THE
NATIONAL LAW REVIEW

A Court's Review of a Disability Benefit Claim May Hinge on the Meaning "Satisfactory to Us"

Wednesday, October 8, 2014

Twenty-five years ago, the **U.S. Supreme Court** ruled that courts should review an ERISA participant's claim for benefits under a de novo standard of review unless the plan gives the plan fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Since then, courts have considered what type of plan language suffices to grant plan fiduciaries discretionary authority to warrant the more deferential arbitrary and capricious standard of review.

Article By Proskauer Rose LLP
Joseph E Clark
Proskauer's ERISA Practice Center Blog

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The issue has garnered a fair amount of attention in the context of employer-provided disability insurance plans. Courts have been particularly focused on whether the requisite discretion is conferred when the plan requires that claimants present "proof satisfactory to us" (e.g., the plan administrator) to receive benefits. Four circuits [the Sixth, Eighth, Tenth and Eleventh Circuits] have ruled that such language clearly grants discretionary authority to the plan administrator, and claim denials in those cases have been subject to an arbitrary and capricious standard of review. However, six circuits [the First, Second, Third, Fourth, Seventh and Ninth Circuits] have held that such language does not provide a clear grant of discretionary authority to a plan administrator and thus claim denials in these cases were subject to de novo review by a court.

Whether a court reviews a benefit claim denial (i) de novo, thus empowering the court to substitute its own judgment for that of the plan fiduciary, or (ii) under the highly deferential arbitrary and capricious standard of review, can sometimes be outcome determinative. This article sheds some light on the reasoning behind each view and suggests steps that plan drafters can take to better ensure that claim denials are subject to deferential review by the courts.

The Firestone Standard

It is well established that a benefit claim denial being challenged under ERISA is subject to de novo review by courts "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."[1] If the plan provides the administrator or fiduciary with discretionary authority to determine eligibility for benefits, however, courts review the decision under the highly deferential arbitrary and capricious standard of review. A plan administrator bears the burden of establishing that the arbitrary and capricious standard should apply.

Courts Finding "Satisfactory To Us" Allows For Arbitrary And Capricious Review

Several circuit courts have concluded that a plan's statement that proof of disability must be "satisfactory to us" is sufficient to warrant application of an arbitrary and capricious standard of review. In fact, three circuit courts of appeals determined that such language triggered an arbitrary and capricious standard of review based solely

on the fact that the language, on its face, clearly gives the plan administrator discretion to determine benefits eligibility.

For instance, the Eleventh Circuit found, without stating its reasoning, that a long-term disability policy requiring "satisfactory proof of total disability to the plan administrator" provided the plan administrator discretion to determine eligibility for benefits, and concluded that it should review the benefit denial under an arbitrary and capricious standard of review.[2] The Eighth Circuit reached the same conclusion in a case involving a long-term disability plan that required claimants to provide written proof of total disability that was "satisfactory to the plan administrator."[3] The Sixth Circuit also applied an arbitrary and capricious standard of review even in the absence of the "to us" in "satisfactory to us." It found that "[a] determination that evidence is satisfactory is a subjective judgment that requires a plan administrator to exercise his discretion," and "the only reasonable interpretation of the [plan] language" was that the plan administrator "retain[ed] the authority to determine whether the submitted proof of disability [was] satisfactory."[4]

The Tenth Circuit concluded that "satisfactory to us" conveys the message that the evidence of disability must be persuasive to the plan administrator, and thus applied an arbitrary and capricious standard of review. It did, however, note that the issue was a close call and cautioned: "plan drafters who wish to convey discretion to plan administrators are ill-advised to rely on language that is borderline in accomplishing that task."[5]

Courts Finding That "Satisfactory To Us" Warrants De Novo Review

The more recent trend among the circuit courts has been to find that "satisfactory to us" is insufficiently clear to result in deferential review of benefit denials. In reaching this conclusion, courts have reasoned that: (i) the language is confusing as to the quality of "proof" that must be submitted to the plan administrator; (ii) the language fails to sufficiently convey to prospective employees whether a plan confers discretion on a plan administrator, and this is a fact that may impact the employment decision; (iii) the language does not adequately notify employees that an administrative denial will be insulated from de novo review; and (iv) it is relatively easy for plan drafters to draft clear language.

The Second Circuit observed that "satisfactory to us" could cause confusion among participants and beneficiaries. In particular, the Court stated it was not clear whether the language meant only that the claimant must submit to the plan administrator proof that is satisfactory or that the claimant must submit proof that is satisfactory to the plan administrator.[6] The court thus reviewed the benefit denial de novo.

The Seventh Circuit took a similar view:

> No single phrase such as "satisfactory to us" is likely to convey enough information to permit the employee to distinguish between plans that do and plans that do not confer discretion on the administrator. And this is a matter that may well be of interest to employees considering where to work: some may prefer the certainty of plans that do not confer discretion on administrators, while others may think that the lower costs that are likely to attend plans with reserved discretion are worth it.[7]

In the same vein, the Fourth Circuit expressed concern about the effect that the language could have on a claimant's presentation during the administrative claim stage. It found that "proof satisfactory to us" was ambiguous and that without clear language notifying employees that their claim would be insulated from plenary judicial review, employees who file claims for benefits may not be fully aware of the gravity of administrative proceedings or the necessity of developing as complete a record as possible early in the claims process.[8]

Finally, the First and Ninth Circuits concluded that the relative ease with which plan drafters could draft clear language is yet another reason courts find that "satisfactory to us" should not subject a benefits denial to arbitrary and capricious review.[9]

The View From Proskauer

Given the relative ease in drafting clear, unambiguous discretion-granting plan language, plan sponsors should undertake a review of their plans to make certain that they in fact clearly confer on the plan fiduciary the discretionary authority to determine eligibility for benefits or to construe the terms of the plan. There are no "magic words" required to ensure that discretion-granting plan language is sufficiently clear. However, drafters might consider using language that has been suggested by the courts, such as "[b]enefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them,"[10] or "[t]he plan administrator has discretionary authority to grant or deny benefits under this plan."[11] The importance of clear discretion-granting plan terms, and plan terms overall, cannot be overstated.

[1] Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

[2] Levinson v. Reliance Std. Life Ins. Co., 245 F.3d 1321, 1324-25 (11th Cir. 2001).

[3] Ferrari v. Teachers Ins. & Annuity Ass'n, 278 F.3d 801, 806 (8th Cir. 2002). More recently, the Eighth Circuit acknowledged that "proof satisfactory to the plan administrator" was an "arguably ambiguous grant of discretion," but declined to deviate from circuit precedent. Prezioso v. Prudential Ins. Co. of Am., 748 F.3d 797, 803 (8th Cir. 2014).

[4] Perez v. Aetna Life Ins. Co., 150 F.3d 550, 555, 557-58 (6th Cir. 1998) (en banc).

[5] Nance v. Sun Life Assur. Co. of Can., 294 F.3d 1263, 1268, n.3 (10th Cir. 2002).

[6] Kintsler v. First Reliance Std. Life Ins. Co., 181 F.3d 243, 251-52 (2d Cir. 1999).

[7] Diaz v. Prudential Ins. Co. of Am., 424 F.3d 635, 639 (7th Cir. 2005); see also Viera v. Life Ins. Co. of N. Am., 642 F.3d 407, 417 (3d Cir. 2011) (finding that accidental death and dismemberment policy's use of "proof of loss satisfactory to us" fails to alert a participant to the possibility that a plan administrator "has the power to re-define the entire concept of [a covered loss] on a case-by-case basis.").

[8] Cosey v. Prudential Ins. Co. of Am., 735 F.3d 161, 166, 167-68 (4th Cir. 2013).

[9] Gross v. Sun Life Assur. Co. of Can., 734 F.3d 1, 16 (1st Cir. 2013); Feibusch v. Integrated Device Tech, Inc., 463 F.3d 880, 883 (9th Cir. 2006).

[10] Diaz, 424 F.3d at 638 (internal quotations omitted).

[11] Feibusch, 463 F.3d at 883 (internal quotations omitted).