VOLUME 22 SUMMER 2017

ILLINOIS BUSINESS LAW JOURNAL

IN CASE OF ERISA VIOLATON: EXHAUST THE EXHAUSTION REQUIREMENT

❖ NOTE ❖

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I. INTRODUCTION

"There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them."[1] Yet when courts enforce additional procedural obstacles in the way of an employee's claim of statutory rights, it becomes, for these plaintiffs, a needless exercise in futility to ERISA's objective of individual protections.

[1] *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552, 560 (6th Cir. 2017).

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This Note argues that when a cause-of-action is based on a statutory breach, employee benefit plan participants and beneficiaries under ERISA should not be mandated to exhaust internal administrative remedies provided by the plan before filing suit in district court. The federal circuits are split on this issue. The proceeding section in Part II will first provide a brief background of the relevant ERISA provisions. Part III of this Note will address the rulings of the circuits falling on both sides of the issue, and contrasts the courts' rationales and considerations. This Note argues in Part IV that courts should decline to read an administrative exhaustion requirement into the statute. Not only does this align with the plain language and Congressional intent of ERISA, but it also promotes a more efficient recovery process for aggrieved participants and beneficiaries by eliminating the futile exhaustion requirement.

II. BACKGROUND

The Employee Retirement Income Security Act of 1974 (ERISA)[2] is a federal law that protects employees by setting minimum standards for most voluntarily established pension and health plans in private industry.[3] The enforcement provisions of ERISA in Section 502(a)(1) provides participants and beneficiaries a "contract-based cause of action" to recover benefits, and enforce or clarify rights to future benefits under the terms of an employee benefit plan.[4] Although ERISA does not expressly require exhaustion of administrative remedies before a participant may bring civil action, due to ERISA's provision for the administrative review of benefits,[5] courts have unambiguously read an exhaustion requirement into the statute.[6]

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[2] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001–1461).

[3] *ERISA*, U.S. DEP'T OF LABOR (2016), https://www.dol.gov/general/topic/retirement/erisa (last visited Jun 11, 2017).

[4] *Hitchcock*, 851 F.3d at 560.

[5] ERISA § 503 states:

> In accordance with regulations of the Secretary, every employee benefit plan shall--
>
> (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 reasons 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.

Under 29 C.F.R. § 2560.503–1(b), ERISA § 503 is deemed to require that "[e]very employee benefit plan shall establish and maintain reasonable procedures governing the

The civil enforcement provision of ERISA in Section 502(a)(3) allows a participant, beneficiary, or fiduciary to bring an action in federal court for violations of ERISA or plan terms.[7] However, where a cause-of-action arose from a statutory violation, ERISA does not provide guidance in regards to the necessity of administrative review.[8] Considering an issue of first impression for the Sixth Circuit, the appellate court in *Hitchcock* reversed the district court's ruling and holds that plan participants and beneficiaries are not required to exhaust internal administrative remedies provided by the plan before filing suit in district court for a claim of statutory breach.[9] With this decision, the Sixth Circuit joins the majority, including the Third, Fourth, Fifth, Ninth, Tenth, and the D.C. Circuits.[10] The Seventh and Eleventh Circuits take the opposite position, and impose an exhaustion requirement.[11]

III. ANALYSIS

A. FEDERAL CIRCUITS THAT REQUIRE ADMINISTRATIVE EXHAUSTION

Courts requiring exhaustion of administrative procedures before bringing suit in the federal courts have focused on the public policy rational that "exhaustion support[s] the important public policy of encouraging private rather than judicial resolution of disputes under ERISA."[12] The Seventh Circuit in *Lindemann* stated, in considering whether to "carve out an exception to the exhaustion requirement," that "[t]hese [policy] advantages

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filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations."

[6] *Hitchcock,* 851 F.3d at 560.

[7] "A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." ERISA § 502(a)(3).

[8] The administrative remedies provision of ERISA § 503 only applies to "any participant whose claim for benefits has been denied." § 503.

[9] *Id.* at 566–67.

[10] *See Zipf v. AT & T*, 799 F.2d 889, 891–94 (3d Cir. 1986); *Smith v. Sydnor*, 184 F.3d 356, 364–65 (4th Cir. 1999); *Galvan v. SBC Pension Benefit Plan*, 204 Fed.Appx. 335, 338–39 (5th Cir. 2006); *Amaro v. Cont'l Can Co.*, 724 F.2d 747, 751–52 (9th Cir. 1984); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1204–05 (10th Cir. 1990); *Stephens v. Pension Ben. Guar. Corp.*, 755 F.3d 959, 966 (D.C. Cir. 2014).

[11] *See Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 649–50 (7th Cir. 1996); *Mason v. Cont'l Grp.*, 763 F.2d 1219, 1226–27 (11th Cir. 1985).

[12] *Lindemann*, 79 F.3d at 650.

outweigh a plaintiff's relatively minor inconvenience of having to pursue her claims administratively before rushing to federal court, and we note that we are not alone on this issue."[13]

In requiring a plan participant to exhaust administrative remedies first and declining to create a distinction between claims for benefits and claims based on statutory violations, the Seventh Circuit concluded that such a requirement more aligns with Congress' "apparent intent in mandating internal claims procedures found in ERISA [] to minimize the number of frivolous lawsuits, promote a non-adversarial dispute resolution process, and decrease the cost and time of claim settlements."[14]

Moreover, the court noted that an exhaustion prerequisite "enables plan fiduciaries to assemble a factual record which will assist a court in reviewing their actions."[15] The Eleventh Circuit, in upholding a requirement for exhaustion of administrative remedies, states that such a requirement moreover "enhance[s] the plan's trustees' ability to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decision making process, and allow prior fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated."[16]

Essentially, in requiring administrative exhaustion, these circuits primarily favor resource considerations. Focusing on an attempt to reduce the strain on judiciary resources, enforcing exhaustion weaves out cases that may otherwise be resolved without resorting to litigation. Even for cases that do not come to a resolution, it would reduce the burden of trial courts by arriving with a more developed record. This is a contrastable different focus than circuits that have held opposite.

B. Federal Circuits that Do Not Require Administrative Exhaustion

In conferring statutory rights through ERISA, "Congress created [] statutory right[s] independent of any [contractual] rights."[17] In rejecting to impose a requirement of administrative exhaustion, the Ninth Circuit noted that "ERISA action is to enforce statutory rights designed to protect the employees from actions which interfere with their attainment of eligibility for

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[13] *Id.*
[14] *Id.*
[15] *Id.* (quoting *Makar v. Health Care Corp. of Mid-Atlantic*, 872 F.2d 80, 83 (4th Cir. 1989)).
[16] *Mason*, 763 F.2d at 1227.
[17] *Amaro*, 724 F.2d at 749.

those benefits."[18] As the court has acknowledged, enforcing an exhaustion requirement by holding otherwise:

> would endanger the protection afforded employees by Congress' enactment of ERISA . . . That protection then would become subject to elimination in the collective bargaining process. An ERISA claim could be defeated without the benefit of protections inherent in the judicial process. The 'ready access to the Federal courts' that ERISA was intended to provide would be eliminated.[19]

The Ninth Circuit moreover noted that where an ERISA cause-of-action is based on statutory violation, it should be in the hands of the court, and not of arbitrators appointed by the plan at issue.[20] Though arbitration and other such administrative procedures are competent and efficient, "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land,"[21] and arbitrators "lack the competence of courts to interpret and apply statutes as Congress intended."[22] Availability to the judicial process allows a plan participant to "avail themselves of liberal pretrial discovery," that is not available in an administrative proceeding controlled by the plan trustees.[23]

Even in instances, such as litigating disputing recovery of benefits, the administrative exhaustion requirement is void "when resort[ing] to the administrative route is futile or the remedy is inadequate."[24] Affirming that following the administrative process is futile where the claim is based on an ERISA violation, the Sixth Circuit held that such claims are not required to exhaust administrative remedies.[25] In a claim based on statutory violation, it is a challenge to the legality of the plan, and "[a] challenge to the 'legality' of a plan's amendment, rather than a challenge to the interpretation of an amendment, is futile because 'if [p]laintiffs were to resort to the administrative process, [the plan administrator] would merely recalculate

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[18] *Id.*
[19] *Id.* (quoting 20 U.S.C. § 1001(b) (2012)).
[20] *Id.*
[21] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).
[22] *Amaro*, 724 F.2d at 750.
[23] *Id.*
[24] *Winterberger v. Gen. Teamsters Auto Truck Drivers & Helpers Local Union*, 162, 558 F.2d 923, 925 (9th Cir. 1977).
[25] *Costantino v. TRW, Inc.*, 13 F.3d 969, 975 (6th Cir. 1994).

their benefits and reach the same result."[26] Thus, an "administrative hearing on this issue would be pointless, and . . . such a hearing could not lead to an appropriate remedy,"[27] and such an issue is "a question best suited for the courts to decide."[28] Though the minority circuits' considerations regarding issues of judicial resource preservation is a valid consideration, the focus of ERISA is, as it was created to be, for individual participant and beneficiary protection.

IV. RECOMMENDATION

Courts should not require a plaintiff to exhaust administrative procedures for an action based on ERISA violations. The text of ERISA is unambiguous in requiring that "[e]very employee benefit plan shall . . . afford a reasonable opportunity to any participant whose *claim for benefits* has been denied for a full and fair review."[29] It was qualifying the requirement specifically to "benefit" related claims, due under 502(a)(1).[30] Meanwhile, Section 502(a)(3) is unrelated in allowing recovery for "any act or practice which violates any provision of this subchapter or the terms of the plan."[31] Thus, to not require administrative exhaustion prior to bringing a statutory violation claim in federal court is not to "carve out an exception,"[32] but to decline to read into the statute, a requirement that is not there.[33] To forgo reading into the statute a requirement of administrative exhaustion where there is none is "consistent with the general principle of statutory construction that a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency."[34]

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[26] *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552, 560 (6th Cir. 2017) (quoting *Costantino*, 13 F.3d at 975).
[27] *Costantino*, 13 F.3d at 975.
[28] *Hitchcock*, 851 F.3d at 562.
[29] ERISA § 503 (emphasis added).
[30] A dispute regarding recovery of benefits due under the plan is a cause-of-action under ERISA § 502(a)(1): "A civil action may be brought . . . to recover benefits due to him under the terms of his plan."
[31] ERISA § 502(a)(3).
[32] *Lindemann*, 79 F.3d at 650.
[33] "[W]here a statute is complete and unambiguous on its face, additional terms should not be read into the statute." *Emmert Indus. Corp. v. Artisan Assocs., Inc.*, 497 F.3d 982, 987 (9th Cir. 2007). "When there is "particularization and detail" in a statutory scheme that Congress has created, a court should not add provisions that are not present in the scheme." *Anderson v. United States*, 85 Fed. Cl. 532, 545 (2009).
[34] *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981).

Additionally, to create such a requirement from Section 503 would make its distinction that administrative procedures should be made available to "participant whose claim for benefits has been denied" meaningless. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[35] If Section 503 was meant to apply participants seeking review no matter the basis of their claim, then it need not single out one such claim. A reading that applies Section 503 across the board thus renders certain parts of it superfluous, and that cannot be what Congress intended.[36]

Moreover, as the Supreme Court has stated, the overarching policy consideration for the enactment of ERISA is a balance of two, often opposing, interests: "Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place."[37] Courts should not require plan participants and beneficiaries to run through futile administrative procedures when their claim is based on an infringement of statutory protection. To force claimants to be subjected to "minor inconvenience" by first going through futile administrative procedures when the issue is clearly one within the jurisdiction of, and best determined by the judiciary, is to deny individuals the protections ERISA. "Congress intended statutory rights to be enforced by the courts, not by plan administrators . . . Congress required plans to provide procedures to review claims for benefits, but did not require internal remedial procedures to embrace claims based on ERISA's substantive guarantees."[38]

V. CONCLUSION

Although the Seventh and Eleventh Circuits have elected to mandate an administrative exhaustion prerequisite for claims based on statutory violation, courts should not enforce such a requirement. Where the claim is based on an issue of statutory interpretation, the issue is better left to the courts. Not reading a requirement into the statute where ERISA has not elected to

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[35] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

[36] "Absent clear congressional intent to the contrary, [the court] will assume the legislature did not intend to pass vain or meaningless legislation." *Coyne & Delany Co. v. Blue Cross & Blue Shield of Virginia, Inc.*, 102 F.3d 712, 715 (4th Cir. 1996).

[37] Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

[38] *Stephens v. Pension Ben. Guar. Corp.*, 755 F.3d 959, 965 (D.C. Cir. 2014).

implement is consistent with the plain face of ERISA. Yet, to read a prerequisite is to add into ERISA provisions it does not include, effectively voiding the text of ERISA. Moreover, administrative procedures become futile where the sole issue to be determined is statutory interpretation. Thus, claimants are better off being able to bring suit in court directly rather than waiting through an administrative procedure just for procedure's sake.