

05-2937-CV

In The United States Court of Appeals
For the Second Circuit

MARTIN M. COYNE,

Plaintiff-Appellant,

v.

BAYER CORP., formerly Miles Inc., **THE SUPPLEMENTAL BENEFIT PLAN COMMITTEE OF
STERLING DRUG INC.,** and **THE STERLING DRUG INC. SUPPLEMENTAL BENEFIT PLAN,**
Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District Of New York

**BRIEF OF AMICUS CURIAE ELAINE L. CHAO, SECRETARY
OF THE UNITED STATES DEPARTMENT OF LABOR
IN SUPPORT OF APPELLANT REQUESTING REVERSAL**

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STATEMENT OF THE ISSUE

Whether the district court erred in concluding that a participant in an ERISA benefit plan is required to exhaust benefit claims procedures when the plan had no claims procedures in place before the suit was filed, failed to act on the claim administratively, and subsequently established procedures only after the suit was filed.

INTEREST OF THE SECRETARY OF LABOR

Title I of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA" or "Act") is administered and enforced by the Secretary of Labor. The Secretary has authority to interpret the Act and often participates as amicus curiae in cases to promote the Act's interests. These interests include promoting uniformity of employee benefit law, protecting participants and beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

In this case, the Secretary has a particular interest in seeing that her regulations governing claims procedures are given proper effect. Those regulations, issued pursuant to the rulemaking authority specifically granted in section 503 of the Act, 29 U.S.C. § 1133, expressly state that a participant's claim is "deemed exhausted" and the participant may bring suit under section 502 of the

Act, if a plan fails to establish or follow procedures that meet the regulatory requirements. 29 U.S.C. § 1132; 29 C.F.R. § 2560.503-1. The Secretary's claims regulation broadly applies to ERISA-covered plans, including the type of plan at issue here, a "top hat" plan providing supplemental benefits to highly compensated employees.¹ Accordingly, the Secretary, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, is filing this amicus curiae brief in support of appellant Coyne to assert the dispositive applicability of her regulation.

STATEMENT OF THE CASE

Martin Coyne began working for Sterling Drug in 1981 and was a participant in its Supplemental Benefit Plan ("the Plan").² The Plan is a type of unfunded retirement arrangement commonly referred to as a "top hat plan," which is maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. Top hat plans are exempt from most provisions of Title I of ERISA. See 29 U.S.C. §§ 1051(2)

¹ Mr. Coyne relied on the Secretary's claims regulation in support of his argument that participants are not required to exhaust non-existent claims procedures before proceeding in federal court, but did not specifically bring the "deemed exhausted" provision to the attention of the district court. Because this argument provides additional support to the argument made below, the waiver doctrine does not apply. See Yee v. City of Escondido, California, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support . . . ; parties are not limited to the precise arguments . . . made below.") (citations omitted).

² We rely on the decision below for the statement of facts. See Kodak v. Bayer, 369 F. Supp.2d 473, 476-77 (S.D.N.Y. 2005).

(participation and vesting), 1081(a)(3) (funding), and 1101(a)(1) (fiduciary responsibility). However, they are not exempt from section 503, 29 U.S.C. § 1133, or the Secretary's claims regulation.³

In 1989, Kodak acquired Sterling and the Plan became part of Kodak's retirement plan. In 1994, Kodak sold Sterling to SmithKline Beecham which, in turn, sold Sterling to Bayer in 2000. In 1994, Coyne left Sterling to work for Kodak until he retired in 2003. On behalf of Coyne, Kodak contacted Bayer in 2003 regarding the amount of Coyne's benefits under the Plan and confirming Bayer's liability for payment. Between May 2003 and April 2004, Kodak and Bayer engaged in a series of communications through which Kodak attempted to secure payment of Coyne's benefits. Many of Kodak's letters and emails were not answered by Bayer, and at no time did Bayer make a determination regarding Coyne's eligibility for benefits. Coyne and Kodak contend that under the Plan, Coyne's benefits became payable on March 1, 2004. It is undisputed that at the time of these communications, the Plan did not have written procedures for filing benefit claims. Kodak has been paying Coyne's benefits under the Plan since March 2004 and Coyne has agreed to reimburse Kodak once Bayer assumes responsibility for payment.

³ Top hat plans are also not exempt from disclosure and reporting requirements, see 29 U.S.C. § 1021, and are subject to the civil enforcement provisions of the Act, as appropriate. See 29 U.S.C. § 1132; see generally 29 U.S.C. § 1103 (ERISA coverage section).

On June 28, 2004, Kodak and Coyne sued Bayer and the Supplemental Benefit Plan Committee (collectively, "Bayer") in the District Court for the Southern District of New York. Kodak sought indemnification for payments it had made to Coyne and a declaratory judgment affirming Bayer's responsibility for payment under the Plan, and Coyne brought suit for his benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Two weeks after the suit was brought, Bayer, on July 12, 2004, amended the Plan by adding a claims procedure retroactive to January 2004. In October 2004, Coyne and Kodak were provided with a copy of the amended Plan document which outlined the Plan's new claim procedure. Subsequently, in its October 2004 answer, Bayer argued that because Coyne failed to exhaust the Plan procedures, his complaint should be dismissed.

Plaintiffs moved for partial summary judgment alleging that the Plan's amendment, with its newly-enacted claims procedures, impaired Coyne's right to benefits and therefore should not apply to his claim. Alternatively, the plaintiffs argued that, in view of Bayer's failure to pay or respond to the claim, the court should excuse Coyne's compliance due to futility. Bayer did not dispute that no administrative claims procedures were in place through the time of suit, but argued that the Plan document gave it the right to amend the Plan retroactively, that the amendment did not impair Coyne's alleged right to benefits, and that the plaintiffs did not make a "clear and positive" showing that complying with the Plan's

administrative procedures would be futile. Kodak v. Bayer, 369 F. Supp.2d 473, 477-78 and 482 (S.D.N.Y. 2005).

The district court denied the plaintiffs' motion for partial summary judgment and dismissed the action without prejudice. The court reviewed the language of the Plan and determined that the sponsor reserved the right to amend the Plan so long as vested rights would not be "impaired" or "adversely affected." 369 F. Supp.2d at 478. The court rejected the plaintiffs' impairment argument on the ground that the delay caused by following the new procedures would not ultimately diminish the amount of benefits Coyne would receive, deprive him of the right to sue if the claim was denied, or affect the judicial standard of review. Id. at 478-82 ("if Coyne ultimately prevails on his claim for benefits, he will be entitled to recover payments for the period in which the plan administrator and review committee consider his claim under the new procedure"). The court also rejected the plaintiffs' futility argument because "[d]efendants' failure to pay and to respond to [the plaintiffs] . . . is not the kind of unambiguous conduct that is sufficient for a showing of futility." Id. at 482-83. Accordingly, the court determined that Coyne was required to exhaust the new administrative remedies and ordered the Plan's administrative committee to treat the complaint as the claim triggering the administrative schedule for review. Id. at 483.

SUMMARY OF THE ARGUMENT

Pursuant to section 503, 29 U.S.C. § 1133, the Secretary has twice issued claims regulations governing the handling of benefit claims presented to ERISA covered employee benefit plans. See 29 C.F.R. § 2560.503-1. Subpart (*I*) of the current regulations expressly states that a participant's claim is "deemed exhausted" if a plan fails to provide procedures that meet the requirements of the regulation. Here, Bayer failed to have any procedures through which Coyne could have pursued his benefit claim. There would be little point to the regulation's "deemed exhausted" directive if plans, like the one at issue here, could simply amend the plan to resolve such procedural irregularities after the participant pursued his rights in court. Plans would have little incentive to comply with the regulation's directives, and the participants' access to court would be delayed or denied. The language of the regulation is clear, and the district court erred in dismissing Coyne's suit and requiring him to exhaust claims procedures that did not exist at the time he filed suit for benefits in federal court.

ARGUMENT

The District Court Erred in Concluding that a Participant in an ERISA-Covered Plan is Required to Exhaust Plan Claims Procedures After Filing a Claim in Federal Court When Those Procedures Did Not Exist at the Time Suit was Filed

A. Under the Secretary's Claims Regulation, Coyne Is Deemed to Have Exhausted His Administrative Remedies

The issue in this case -- whether the participant could be required to exhaust plan procedures which did not exist until after he filed his lawsuit for benefits -- directly implicates the Secretary's exercise of her authority to delimit by regulation exhaustion requirements for the processing of benefit claims by ERISA plans.

Section 503 of ERISA 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.

29 U.S.C. § 1133. Pursuant to section 503's directive, the Secretary promulgated regulations at 29 C.F.R. § 2560.503-1 detailing the procedures for handling benefit claims that all ERISA plans must have in place. As a general matter, these regulations set minimum requirements pertaining to benefit claims, requiring every

employee benefit plan to establish and maintain reasonable claims procedures and giving deadlines for the review of claims and appeals from adverse benefit determinations. Taken together, the statute and regulations generally reflect a preference that claimants exhaust plan procedures before bringing suit in court appealing the denial of a claim. See Linder v. BYK Chemie USA Inc., 313 F. Supp.2d 88, 91 (D. Conn. 2004) ("although ERISA itself does not include an exhaustion requirement, there is a 'firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases'") (citations omitted).

The exhaustion requirement, however, presupposes that the plan has provided a full and fair claims process, as mandated by the claims regulations. Thus, paragraph (I) of the regulations sets forth the consequences of a failure to establish and follow reasonable claims procedures:

In the case of the failure of a plan to establish or follow claims procedures consistent with the requirements of this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim.

29 C.F.R. § 2560.503-1 (I).⁴ The claims procedure regulation thus provides that when a plan has failed to "establish or follow claims procedures consistent with the requirements of [the regulations]," a claimant is "deemed to have exhausted the

⁴ In 2000, the Secretary amended the former claims regulation applicable to all claims filed on or after January 1, 2002.

administrative remedies available under the plan," and may file suit "on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim." Id. A claimant may therefore proceed directly to federal court without waiting for a denial of his claim, in the event of certain procedural violations, including the failure to adopt claims procedures.

Consistent with general principles governing judicial review of agency exercises of interpretive or rulemaking authority, the Supreme Court has made clear that the Secretary's regulatory choices under ERISA are entitled to controlling deference so long as they are reasonable. Massachusetts v. Morash, 490 U.S. 107, 116 (1989). "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 843-44.

Where, as here, the plan failed to establish any procedures at all, the plain language of the regulation provides that the participant is deemed to have

exhausted his administrative remedies, and entitles him to immediately proceed to court under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). In the preamble to the Secretary's regulations, the Secretary noted that "[a] plan's failure to provide procedures consistent with [the regulations'] standards would effectively deny a claimant access to the administrative review process mandated by [ERISA]" and stated that, "[a]t a minimum, claimants denied access to the statutory administrative review process should be entitled to take that claim to court ... for a full and fair hearing on the merits of the claim." 65 Fed. Reg. 70246, 70256 (Nov. 21, 2000).

B. Bayer Did Not Alter Coyne's Right To Seek Judicial Review By Amending Plan Procedures After Coyne Had Already Filed Suit

It is undisputed that from the time Kodak began making inquiries on Coyne's behalf to the time Coyne and Kodak filed their complaint in court against Bayer (a period of more than one year), no written procedures existed for a participant to follow in making a claim for benefits under the Plan. Rather, Bayer waited until two weeks after it was sued by plaintiffs to amend its Plan to establish its claims procedures, declare them to be retroactive, and argue that they applied to Coyne's pending claim. Under the Secretary's regulations, however, Coyne was already deemed to have exhausted the claims process at the time he filed his lawsuit, and nothing in the claims regulation permitted Bayer to effectively "undeem" exhaustion by enacting, for the first time, procedures that complied with the claims

regulation after Coyne filed suit and after failing to offer an appropriate procedure in the many months preceding Coyne's lawsuit. The Department of Labor's interpretation of the regulation, in this regard, comports with its plain language, as set forth above, is reasonable, and is entitled to deference. See, e.g., Auer v. Robbins, 519 U.S. 452, 461 (1997).

The district court decision, relying upon the Plan's retroactive amendment of its procedures, simply failed to consider the claims regulation which established that the claims process had already been exhausted, and entitled Coyne to pursue his claims in court. Although the district court cited a number of cases from other circuits involving plan amendments, none of the cases conflicted with the Secretary's regulations and all of the cases were factually dissimilar. See, e.g., 369 F. Supp.2d at 479-80, citing Smathers v. Multi-Tool, Inc./Multi-Plastics, Inc. Employee Health & Welfare Plan, 298 F.3d 191, 195-96 (3d Cir. 2002) (holding that plan could add a provision giving the administrator discretionary authority to interpret plan provisions, thereby entitling the administrator to deferential review, while claim was pending, but before consideration of participants' claim); Member Servs. Life Ins. Co. v. American Nat'l Bank & Trust Co., 130 F.3d 950, 954 (10th Cir. 1997) (holding that plan could not use amendment to recover benefits that had vested through payment); Virta v. DeSantis Enters., Inc., No. 94-CV-1378 (FJS),

1996 WL 663970, at *4 (N.D.N.Y. Nov. 7, 1996) (holding that plan could not use amendment to determine that benefits had not vested).⁵

More pertinently, this Court recently addressed the effect of a plan's failure to follow the claims regulation on a participant's claim for benefits. In Nichols v. Prudential Ins. Co., 406 F.3d 98 (2d Cir. 2005), a beneficiary of a long-term disability plan sued the plan administrator for wrongful termination of benefits. The plan never rendered a final decision on appeal, insisting instead that the participant submit further information before ruling. The participant then brought the suit one hundred ninety seven (197) days after her initial appeal date. The district court dismissed the participant's claim for failure to exhaust the plan's administrative remedies. Citing the Department's regulation, however, the Court reversed. The Court first looked at the "deemed exhausted" language of the claims regulation and observed that "[i]f Prudential missed these deadlines, then Nichol's claim is deemed denied and her administrative remedies are therefore exhausted, removing any procedural obstacle to the present suit." Id. at 104. The Court then addressed Prudential's argument for substantial compliance, and noted "that the

⁵ Consistent with the Secretary's view, a number of district court decisions under both current and prior versions of the claims regulation have generally held that plans may not require claimants to exhaust additional administrative remedies once claims are (or have been deemed) exhausted or denied. See, e.g., Ward v. Plains Exploration & Prod. Co., 380 F. Supp.2d 817, 820 (S.D. Tex. 2005); Urso v. Prudential Ins. Co., No. CIV 03-024-JD, 2004 WL 3355265, at *2 (D.N.H. Nov. 23, 2004); Schmir v. Prudential Ins. Co., No. 03-187-P-S, 2003 WL 22466168, at *3 (D. Me. Oct. 30, 2003).

language of the regulation is not ambiguous." *Id.* at 106. Accordingly, the Court stated that "adopting the proposition that substantial compliance can delay accrual of the right to sue would permit plan administrators to indefinitely tie up claimants, who are often in immediate need of benefits, with ongoing requests for information. Such a result would render the plain language of section 2560.503-1(h)(1) a nullity." *Id.* at 107. See also Linder, 313 F. Supp.2d at 94 ("the regulation is unequivocal that any failure to adhere to a proper claims procedure is sufficient to deem administrative remedies exhausted").

In the present case, there was no compliance with the claims regulation, substantial or otherwise, until after the participant filed an action under ERISA § 502(a)(1)(B) as the "deemed exhausted" regulation contemplates. 29 U.S.C. § 1132(a)(1)(B). This is not a case in which a plan had established procedures in full conformity with the regulation and inadvertently deviated from those procedures.⁶ Nor is it a case in which the plan promulgated appropriate procedures after the participant sought benefits, but before the participant filed suit. The plan here

⁶ The Department of Labor has posted FAQs about the claims regulation on its website, which indicate that such inadvertent deviations from procedures established in "full conformity with the regulation" may not trigger the deemed exhaustion provision where "the plan's procedures provide an opportunity to effectively remedy the inadvertent deviation without prejudice to the claimant, through the internal appeal process or otherwise." U.S. Department of Labor, Employee Benefits Security Administration, Frequently Asked Questions about the Claims Procedure Regulation, FAQ F-2, at http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html (last visited on October 14, 2005).

failed to have any procedures through which Coyne could have pursued his benefits at any time before he filed suit. Once he filed suit, the claims were deemed exhausted under the regulation and the lawsuit could proceed. No subsequent action by the plan could change that result or add prerequisites to the filing of the suit. While Nichols dealt with a plan's failure to adhere to appeal deadlines, the effect of either allowing a plan to miss a deadline or to retroactively amend the plan document to add claims procedures is the same -- participants' access to court is delayed or denied. The regulation's "deemed exhausted" directive would be totally frustrated if plans could simply amend the plan to resolve such procedural irregularities after the participant pursued his rights in court. Giving retroactive effect to a plan amendment in these circumstances thus plainly conflicts with the "deemed exhausted" regulation. The district court erred in dismissing Coyne's suit and requiring him to exhaust claims procedures that did not exist at the time he originally requested benefits or filed suit for benefits in federal court.

Finally, if this Court decides that Mr. Coyne is entitled to pursue his claims in the district court, it is important that the district court consider his claim under the appropriate standard. Because the Plan has not exercised any discretion with respect to Mr. Coyne's claim, had no procedure in place for adjudication of his claim and, in fact, made no decision regarding his claim, deferential review would

be inappropriate. Deferential review is only appropriate when there has been an actual exercise of discretion pursuant to a valid claims procedure. As this court previously noted in Nichols, "we may give deferential review only to actual exercises of discretion." 406 F.3d at 109. See also, Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Protection Plan, 349 F.3d 1098, 1106 (9th Cir. 2003) ("Deference to an exercise of discretion requires discretion actually to have been exercised"), cert. denied, 125 S. Ct. 2956 (2005). On the facts of this case, there was neither a process nor a decision to which the district court could defer.

CONCLUSION

For the reasons set forth above, the Secretary of Labor urges this Court to reverse the district court's grant of summary judgment to defendants.

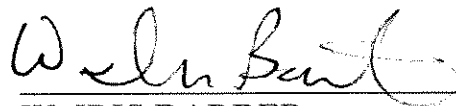
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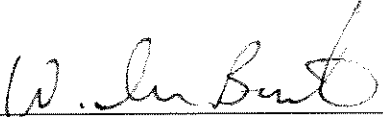
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