

ERISA Overpayments – Claims & Defenses

AIDS Legal Referral Panel

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The Overpayment Problem

- Administering ERISA benefit plans is difficult and mistakes will be made.
- Those administering ERISA benefit plans (insurance companies, third party administrators, etc.) are not always accurate or careful.
- Some participants receive benefits that the Plan or Insurance Company later claims they were not entitled to.

Examples of Overpayments

- Pension: defined benefit plan (traditional pension plan) pays out monthly benefit based on erroneous calculation, which continues for years.
- Pension: defined contribution plan (401(k)) provides distribution or rollover in incorrect amount.
- Disability: long term disability plan pays out benefits, later determines incorrect calculation of benefits or offset.
- Health: plan provides benefits to divorced spouse of participant in violation of plan terms.

How Do Overpayments Happen?

- **Plan Administrator Errors:**
 - Recordkeeping errors
 - Data input mistakes
 - Errors in benefit calculations
 - Miscommunication between plan administrators and recordkeepers

- **Plan Participant Errors:**
 - Failure to report information (e.g. return to work, divorce, receipt of other income benefits)

- **No Error:**
 - Retroactive offsets of LTD Benefits.
 - E.g. SSDI or Disability Retirement Benefits approved months or years after LTD benefits approved.

How Are Overpayments Discovered?

- LTD insurance companies –
 - Periodically request information re: other income
 - Recent trend of requesting SSDI files
- Internal control audits
 - HR or plan administrator audits
 - Corporate audits
- Plan service provider audits
 - Recordkeeper accuracy audits
 - Trustee audits
- Benefit claim process
 - Analysis of claims can reveal errors
- Legal compliance reviews
 - Law department or outside counsel uncovers discrepancies between plan document, administrative practice, recordkeeping manuals
- Government agency audits – IRS or DOL

The Overpayment Problem

- Plan's Perspective: such overpayments may -
 - deprive other participants of funding for benefits
 - subject the plan to potential disqualification
 - tax-qualified plans must be operated in accordance with their terms.
 - IRS categorizes overpayments as an “operational failure” (failure to operate plan in accordance with its terms)
 - result in increased costs for plan sponsors, fewer assets remain in the plan to pay benefits of other participants and beneficiaries

- Participant's Perspective:
 - unfair to put burden of plan's or third party administrator's mistake on participant
 - participant expects correct information from plan administrator, relies on it
 - vulnerability of participant – may be 80 year old retiree or disabled person on fixed income
 - may be contested whether there was an overpayment

Relevant Law & Guidance

- ERISA § 404(a)(1) requires that fiduciaries must act:
 - “in accordance with the documents and instruments governing the plan”
 - “solely in the interest of the participants and beneficiaries”
 - “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

Relevant Law & Guidance

- IRS “Guide to Common Qualified Plan Requirements” states:
- “Your employees’ rights to contributions and benefits are derived from the plan document. **You must operate your plan strictly in accordance with the terms of your plan document;** that is, you must cover the employees that your plan document describes as being covered and when the plan document says they should be covered, and you must provide them the contributions or benefits set out in the plan document.”

Relevant Law & Guidance

- The Department of Labor has taken the position that ERISA requires plan fiduciaries to at least attempt to recover overpayments. *See, e.g.*, Advisory Opinion No. 77-08.
- But – the DOL Advisory Opinion indicates the Plan should seek recovery from the person or entities “whose alleged negligence caused the overpayments to be made.” *Id.*
- Authorizes hardship of participant/beneficiary may be considered.

Relevant Law & Guidance

- IRS Employee Plans Compliance Resolution System (EPCRS) requires recovery of all overpayments except de minimis amounts (less than \$100)
- But 2015 IRS guidance “clarifies” that seeking recoupment of overpayments is not required. Instead, plan sponsors may decide to skip recoupment and make a contribution to the plan that will make it whole.
 - IRS Rev. Proc. 2015-27.

Participant Claims & Defenses:

No Equitable Remedy

- Fiduciary can bring ERISA § 502(a)(3) claim to recover overpayment.
- But remedies under 502(a)(3) are limited to “appropriate equitable relief.”
- *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993) - The Supreme Court first construed the scope of “appropriate equitable relief,” instructing that Section 502(a)(3) provides only “those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).”

Participant Claims & Defenses:

No Equitable Remedy

- Absent appropriate equitable remedy, it's just seeking monetary damages – not available remedy under ERISA 502(a)(3).
 - *Mertens*, 508 U.S. at 255: “Money damages are, of course, the classic form of *legal* relief.”
 - *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083, 1092-94 (9th Cir. 2012): despite the plan administrator’s characterization of the relief sought as being equitable, the Court held that it really sought a judgment requiring the participant to pay money out of her general assets, which is “quintessentially legal, rather than equitable, relief,” and thus is impermissible under ERISA.

Participant Claims & Defenses: *No Available Remedy*

- Equitable lien by agreement / constructive trust –
 - Available remedy only if Plan document has an express reimbursement agreement – contractual promise by the participant to reimburse the fiduciary for plan benefits.
 - *Sereboff v. Mid Atlantic Medical Services*, 547 U.S. 356, 361-62 (2006).
- *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657-59 (2016): the Supreme Court clarified that an equitable lien by agreement/constructive trust is only available as a form of equitable relief if it is directed at specific funds that continue to remain in the other party's possession.

Participant Claims & Defenses: *No Available Remedy*

- Equitable restitution – even if no contractual reimbursement provision –
 - But in the Ninth Circuit, only viable where the participant has engaged in fraud or wrongdoing.
 - *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 953, 957 (9th Cir. 2014).
 - *Carpenters Health & Welfare Trust for S. Cal. v. Vonderharr*, 384 F.3d 667, 672 (9th Cir. 2004).
 - *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1249 (9th Cir. 2000).
- Courts also consider fairness factors: relative culpability of parties, amount of overpayment, amount of time that has passed, participant’s total income and effect recoupment would have.
 - E.g. *Dandurand v. Unum*, 150 F. Supp. 2d 178 (D. Maine 2001)

Participant Claims & Defenses: *Waiver*

- “A waiver occurs when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.” *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 938 (9th Cir. 2017)
- The doctrine of waiver “looks to the act, or the consequences of the act, of one side only.” *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1559 (9th Cir. 1991).
 - I.e. not necessary to show detrimental reliance by participant.

Participant Claims & Defenses: *Waiver*

- *Moon v. Bd. of Trustees of PAMCAH-UA Local 675 Pension Fund*, 319 F. Supp. 3d 1193 (N.D. Cal. 2018) (documents demonstrate that trustees waived right to seek repayment of overpayment).
- *Burger v. Life Ins. Co. of N. America*, 103 F. Supp. 2d 1344 (N.D. Ga. 2000) (where insurer knew participant was working part-time, and was aware of its right to reduce disability benefits by income he received from the work but did not do anything about it, the insurer “knowingly and intentionally waived” its right to recoup the overpayment)
- *Swint v. Protective Life Ins. Co.*, 779 F. Supp. 532, 560 (S.D. Ala. 1991) (insurer waived right to deny coverage under an ERISA policy where it continued coverage after learning of the insured’s ineligibility).

Participant Claims & Defenses: *Equitable Estoppel, SOL, Laches*

- **Equitable Estoppel** – fiduciary must provide a benefit that it had previously promised.
 - But many courts require extraordinary circumstances, ambiguous plan terms, detrimental reliance.
 - *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955-56 (9th Cir. 2014)
- **SOL** – can't seek repayment from years ago.
- **Laches** – based on maxim that “equity aids the vigilant and not those who slumber on their rights.” (Black's Law Dictionary).
 - A legal right or claim will not be enforced if a long delay in asserting it has prejudiced the adverse party.

Participant Claims & Defenses: *Not an Overpayment*

- Look at terms of the plan.
- See if any claim that the participant is entitled to the benefits under the plan terms.
 - Example - LTD – whether the other income at issue is an appropriate offset under terms of the plan.
 - Example - Pension in multi-employer plan – whether the person’s return to work was in “suspendible service” pursuant to the Plan terms and ERISA
- Must utilize ERISA administrative claims process.

Participant Claims & Defenses: *Reduction of Ongoing Benefits*

- Plans can reduce future benefits (if applicable)
- See if plan limits amount of reduction to ongoing benefits.
- If multi-employer pension plan, and participant is over age 65, and overpayment is due to alleged reemployment in “suspendible service,” DOL regulations limit recoupment to 25% of benefit going forward.

Strategy

- Evaluate claims and defenses.
- Write letter challenging request for overpayment reimbursement.
 - Highlight sympathetic facts.
 - Discuss legal claims/defenses.
 - Remind Plan/Insurance Co. that it can seek repayment elsewhere. And no IRS requirement that fiduciary sue P.
- If ongoing future benefits, negotiate repayment plan (e.g. reduce future benefits only by 25%).



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Kirsten Scott is a partner in the San Francisco firm of Renaker Hasselman Scott, LLP. She represents plaintiffs in various employee benefit matters under ERISA and government employee benefit programs, including claims for pension and disability benefits and breach of fiduciary duty. Kirsten also represents clients with respect to medical leaves of absence, unpaid wages, and severance negotiation.

Kirsten is an active member of the American Bar Association, and regularly speaks and writes on a variety of employee benefit-related topics. She is a contributing author to Employee Benefits Law (BNA) and ERISA Litigation (BNA). She has been an AIDS Legal Referral Panel (ALRP) panel attorney since 2013, and formerly served on the ALRP Board of Directors from 2012-2014.