CHAPTER 7

Exhaustion

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Synopsis

As a general proposition, "exhaustion is a very important concept in our jurisprudence, with deep roots in the principles of federalism and comity."[1] The doctrine of exhaustion of administrative remedies rests on the principle "that no one is entitled to judicial relief for a threatened injury until the prescribed administrative remedy has been exhausted."[2]

§ 7.01 INTRODUCTION

It is frequently acknowledged by federal courts that ERISA does not contain an explicit exhaustion of remedies requirement,[3] although an exhaustion of administrative

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[1] *Conley v. Pitney Bowes*, 34 F. 3d 714 (8th Cir. 1994), citing *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

[2] *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F. 2d. 588, 592 (2d Cir. 2002), quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). See also, *Springer v. Wal-Mart Assoc. Group Health Plan*, 908 F. 2d 897, 900 (11th Cir. 1990) ("The very premise of the exhaustion requirement . . . is that the right to seek federal court review matures only after a denial of claims has been reviewed by the appropriate fiduciary"), quoted in *University of North Carolina Healthcare System v. ITPEU Health & Welfare Plan*, 2022 WL 4668079 (S.D. Ga. Sept. 28, 2022).

[3] See, for example, *Makar v. HealthCare Corp. of Mid-Atlantic*, 872 F. 2d 80, 82 (4th Cir. 1989); *Wit v. United Behavioral Health*, 58 F. 4th 1080 (9th Cir. 2023); *Diaz v. United Agr. Emp. Welfare Benefit Plan & Trust*, 50 F. 3d 1478, 1483 (9th Cir. 1995); *Abatie v. Alta Health & Life Ins Co.*, 458 F. 3d 955, 961

remedies[4] can be required either by statute, by federal common law, or by contract.[5] Notwithstanding the absence of an express statutory mandate, federal courts have created[6] and uniformly[7] apply a "very important"[8] judicially created[9] exhaustion

(9th Cir. 2006); *Wilson v. United Healthcare, Inc.*, 27 F. 4th 228, 241 (4th Cir. 2022); *Watts v. Bell South Telecommunications, Inc.*, 316 F. 3d 1207 (11th Cir. 2003); *Wert v. Liberty Life Assurance Co. of America*, 447 F.3d 1060, 1062 (8th Cir. 2006); *Wallace v. Oakwood Healthcare, Inc.*, 954 F. 3d 879 (6th Cir. 2020); *Coomer v. Bethesda Hospital, Inc.*, 370 F. 3d 499, 504 (6th Cir. 2000); *Whitehead v. Okla. Gas. & Elec. Co.*, 187 F. 3d 1184, 1190 (10th Cir. 1999); *Stephens v. PBGC*, 755 F. 3d 959, 964 (D.C. Cir. 2014); *Hall v. National Gypsum*, 105 F. 3d 225, 231 (5th Cir. 1997); *Wilczynski v. Lumbermens Mutual Casualty*, 93 F. 3d 397, 401 (7th Cir. 1996); *Di Joseph v. Standard Insurance Co.*, 776 Fed. Appx. 343 (7th Cir. 2019); *Conley v. Pitney Bowes*, supra, n. 1; *Robyns v. Reliance Standard Life Ins. Co.*, 130 F. 3d 1231(7th Cir. 1997); *Neal v. United of Omaha Life Ins.*, 2020 WL 434664 7 (S.D. Ohio, July 29, 2020); *Yates v. Symetra Life Ins. Co.*, 2022 WL 19211 (E.D. Mo. Jan. 3, 2022), aff'd (8th Cir. Feb. 23, 2023); *Infoneuro Group, Inc. v. Aetna Life Ins. Co.*, 2019 WL 3006549 (C.D. Cal. May 3, 2019); *Zerangue v. The Lincoln National Life Ins. Co.*, 2019 WL 2058984 (E.D. La. May 9, 2019); *Laborers Pension Fund v. Buchanan*, 2012 WL 3581178 (N.D. Ill. Aug. 7, 2012); *Freeman v. MetLife Group, Inc.*, No. 08-10864-NMG (D. Mass. Oct. 17, 2008); *Tarr v. State Mutual Life Ins. Co. of America*, 913 F. Supp. 40 (D. Mass. 1996); *White v. The Keychoice Welfare Benefit Plan*, 827 F. Supp. 690 (D. Wyo. 1993) Cf. *Doe v. Blue Cross and Blue Shield United of Wisconsin*, 112 F. 3d 869, 878 (7th Cir. 1997) ("Even without [a provision requiring exhaustion], the plaintiff, as a matter of the federal common law of ERISA, would be required to exhaust his required remedies before being allowed to sue.").

[4] The failure to file a request for review within a plan's limitation period is one way that a claimant can fail to exhaust administrative remedies. *Gayle v. United Parcel Service*, 401 F. 3d 222 (4th Cir. 2005); *Gallegos v. Mt. Sinai Medical Center*, 210 F. 3d 803, 808 (7th Cir. 2000); *Cross v. Bragg*, 47 EBC 1784, 329 Fed. Appx. 943 (4th Cir. 2009); *Buck v. Continental Casualty*, 2008 WL 11355359 (M.D.N.C. June 6, 2008).

[5] *Wallace v. Oakwood Healthcare, Inc.*, supra, n. 2 (J. Thapar, concurrence); *Conley v. Pitney Bowes*, supra, n.1. See also, *Jackson v. Guardian Life Ins. Co. of America*, 2023 BL 125179, 2023 US Dist. LEXIS 65167 (N.D. Cal. April 13, 2023) ("ERISA exhaustion is ultimately a matter of contract.").

[6] The Supreme Court had an opportunity to address this issue before the exhaustion of administrative remedies under ERISA became entrenched, but it declined to do so, denying certiorari in *Mason v. Continental Group, Inc.*, 106 S. Ct. 863 (1986). However, in a dissenting opinion to the denial of the writ of certiorari, Justice White urged the Court to grant certiorari "in order to resolve the uncertainty over the exhaustion requirements in cases of this kind." In light of what he correctly saw as the growing volume and significance of ERISA litigation, Justice White further stated "the need for clear procedural rules governing access to federal courts is imperative . . . Accordingly, the conflict among the circuits over the existence of an exhaustion requirement under ERISA can hardly be passed over as an unimportant one unworthy of the Court's attention," discussed in Whitman F. Manley, "Note: When Do Civil Actions Require that Claimants Exhaust Arbitral or Intrafund Remedies," 71 Cornell Law Review, 952, 960 (1986) (hereinafter Manley, "Civil Actions").

[7] *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99 (2013) ("The Courts of Appeal have uniformly required that participants exhaust administrative remedies before bringing a claim for judicial review under 502(a)(1)(B)"); *Stephens v. PBGC*, supra, n. 2 ("courts have universally applied the [exhaustion] requirement as a matter of judicial discretion"); *Hall v. National Gypsum Co.*, supra, n. 2 at 231; *Zerangue v. The Lincoln National Life Ins. Co.*, supra, n. 2; *Brown v. J.B. Hunt Transportation*

requirement under ERISA,[10] including top-hat plans,[11] a requirement that "finds its

Services, Inc., 586 F. 3d 1079, 1084 (8th Cir. 2009); Manley, "Civil Actions"), supra, n. 5, at 960 ("Courts uniformly hold that the failure of a participant to exhaust internal review procedures when challenging a benefit denial under the terms of a benefit plan will bar his subsequent suit under ERISA Section 502(a)(1)(B)."), quoted in Jared A. Goldstein, "Employment Discrimination Claims under ERISA Section 510: Should Court Require Exhaustion of Arbitral and Plan Remedies," 93 Michigan Law Rev. 193, 198, fn. 28 (1994) (hereinafter, "Goldstein, Employment Discrimination"). Cf. *Paese v. Hartford Life & Acc. Ins. Co.*, 449 F. 3d 435, 445 (2d Cir. 2006) ("a firmly established policy favoring exhaustion of administrative remedies in ERISA claims"). However, the application of the exhaustion doctrine in the ERISA context was criticized by Judge Thapar in his concurring opinion in *Wallace v. Oakwood Healthcare, Inc.*, supra, n. 2. For a discussion of Thapar's concurrence, see, Mark Debofsky "Judge Casts Doubt Over Administrative Exhaustion Doctrine for ERISA Claims," March 21, 2021, and "Reimagining of ERISA Civil Procedure."

[8] *Conley v. Pitney Bowes*, supra, n. 1.

[9] *Kinkead v. Bell Corp. Sickness and Accident Disability Plan*, 111 F. 3d 67 (8th Cir. 1997); *Zar El Jaron-Matisse Thomas Bey v. Board of Trustees of the Carpenters and Joiners Defined Contribution Plan*, 2023 WL 3752190, (D. Md. June 1, 2023); *Harding v. Provident Life & Accident Ins. Co.*, 809 F. Supp. 2d 403, 420 (W.D. Pa. 2011) ("exhaustion under ERISA is a judicially created affirmative defense."); *Watts v. Bell South Telecommunications, Inc.*, supra, n. 2 (Exhaustion requirement is a "court-imposed, policy-based requirement"); *Metropolitan Life Ins Co. v. Price*, 501 F. 3d 271, 279 (3d Cir. 2007) (Exhaustion requirement is a judicial innovation with an eye toward sound policy); *Thibodeau v. Prudential Insurance Co. of America*, 2008 WL 5397236 (W.D. La. Oct. 30, 2008); *Richardson v. Kellogg Company*, 2014 WL 7338844 (D. Kan. Dec. 22, 2014) *Dioquino v. United of Omaha Life Ins. Co.*, 2021 WL1378747 (S.D. Cal. Apr. 12, 2021). Cf. *Conley v. Pitney Bowes*, supra, n. 1 (The exhaustion doctrine under ERISA is "a creature either of contract or judicial invention"); *Stephens v. PBGC*, supra, n. 2 ("Courts have universally applied the [exhaustion] requirement as a matter of judicial discretion"); *Powell v. AT&T*, 938 F. 2d 823, 825 (7th Cir. 1991) (Exhaustion of administrative remedies is within a court's discretion, not an ERISA mandate).

[10] As early as 1983, in *Kross v. Western Electric Co., Inc.*, 701 F. 2d 1238 (7th Cir. 1983), the Court of Appeals for the Seventh Circuit referred to "the firmly established policy favoring exhaustion of remedies in ERISA cases," and commented that in *Challenger v. Local Union No. 1 of Intern. Bridge*, 619 F. 2d 645 (7th Cir. 1980), "this Court recognized the strong policy which underlies the exhaustion doctrine in ERISA suits." Similarly, in *Springer v. Wal-Mart Assoc. Group Health Plan*, supra, n.1, the Court of Appeals for the Eleventh Circuit observed that "it is no longer open to serious dispute that plaintiffs in ordinary breach of contract ERISA actions must normally exhaust available administrative remedies."

[11] *Campbell v. Royal Bank Supplemental Retirement Plan*, 2022 WL 4009512 (E.D. Pa. Sept. 21, 2022); *Vest v. The Nisssan Supplemental Exec. Retirement Plan II*, 2020 WL 7695261 (M.D. Tenn. 2020); *Paula Campbell v. Sussex Fed. Credit Union*, 602 Fed. Appx. 71 (3d Cir. 2015); *Maynard v. Merrill Lynch & Co.*, 2008 WL 4790670 (M.D. Fla. Oct. 28, 2008); *Hoak v. Plan Admin. of Plans of NCR Corp.*, 389 F. Supp. 3d 1234, 1270 (N.D. Ga. 2019).

genesis"[12] in ERISA Section 503.[13] Consistent with that genesis, exhaustion of administrative remedies does not extend to the seeking of external review.[14]

§ 7.02 AMATO v. BERNARD

One of the significant cases addressing the issue[15] is *Amato v. Bernard*.[16] In that case, the Court of Appeals for the Ninth Circuit acknowledged that "It is true that the text of ERISA nowhere mentions the exhaustion requirement. The question may therefore be raised as to whether Congress intended to grant that authority to the courts to apply that doctrine in suits arising under ERISA."[17] The Court concluded that "the legislative history of ERISA clearly suggests that Congress intended to grant authority to the courts to apply the exhaustion requirement in suits arising under ERISA."[18] The Court further determined. that the claims review provisions of ERISA supported this conclusion.[19] It concluded that "The text of ERISA and the policies underlying that text, far from suggesting that Congress intended to abrogate the exhaustion requirement in the case of suits arising under ERISA, or that sound policy would counsel its abrogation by the courts, suggest just the opposite."[20] To be enforceable under

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[12] *Brown v. J.B. Hunt Transportation Services*, supra, n. 6; *Yates v. Symetra*, supra, n. 2.

[13] With respect to multiemployer withdrawal liability claims, arbitration constitutes an exhaustion of administrative remedies. *Board of Trustees of the Construction Laborers Pension Trust for Southern California v. MM Sundt Construction Company*, 37 F. 3d 1419 (9th Cir. 1994) (collecting cases).

[14] *Duncan v. Jack Henry & Associates*, 2022 WL 2975072 (W.D. Mo. July 27, 2022).

[15] The Court of Appeals for the Fifth Circuit in *Hall v. National Gypsum*, supra, n. 2, referred to "Amato" as the "seminal case" on exhaustion of administrative remedies in the ERISA context.

[16] 618 F. 2d 559 (9th Cir. 1980).

[17] Ibid. at 566. *Gallegos v. Mt. Sinai Medical Center*, supra, n. 3 ("The intent of Congress is best effected by granting district courts discretion to require administrative remedies."). See also, Goldstein, "Employment Discrimination," fn. 64.

[18] Ibid. at 567.

[19] See, Goldstein, "Employment Discrimination," p. 200 ("ERISA's requirement that plans include an appeals procedure implies a Congressional understanding that those bringing benefits claims in federal court would first resort to plan procedures . . .The legislative history of ERISA further demonstrate a Congressional intent to require exhaustion for benefits claims . . . An exhaustion requirement for benefits claims also appears to comport with the purposes of ERISA.").

[20] Id. See also, Goldstein, "Employment Discrimination," p. 202 ("The text, history, and purposes of ERISA thus suggest that exhaustion of plan remedies for benefit claims is a sensible requirement."). See also, Manley, "Civil Actions, supra, n. 5 at 964 ("ERISA's explicit preemption of state law in the employee benefit area suggests that Congress intended federal courts to fashion a doctrine of exhaustion and deference to an administrative outcomes that promotes the statute's underlying aims."). Manley further stated that the scant relevant legislative history suggests that courts should require that claimants seeking judicial review of a benefits denial under Section 502(a)(1)(B) first exhaust arbitral remedies." Id. at 970.

Heimeshoff,[21] the period of time between the exhaustion of administrative remedies and the contractual limitations period must be reasonable.[22] Where a limitations period would require a claimant to file suit within a specific date regardless of the status of an administrative appeal, exhaustion of administrative remedies will not be required.[23] However, as stated above, the failure to file a request for review within a plan's limitation period is one means by which a claimant may fail to exhaust his or her administrative remedies.[24]

§ 7.03 POLICY CONSIDERATIONS

There are several policy considerations that federal courts have advanced for enforcing the exhaustion requirement,[25] including: (i) reduction in the number of frivolous law suits;[26] (ii) promotion of the consistent treatment of claimants;[27] (iii) to provide a non-adversarial method of claim settlement;[28] (iv) to minimize the cost of

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[21] Supra, n. 6.

[22] *Abena v. Metropolitan Life Ins. Co.*, 544 F. 3d 880, 883–884 (7th Cir. 2008); (seven months between exhaustion of administrative remedies and contractual limitation period is reasonable). See also, *Di Joseph v. Standard Insurance Company*, supra, n. 2; *Meta F. Crumb, Plaintiff v. Plan #501 Group Long Term Disability Plan*, 2017 WL 9478472 (W.D. Ark. May 18, 2017); *Simmers v. Hartford Life & Accident Ins. Co.*, 2014 WL 107002 (E.D. Wis. January 9, 2014).

[23] *Ingram v. The Travelers Ins. Co.*, 897 F. Supp. 1160 (N.D. Ill. 1995).

[24] Supra, n. 3.

[25] *Sanchez v. Hartford Life and Accident Ins. Co.*, 2022 WL 4009176 (C.D. Cal. Sept. 2, 2022); *Tarr v. State Mutual Life Ins. Co. of America*, supra, n. 2. See also, Manley, "Civil Actions," supra, n. 5, pp. 966–968.

[26] *Costantino v. TRW, Inc.*, 13 F. 3d 969, 975 (6th Cir. 1994); *Conley v. Pitney Bowes*, supra, n. 1; *Byrd v. MacPapers, Inc.*, 961 F. 2d 157, 160 (11th Cir. 1992) ("Policy considerations supporting the exhaustion requirement include reducing the number of lawsuits under ERISA"); *Powell v. AT&T*, supra, n. 8 ("Congress' apparent intention in mandating internal claims procedures found in ERISA was to minimize the number of frivolous lawsuits"); *Diaz v. United Agr. Emp. Welfare Plan and Trust*, supra, n. 2; *Gallego v. Mt. Sinai Med. Center*, supra, n. 3; *Zhou v. Guardian Life Ins. Co. of America*, 295 F. 3d 677, 679 (7th Cir 2002); *Galman v. Prudential Ins. Co. of America*, 254 F. 3d 768, 770 (8th Cir. 2001); *Angevine v Anheuser Busch Co. Pension Plan*, 646 F. 3d 1034, 1037 (8th Cir. 2011); *Mason v. Continental Group, Inc.*, 763 F. 2d. 1219, 1227 (11th Cir. 2000); *Hall v. National Gypsum,* supra, n. 2; *Kennedy v. Empire Blue Cross & Blue Shield*, supra, n. 1; Goldstein, "Employment Discrimination," fn. 63.

[27] *Constantino v. TRW, Inc.*, supra, n. 25; *Conley v. Pitney Bowes*, supra, n. 1; *Galman v. Prudential Ins. Co. of America*, supra, n 25; *Angevine v. Anheuser Busch Co. Pension Plan*, supra, n. 25; *Diaz v. United Agr. Emp. Welfare Plan and Trust*, supra, n. 2; *Kennedy v. Empire Blue Cross & Blue Shield*, supra, n. 1; *Hall v. National Gypsum*, supra, n. 2.

[28] *Constantino v. TRW, Inc.*, supra n. 25; *Conley v. Pitney Bowes*, supra, n. 1; *Lindemann v. Mobil Oil Corp.*, 79 F. 3d 647, 650 (7th Cir. 1996); *Diaz v. United Agr. Employee Welfare Benefit Plan and Trust*, supra, n. 2; *Galman v. Prudential Ins. Co. of America*, supra, n. 25; *Angevine v. Anheuser Busch Co.*

claims settlement for all concerned;[29] (v) to enhance the ability of trustees of benefit plans to expertly and efficiently manage their funds by preventing premature judicial intervention into their decision making process;[30] (vi) enhance the ability of trustees of benefit plans to correct their errors;[31] (vii) to enhance the ability of trustees to interpret plan provisions;[32] (viii) assembling a factual record that will assist a court in reviewing the fiduciaries' actions;[33] (ix) ensuring that ERISA trustees, not federal courts, be responsible for their actions, so that not every ERISA action becomes literally a federal case;[34] and (x) assuring that any judicial review of fiduciary action (or inaction) is made

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Pension Plan, supra, n. 25; *Kennedy v. Empire Blue Cross & Blue Shield*, supra, n. 1; *Hall v. National Gypsum*, supra, n. 2.

[29] *Constantino v. TRW, Inc.*, supra, n. 25; *Conley v. Pitney Bowes*, supra n. 1; *Taylor v. Bakery & Confectionary Union and Indus. Intl. Welfare Fund*, 455 F. Supp. 816, 820 (E.D. N.C. 1978) ("If claimants were allowed to litigate the validity of their claims before a final decision [by the plan administrator] was rendered, the costs of dispute settlement would increase markedly for employers. Employees would also suffer financially because, rather than utilize a simple procedure which allows them to deal directly with their employer, they would have to employ an attorney and bear the costs of adversary litigation in the courts."), discussed in *Manley*, supra n. 5, p. 968); *Communication Workers v. AT&T Co.*, 40 F. 3d 426, 432 (D.C. Cir. 1994) (From the perspective of federal courts, exhaustion of remedies is desirable because it "may render subsequent judicial review unnecessary . . . because a plan's own remedial procedure will resolve many claims."); *Galman v. Insurance Co. of America*, supra, n. 25; *Angevine v. Anheuser Busch Co. Pension Plan*, supra, n. 25; *Lindemann v. Mobil Oil Corp.,* supra, n. 27; *Mason v. Continental Group, Inc.*, supra, n. 25, *Hall v. National Gypsum*, supra, n. 2.

[30] *Constantino v. TRW, Inc.*, supra, n. 25; *Conley v. Pitney Bowes*, supra, n. 1; *Mason v. Continental Group Inc.*, supra, n. 25; *Ravenscroft v. Unum Life Ins. Co.*, 212 F. 3d 341, 348 (6th Cir. 2000); *Diaz v. United Agr. Employee Welfare Plan and Trust*, supra, n. 2; *Coomer v. Bethesda Hospital*, supra, n. 2; *Kross v. Western Electric Co.*, supra, n. 9; Goldstein, "Employment Discrimination," fn. 63.

[31] *Constantino v. TRW, Inc.*, supra, n. 25; *Conley v. Pitney Bowes*, supra, n.1; *Galman v. Prudential Ins. Co. of America*, supra, n. 25; *Angevine v. Anheuser Busch Pension*, supra, n. 25; *Ravenscroft v. Unum Life Ins. Co.*, supra, n. 29; *Coomer v. Bethesda Hospital*, supra, n. 2; *Anderson v. United of Omaha Life Ins. Co.*, 2021 WL 613238 (E.D. Mich. Feb. 7, 2021).

[32] *Constantino v. TRW, Inc.*, supra, n. 25; *Conley v. Pitney Bowes*, supra, n. 1; *Ravenscroft v. Unum Life Ins. Co.*, supra, n. 29; *Coomer v. Bethesda Hospital, Inc.*, supra, n. 2; *Anderson v. United of Omaha Life Ins. Co.*, supra n. 30.

[33] Ibid. See also, *Flores v. Life Ins. Co. of North America*, 2021 WL 3206793 (C.D. Cal. July 29, 2021); *Zhou v. Guardian Life Ins. Co. of America*, supra n. 25; *Gallegos v. Mt. Sinai Medical Center*, supra, n. 3; *Brown v. J.B. Hunt Transportation Services*, supra, n. 6. (The exhaustion requirement "enables the employer, or the plan, to obtain full information about a claim for benefits, to compile an adequate remedy, and to make a reasoned decision . . . The process is of substantial benefit to a reviewing court because it gives them a factual predicate on which to proceed"); *Meza v. General Battery Corp.*, 908 F. 2d 1262, 1279 (5th Cir. 1990) (Provide a sufficiently clear record of administrative action if litigation should ensue); *Denton v. First National Bank of Waco*, 765 F. 2d 1295, 1300 (5th Cir 1985); *Mason v. Continental Group, Inc.*, supra, n. 24; *Ames v. American National Can Co.*, 170 F. 3d 751, 756 (7th Cir. 1999) (Exhaustion of administrative remedies helps develop a complete administrative record for judicial review.).

[34] *Medina v. Anthem Life Ins. Co.*, 983 F. 2d 29, cert den. 510 U.S. 816 (1993); *Meza v. General*

under the arbitrary and capricious standard, and not de novo.[35] Further, the Court of Appeals for the Second Circuit has indicated that requiring plaintiffs to exhaust their administrative remedies prior to resorting to federal court provides a "safeguard that encourages employers and others to undertake the voluntary step of providing medical and retirement benefits to plan participants."[36] Accordingly, "These advantages outweigh a plaintiff's relatively minor inconvenience of having to pursue her claims administratively before rushing to federal court."[37] In the class action context, in *Wit v. United Behavioral Health*,[38] the Ninth Circuit held that unnamed class members are not excused from exhausting administrative remedies.

§ 7.04 EXCEPTIONS TO THE EXHAUSTION REQUIREMENT

However, because the exhaustion requirement is prudential,[39] not jurisdictional,[40]

Battery Corp., supra n. 32; *Denton v. First National Bank of Waco*, supra, n. 32 ("the exhaustion requirement" prevents fiduciaries from avoiding their duties under the Plan by insulating all benefit decisions in the protective mantel of federal judicial review. If fiduciaries were to find their decisions more closely supervised by an intervening federal judiciary, it is likely that they would go to court to seek instruction by declaratory relief on questions involving claims for benefits, rather than deciding those questions themselves as Congress intended. By requiring exhaustion of remedies, we strike a balance between judicial intervention and the discharge of the fiduciary's duties."). Cf. *Challenger v. Local 1, Int'l Bridge, Structural and Ornamental Ironworkers*, supra, n. 9 (making every claim dispute into a federal lawsuit would place an economic burden on plans).

[35] *Meza v. General Battery Corp.*, supra, n. 32; *Denton v. First National Bank of Waco*, supra, n. 32.

[36] *Halo v. Yale Health Plan, Director of Benefits and Records*, 819 F. 3d 42, 55 (2d Cir. 2016), quoting *Larue v. DeWolff Boeing and Assoc.*, 552 U.S. 248, 259 (2008) (Roberts, C.J., concurring).

[37] *Lindemann v. Mobil Oil Corp.*, supra, n. 26.

[38] Supra, n. 2.

[39] In *Jackson v. Guardian Life Insurance of America*, supra, n. 4, the District Court for the Northern District of California suggested that, at least in the Ninth Circuit, "contractual exhaustion may have displaced prudential exhaustion and its requirements." While it is not clear that this result was intended by combining two decisions of the Court of Appeals for the Ninth Circuit, the rationale of the District Court was as follows: "Since, under a plan's terms, it seems exhaustion is either reasonably read as mandatory or optional, it is not clear how a court could ever reach the prudential exhaustion requirement (or the exceptions thereupon). In other words, it seems either (1) a plan makes exhaustion optional, and *Spinedex* means exhaustion is optional; or (2) a plan makes exhaustion mandatory, and *Wit* means exhaustion is mandatory." The District Court also noted that there was a split of authority as to the meaning of whether a plan makes exhaustion of administrative remedies optional. In *Kirkendall v. Halliburton, Inc.*, 707 F. 3d 173 (2d Cir. 2013) and *Watts v. BellSouth Telecommunications, Inc.*, supra, n. 2, the relevant test is described in subjective terms (i.e., the question is whether the claimant "reasonably interprets" exhaustion of administrative remedies as optional). However, under *Spinedex*, in the Ninth Circuit, the standard is objective—"a claimant need not exhaust when the plan does not require it." *Spinedex Physical Therapy USA v. United HealthCare of Arizona, Inc.*, 770 F. 3d 1282 (9th Cir. 2014).

[40] *Harris v. Provident Life & Accident Ins. Co.*, 2020 WL 9936825 fn. 1 (M.D. Tenn. January 28, 2020); *Wit v. United Behavioral Health*, supra, n. 2; *Vaught v. Scottsdale Health Care Corp. Health Plan*,

there are exceptions to the rule,[41] although in light of the "strong policies supporting exhaustion,"[42] courts excuse exhaustion failures "only in the most exceptional circumstances."[43] There may also be equitable exceptions to the exhaustion requirement.[44]

Courts have taken different approaches in classifying the grounds for exercising exhaustion. Some courts have grouped a variety of reasons to excuse exhaustion under the umbrella term futility.[45] Other courts use a narrower definition of futility requiring, for example, proof that the claim will be denied and classifying other grounds for excusing exhaustion as something other than futility.[46] Similarly, courts in different

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546 F. 3d. 620 (9th Cir. 2008); *Crowell v. Shell Oil Company*, 541 F. 3d 295 (5th Cir. 2008); *Paese v. Hartford Life Accident Ins. Co.*, supra, n. 6; *Thibodeau v. Prudential Ins. Co. of America*, supra, n. 8; *Richardson v. Kellogg Company*, supra, n. 8; *Scarangella v. Group Health, Inc.*, 2009 WL 764454 (S.D.N.Y. March 24, 2009); *Stampone v. Walker*, 722 Fed. Appx. 246, 249 n. 3 (3d Cir. 2018); *Severine v. Anthem Blue Cross Life & Health Ins. Co.*, 2020 WL 1519287 (D. Colo. March 31, 2020) (same); *Tronsgard v. FBL Financial Grp., Inc.*, 312 F. Supp. 3d. 982, 1005 (D. Kan. 2005) ("If presented with the question, the Tenth Circuit would conclude that ERISA's exhaustion requirement is not jurisdictional."). Cf. *Gonzalez v. Blue Cross Blue Shield Assn.*, 62 F. 4th 891 (5th Cir. 2023) ("There are two types of exhaustion requirements, jurisdictional and jurisprudential. When Congress statutorily mandates that a claimant exhaust administrative remedies, the exhaustion requirement is jurisdictional.")

[41] *Vaught v. Scottsdale Health Corp. Health Plan*, supra, n. 39; *Jackson v. Guardian Life Ins. of America*, supra, n. 4.

[42] *Tomcyzscyn. v. Teamsters Local 115 Health and Welfare Fund*, 590 F. Supp. 2d. 211 (E.D. Pa. 2014).

[43] *Davis v. AIG Life Ins. Co.*, 85 F. 3d 624 (5th Cir. 1996), citing *Communication Workers of America v. Am. Tel. & Tel. Co.*, supra, n. 28. See also, *Ctr. for Restorative Breast Surgery, L.L.C. v. Blue Cross Blue Shield of La.*, 2016 WL 4208479 (E D. La. Aug. 10, 2016) ("the exceptions apply . . . only in extraordinary circumstances"); *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 2018 WL 3738086 (S.D. Tex. Aug. 7, 2018), aff'd 952 F. 3d 708 (5th Cir. 2020); *Mission Toxicology v. United Healthcare Ins. Co.*, 499 F. Supp. 3d 338 (W.D. Tex. 2020). *Perrino v. S. Bell Tel. & Tel. Co.*, 209 F. 3d 1309, 1315, 1318 (11th Cir. 2004) (Compliance with the exhaustion requirement is excused only in "narrow "and "exceptional circumstances"); *Garcon v. United Mutual of Omaha*, 779 Fed. Appx. 595 (11th Cir. 2019); *Van Natta v. Sara Lee Corp.*, 439 F. Supp. 2d 911, 940 (N.D. Iowa 2006).

[44] *Pethers v. Unum Life Insurance Co. of America*, 2005 WL 2206478(W.D. Mich. Sept. 12, 2005). See also, *Gayle v. United Parcel Service, Inc.*, supra, n. 3; *Buck v. Continental Casualty Company*, supra, n. 3; *Sanfilippo v. Provident Life & Cas. Ins. Co.*, 178 F. Supp. 2d 450, 458 (S.D.N.Y. 2002) ("absent appropriate equitable considerations, court action is barred absent such exhaustion [of administrative remedies].")

[45] See, discussion in *Brown v. J.B. Hunt Transportation Services, Inc.*, supra, n. 6. Cf. *Lanfear v. Home Depot, Inc.*, 536 F. 3d. 1217, 1224–25 (11th Cir. 2008), suggesting that the futility exception and the denial of meaningful access exception are co-extensive to the extent that the futility exception protects participants who are denied meaningful access to administrative procedures. Cf. *Glover v. St. Louis San Francisco Railway*, 393 U.S. 324, 330 (1969) (exhaustion of administrative remedies not required if it "would be totally futile").

[46] *Wilson v. United Healthcare Ins. Co.*, fn. 5, supra, n. 2.

circuits have different tests for applying exhaustion of administrative remedies.[47] For example, in the Third Circuit, there are five factors, which may not be weighted equally, that a court may take into account in determining whether the futility exception applies: (i) whether the plaintiff diligently pursued administrative relief, (ii) whether plaintiff acted reasonably in seeking immediate judicial review under the circumstances, (iii) the existence of a fixed policy denying benefits, (iv) the failure of the insurance company or administrator to comply with its own internal procedures, and (v) the testimony of a plan administrator that an administrative appeal would be futile.[48] In the Sixth Circuit, factors that have led courts to conclude that administrative appeals would be futile include the lawsuit at issue was not frivolous; the claimant had made unsuccessful inquiries to the insurance company to change its methodology for two (2) years; further use of the administrative proceedings would have caused the parties additional litigation costs; the factual record was well established; and the court believed it was certain that the insurer would not "seriously reconsider" the methodology at issue.[49]

A common historical formulation[50] was that exhaustion of remedies is excused where resort to the plan's administrative procedures would simply be futile[51] or the

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[47] *C.L. on Behalf of Minor C.L. v. Newmont USXLY Co.*, 2020 WL 3414807 (D. Utah June 22, 2020) (Courts in the Tenth Circuit apply a different test for applying exhaustion than courts in the Third Circuit).

[48] *Harrow v. Prudential Ins. Co. of America*, 279 F. 3d 244 (3d Cir. 2002); *Vanlinski v. E & B Giftware, Inc.*, 2007 WL 9761645 (M.D. Pa. Nov. 7, 2007).

[49] *Fallick v. Nationwide Mutual Insurance Company*, 162 F. 3d. 410, 420–421 (6th Cir. 1998); *Productive M.D. LLC v. Aetna Health Inc.*, 969 F. Supp. 2d 901, 931–32 (M.D. Tenn. 2013).

[50] See, for example, *Wit v. United Behavioral Health*, supra, n. 2 ("We have also consistently recognized three exceptions to the prudential exhaustion requirement: futility, inadequate remedy, and unreasonable claims procedures.").

[51] *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965), cited in *Nierenberg v. Health Center of SW Florida, P.A.*, 835 F. Supp. 1404 (M.D. Fla. 1993). As examples of futility, see *Leung v. Skidmore, Owings Merrill LLP*, 213 F. Supp. 2d 1097, 1101(N.D. Cal. 2002), in which a district court found a plaintiff's showing of futility sufficient to excuse exhaustion where, in order to receive benefits, the plan required documentation that the plaintiff simply did not have. In *Perkins v. Prudential Insurance Co. of America*, 417 F. Supp. 2d 1149,1153 (C.D. Cal. 2006), plaintiffs showing of futility was sufficient where the long history of claims and lawsuits between plaintiff and the insurer showed that the insurer consistently failed to pay benefits unless sued. In *Melczer v. Unum Life Ins. Co. Am.*, 2009 WL 792502 (D. Ariz. March 24, 2009), futility was adequately shown where there was evidence regarding the lack of reviews done by the insurer in the initial denial of claims); *Phillips v. Steelworkers Western Independent Shops Pension Plan*, 2204 WL 2203558 (N.D. Cal. Sept. 29, 2004) (plaintiff adequately pled futility in light of the board's interpretation of the rule that would govern determination of benefits); *Darensbourg-Tillman v. Robins, Kaplan, Miller Ciresi LLP Short Term Disability Plan*, 2004 WL 5603225 (C.D. Cal. Sept. 3, 2004) (exhaustion futile for a claim under a long term disability plan where plaintiff had pursued the claim under the more liberal short term disability policy and the claim was denied).

remedy inadequate[52] or a lack of meaningful access to the review procedures.[53] A lack of meaningful access to administrative procedures may be found where a claimant attempts to initiate higher levels of review but is denied access to those procedures,[54] or where a claimant is not told that a review procedure is available[55] or how to file an appeal.[56] Exhaustion is not required where a claimant would be threatened with

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[52] *Southeast Alaska Conservation Council v. Watson*, 697 F. 2d. 1305 (9th Cir. 1983); *Fallick v. Nationwide Mutual Insurance Co.*, supra, n. 48, at 419; *Lanfear v. Home Depot*, supra, n. 44; *Drinkwater v. Metro. Life Ins. Co.*, 846 F. 2d 821, 826 (1st Cir. 1988), cert. den. 488 U.S. 909 (1988); *Sawyer v. USAA Ins. Co.*, 912 F. Supp. 2d 1118, 1142 (D. N.M. 2012) (The inadequacy of remedy exception applies "where a plaintiff asserts that he or she received inadequate notice of the administrative remedies available and how to pursue them"). *Nierenberg v. Heart Center of SW Florida, P.A.*, supra, n. 50; See, Goldstein, "Employment Discrimination," p. 203 and fn. 60 ("The inadequate remedies exception to the exhaustion requirement applies when the remedies available under the private procedures would not compensate the plaintiff for the injuries she claims to have suffered . . . The lack of cases arising under this exception is not surprising. Benefit claimants seek only the benefits provided under the plan. As a result, the remedies available under plan procedures provide the identical relief available in court.").

[53] *Smith v. Blue Cross Blue Shield of Wisconsin*, 959 F. 2d 656, 658–59 (7th Cir. 1992); *Amato v. Bernard*, supra, n. 15; *Lindemann v. Mobil Oil Corporation*, 888 F. Supp. 859 (N.D. Ill. 1995), aff'd supra, n. 27); *Koenig v. Waste Management, Inc.*, 76 F. Supp. 2d 908, 912 (N.D. Ill. 1999). In *Yates v. Symetra Life Ins. Co.*, supra, n. 2 the District Court for the District Court of Missouri described this exception to the exhaustion requirement in the Eighth Circuit as "when available review procedures neither comply with ERISA's fiduciary review procedures nor apply to the specific claimants." See also, *Bickley v. Caremark*, 461 F. 3d 1325, 1330 (11th Cir. 2006) ("A district court has the sound discretion to waive or excuse the exhaustion requirement . . . where a claimant as denied "meaningful access" to the administrative review scheme in place").

[54] *Carter v. Signode, Inc.*, 688 F. Supp 1283, 1287 (N.D. Ill. 1988) and *Shine v. The University of Chicago*, 55 EBC 1443 (N.D. Ill. March 28, 2013).

[55] In *Wallace v. Oakwood Healthcare, Inc.*, supra, n. 2 and *Yates v. Symetra*, supra, n. 2, the Sixth Circuit and the Eighth Circuit held that exhaustion of administrative remedies is not required where the plan document contains no such procedures, even if a benefit denial letter sets forth in detail a plan's claims review procedures.

[56] *Boesl v. Suburban Trust and Savings Bank*, 642 F. Supp. 1503, 1516 (N.D. Ill. 1986) and *Shine v. The University of Chicago*, supra, n. 53. See also, *Watts v. Bell South Telecommunications, Inc.*, supra, n. 2 ("When the plaintiff's failure to exhaust administrative remedies resulted from certain language in the plan's summary plan description which plaintiff reasonably interpreted as meaning that she could go straight to court with her claims," the exhaustion requirement is excused); *Doctors Hospital of Augusta, Inc. v. Horton Homes, Inc.*, 2005 WL 8154300 (N.D. Ga. Sept. 28, 2005) (same); *Smith v. Westvaco Corp. VEBA LTD Plan*, 399 F. Supp. 2d 692 (D. S.C. 2005) (same); *McCay v. Drummond Company, Inc.*, 2013 WL 616923 (11th Cir. 2013) (same). In *Yates v. Symetra Life Ins. Co.*, supra, n. 2, the District Court indicated that one of the grounds on which exhaustion of remedies is excused is failure to provide notice. However, in the Eighth Circuit, exhaustion of remedies is required in the context of a denial of benefits action under ERISA, when there is available to the claimant a claims review procedure in accordance with DOL regulations, even if the materials describing the procedure does not explicitly state that it is mandatory or a prerequisite, so long as a participant has notice. *Wert v. Liberty Life Assurance Company*

irreparable harm,[57] and the Sixth Circuit has also stated that generally, futility applies in only two cases—when a plaintiff asserts questions about the plan's legality, or when plaintiffs challenge a defendant's authority to decide their claims.[58] In addition to these traditional bases for recognition of exceptions to the exhaustion requirement, courts have also recognized the deemed exhaustion of remedies under Department of Labor ("DOL") claim review procedures regulations,[59] although to a lesser degree in the Tenth Circuit.[60] Accordingly, "employers who wish to rely on the exhaustion of

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of Boston, Inc., supra, n. 2. Cf. In *Wallace v. Oakwood Healthcare, Inc.*, supra, n. 2, the Court of Appeals for the Sixth Circuit did not decide whether a plan document must explicitly and affirmatively require exhaustion in order for the futility exception to be unavailable to a claimant. Cf. In *DeLong v. Teachers Insurance and Annuity Association*, 2000 US Dist. LEXIS 4759 (E.D. Pa. 2000) and *Vanlinski v. E & B Giftware, Inc.*, supra, n. 47, District Courts held that a plaintiff's alleged lack of notice of administrative procedures does not render the claim process futile. See also, Lauren Garraux, "ERISA's Exhausting and Exasperating Exhaustion Requirement and the Exceptions Medical Providers Seeking Full Reimbursement from Health Insurers Should Know," K & L Gates, LLP, July 20, 2015).

[57] *Tomcszyscyn v. Teamsters Local 115 Health & Welfare Fund*, supra, n. 41; *Central States, Inc. v. Time, D.C.*, 826 F. 2d 320 (5th Cir. 1987); *Nierenberg v. Heart Center of Southwest Florida, PA*, supra, n. 50.

[58] *Anderson v. United of Omaha Life Ins.*, supra, n. 30, citing *Dozier v. Sun Life Assurance Co. of Canada*, 466 F. 3d 532, 535 (6th Cir. 2006). For a discussion of *Dozier*, see, Matt Pulle, "The Futility Exception to the ERISA Requirement That Claimants Must Exhaust Their Administrative Remedies in Order to be Able to File a Lawsuit," Tennessee Disability and Life Insurance Blog, December 22, 2017.

[59] Under the deemed exhaustion rule, claimants are deemed to have exhausted their administrative remedies if a plan failed to establish or follow claims procedures consistent with the requirements of regulations under ERISA Section 503. *Nichols v. Prudential Ins. Co. of America*, 406 F. 3d 98, 107 (2d Cir. 2005) ("A plan administrator's failure to adhere literally to the regulatory deadline renders the claimant's administrative remedies exhausted as a matter of law."); *Wallace v. Oakwood Healthcare, Inc.*, supra, n. 2; *Yates v. Symetra Life Ins. Co.*, supra, n. 2. In footnote 4 of its decision affirming *Yates v. Symetra*, the Eighth Circuit indicated that it was not addressing under what circumstances administrative remedies that are actually prescribed in a written plan document can still be deemed exhausted when a plan's appeal procedures fail to comply with the DOL's implementing regulations under ERISA Section 503. In *Eastman Kodak v. STWB, Inc.*, 452 F. 3d 215, 222 (2d Cir. 2006), the Second Circuit observed that "the 'deemed exhaustion' requirement was plainly designed to give claimants faced with inadequate claims procedures a fast track into court.") *Price v. Unum Life Ins. Co. of America*, 2018 WL 1352965 at *8 (D. Md., March 14, 2018), aff'd 746 Fed. Appx. 231 (4th Cir. 2018); *Krysztofiak v. Boston Mutual Life Ins. Co.*, 2021 WL 5304011 (D. Md. Nov. 15,2021); *Rupprecht v. Reliance Standard Life Ins. Co.*, 623 F. Supp. 3d 683 (E.D. Va. 2022).

[60] In *Holmes v. Colo. Coalition for Homeless Long Term Disability Plan*, 762 F. 3d 1195 (10th Cir. 2014), the Court of Appeals or the Tenth Circuit indicated that "courts have . . . been willing to overlook [a] plan administrator's failure to meet certain procedural requirements when the administrator has substantially complied with the regulations, and the process as a whole fulfills the broader purpose of ERISA and its accompanying regulations." Id. at 1211. Deficiencies are excused "so long as the clamant has not been prejudiced thereby." Ibid. To show prejudice, a "claimant must demonstrate the notice and disclosure deficiencies actually denied the participant a reasonable review process." Id. at 1213. See also,

administrative remedies doctrine. . . must comply with applicable ERISA provisions."[61] Further, if a claim is processed either under an incorrect form or an incorrect procedure, a claimant is deemed to have exhausted his or her administrative remedies.[62] The demonstrated futility of administrative appeals constitutes an exception to the prudential exhaustion requirement.[63] In *Ludwig v. Nynex Serv. Co.*,[64] the District Court for the Southern District of New York stated that "the futility doctrine is perhaps best understood as a term of art that considers whether in light of both the claimant's and plan administrator's actions, it is fair to require the dismissal of the claimant's suit pending reapplication for benefits in accordance with the procedures set forth in the summary plan description."[65]

Although futility is a recognized exception to the exhaustion requirement,[66] for the futility exception to apply, a plaintiff must establish why the process would have been futile,[67] a "significant burden."[68] Courts have stated that "the threshold requirement for the futility exception is "very high,"[69] and that the exception is "narrow"[70] and "quite

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C.L. on Behalf of H.L. v. Newmont USA, Ltd., 2020 WL 3414807 (D. Utah June 20, 2022) (If a claimant cannot demonstrate that he or she was actually denied a reasonable review procedure as a result of the deficiency, then the deemed exhaustion requirement does not apply. Cf. *Wallace v. Oakwood Healthcare*, supra, n. 2 (not deciding whether strict compliance with DOL's claims procedures is required, or substantial compliance is sufficient). For an example of a Tenth Circuit case in which the inadequacy of remedy exception to the exhaustion of administrative remedies was found to apply, see *Gutierrez v. Johnson & Johnson International, Inc.*, 2022 WL 1421981 (D. N.M. May 5, 2022) (plaintiff has plausibly alleged that defendants failed to follow claims procedures consistent with requirements of DOL Regulation Section 2560.503-1(b) and (g), and that its failure actually deprived plaintiffs of a reasonable claims procedure).

[61] *Garland v. General Felt Industries, Inc.*, 777 F. Supp. 948, 951 (N.D. Ga. 1991). See also, *White v. The Keychoice Welfare Benefit Plan*, supra, n. 2.

[62] *McKennan v. Meadowvale Dairy Employees Benefit Plan*, 374 F. Supp. 3d 771 (N.D. Iowa 2019); *Young v. Unum Provident Corp.*, 2002 WL 2027285 (D. Minn. Sept. 3, 2002); *Theil v. United Healthcare of Midlands, Inc.*, 2001 WL 574637 (D. Nebr. Jan. 23, 2001).

[63] *Noren v. Jefferson Pilot Financial Ins. Co.*, 378 Fed. Appx. 696, 698 (9th Cir. 2010).

[64] 838 F. Supp. 769 (S.D.N.Y. 1993).

[65] Id. at 781. See also, Goldstein, "Employment Discrimination, "p. 203 ("In the context of ERISA benefits claims, the futility exception allows a court to waive the exhaustion requirement if the court concludes that reliance on a plan's internal claims procedures would be unavailing, unsuccessful, or a waste of time.").

[66] *Mission Toxicology LLC v. United HealthCare Ins. Co.*, supra, n. 41.

[67] *Flores v. Life Insurance Co. of North America*, supra, n. 32; *Zhou v. Guardian Life Ins. Co. of America*, supra, n. 25 (Burden is on plaintiff seeking an excuse for failure to comply with a plan's administrative procedures).

[68] *Neal v. United of Omaha Life Ins. Company*, supra, n. 2.

[69] *Barnett v. IBM Corp.*, 885 F. Supp. 581, 589 (S.D.N.Y. 1995). See also, *Hitchcock v. Cumberland*

restricted."[71] It is available to a plaintiff who can make a "clear and positive showing"[72] that exhausting his or her administrative remedies would be "clearly useless,"[73] or "demonstrably doomed to fail,"[74] "definitely would not work,"[75] "would not work if pursued,"[76] "would serve no purpose,"[77] or would require "certainty of an adverse decision,"[78] not merely "doubts that an appeal will result in a different decision."[79] However, for the avoidance of doubt, the certainty of the futility of exhausting administrative remedies is not death and taxes certainty. As the Court of Appeals for the Sixth Circuit explained in *Dozier v. Sun Life Assurance Company of Canada*,[80] "Courts and applicants may fairly assume that a company will treat benefit claims consistently and coherently They should not be required to insist on exhaustion on the assumption that the company may have a bad day. Otherwise, the futility exception would never

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Univ. 403(b) DC Plan, 851 F. 3d 552, 560 (6th Cir. 2017) (satisfying the futility exception is a "high standard"); *Anderson v. United of Omaha Life Ins. Co.*, supra, n. 30 (same).

[70] *Sanchez v. Hartford Life & Accident Ins. Co.*, supra, n. 24; *Yates v. Symetra Life Ins. Co.*, supra, n. 2; *Almont Ambulatory Surgery Center, LLC v. United Health Group, Inc.*, 99 F. Supp. 3d. 1110, 1179 (C.D. Cal. 2015); *Brown v. J.B. Hunt Transportation Services, Inc.*, supra, n. 6; *Cherry v. McKenney*, 2017 WL 2992736 (C.D. Cal. Apr. 22, 2017); *McKennon v. Meadowland Dairy Employee Benefit Plan*, supra, n. 61; *Chorosevic v. MetLife Choices*, 600 F. 3d 934, 945 (8th Cir. 2010).

[71] *Kern v. Verizon Communications, Inc.*, 381 F. Supp. 2d 532, 537 (M.D. W. Va. 2005); *Communication Workers of America v. AT&T*, supra, n. 28; *Strumsky v. Washington Post. Co.*, 922 F. Supp. 2d 96, 101 (D. D.C. 2013).

[72] *Williams v. Walmart Stores East, L.P.*, 2019 WL 260898 (M.D. Ala. 2019); *Davenport v. Henry N. Abrams, Inc.*, 249 F. 3d 130, 133–34 (2d Cir. 2001); *Kunda v. C.R. Bard, Inc.*, 671 F. 3d 464, 471–72 (4th Cir. 2011); *Sauls v. Liberty Mutual Personal Ins. Co.*, 2021 WL 3053282 (D.S.C. July 20, 2021); *Kennedy v. Empire Blue Cross and Blue Shield*, supra, n. 1; *Corsini v. United Healthcare Corp.*, 965 F. Supp. 265, 269 (D. R.I. 1997); *Freeman v. MetLife Group, Inc.*, supra, n. 2; *Schneider v. Life Insurance Company of North America*, 2023 WL 3442394 (S.D. Fla. Apr. 20, 2023).

[73] Ibid.

[74] *AF v. Providence Health Plan*, 157 F. Supp. 3d. 899, 909 (D. Ore. 2016); *Diaz v. United Agr. Workers Employee Welfare Benefit Plan and Trust*, supra, n. 2.

[75] *Dale v. Chicago Tribune Co.*, 797 F. 2d. 458, 466 (7th Cir. 1986), cert. den. 479 U.S. 1066 (1987); *Lindemann v. Mobil Oil Corp.*, 888 F. Supp. 859 (N.D. Ill. 1995).

[76] *Laborers Pension Fund v. Buchanan*, supra, n. 2.

[77] *Tomczysyn v. Teamsters Local 115 Health and Welfare Fund*, supra., n. 41.

[78] *Communication Workers of America v. AT&T*, supra., n. 28; *Bourgeois v. Pension Plan for Employees of Santa Fe Intl. Corps.*, 215 F. 3d 475, 479 (5th Cir. 2000); *Smith v. Blue Cross and Blue Shield United of Wisconsin*, 959 F. 2d., 655, 659 (7th Cir. 1992).

[79] *Lindemann v. Mobil Oil Corp.*, supra, n. 27; *Koenig v. Waste Management, Inc.*, supra, n. 52 at 912. See also, *Getting v. Fortis Benefits Ins. Co.*, 5 Fed. Appx. 833, 836 (10th Cir. 2001) (agreeing with Seventh Circuit approach that a plaintiff must establish that it is certain that his claim will be denied on appeal, not merely that he doubts that an appeal will result in a different decision).

[80] 466 F. 3d 532 (6th Cir. 2006).

apply—as the specter of a mistake or inconsistent application of a plan's terms would always hold out the possibility of relief. No authority to our knowledge exists for the proposition that the futility exception does not apply whenever it can be said-indeed it always can be said—that the company might make a mistake or exercise its discretion in an inconsistent manner."[81]

Not surprisingly, therefore, conclusory allegations[82] or speculation or conjecture as to adverse results is not enough,[83] nor is simply asserting futility[84] or making bare assertions or suggestions of futility without any factual support[85] or alleging that a plaintiff has performed all conditions precedent[86] sufficient to establish the futility exception. Thus, a participant, because he or she believes that a claim for benefits would be futile, fails to file a claim for benefits, cannot claim futility.[87]

While allegations of breach of fiduciary duty or biased, bad faith analysis of a participant's claim would be evidence of futility,[88] a claimant's failure to show hostility

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[81] Id. at 536–537.

[82] *McGowin v. Manpower Intl, Inc.*, 363 F. 3d 556, 559 (5th Cir. 2004).

[83] *Wilczynski v. Kemper National Ins. Companies*, 1995 WL 290402 at *5 (N.D. Ill. May 10, 1995); *Goewert v. Hartford Life & Accident Ins. Co.*, 2006 WL 2092426 (E.D. Mo. July 26, 2006); *Lapka v. Juno Lightning, Inc.*, 1998 WL 102714 (N.D. Ill. March 3, 1998) (The "court cannot conclude that administrative review would have been futile unless it engages in speculation as to the results of a hypothetical claim and a hypothetical appeal. The court declines to do so."); *Robyns v. Reliance Ins. Co.*, supra, n. 2 (rejecting a futility claim "based solely on conjecture").

[84] *Laborers Pension Fund v. Buchanan*, supra, n. 2; *Drinkwater v. Metropolitan Life Ins. Co.*, supra, n. 51 ("a blanket assertion unsupported by any facts, is insufficient"); *Giuffre v. Delta Air Lines, Inc.*, 746 F. Supp. 238, 240 (D. Mass. 1990).

[85] *Grenell v. UPS Health & Welfare Package*, 390 F. Supp. 2d 932, 935 (C.D. Cal. 2005); *Cherry v. McKenney*, supra, n. 68; *Diaz v. United Agr. Employees Welfare Benefit Plan & Trust*, supra n. 2 at 1485; *Ajayi v. Kaiser Foundation Health Plan*, 56 EBC 2306 (E.D. Cal. Jan. 10, 2013); *Flores v. Life Ins. Co. of North America*, supra, n. 32; *Springer v. Wal-Mart Assoc. Group Health Plan*, supra, n. 1. See, for example, *Hickey v. Digital Equipment Corp.*, 43 F. 3d 941, 945 (4th Cir. 1995) (Rejecting an assertion of futility when the claimant did not file a written claim and alleged, with no further foundation, that doing so 'would have been a mere formality if not a charade.').

[86] *Vocational Development Group, Inc. v. Aetna Health, Inc.*, 2017 WL 6940562 (M.D. Fla. Sept. 6, 2017); *Variety Children's Hospital v. Century Medical Health Plan*, 57 F. 3d 1040, 1042, n. 2 (11th Cir. 1995); *Rodriguez v. Health Options, Inc.*, 2003 WL 27391269 (S.D. Fla. Sept. 2, 2003).

[87] *Berger v. Edgewater Steel*, 911 F. 2d. 911 (3d Cir. 1990).

[88] *Ludwig v. NYNEX Serv. Corp.*, supra, n. 62; *Riggs v. A. J. Ballard Tire & Oil Co.*, 1992 WL 345584 (4th Cir. Nov. 19, 1992); *DeSilva v. North Shore Long Island Jewish Health System*, 770 F. Supp. 2d 497 (E.D. N.Y. 2011); *DePace v. Matsushita Elec. Corp. of America*, 257 F. Supp. 2d 543, 558–559 (E.D.N.Y. 2003); *Smith v. Champion Intl. Corp.*, 573 F. Supp. 2d 599, 608 (D. Conn. 2008); *Neal v. United of Omaha Life Ins. Co.*, supra, n. 2. See, Goldstein, "Employment Discrimination," p. 207 ("Under the futility exception, courts do not require exhaustion of administrative remedies where a plaintiff can show that the

or bias on the part of the administrative review committee has been held to be fatal to a claim of futility.[89] As the Court of Appeals for the Fifth Circuit explained in *Denton*: "If Denton's view of exhaustion were to prevail, no plaintiff who knew how to claim 'bitterness or hostility' on the part of the Plan's review committee could be compelled to submit his claim for administrative review of the denial of benefits prior to filing of a federal lawsuit. Accordingly, benefit disputes would not only be more numerous and more often frivolous, but less defined as a result of this evasion of the Congressionally mandated administrative process."[90]

The mere denial of a claim is not de facto evidence of the futility of filing a formal appeal.[91] Further, the fact that a plan administrator and those who review appeals share common interests or affiliations does not establish futility.[92] As expressed by the Court of Appeals for the Eleventh Circuit in *Lanfear v. Home Depot*,[93] "the futility exception protects participants who are denied meaningful access to administrative procedures, not those whose claims would be heard by an interested party."[94] Therefore, a statement by a high ranking officer of a plan sponsor who would not have considered the appeal was held insufficient to establish futility,[95] nor does a plan's refusal to pay by itself show futility.[96] For example, in *Medical Alliances, LLC v. American Medical Security*, plaintiff alleged that it had made numerous demands for payment from defendant, and the defendant had refused and continued to refuse to pay. In holding that these

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private decision maker clearly is biased against her claim, making resort to the plan procedures a waste of the plaintiff's time and resources.").

[89] *McGowin v. Manpower Intl., Inc.*, supra, n. 81, at 559. *Mission Toxicology v. UnitedHealthcare Ins. Co.*, supra, n. 42. Cf. On a motion to dismiss, courts in the Second Circuit have found allegations of bad faith on the part of a plan's trustees and administrators sufficient to allege the futility of exhausting remedies. *Gray v. Briggs*, 1998 WL 386177 (S.D.N.Y. July 7, 1998); *Falberg v. Goldman Sachs*, 2020 WL 7695711 (S.D. N.Y. Dec. 28, 2020).

[90] Supra, n. 32 at 1303.

[91] *Ruderman v. Liberty Mutual Group*, 2021 WL 827693 (N.D.N.Y. March 4, 2021).

[92] *Ravencraft v. UNUM Life Ins. Co. of America*, supra, n. 29; *Neal v. United of Omaha Life Ins. Co. of America*, supra, n. 2.; *Dale v. Chicago Tribune Co.*, supra, n. 74; (*Robyns v. Reliance Ins. Co.*, supra, n. 2.

[93] 536 F. 3d 1217(11th Cir. 2008).

[94] Id. at 1224. See also, *McCay v. Drummond Company, Inc.*, 2013 WL 616923 (11th Cir. 2013); *Amato v. Bernard*, supra, n. 15 at 569 ("The appeals procedures are not inadequate simply because they are administered by the Trustees, rather than by some 'neutral arbitrators.' "); *Springer v. Wal-Mart Assoc. Group Health Plan*, supra, n. 1 (same); *Denton v. First Natl. Bank*, supra, n. 32 (same). Goldstein, "Employment Discrimination," p. 208 ("In the context of benefit claims, courts have rejected the argument that pursuing plan remedies would be futile when plan administrators are aligned with the employer.")

[95] *Bourgeois v Pension Plan for Employees of Santa Fe Intern. Corp.*, supra, n. 77.

[96] *Foster v. Blue Shield of California*, 2009 WL 1586039 at *5 (C.D. Cal. June 3, 2009); *Langemo v. Blue Cross Blue Shield of Idaho*, 2021 WL 1238370 (D. Idaho March 30, 2021).

allegations were insufficient to establish the futility exception, the District Court explained that the complaint "does not state that all future attempts to pursue administrative remedies are certain to be futile."[97] The futility exception does not apply where a claim's denial is founded on an employee's failure to comply with a plan's administrative procedures.[98] A District Court has also held that mental incapacity is not an exception to the exhaustion requirement.[99] If a plaintiff does not exhaust his or her administrative remedies and cannot establish futility, a District Court generally will not remand the case back to a plan administrator,[100] although there is contrary authority.[101]

As an additional exception to the exhaustion of administrative remedies requirement, several circuit courts have held that exhaustion of administrative remedies is not required prior to bringing a claim for breach of fiduciary duty or other statutory ERISA violation,[102] although the Seventh[103] and Eleventh Circuits[104] have held to the contrary.

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[97] 144 F. Supp. 2d 979 (N.D. Ill. 2001).

[98] *Diaz v. United Agr. Employees Welfare Plan and Trust*, supra, n. 2; *Tarr v. State Mutual Life Ins. Co. of America*, supra, n. 2 at fn. 3.

[99] *Smith v. The Hartford*, 2020 WL 4815143 (N.D. Ala. August 19, 2020).

[100] *Battles v. Dearborn National Life Ins.*, 2020 WL 6379332 (W.D. Tex. August 20, 2020).

[101] *Ravencraft v. Unum Life Ins. Co.*, supra, n. 29 (Where remedies not exhausted, a District Court should exercise its discretion and dismiss the case without prejudice, allowing a plaintiff to pursue his or her administrative remedies); *Communication Workers of America v. AT&T*, supra, n. 28; *Wall v. Reliance Standard Life Ins. Co.*, 2022 WL 17976806 (D. D.C. Nov. 8, 2022); *Riley v. American Electric Power Service Corp.*, 2023 WL 3184318 (S.D. W. Va. May 1, 2023) ("Plaintiff may have jumped the gun by filing suit before exhausting her administrative remedies. But that mistake does not prevent her from now going back, exhausting her administrative remedies, and then refiling a proper ERISA action."). For a discussion of circumstances in which remand may be appropriate when a claimant fails to exhaust his or her administrative remedies, see, *Gayle v. United Parcel Service*, supra, n. 3.

[102] *Harrow v. Prudential Insurance Co. of America*, supra, n. 47; *Zipf v. AT&T Corp.*, 799 F.2d 889 (Cir. 1986); *Smith v. Sydnor*, 184 F. 3d 356 (4th Cir. 1999); *Chailland v. Brown & Root, Inc,* 45 F. 3d 947 (5th Cir. 1995); *Hitchcock v. Cumberland University 403(b) Plan*, supra, n. 68; *Horan v. Kaiser Steel Retirement Plan*, 947 F. 2d 1412 (9th Cir. 1991); *Amaro v. Continental Can Co.*,724 F. 2d 747 (9th Cir. 1984); *Held v. Manufacturers Hanover Leasing Corp.*, 912 F. 2d 1197 (10th Cir. 1990); *Stephens v. PBGC*, supra, n. 2. See also, Art Marrapese, "ERISA Exhaustion Still Viable in Some Jurisdictions," (January 7, 2021). The Court of Appeals for the Second Circuit has not expressly addressed the issue, but District Courts in the Second Circuit have generally held that exhaustion is not required. See, *Disberry v. Employee Retention Committee of the Colgate Palmolive Company*, 2022 WL 17807122 (S.D.N.Y. Dec. 19, 2022).

[103] *Lindemann v. Mobil Oil Corp.*, supra, n. 27; *Robyns v. Reliance Standard Life Ins. Co.*, supra, n. 2; *Kross v. Western Electric Co.*, supra, n. 8.

[104] *Lanfear v. Home Depot, Inc.*, supra, n. 43; *Mason v. Continental Group*, supra, n. 25.

§ 7.05 PLEADING ISSUES

From a procedural perspective, exhaustion of administrative remedies, which is determined by a District Court before the arbitrary and capricious standard,[105] is an affirmative defense[106] that can be waived,[107] not a jurisdictional bar.[108] The burden of establishing an affirmative defense rests with the defendant,[109] and therefore courts have held that a plaintiff is not required to plead either exhaustion of remedies or futility.[110] However, at least in the Eleventh Circuit,[111] a plaintiff must plead that he or she has exhausted his or her administrative remedies. In *Turner v. Burnside*,[112] the Eleventh Circuit elaborated upon its approach on a defendant's 12(b)(6) motion to dismiss because of a failure to exhaust administrative remedies. Deciding a motion to dismiss for failure to exhaust administrative remedies is a two-step process. First, the court looks to the factual allegations in the defendant's motion to dismiss, and those in the plaintiff's response, and if they conflict, the plaintiff's version of the facts is taken

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[105] *Wolf v. National Shopmen Pension Fund*, 728 F. 2d. 182 (3d Cir. 1984).

[106] In *Jones v. Bock*, 549 U.S. 199, 212 (2007), quoted in *Niemeyer v. Store Kraft Mfg. Co.*, supra, n. 50, the Supreme Court observed that "the usual practice under the Federal Rule is to regard exhaustion as an affirmative defense." *Norris v. Mazzola*, 2016 WL 1588345 at *6 (N.D. Cal. 4/20/2016); *Infoneuro Group v. Aetna Life Ins. Co.*, supra, n. 2; *Rogers v. UnitedHealth Group, Inc.*, 144 F. Supp. 3d 792, 801 (D. S.C. 2015); *Sauls v. Coastal Bridge Co., LLC*, supra, n. 71; Cf. *Jones v. Bock*, supra, at p. 216 (The failure to exhaust under the Prison Litigation Reform Act is an affirmative defense that is not required to be specifically plead or demonstrated in plaintiff's complaint); *Spengler v. Worthington Cylinders*, 615 F. 3d 481, 489 (6th Cir. 2010); *Law Offices of Scott E. Combs v. United States*, 767 F. Supp. 2d. 758 (E.D. Mich. 2011).

[107] *Patterson v. Chrysler Group, LLC*, 845 F. 3d 756, 763, n. 7 (6th Cir. 2017); *Hines v. Provident Life & Accident Insurance Co.*, 2020 WL 9936825 (M.D. Tenn., January 28, 2020), fn. 1.

[108] *Bourgeois v. Pension Plan for Employees of Santa Fe, Intl. Corp.*, supra, n. 77 at 479; *Paese v. Hartford Life & Accident Ins. Corp.*, supra, n. 6; *Crowell v. Shell Oil Co.*, 541 F. 3d 295, 308–09 (5th Cir. 2008); *Hines v. Provident Life & Accident Ins. Co.*, supra, n. 106; *Martinez v. Superior Healthplan, Inc.*, 2017 WL 10821037 (W.D. Tex. Sept. 26, 2017); *Mission Toxicology v. United Healthcare Ins.*, supra, n. 42); *Wilkes v. Cargill, Inc.*, 2022 WL 4134745 (N.D. Miss. Sept. 12, 2022). Cf. *Chailland v. Brown & Root*, supra, n. 101 (Because exhaustion is not required by ERISA, it is not a prerequisite to our jurisdiction) and *Central States SE & SW Areas Pension Fund v. T.I.M.E., D.C.*, supra, n. 56 (same).

[109] *Mission Toxicology, LLC v. UnitedHealthcare Ins. Co.*, supra, n. 42 and *Kirkindoll v. National Credit Union Admin Bd.*, (N.D. Tex. Dec. 17, 2014). However, if defendant demonstrates that plaintiff failed to exhaust his or her administrative remedies, then plaintiff has the burden of showing that an exception applies. *McGowin v. Manpower Int'l, Inc.*, supra, n. 81.

[110] *Goodman v. PraxAir, Inc.*, 494 F. 3d 458, 464 (4th Cir. 2007); *Wilson v. Continental Auto, Inc.*, 2016 WL 6543128 (W.D. N.C. Nov. 2, 2016); *Severine v. Anthem Blue Cross Life & Health Ins. Co.*, supra, n. 39. Cf. *Tronsgard v. FBL Financial Group, Inc.*, supra, n. 39 ("If presented with the question, the Tenth Circuit would conclude that ERISA's exhaustion requirement is . . . an affirmative defense.").

[111] *Byrd v. Macpapers, Inc.*, supra, n. 25; *Garcon v. United Mutual of Omaha Ins. Co.*, supra, n. 42.

[112] 541 F. 3d. 1077 (11th Cir. 2008).

as true. If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed."[113] Courts have held that if a defendant produces evidence that, viewed in the light most favorable to plaintiffs, shows a failure to exhaust, then a defendant is entitled to summary judgment.[114] Thus, "unless the complaint itself makes it apparent that a plaintiff has failed to exhaust administrative remedies, a summary judgment motion is the proper procedure to assert an ERISA failure to exhaust administrative remedies defense."[115] Similarly, in *Sauls v. Coastal Bridge Co., LLC*, the District Court stated that "Under Rule 12(b)(6), dismissal on the basis of an affirmative defense is only appropriate if the defense appears on the face of the complaint. In such a scenario, the claim is said to have a built-in defense and is essentially self-defeating."[116] However, courts disagree,[117] and, particularly in the Second Circuit, courts routinely dismiss ERISA claims brought under ERISA Section 502(a)(1)(B) on a 12(b)(6) motion to dismiss where a plaintiff fails plausibly to allege exhaustion of remedies.[118] In *Day v. Southern Electrical Retirement Fund*,[119] the District Court for the Eastern District of Tennessee elaborated: "Courts disagree on whether failure to exhaust administrative remedies

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[113] Id. at 1082.

[114] *Albino v. Baca*, 747 F. 3d 1162, 1166 (9th Cir. 2014).

[115] *Wilson v. United Healthcare*, supra, n.2; *Wilkes v. Cargill*, supra, n. 107.

[116] Supra, n. 71. As such, courts have refused to consider the affirmative defense of ERISA exhaustion of remedies on a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), because such a motion focuses on the allegations in plaintiff's complaint, not on defendant's affirmative defense. *Richardson v. Kellogg*, supra, n. 8. See also, *Zappley v. the Stride Rite Corp.*, 2010 WL 234713 at *4 (W.D. Mich. Jan. 13, 2010) ("Because exhaustion is an affirmative defense, a rule 12(b)(6) motion is generally not the proper vehicle for asserting lack of exhaustion."); *Gunn v. Blue Cross Blue Shield of Tennessee, Inc.*, 2012 WL 1711555 at *4 (E.D. Tenn. May 15, 2012) ("When a defendant in an ERISA action raises an ERISA plaintiff's failure to exhaust administrative remedies as an affirmative defense, the Court concludes the proper means to raise such a challenge is through an appropriately supported motion under Federal Rules Civil procedure 56."); *Tronsgard v. FBL Financial Group, Inc.*, supra, n. 39. In *Burton v. Ghosh*, 961 F. 3d 960, 964 (7th Cir. 2000), cited in *Jiminez v. Laborers Welfare Fund of the Health and Welfare Department of the Construction and General Laborers' District Council*, 493 F. Supp. 3d 671 (N.D. Ill. 2020), the Seventh Circuit stated that: "The proper way to seek a dismissal based upon an affirmative defense under most circumstances is not to move to dismiss under Rule 12(b)(6) for failure to state a claim. Rather, the defendant should answer and then move under Rule 12(c) for judgment on the pleadings.).

[117] Rules of Civil procedure also need to be taken into account. In *Zar El Jaron-Matisse Thomas Bey v. Board of Trustees of the Carpenters and Joiners Defined Contribution Plan*, supra, n. 8, the District Court granted a 12(b)(6) motion to dismiss when plaintiff failed to respond.

[118] *Abe v. New York University*, 2016 WL 1275661 (S.D.N.Y. March 30, 2016) (collecting cases). See also, *Vanlinski v. E & B Giftware, LLC*, supra, n. 47; *Balmat v. CertainTeed Corp.*, 2004 U.S. Dist. LEXIS 25031 (E.D. Pa. 2005) (An ERISA claim may be dismissed if it does not plead or otherwise deal with the issue of exhaustion).

[119] 2020 WL 6937455 (E.D. Tenn. August 27, 2020).

under ERISA is properly presented in a Rule 12(b)(6) motion. Some say that failure to exhaust is an affirmative defense best presented in a motion for summary judgment. But, under this approach, where the issue of exhaustion appears from the face of plaintiff's complaint, defendants may move to dismiss under Rule 12(b)(6).[120] Other courts opine that 12(b)(6) is the appropriate remedy for failure to exhaust—especially where defendants do not ask for judgment on the administrative record but instead seek dismissal for failure to exhaust. Here Rule 12(b)(6) is the appropriate avenue . . . because Day's failure to exhaust appears on the face of his amended complaint."[121] The Court of Appeals for the Ninth Circuit takes a slightly different approach. In *Wyatt v. Terhune*,[122] the Court of Appeals for the Ninth Circuit explained that "the failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated 12(b) motion rather than a motion for summary judgment."[123] In *Foster v. Wellpoint Health Networks, Inc.*,[124] a California District Court elaborated: "A motion to dismiss for failure to exhaust is not treated as a normal 12(b)(6) motion. When deciding such a motion, a district court may look beyond the pleadings and resolve factual disputes. A dismissal for failure to exhaust remedies is without prejudice and is not an adjudication on the merits."

§ 7.06 STANDARD OF REVIEW OF DISTRICT COURT DECISION

There is also a split on the standard of review by a circuit court with respect to a District Court's determination with respect to the requirement to exhaust administrative remedies. The Eighth Circuit[125] and the Second Circuit[126] have held that an appeals court reviews de novo the underlying issue as to whether a claimant is required to exhaust his or her administrative remedies, and the Ninth Circuit,[127] Sixth Circuit,[128]

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[120] *Wilkes v. Cargill*, supra, n. 107.

[121] Supra, n. 117., fn. 2. See also, *Beamon v. Assurant Emp. Benefits*, 917 F. Supp. 2d. 662, 666 (W.D. Mich. 2013) and *Jordan v. Reliance Standard Life Ins. Co.*, 2018 WL 543041 at *3 (E.D. Tenn. Jan. 24, 2018).

[122] 315 F. 3d 1108(9th Cir. 2003).

[123] Id. at 1119–1120.

[124] Case No. CV-0503324DDP (C.D. Cal. June 3, 2009).

[125] *Kinkead v. SW Bell Corp. Sickness Accident Disability Plan*, supra, n. 8; *Brown v. J.B. Hunt*, supra, n. 6; *Jones v. Aetna Life Ins. Co.*, 943 F. 3d 1167 (8th Cir. 2019); *Yates v. Symetra*, supra, n. 2.

[126] *Burke v. Kodak Retirement Plan*, 336 F. 3d 103, 107 (2d Cir. 2003).

[127] *Diaz v. United Agr. Workers Employee Welfare Benefit Fund*, supra n. 2; *Amato v. Bernard*, supra, n. 15; *Barboza v. Cal. Ass'n of Prof. Firefighters*, 651 F. 3d 1073, 1076 (9th Cir. 2011); *Wit v. United Behavioral Health*, supra, n. 2.

[128] *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, supra, n. 68 and *Wallace v. Oakwood Healthcare, Inc.*, supra, n. 2.

and Third Circuit[129] have held that the potential applicability *vel non* of exhaustion principles is a question of law, which Courts of Appeal consider *de novo*. However, after a determination has been made that exhaustion principles are applicable, courts in the Third and Ninth Circuits have held that the applicable standard of review is abuse of discretion.[130] In contrast, courts in the Seventh,[131] Eleventh,[132] Fourth,[133] and Fifth Circuits[134] have applied an abuse of discretion standard of review.

One area in which there is a disagreement between circuit courts is the necessity of exhausting remedies when there is an alleged failure of recordkeeping. For example, in *Winfield v. Citibank, N.A.*,[135] plaintiffs contended that they should not be required to exhaust administrative remedies because their claims would be futile and inadequate. Plaintiff's argument was that exhaustion would be futile because their claims did not stem from the nonpayment of benefits, which could have been remedied under the plan's administrative procedures, but rather from a failure properly to record hours worked, which resulted in inaccurate payroll records from which benefits under the Plan are derived. Their contention was that they had no administrative recourse within the plan for proper accounting and crediting of hours. Because the defendant had not

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[129] *Harrow v. Prudential Insurance Company of America*, supra, n. 47.

[130] See, Third Circuit, *D'Amico v CBS Corporation*, 297 F. 3d 287 (3d Cir. 2000) (A Court of Appeals reviews for abuse of discretion both a District Court's decision to deny a futility exception and its decision to grant summary judgment rather than enter a stay to allow exhaustion of administrative remedies); *Harrow v. Prudential Insurance Company of North America*, supra, n. 47; Ninth Circuit; *Dishman v. Unum Life Ins. Co. of America*, 269 F. 3d 974 (9th Cir. 2001); *Diaz v. United Agr. Employees Welfare Benefit Plan and Trust*, supra, n. 2; *Horan v. Kaiser Steel Retirement Plan*, supra, n. 101.

[131] *Zhou v. Guardian Life*, supra, n. 25; *Dale v. Chicago Tribune Co.*, supra, n. 74 ("The application of the administrative exhaustion requirement in an ERISA case is committed to the strong discretion of the District Court."); *Stark v. PPM America, Inc.*, 354 F. 3d 666, 671 (7th Cir. 2004) (While exhaustion of administrative remedies is "favored," "the decision to require exhaustion before a plaintiff may proceed with a federal lawsuit is a matter within the sound discretion of the trial court."); *In re Household Int'l Tax Reduction Plan*, 441 F. 3d 500, 502 (7th Cir. 2006) ("The District Court has discretion to require no exhaustion by anyone."); *Powell v. AT&T Communications, Inc.*, supra, n. 8 ("The rule in this court is clear: the decision to require exhaustion as a prerequisite to bringing suit is a matter within the discretion of the trial court. Abuse of discretion means a serious error of judgment, such as reliance upon a forbidden factor or failure to consider an essential factor".).

[132] *Perrino v. Bell South*, supra, n. 42 ("The decision of a District Court to apply or not apply the exhaustion of administrative remedies requirement for ERISA claims is a highly discretionary decision which we review only for a clear abuse of discretion."); *Springer v. Wal-Mart Assoc. Group Health Plan*, supra, n. 1; *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 891 F. 2d 842, 846 (11th Cir. 1990).

[133] *Vogel v. Indep. Fed. Savings Bank*, 728 F. Supp. 1210, 1223 (D. Md. 1990); and *George v. Duke Energy Ret. Cash Balance Plan*, 560 F. Supp. 2d 464, 469 (D. S.C. 2008).

[134] *Hall v. National Gypsum*, supra, n. 2; *Harris v. Trustmark National Bank*, 287 Fed. Appx. 283, 294 (5th Cir. 2008) (per curiam).

[135] 2012 WL 266687 (S.D.N.Y. Jan. 30, 2012).

maintained records sufficient to enable such an accounting to take place. Plaintiffs relied upon *Stickle v. SCI Western Mkt. Support Center, L.P.*,[136] in which the district court stated that: "It would be futile for plaintiffs to exhaust administrative remedies with the Plan when, Plaintiffs allege, the Plan has not been provided a correct record of Plaintiffs' hours."[137] However, courts have generally rejected the *Stickle* approach, instead dismissing recordkeeping claims on the ground that such claims were disguised claims for benefits under ERISA Section 502(a)(1)(B) for which exhaustion was required.[138]

With respect to statutes of limitation, courts have rejected the argument that a limitations period does not begin to run until administrative remedies have been exhausted.[139]

The futility exception has been found to be available when the trustee who would be making the benefit determination had filed suit against the plaintiff for fraud[140] or brought an action to recover unpaid contributions;[141] where plaintiff was repeatedly told that his air ambulance claims would not be paid;[142] where trustees had made clear over a two-year period that they would deny any claim for refund;[143] where a plan administrator had denied a participant meaningful access to administrative procedures by repeatedly ignoring requests for documents;[144] where there is a history of unsuccessful correspondence and review with the plan;[145] where an administrator failed to respond to a claimant's appeal request prior to litigation and consistently refused to pay plaintiff's benefit until suit was filed;[146] where plaintiff submitted hundreds of letters regarding the benefit determination, the available claims and appeal process was

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[136] 2008 WL 4446539 (D. Ariz. Sept. 30, 2008).

[137] Id. at *17.

[138] *Winfield v. Citibank, N.A.*, supra, n. 134; *DeSilva v. North Shore Long Island Jewish Hospital System*, supra, n. 86; *Barrus v. Dick's Sporting Goods, Inc.*, 732 F. Supp. 2d. 243 (W.D.N.Y. 2010).

[139] *Morrison v. Marsh & McLennan Companies, Inc.*, 439 F. 3d 295 (6th Cir. 2006); *Ozarowsky v. Owens*, 2010 WL 2696789 (W.D. Pa. July 6, 2010).

[140] *Laborers Pension Fund v. Buchanan*, supra, n. 2.

[141] *Central States SE & SW Areas Pension Fund v. Hoosier Dairy*, 1990 WL 205861 (N.D. Ill. Dec. 7, 1990).

[142] *White v. The Keystone Welfare Benefit Plan*, supra, n. 2.

[143] *Alvan Motor Freight v. Trustees of the Central States, SE & SW Areas Pension Fund*, 2007 WL 6942283 (W.D. Mich., Dec. 19, 2007) and *Electricians Health Welfare & Pension Plans, IBEW Local 995 v. Sara Electric Inc.*, 594 F. Supp. 1265, 1272 (D. La. 1994).

[144] *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, supra, n. 131.

[145] *Foster v. Blue Shield of California*, 2009 WL 1586039 at *5, supra, n. 95.

[146] *Perkins v. Prudential Ins. Co. of America*, 417 F. Supp. 2d 1149, 1153 (C. D. Cal. 2006).

never followed and defendants promised a review that never came;[147] where an employer did not dispute that any claims for benefits by the former employee would be denied;[148] where the same entity is the arbiter of claims under both plans;[149] where plaintiff can point to a similarly situated individual who exhausted his or her administrative remedies to no avail;[150] where the plan did not provide a procedure or remedy for reviewing the type of claim asserted;[151] where, in the context of an M&A transaction, both the purchaser and seller denied that they had any responsibility under a pension plan;[152] where an employer had failed to reinstate an employee;[153] and based upon a defendant's conduct throughout a litigation.[154]

§ 7.07 DISABILITY CLAIMS

A benefits area in which the exhaustion of administrative remedies frequently arises is long-term disability. In a common fact pattern where the claim for long-term disability benefits involved the same disability or illness and would be determined by the same administrator, courts have held that, "it is certain from the denial of [plaintiff's] claims for short-term disability benefits that her claim for long-term disability benefits would also be denied."[155] Decisions in this area tend to be fact specific, with some courts holding that applying for LTD benefits would be futile,[156]

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[147] *Goades v. Pacific Gas & Electric Co.*, 2012 WL 4944090 at *3 (N. D. Cal. Oct 17, 2012).

[148] *Salus v. GTE Directories Service Corp.*, 104 F. 3d 131 (7th Cir. 1997).

[149] *Burnett v. Raytheon Co. Short Term Disability Basic Benefit Plan*, 784 F. Supp. 2d 1170 (C.D. Col. 2012); *Dioquino v. United of Omaha Life Ins. Co.,* supra, n. 8.

[150] *Driscoll v. Metropolitan Life Insurance*, 2016 WL 11529805 (C.D. Cal. May 2, 2016).

[151] *Nauman v. Abbott Laboratories*, 2005 WL 1139480 (N.D. Ill. April 27, 2005).

[152] *Kurisu v. Svenhard Swedish Bakery Supplemental Key Employee Retirement Plan*, 2021 WL 3271252 (N.D. Cal. July 30, 2021).

[153] *Richards v. General Motors Corp.*, 991 F. 2d 1227, 1235–1238 (6th Cir. 1993).

[154] *Renney v. White Consolidated Ind.*, 1990 WL 482748 (W.D. Mich. Apr. 8, 1990).

[155] *Zerangue v. Lincoln National Life Ins.*, supra, n. 2, citing *Taylor v. Prudential Ins. Co. of America*, 954 F. Supp. 2d 476, 485 (S.D. Miss. 2013). However, in the absence of an administrative record upon which to rule the District Court denied the motions of both parties, with a stay to allow plaintiffs to exhaust their administrative remedies and create an administrative record for the District Court to review.

[156] *Darensbourg-Tillman v. Roberts, Kaplan, Miller & Ceresi LLP Short Term Disability Plan, supra, n. 50.*; *Young v. Unum Provident Corp.*, supra, n.61 at *1 (D. Minn. Sept. 3, 2002); *Burnett v. Raytheon Co. Short Term Disability Basic Benefit Plan*, supra, n. 147; *Disquino v. United of Omaha Life Ins Co.*, supra, n. 8. Cf. *Welsh v. Wachovia Corp.*, 191 Fed. Appx. 345, 358 (6th Cir. 2006) (holding futility exception applied because plaintiff was effectively precluded by the terms of the LTD plan from applying for LTD benefits).

while other courts have stated that the denial of short-term benefits does not make applying for long-term benefits futile.[157]

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[157] *Gambino v. Arnouk*, 232 Fed. Appx. 114 (3d. Cir. 2007); *Messick v. McKesson Corp.*, 640 Fed. Appx. 796 (10th Cir. 2016); *Sanchez v. Hartford Life & Acc. Ins. Co.*, supra, n. 24. Cf. *Stout v. Liberty Life Assurance Company of Boston* (C.D. Cal. Feb. 28, 2023), 2023 BL 65093 (Plaintiff does not explain how a denial of short-term disability under a self-insured plan would make it futile to apply for long-term disability benefits under an insured plan with different terms).