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Employer, as Plan Administrator, May Be Liable for Civil Penalties for Not Providing Plan Documents It Did Not Possess

by By J. S. "Chris" Christie, Jr.

The Seventh Circuit's decision in *Mondry v. American Family Mutual Insurance Company*, 557 F.3d 781, 795-803 (7th Cir. 2009), should serve as a wake up call for employers as to their duties to respond to requests by ERISA plan participants for plan documents.

The *Mondry* opinion included three holdings relevant to claims for ERISA civil penalties for not providing plan documents:

• Only the plan administrator, as defined by ERISA, could be liable for civil penalties.

• The claim administration agreement and certain internal guidelines were plan documents for which civil penalties could be assessed for non-production.

• A plaintiff could claim ERISA statutory civil penalties based on the employer's failure to provide plan documents that the employer never had in its possession.

As background, pursuant to ERISA § 104(b)(4),29 U.S.C. § 1024(b)(4), the administrator of a plan must provide a plan participant with certain documents when the participant requests the documents in writing. Congress gave teeth to this disclosure requirement by providing a claimant with a statutory claim for civil penalties.

Under ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(I)(B), a plan participant can sue a plan administrator who, within 30 days of the request, fails to provide the requested plan documents. By regulation, the maximum penalty under § 502(c)(1) is $110 per day. 29 C.F.R. § 2575. 502 c-3.

Only the Administrator, as Defined by ERISA, Can Be Liable for Penalties

The Seventh Circuit held in *Mondry* that only the plan administrator, which here was the employer, could be liable under § 502(c) for statutory penalties, and that the insurer, even if a claim administrator, could not be liable for statutory penalties. *Id.* at 792-96.


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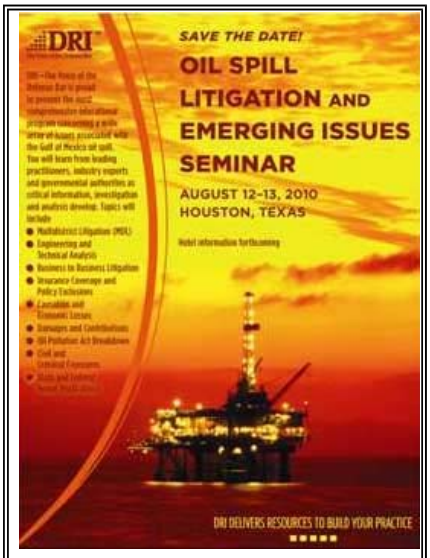

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Prior to *Mondry*, eight federal circuits had held that only the plan administrator, as defined in ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), can be liable under § 502(c)(1) for civil penalties, rejecting arguments that other parties, including insurance companies and claims administrators, can be held liable for failing to provide a participant with the plan documents. *See, e.g.*, *Gore v. El Paso Energy Corp. Long Term Disability Plan,* 477 F.3d 833, 843-44 (6th Cir. 2007); *Ross v. Rail Car Am. Group Disability Income Plan,* 285 F.3d 735, 743-44 (8th Cir. 2002); *Hightshue v. AIG Life Ins. Co.,* 135 F.3d 1144, 1149 (7th Cir.1998); *Lee v. Burkhart,* 991 F.2d 1004, 1010 (2d Cir.1993); *McKinsey v. Sentry Ins.,* 986 F.2d 401, 403-05 (10th Cir.1993); *Coleman v. Nationwide Life Ins. Co*., 969 F.2d 54, 62 (4th Cir.1992); *Moran v. Aetna Life Ins. Co*., 872 F.2d 296, 298-300 (9th Cir.1989)*; Davis v. Liberty Mutual Ins. Co.*, 871 F.2d 1134, 1138-39 & n.5 (D.C. Cir.1989). *See Thorpe v. Retirement Plan of Pillsbury Co.,* 80 F.3d 439, 444 (10th Cir.1996) ("ERISA requires plan administrators to respond to informational requests by plan participants …. Such causes of action may be brought only against designated plan administrators, rather than against the plan itself or the employer …. The language of [§ 502 (c)] … is unambiguous and admits of no other interpretation."); *but see Law v. Ernst & Young,* 956 F.2d 364, 373-74 (1st Cir.1992) (holding that a *de facto* plan administrator could be liable under § 502(c)(1) for civil penalties for failing to provide a participant with requested plan documents); *Rosen v. TRW, Inc.*, 979 F.2d 191 (11th Cir. 1992) (same); *cf. Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1077 (5th Cir. 1990) (discussing this issue in *dicta*).

For single employer plans, the "administrator" definition almost always results in the employer being the plan administrator, because the employer is the plan sponsor, and the plan documents usually do not name another entity as the plan administrator. *See* ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B) (defining the term "plan sponsor" as being the person who established or maintains the plan as the employer).

Therefore, for most employers' benefit plans, ERISA places both the duty to provide plan documents and the liability for failing to provide plan documents on the "administrator" – and that administrator is the employer.

The Claim Administration Agreement and Internal Guidelines Were Plan Documents

The Seventh Circuit held in *Mondry* that the claim administration agreement and certain internal guidelines were plan documents for which the employer, as administrator, was liable for civil penalties, because it did not provide these plan documents within 30 days of a written request. *Id*. at 796-801.

For a plaintiff to have a claim for civil penalties, the requested document must be one "under which the plan is operated or established" such that it "falls within the scope of [ERISA § 104(b)(4)]." *Id*. at 796. The Seventh Circuit recognized that not all claim administration agreements and not all internal guidelines are such documents. *Id*. at 796 & 798 (citing cases). The Seventh Circuit's analysis gives insight as to when such documents might be plan documents.

As for the claim administration agreement, the Seventh Circuit held that the agreement "governs the operation of the Plan in the sense that it defines the respective roles of [the employer] and [the insurer] as the plan and claim administrators, respectively." *Id*. "In that respect," the court said, the claim administration agreement "qualifies as a contract under which the plan was operated, and [the plaintiff] was entitled to its production under [§ 104(b)(4)]." *Id.* Therefore, under *Mondry*, a contract that defines the respective roles of the employer or administrator and the insurer or claim administrator are plan documents for which civil penalties can be available.

As for the internal guidelines, the Seventh Circuit held that the employer, as the plan administrator, could be liable under § 502(c) for not furnishing these guidelines. *Id.* at 797-803. It quoted the Department of Labor's position from Dep't of Labor Adv. Op. 96-14a and cited numerous examples of courts that had reached different holdings on whether guidelines could be the basis for a § 502(c) penalty claim. *Id.* at 797-98.

It described the holdings of courts that have not held such guidelines to be within the scope of § 104(b)(4) as having "reasoned that however relevant such guidelines" might be, they were "internal interpretive tools" that were "not binding on the claims administrator and therefore do not formally govern the operation of the plan." *Id.* at 798 (as an example, citing *Doe*, 167 F. 3d at 60). Based on the insurer's claim denial explanation in *Mondry*, the Seventh Circuit "assume[d], without deciding, that had the [insurer as claim administrator] privately relied on the [guidelines] as reference materials to guide its interpretation and application of the plan language, these documents would not have come within the scope of § 104(b)(4)]." *Id*. at 799.

The Seventh Circuit held that "when a claims administrator expressly cites an internal document and treats that document as the equivalent of plan language in ruling on a participant's entitlement to benefits, the administrator renders that document one that in effect governs the operation of the plan for purposes of [§ 104(b)(4)], and production of that document is required." *Id.* at 801.

The Seventh Circuit did not discuss or cite 29 C.F.R. § 2560.503-1(g)(1)(v). This part of the Department of Labor claim regulation requires a claim administrator's initial denial notice to include, "[i]f an internal … guideline … was *relied upon* in making the adverse benefits determination, either the specific … guideline or a statement that such a … guideline … was relied upon in making the adverse benefit determination and that a copy … will be provided free of charge upon request." *Id*. (emphasis added); *see id*. at § 2560.503-1(j)(5)(i) (requiring same for appeal denial notice).

In other words, the claim regulation prohibits a claim administrator from "privately" relying upon an internal guideline (as the Seventh Circuit in *Mondry* assumed, without deciding, the claim administrator could have done and avoided the penalty issue), and instead requires the claim administrator's initial denial notice and an appeal denial notice to cite expressly an internal guideline if it was relied upon.

Therefore, the claim regulation expands the circumstances where guidelines must be provided under *Mondry*. For a denied claim, the question, under the claim regulation, is whether a claim administrator relied upon a guideline. If so, the claim administrator must cite the guideline in its denial notice. Then, under *Mondry*, the administrator must treat cited guidelines as plan documents when responding to written requests for plan documents.

The Administrator Could Be Liable for Not Providing Plan Documents It Never Possessed

In *Mondry*, the Seventh Circuit recognized that a "final wrinkle here is that [the insurer as the claim administrator] rather than [the employer as the plan administrator] had possession of the [guidelines], and yet the [claim administrator] was not the plan administrator with the statutory obligation to produce plan documents." *Id.* at 801 -03. Nonetheless, since the employer was the plan administrator as defined under ERISA, the employer was the entity at risk for civil penalties for not having provided the guidelines in response to the plaintiff's written request. *Id.*

The *Mondry* opinion illustrates a potential problem for employers when a claimant seeks penalties under ERISA § 502(c). In *Mondry*, the disability insurer for the employer's plan denied the plaintiff's claim for disability benefits, expressly relying on the insurer's internal guidelines.

For sixteen months, the plaintiff asked the employer, which was the administrator as defined by ERISA, and also asked the insurer, which was the claim administrator, for those guidelines. *Id.* When the relevant documents were finally produced, it was "patently clear that the provisions of these documents were inconsistent with" the governing plan language, and that the insurer as claim administrator had inappropriately denied the claim. *Id.* The plaintiff then filed suit for § 502(c) penalties against the employer and the insurer. *Id.*

In *Mondry*, the employer had attempted to obtain a copy of the guidelines from the insurer, but was told that the guidelines were a "proprietary document" that the insurer was unwilling to produce. *Id*. The Seventh Circuit stated that "[a]ny dilemma this may have posed for the [employer as plan administrator] did not excuse its statutory obligation to" the plaintiff. *Id.* at 802.

Accordingly, the Seventh Circuit remanded the case to the district court "with directions to enter summary judgment in favor of [the plaintiff and for] determination of the appropriate amount of the penalty." *Id.* at 803.

Conclusion

If an employer does not have requested plan documents, such as an insurer's proprietary guidelines, it needs to obtain them to avoid the risk of ERISA statutory penalties.

Under *Mondry*, unless another entity is named as the plan administrator, only employers must respond to ERISA plan participants' requests for plan documents, and the responsive documents include guidelines that an insurer, as claim administrator, relies upon when considering the claim. Employers are not relieved of liability just because

the employer does not have and cannot obtain the insurer's guidelines.

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