LEGAL UPDATE

Substantial Compliance

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If a plan sponsor fails to comply with the terms of a plan, in theory a plan could be disqualified, and the plan sponsor must take the appropriate method of correction under EPCRS. Under ERISA Section 404(a)(1)(D), a plan must be administered in accordance with its terms, unless those terms are inconsistent with ERISA. Those rules are straight forward on their face, but as with most rules, there can be exceptions and qualifications. For example, the phrase "any occupation" in a long-term disability plan cannot be given an absolute and literal meaning, such that a benefit could only be paid to an individual if he or she had no conscious life. *Helms v. Monsanto* (11th Cir. 1984) and *Torix v. Ball Corporation* (10th Cir. 1988). Similarly, while the Supreme Court's decision in *Kennedy v. Plan Administrator for Dupont Savings Plan* emphasized the necessity for a plan administrator to comply with the terms of a plan, lower courts are still undecided as to whether that decision eliminated the substantial compliance doctrine, an issue that frequently arises in designation of beneficiary cases. So long as a plan contains Firestone language which provides a plan administrator with discretion to interpret a plan, a plan administrator can always insist upon strict compliance with the terms of a plan. An issue may arise, however, where a plan administrator wants to rely upon the substantial compliance doctrine in interpreting a plan.

The substantial compliance doctrine is not limited to compliance with the substantive provisions of a plan. As the District Court for the Northern District of Indiana stated last year in *Fessenden v. Reliance Standard Life Insurance Company*, "the guy who said that close is only good in horseshoes and hand grenades must not have heard of ERISA and the substantial compliance doctrine. In the murky world of ERISA litigation, close enough is often considered to be good

enough. This is because the substantial compliance doctrine often excuses plan administrators who don't turn square corners in following ERISA regulations." The next sentence of the opinion, however, contained an important caveat: "But the substantial compliance doctrine does not always save the day from administrative foul-ups." Whether it will save the day may depend upon where the plan is located, since there is a split of authority among the Circuits on this issue, although the position of the DOL is clear.

The DOL regulations contain a "deemed exhaustion" rule, which states that a plan's administrative procedures will be deemed exhausted if the plan has failed to establish or follow certain claims procedures. Discussing this regulation in *Halo v. Yale Health Plan* in 2016, the Second Circuit held that, when denying a claim for benefits, if a plan fails to comply with the DOL's claims procedure regulations, the claim will be reviewed *de novo* in Federal Court unless the plan has otherwise established procedures in full conformity with the regulation and can show that the failure to comply with the claims procedure regulation in the processing of a particular claim is inadvertent and harmless. As illustrations of such circumstances, the Court cited human error causing a plan to respond in 73 hours when a plan was required to respond in 72 hours, or in 16 days, when the regulation specifies 15 days. Moreover, the plan bears the burden of proof on this issue. In a similar vein, when the DOL revised the claims procedure regulations with respect to disability claims, it provided that "if the plan fails to strictly adhere to all the requirements of this section with respect to a claim... the claim on appeal is deemed denied on review without the exercise of discretion by an appropriate fiduciary." Furthermore, the loss of deferential review is prevented only by "de minimis violations that do not cause, and are not likely to cause, prejudice or harm to the claimant so long as the plan demonstrates that the violation was for good cause or due to matters beyond the control of the plan and the violation occurred in the context of an ongoing, good faith exchange of information between the plan and the claimant." That change will only affect employee pension plans to the extent they provide disability benefits not determined by the Social Security administration, a long-term disability insurance carrier, or other third-party payer.

However, unlike the Second Circuit decision in *Halo*, in *Edwards v. Briggs & Stratton Retirement Plan* (7th Cir. 2011), the Court of Appeals for the Seventh Circuit explained that "in general the doctrine of substantial compliance means that a plan administrator who has violated a technical rule under ERISA... may be excused for the violation if the administrator has been substantially compliant with the requirements of ERISA, "although a plan administrator who does not render a decision within the time provided by the DOL regulations" can only be in substantial compliance with ERISA's procedural requirements if there is an ongoing productive evidence gathering process in which the claimant is kept reasonably well informed as to the status of the claim and the kinds of information that will satisfy the administrator." *Rasenack v. AIG Life Ins. Co.*, (10th Cir. 2009). The Eighth Circuit and the Eleventh Circuit take a similar view as the Seventh and Tenth Circuits.

This is also an issue upon which plaintiff's counsel are increasingly focusing. Presently, because of the *Firestone* case, plan administrators have a significant advantage in litigation, because their interpretation of a plan need not be the better interpretation, only a reasonable one—not a particularly high standard. If a failure to comply with claims review procedure rules will change the standard, plaintiffs will look for any violation of the claims review procedure regulations.

Takeaway: Even though several circuits still adhere to the substantial compliance doctrine in reviewing failures by plan administrators to comply with all aspects of the regulations in connection with employee benefit pension plans, plan administrators wishing to ensure that they retain the benefits of an arbitrary and capricious standard of review on appeal to a District Court should attempt to comply strictly with the claims procedure regulations.

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