terms are not the terms of the plan.

However, the Ninth Circuit then stated that the plaintiffs could still have a claim for breach of a statutory duty to provide an SPD that was ''sufficiently accurate and comprehensive to reasonably apprise'' the plaintiffs of their rights and obligations under the plan and to clearly identify offsets and reductions.[9]

The court stated that such a theory would support recovery of equitable surcharge if the committee were unjustly enriched, or if the breach resulted in any harm to participants. The court nevertheless rejected any such theory, since there was no evidence that the committee gained a benefit from an inaccurate SPD, and because, in the absence of any evidence that the plaintiffs relied on the SPD, plaintiffs could not establish actual harm.

In so ruling, the court also rejected the plaintiffs' argument that the ''harm'' of being deprived of their statutory right to an accurate SPD was compensable, stating that such an interpretation of ERISA ''would render the . . . committee strictly liable for every mistake in summary documents.''

Proskauer's Perspective

The Ninth Circuit's ruling gives some insight as to how courts will apply *Amara*'s observations on ERISA's equitable remedies, and as to what a plaintiff must prove to obtain reformation of the plan or a surcharge award.

The Ninth Circuit specifically rejected the notion that a mere violation of the law, without more, constituted harm.

Furthermore, notwithstanding statements by the Supreme Court in *Amara* that equitable relief could conceivably be available even absent a showing of detrimental reliance, in the context of the facts and circumstances presented, the Ninth Circuit appeared to rule out any evidence short of detrimental reliance as satisfying a plaintiff's burden of proof with respect to harm.

Notwithstanding the ultimate finding that there was no recovery, this case underscores the importance of ensuring that:

- plan documents are complete,
- all documents relating to the plan should be consistent, and
- institutional review should periodically confirm that all plan related documents comport with the plan document.

The *Skinner* decision may have additional practical significance in ERISA claims arising from allegedly deficient SPDs. For example, defendants may seize on *Skinner* as establishing that claimants must demonstrate detrimental reliance in such a case, notwithstanding *Amara*, at least where reformation and surcharge are the remedies sought.

In contrast, ERISA plaintiffs may struggle to articulate actionable harm (i.e., other than detrimental reliance) that would satisfy the standards enunciated in *Skinner*.

ERISA defendants may also rely upon *Amara*'s discussion of harm and causation concepts to negate findings of commonality and typicality adequate for class certification.

Of course, *Skinner* is not the final word on numerous open questions regarding monetary awards as ''equitable relief.'' If courts apply traditional trust law concepts as faithfully as in *Skinner*, the availability of monetary relief may be substantially curtailed, especially if such relief is available only against breaching plan fiduciaries, rather than the plan itself.

If *Skinner* represents a new post-*Amara* requirement that claimants seeking reformation or surcharge demonstrate actual harm and causation, it could signal additional problems for ERISA plaintiffs, particularly if compensable harm is limited to the loss of benefits rather than some collateral harm, or where benefits are not available under the terms of the plan.

In *Skinner*, the Ninth Circuit did not extend itself this far, but it may have given other courts a start in that direction.

Limiting ERISA's Limitations Period through the Use of Contractual Accrual Dates[10]

Contributed by Aaron A. Reuter

We have previously reported on how the federal discovery rule – pursuant to which claims for benefits do not accrue until the participant could reasonably have discovered the claim – can require plans to defend the merits of dated claims.[11] Recently, there have been some helpful developments with respect to pension plan claims, insofar as courts have recognized that a claim may accrue at the time of retirement and, in some cases, even before retirement. Outside the pension plan context, efforts to protect plans have taken the form of contractual provisions that not only narrow the limitations period, but also prescribe when the claim accrues for statute of limitations purposes. Although most circuits have enforced such contractual provisions, there are some holdouts. As discussed below, courts that have invalidated contractual accrual provisions do so out of the misplaced belief that because federal law, rather than state law, governs the accrual of a cause of action, a contractual limitations period cannot apply. Because there is in fact no support for this distinction, it is hoped that these courts will eventually change course and a consensus will develop in favor of the enforcement of contractual accrual provisions.

ERISA's Rules on Statutes of Limitations

A starting point in the defense of ERISA lawsuits is to determine whether a plaintiff's claim is time-barred by the applicable statute of limitations. Because ERISA does not provide a statute of limitations for non-fiduciary claims, like a claim for benefits under ERISA Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), courts "borrow" the state statute of limitations that is most analogous to a plaintiff's non-fiduciary ERISA claim.[12] Courts do not, however, "borrow" the accrual date from state law. Irrespective of the source of a statute of limitations, the accrual date for a federal claim is governed by federal law.[13]

Courts utilize the federal "discovery rule" to determine the accrual date for an ERISA benefits claim. The rule generally provides that a statute of limitations begins to run when a plaintiff discovers or should have discovered the injury that forms the basis of his claim. In the ERISA context, the rule has evolved to the so-called "clear repudiation rule," pursuant to which a non-fiduciary cause of action will accrue when a claim for benefits has been denied. The "clear repudiation rule" does not require that a *formal* denial occur. Rather, a cause of action accrues when a fiduciary repudiates a claim for benefits and that repudiation is clear and made known to the beneficiary.[14]

Contractual Limitations Periods

The fact that courts will borrow from state law to determine the limitations period does not prevent parties from contracting for a shorter statute of limitations period. Federal courts will generally enforce contractual statutes of limitations for benefit claims, so long as they are not "manifestly unreasonable."[15] They are less consistent, however, in enforcing contractual accrual provisions, even when these provisions appear alongside the language setting forth the length of the limitations period. The circuits have been divided on this issue and, as discussed below, one circuit appears to have rulings that contradict each other.

The Fourth and Ninth Circuits have refused to enforce accrual provisions derived from ERISA plan statute of limitations language and will instead apply the "clear repudiation rule."[16] In *White v. Sun Life Assurance Co. of Canada*, the Fourth Circuit specifically refused to enforce a contractual accrual date that began upon the date proof of loss was required to be furnished.[17] The court not only disapproved of the application of the contractual accrual date in the case before it, but also refused to adopt a case-by-case, fact-intensive assessment of the reasonableness of the accrual provision, reasoning that such an approach "would impose upon courts a federal common law methodology less compatible with the ERISA framework than the familiar accrual rule that federal courts have presumptively applied."[18] In so ruling, the court relied on the Ninth Circuit's reasoning in *Price v. Provident Life & Accident Insurance Co.* and stated that contractual accrual rules "create incentives for plans to use their governing documents to undermine their participants' civil claims . . . by making claims accrue when proof of loss was due and allowing the statute to expire before a plan participant knew that his claim had been denied."[19]

Contrasting the rulings by the Fourth and Ninth Circuits are those in the Second, Sixth, Seventh, and Eighth Circuits, which have enforced accrual dates contained in plan documents similar to those rejected by the *White* and *Price* courts.[20] These courts reasoned that so long as the entire statute of limitations provision, including both the temporal and accrual elements, was reasonable, there was no reason not to apply and enforce the contractual terms on accrual dates. These courts also concluded that their approach was consistent with the principle that courts not re-write unambiguous contractual terms in such a way that a plan administrator could not anticipate when a suit would be brought.

Confusion in the Third Circuit

The Third Circuit's decision in *Miller v. Fortis Benefits Insurance Co.* is frequently cited by its district courts for the proposition that the "clear repudiation rule" should be used to determine the accrual date of a claim for benefits under ERISA, even where the ERISA plan at issue provides its own accrual date along with a temporal length for the contractual statute of limitations. In fact, however, the *Miller* court did not specifically hold that contractual accrual dates may not apply to ERISA benefit claims, and a later unreported decision from the Third Circuit suggests the opposite could be true.

In *Miller*, the plaintiff brought a claim for long term disability ("LTD") benefits, arguing that his LTD benefits had been improperly calculated with a salary that was lower than the one he actually received.[21] Both parties agreed that a six-year statute of limitations applied to the plaintiff's claim,[22] but disputed the accrual date.[23] The district court utilized the terms of the LTD plan to determine the accrual date and concluded that the complaint was time-barred.[24] On appeal, the defendant cited the Seventh Circuit's decision in *Doe v. Blue Cross & Blue Shield United of Wisconsin*, for the proposition that "an agreed-upon limitations period, embodied in an ERISA plan, will control if the court considers it to be reasonable." *Miller*, 475 F.3d at 520. The Third Circuit, however, concluded that the defendant's reliance on *Doe* was misplaced because, it reasoned, the Seventh Circuit had only "determined the applicable statute of limitations for a non-fiduciary ERISA claim."[25]

The Third Circuit went on to state:

As we have explained previously, the accrual date for federal claims is governed by federal law, irrespective of the source of the limitations period. To determine the accrual date of a federal claim, we utilize the federal "discovery rule" when there is no controlling federal statute. Under this rule, a statute of limitations begins to run when a plaintiff discovers or should have discovered the injury that forms the basis of his claim. In the ERISA context, the discovery rule has been "developed" into the more specific "clear repudiation" rule whereby a non-fiduciary cause of action accrues when a claim for benefits has been denied.[26]

The court did not discuss the contractual provision in the LTD plan and instead went through an extensive analysis of the "clear repudiation rule," concluding that the plaintiff's claim accrued on the date he first received a miscalculated benefit payment.[27] Applying this rule, the Third Circuit affirmed the district court's ruling that the complaint was time-barred.

Insofar as *Miller* construed the Seventh Circuit's ruling in *Doe,* the decision is subject to challenge. The Seventh Circuitenforced a contractual statute of limitations provision that ran 39 months from the date of the services for which benefits are sought, declining to apply the federal "discovery rule."[28] Then, in *Abena v. Metropolitan Life Insurance Co.*, 544 F.3d 880, 884 (7th Cir. 2008), the court reasoned that, under *Doe*, "a contractual limitations period is enforceable in an ERISA action so long as it is reasonable" and specifically upheld a contractual term that allowed "three years from the time the proof of Disability must be submitted in which to file suit." Thus, while the Seventh Circuit has never specifically addressed whether the federal "discovery rule" trumps a contractual accrual provision, it has enforced contractual accrual dates where the entire statute of limitations period was considered reasonable.

The Third Circuit has continued to reject contractual accrual provisions and instead utilize the federal "discovery rule" and the ERISA specific "clear repudiation rule," stating that "a non-fiduciary cause of action under ERISA 'accrues when a claim for benefits has been denied.'"[29]

What about *Klimowicz*?

In an unreported decision that came after *Miller*, but did not reference it, the Third Circuit reasoned in *Klimowicz v. Unum Life Insurance Co. of America* that the proper start date for the contractual statute of limitations period in a plan document for a LTD claim was *either* at the time proof of claim was required as defined by the plan document in the statute of limitations provision *or* when the plaintiff received a "clear repudiation" that his benefits would end.[30] The district court had used the contractual accrual date in order to calculate whether the plaintiff's claim was time-barred by the plan's statute of limitations. In affirming the district court's ruling and reasoning that the proper accrual date *could* be derived from the plan document, the Third Circuit appears to have refuted the reasoning of its prior opinion in *Miller*. No district court in the Third Circuit, however, has followed *Klimowicz's* logic and expressly enforced a contractual accrual date.

Proskauer's Perspective

The reasoning of the Second, Sixth, Seventh, and Eighth Circuits is more consistent with the enforcement of the contractual provisions of ERISA plans because these courts allow for the adoption of *both* reasonable temporal lengths and accrual dates for statute of limitations purposes. It seems illogical to only adopt one half of the provision; indeed, how can the reasonableness of a time period be established without considering when it starts?

While the *Miller* decision seems to follow the reasoning of the Fourth and Ninth Circuits, its decision in *Klimowicz* appears to find a middle ground. Where a contractual accrual provision is either unreasonable or not available, it makes sense to utilize the clear repudiation rule. Where, however, there is a reasonable contractual accrual provision, it should be adopted and applied along with the rest of the contractual statute of limitations provision.

The lack of uniformity among the courts on this issue is particularly unfortunate because it can provoke forum shopping. It is hoped, therefore, that the courts that have declined to enforce contractual accrual provisions will soon "see the light" and reverse course.

Rulings, Filings, and Settlements of Interest

Withdrawal Liability/Delinquent Contributions:

In *Shelter Distribution, Inc. v. General Drivers, Warehousemen & Helpers Local Union No. 89*, No. 11-5450-cv, --- F.3d ----, 2012 WL 880601 (6th Cir. Mar. 16, 2012), the Sixth Circuit affirmed the district court's ruling that it was not contrary to public policy for a union to indemnify an employer for any contingent liability to a pension plan incurred by the employer. In a case of first impression, the court ruled that a provision in a collective bargaining agreement between the union and the employer that obligated the union to reimburse the employer for its payment of withdrawal liability under ERISA was enforceable. The union disputed the enforceability of the provision on the ground that it was against public policy for unions and employers to "shift[] withdrawal liability through a negotiated collective bargaining agreement because such a shift" defeated the purpose of the statute. The Sixth Circuit disagreed, reasoning that under Section 1110(b) of ERISA, fiduciaries are permitted to purchase insurance to cover any potential liability, and since indemnification agreements accomplish the same result, namely insurance for potential liability, they should be permitted. The court noted that "there is no logical difference between contracting with an insurance company under section 1110(b) and negotiating an indemnification provision" like the one in this case.

In *Central Illinois Carpenters Health & Welfare Trust Fund v. Olsen*, No. 06-4350, 2012 U.S. App. LEXIS 5442 (7th Cir. Mar. 15, 2012), the Seventh Circuit held that two entities were a single employer under ERISA and that the owner of the entities was liable for delinquent benefit contributions owed to multi-employer benefit funds under applicable collective bargaining agreements. The owner was a sole proprietor who conducted business as two separate entities, one for residential construction and one for commercial construction. The owner signed collective bargaining agreements under the guise of the commercial construction entity only. The funds sought to recover contributions associated with work performed by three employees, but the owner argued that the employees had performed residential construction and that, as a result, the terms of the collective bargaining agreements did not apply. The district court found that the two entities were a single employer under ERISA and that the owner was liable for the delinquent contributions to the funds. On appeal, the Seventh Circuit noted that the single employer doctrine inquiry was unnecessary because the entities were simply assumed names under which the owner operated his business as a sole proprietorship and that the owner was thus a single employer. The Seventh Circuit nevertheless considered the factors under ERISA's single employer doctrine and found the owner liable for the delinquent contributions to the funds as a single employer based on the following: sole proprietor status of the owner, common management, centralized control of labor relations, common ownership, and interrelation of operations.

Claims for Benefits:

In *Schultz v. Aviall, Inc. Long Term Disability Plan*, 670 F.3d 834 (7th Cir. 2012), the Seventh Circuit held that the plan administrator of a disability plan acted properly by interpreting a Social Security offset provision that limited benefits by accounting for Social Security benefits paid to the participants and their dependent children. The court reviewed the administrator's decision de novo because, although an "ERISA Statement" attached to each disability policy contained language conferring discretion on the plan administrator, the disability plan itself did not. The plan at issue reduced benefits by "deductible sources of income," defining this phrase to include "the amount that you, your spouse and children receive . . . because of your disability under . . . the United States Social Security Act." Plaintiffs argued that the plan administrator's interpretation was unreasonable because Social Security payments to a dependent child of a disabled parent were not intended to replace the income that the household lost as a result of the parent's inability to work. The court found plaintiffs' arguments unpersuasive in light of the plain terms of the plan, noting that "the plan must be read as a whole, considering separate provisions in light of one another and in the context of the entire agreement." Because the court found that the plan language on the offset was unambiguous, the court upheld the administrator's reading as "the only reasonable interpretation of the applicable language."

In *Baptista v. Mutual of Omaha Ins. Co.*, No. 010–467-ML, 2012 WL 896181 (D.R.I. Mar. 14, 2012), the district court approved a $1.9 million settlement of class action claims alleging that a life insurance plan administrator breached its fiduciary duties over the past six years by failing to pay almost 7,000 participants' benefits in separate lump sum "Total Access Benefits Service (TABS) Accounts" as promised, and instead invested those benefits for its own account. Plaintiff was informed that her benefits would be paid into a TABS account earning 2.5% interest. She alleged the benefits were instead invested for the administrator's own account and earned more interest than she received. Plaintiff brought suit on behalf of a class TABS account holder for disgorgement of the administrator's profits, which she claimed totalled $5 million. In approving the settlement, the court noted that similar litigation over TABS accounts had met with varying success, the settlement amount of approximately 40% of the claimed damages was reasonable, the settlement was reached during an arms-length mediation, and there were no objections by putative class members.

Jurisdiction to Hear Appeal of Remand to Plan:

In *Young v. Prudential Life Ins. Co. of America*, No. 10-14857-cv, --- F.3d ----, 2012 WL 538955 (11th Cir. Feb. 21, 2012), the Eleventh Circuit ruled that it did not have jurisdiction to hear Prudential's appeal of the district court's order remanding a plan participant's claim for disability benefits back to the plan because the district court's remand order was not a "final decision." The Eleventh Circuit determined that although the district court order was "labeled" as a judgment, it did not "end the litigation on the merits," nor did it "award or deny benefits" and, therefore, was not a final order from which an appeal could be heard. Moreover, jurisdiction was not available under the collateral jurisdiction doctrine, which requires that the district court order "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." The court ruled that the order was not collateral because the order specifically involved the merits of the plaintiff's claim. Accordingly, the appeal was dismissed for want of jurisdiction.

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[2] In previous articles, we have analyzed the dicta in *Amara* that provides that ERISA Section 502(a)(3) may provide equitable remedies and whether and to what extent a plaintiff would have to show harm, causation, and damages to make a claim for equitable relief. *See* Bloomberg Law Reports. *View from Proskauer: 2011—The Year in Review: Last Year's Most Significant ERISA Litigation Opinions and What They Foreshadow for 2012* (published Jan. 9, 2012); Bloomberg Law Reports. *View from Proskauer: Perspectives on Hot Topics in Employee Benefits* (published Oct. 4, 2012);Bloomberg Law Reports. *View from Proskauer*: ''*Surcharge*" *as Monetary Relief after Amara* (published Aug. 25, 2011).

[3] 2012 BL 61849.

[4] *Skinner v. Northrop Grumman Pension Plan, et al.,* No. CV 07-3923 JFW (JTLx), Rec. Doc. 109 (C.D. Ca. March 10, 2008).

[5] *Skinner v. Northrop Grumman Pension Plan B, et al.,* 334 Fed.Appx. 58 (9th Cir. 2009).

[6] *Skinner v. Northrop Grumman Pension Plan, et al.,* 48 EBC 2783 (C.D. Cal. Jan. 26, 2010).

[7] 29 U.S.C. § § 1021(a), 1022(a), 1024(b); 29 C.F.R. § 2520.102-3(l).

[8] An in-depth discussion and analysis of *Amara*'s decision on surcharge appears in the September 2011 ERISA Litigation Newsletter.

[9] 29 U.S.C. § § 1022(a), 1024; 29 C.F.R. § 2520.102-3(l).

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[11] *See* Myron D. Rumeld, Russell L. Hirschhorn, and Brian Neulander, Proskauer Rose LLP, *ERISA's Statute of Limitations for Benefit Claims: Where to Begin?*, Bloomberg Law Reports – Employee Benefits, Vol. 3, No. 14 (July 6, 2010).

[12] *Klimowicz v. Unum Life Ins. Co. of Am.*, 296 F. App'x 248, 250 (3d Cir. 2008) (citing *Hahnemann Univ. Hosp. v. All Shore, Inc.*, 514 F.3d 300, 305-06 (3d Cir. 2008)). ERISA Section 413, 29 U.S.C. § 1113, governs claims for breach of fiduciary duty. It requires that claims be brought within the earlier of six years from the date of the last action that constituted a part of the alleged breach or violation, or three years after the earliest date that the plaintiff had actual knowledge of the alleged breach or violation. In the case of fraud or concealment, the period is extended to six years from the date of discovery of the alleged breach or violation.

[13] *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 520 (3d Cir. 2007) (citation omitted).

[14] *Id.*at 520-21. This rule is also followed by the Second, Seventh, Eighth and Ninth Circuits. *Id.* at 521 (citations omitted) ("We . . . follow the Seventh, Eighth, and Ninth Circuits in holding that an ERISA claim accuse upon a clear repudiation by the plan that is known, or should be known, to the plaintiff – regardless of whether the plaintiff has filed a formal application for benefits.").

[15] *Klimowicz*, 296 F. App'x at 250 (citation omitted).

[16] *See White v. Sun Life Assurance Co. of Canada*, 448 F.3d 240, 250 (4th Cir. 2007) (refusing to enforce an accrual provision that provided that a claim accrued under the plan when proof of loss was due); *Price v. Provident Life & Accident Ins. Co.*, 2 F.3d 986, 988 (9th Cir. 1993) (same).

[17] *White*, 448 F.3d at 250.

[18] *Id.*

[19] *Id.* (citing *Price*, 2 F.3d at 988).

[20] *See Burke v. Price Waterhouse Coopers LLP Long Term Disability Plan*, 572 F.3d 76, 79 (2d Cir. 2009) (upholding contractual limitations period stated in plan document that ran "three years after the time written proof of loss is required"); *Rice v. Jefferson Pilot Fin. Ins. Co.*, 578 F.3d 450, 456 (6th Cir. 2009) (same); *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 875 (7th Cir. 1997) (enforcing a contractual statute of limitations provision that accrued from the date of the services for which the benefits were sought); *Blaske v. UNUM Life Ins. Co. of Am.*, 131 F.3d 763, 764 (8th Cir. 1997) (upholding contractual limitations period stated in plan document that ran "three years after the time written proof of loss is required").

[21] *Miller*, 475 F.3d at 518.

[22] While the district court ruled that the six-year statute of limitations was based on the language in the LTD plan, the Third Circuit did not reach this issue. Instead, the Third Circuit stated that "[s]ince there is no dispute about the length of the limitations period, we need not determine the source from which it derives." *Id.* at 518 n.1.

[23] *Id*. at 520.

[24] *Id*. at 519.

[25] *Id.*

[26] *Id*. at 520 (citations omitted).

[27] *Id.* at 521-22.

[28] *Doe*, 112 F.3d at 875.

[29] *Kapp v. Trucking Emps. of N. Jersey Welfare Fund, Inc. – Pension Fund*, 426 F. App'x 126, 129 (3d Cir. 2011) (citing *Miller*, 475 F.3d at 520).

[30] *Klimowicz*, 296 F. App'x at 251.

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