The Private Resolution of Employee Benefit Disputes

Section 503 and the Meaning of "Evidentiary Materials" in ERISA Cases

By John J. Conway

Sun Tzu, the Chinese military general and philosopher, wrote that the supreme art of war is to "defeat the enemy without ever coming to battle."[1] While that sentiment might not have been on the minds of Congress four decades ago when it passed the Employee Retirement Income Security Act of 1974 (ERISA), the objective of prevailing without litigating is one of the statute's attractive features. In a typical employee benefit case, if an ERISA participant or beneficiary does not prevail before filing a complaint, he or she may well prevail soon after on motion practice, as long as an evidence-ready case exists when the suit is filed.

ERISA's passage was a long and arduous process following the collapse of the Studebaker-Packard Corporation in 1963.[2] When the distressed Indiana automotive company went bankrupt, employees who had labored for years in the hopes of a dignified retirement saw their pension savings largely vanish.[3] Until ERISA, individual pension and employee benefits disputes were resolved largely as a matter of state contract law. The act was signed into law on Labor Day 1974 by President Gerald R. Ford and essentially federalized employee benefits law for private employers and unions.[4] It imposed fiduciary standards of conduct on employee benefit plans and required insurance against the loss of certain types of benefits. It empowered federal courts to create a body of common law giving interpretive life to its provisions.[5] ERISA has been amended several times and expanded to cover all forms of benefit claims.

Today, ERISA litigation generally involves disputes over retirement and welfare benefits such as healthcare, life insurance, and disability insurance. While there are distinct statutory and regulatory requirements imposed on ERISA retirement and welfare benefit plans, the manner in which individual claims are resolved is essentially the same.

ERISA: The litigation setting

ERISA contains provisions designed to promote the security of employee benefits and access to information, and for the informal resolution of disputes for employee benefit claims. Section 503 requires that employee benefit plans provide participants and beneficiaries with a pre-suit dispute resolution procedure:

> In accordance with the regulations of the Secretary, every employee benefit plan shall
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> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reason for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.[6]

Despite its brevity, federal courts have provided an expansive interpretation of Section 503's requirements in relation to civil actions brought under ERISA Section 502(a)—the statute's enforcement provision.[7] Courts have ruled that Section 503 mandates a pre-suit administrative process which must be exhausted by the claimant and, if ignored, could result in the dismissal of an action.[8] The word "exhaustion" appears nowhere in the statute, and Section 503 provides little guidance on which evidence is considered during the administrative review process. Indeed, the language of the provision requires only that an ERISA plan member be afforded a "reasonable opportunity" to have a "full and fair" review of a claims decision, and that the "specific reason" for a decision be provided to the member in writing.

In 1998, the importance of Section 503 in the ERISA pre-suit dispute resolution process came more fully into view. In *Wilkins v Baptist Healthcare System, Incorporated*,[9]

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"Trial Practice" is a regular column of the *Michigan Bar Journal*, edited by Gerard Mantese and Theresamarie Mantese for the Publications and Website Advisory Committee. To contribute an article, contact Mr. Mantese at gmantese@manteselaw.com.

Judge Ronald Lee Gilman of the U.S. Court of Appeals for the Sixth Circuit issued a concurring opinion which set forth a number of "suggested guidelines" for resolving ERISA benefits disputes.[10] Judge Gilman's opinion, in which he was joined by Judge James Ryan, has become the accepted method for resolving benefits disputes under the statute.[11] The *Wilkins* guidelines stated that the use of summary judgment under FR Civ P 56 was "inapposite" to the proper resolution of ERISA benefit cases since trials of such claims are rare. Judge Gilman proposed a new method for resolving disputes by way of the following litigation procedure:

(1) As to the merits of the action, the district court should conduct a *de novo* review based solely upon the administrative record, and render findings of fact and conclusions of law accordingly. The district court may consider the parties' arguments concerning the proper analysis of the evidentiary materials contained in the administrative record, but may not admit or consider any evidence not presented to the administrator.

(2) The district court may consider evidence outside of the administrative record only if that evidence is offered in support of a procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part. This also means that any prehearing discovery at the district court level should be limited to such procedural challenges.[12]

Taken together, Section 503 and the suggested guidelines of *Wilkins* have created a framework for the prompt, private resolution of employee benefit claims which, if resolved by way of a favorable decision, are largely kept from public view. On the other hand, in those cases where a claim is not resolved to the satisfaction of the ERISA plan participant, the case is ripe for judicial review on the day it is filed since all evidentiary materials should have been submitted during the administrative review process.

Because evidence submitted in support of an ERISA benefit claim cannot be derived using the typical methods available in litigation such as depositions, subpoenas, or written discovery requests, evidence must be gathered outside of the litigation context. Since *Wilkins* also recommended placing significant limitations on pretrial discovery under FR Civ P 26, the parties are left to argue inferences taken from the evidentiary materials rather than directly challenging their evidentiary reliability.[13] In an ERISA case, a litigant is one of the arbiters of relevancy during the pre-suit process. Evidence submitted by the claimant is preserved intact and transferred to the reviewing court in the form of an official administrative record. Both sides are then permitted to brief the issues raised in the pre-suit appeal using cross-motions for judgment on the administrative record in accordance with the *Wilkins* framework. Section 503 allows nearly any form of reliable evidence of any length to be submitted in support of a claim for benefits. Some examples of evidence that may be submitted during the Section 503 review are listed below.

Testimonial evidence

There are no specific limitations on the form of evidence that may be submitted in support of an ERISA claim.[14] As a result, evidence in the form of sworn testimony may be submitted to support a claim for benefits. In *Ravencraft v Unum Life Insurance Company of America*,[15] the Sixth Circuit explained that the pre-suit exhaustion should not be viewed as a procedural formality; when used wisely, it allows the parties to "assemble a factual record that will assist a court in reviewing the fiduciaries' actions."[16] In using the pre-suit administrative procedures, two sets of rules apply: what the employee benefit plans themselves provide and what the U.S. Department of Labor provides through its regulatory authority.[17]

During the process, the evidentiary materials should be compiled with an eye toward the types of evidence federal courts routinely review in motion practice. Testimonial evidence may be especially useful in establishing a factual record in support of a claim. For example, a well-drafted affidavit may assist in proving the number of years worked at an employer for purposes of establishing pension service credit or detailing functional limitations in an occupational disability claim. Oftentimes, the sworn testimony is stacked up against unsworn notations or offhand computer entries. Sworn testimony adds weight to the claim, and reviewing courts that are used to seeing affidavits filed in support of motions outside of the context of ERISA may find the testimony persuasive.

Documentary evidence

While a benefit plan may specify the type of evidence it deems useful in making claim determinations, there are no specific limitations on either the volume or form of documentation that can be submitted. In cases involving healthcare, disability, and life insurance, the need for medically supportive documentary evidence is obvious. Often, plans will define their own minimum "proof" requirements for medical claims, and evidence satisfying these requirements should be submitted. Other forms of evidence that are extremely useful might not be so obvious—scholarly articles, contextual information from reputable sources, photographic evidence, video evidence, and audio recordings are types of evidence attorneys like presenting to juries because they make for a more persuasive case. These same materials may be useful in the claims process or in a judicial review. For example, in a case in which bias on the part of the claims administrator is suspected, articles and copies of governmental investigations discussing the administrator may all have relevance. Submitting these materials may prove especially useful should the case proceed to litigation.

Access to the administrative record for admissions

ERISA, Department of Labor guidelines, and even the plans themselves permit access to the internal files and documents of the plans' operations and decision-making processes.[18] These files may contain a treasure trove of information. For litigation attorneys, a careful review of the administrative claims file may reveal a number of admissions by a party opponent. Most administrative staff working for ERISA plans are processing hundreds of claims per month. E-mails and computer entries can contain evidence of negligence and adversity instead of the "fairness" required by law in the decision-making process.

Arguing the main points of the benefit dispute without page restrictions

The size of the written ERISA pre-suit submission may vary. In a complicated pension case, which requires a written analysis of the provisions of a pension plan document, a lengthy written submission may be required, as each plan provision must be cited and explained. For example, in a pension case in which a retiree's employment ended abruptly in a termination and the retiree is seeking additional service credit for purposes of calculating his or her pension, a submission may be lengthy and read somewhat like a motion for summary judgment on a contract claim. The submission may direct the reviewer's attention to the provisions for vesting credit and service credit, highlight the differences in one or more plan documents, and explain why the retiree qualifies for the credit enhancement.

Other times, a short statement highlighting the main points of the evidence is all that may be required. Sometimes, the plan administrator will respond directly to the arguments (commonly seen in benefit committee decisions) and sometimes reviewers will respond only to the evidence submitted. Either way, the submission of a particularly persuasive argument may give a plan administrator pause to at least consider whether it is worth risking the argument being made public and establishing precedent.

A final word

What was once simply an innocuous notice of rights provision of a lengthy pension law, and a short concurring opinion interpreting it, ERISA Section 503 and *Wilkins* have combined to create a legal setting that permits wide latitude in the submission of evidentiary materials in support of employee benefit claims. Taken together, they have allowed for the prompt and private resolution of disputes and the elimination of trial by surprise. If the opportunity to submit persuasive evidentiary materials is followed thoughtfully and appropriately, the battle over benefits may be won without ever firing a shot. ■

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ENDNOTES

1. Tzu (Trapp, trans), *The Art of War, A New Translation* (New York: Chartwell Books, 2012), p 17.
2. Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* (Berkeley: University of California Press, 2004), pp 76–79.
3. *Id.*
4. *Id.* at 270.
5. *Auto Owners Ins Co v Thorn Apple Valley, Inc*, 31 F3d 371, 374 (CA 6, 1994).
6. 29 USC 1133.
7. 29 USC 1132(a).
8. *Coomer v Bethesda Hosp, Inc*, 370 F3d 499, 504–506 (CA 6, 2003); *Ravencraft v Unum Life Ins Co of Am*, 212 F3d 341, 343 (CA 6, 2000); see also *Hagen v VPA, Inc*, 428 F Supp 2d 708, 712–713 (WD Mich, 2006).
9. *Wilkins v Baptist Healthcare Sys, Inc*, 150 F3d 609, 617–619 (CA 6, 1998).
10. *Id.* at 619.
11. See *Sullivan v Cap Gemini Ernest & Young*, 573 F Supp 2d 1009, 1013 (ND Ohio, 2008).
12. *Wilkins*, 150 F3d at 619.
13. *Id.*
14. 29 CFR 2560.503-1.
15. *Ravencraft*, 212 F3d 341.
16. *Id.* at 343, quoting *Makar v Health Care Corp*, 872 F2d 80, 83 (CA 4, 1989).
17. 29 USC 1135; 29 CFR 2560.503-1.
18. 29 USC 1024; 29 CFR 2560.503-1(h)(2)(iii).