**No.**

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**In The**
**Supreme Court of the United States**

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JULIE HEIMESHOFF,

*Petitioner,*

v.

HARTFORD LIFE & ACCIDENT INSURANCE CO., and WAL-MART STORES, INC.,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. When should a statute of limitations accrue for judicial review of an ERISA disability adverse benefit determination?

2. What notice regarding time limits for judicial review of an adverse benefit determination should an ERISA plan or its fiduciary give the claimant with a disability claim?

3. When an ERISA plan or its fiduciary fails to give proper notice of the time limits for filing a judicial action to review denial of disability benefits, what is the remedy?

## LIST OF PARTIES

The parties to this action are listed in the caption: The Petitioner, Julie Heimeshoff, was plaintiff and appellant in the courts below. Respondents Hartford Life & Accident Insurance Company and WalMart Stores, Inc., were defendants and appellees.

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Unpublished opinion of the Second Circuit Court of Appeals, No. 12-651-cv, Summary Order, September 13, 2012, *Heimeshoff v. Hartford Life & Accident Insurance Co., WalMart Stores, Inc.,* 2012 U.S. App. LEXIS 19269 (2d Cir. Sept. 13, 2012) (Parker, Wesley, Circuit Judges; and Gleeson, District Judge sitting by designation) reprinted at **Pet.App.1-4**. The Court of Appeals affirmed the ruling of the District Court, (**Pet.App.5-18**, unpublished Order dated Jan. 16, 2012), which granted Appellees' motion to dismiss Heimeshoff's action challenging Hartford Life & Accident Insurance Company's ("Hartford") denial of long-term disability benefits under ERISA, 29 U.S.C. §1132(a)(1)(B), as untimely. The District Court entered Judgment on January 23, 2012.

## STATEMENT OF JURISDICTION

The Second Circuit issued its opinion on September 13, 2012. Heimeshoff did not seek rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTES AND REGULATIONS INVOLVED

Title 29, United States Code, Sections 1001(a), (b); 1022(a), (b); 1104(a)(1); 1133(1); 1133(2).

Title 29, Code of Federal Regulations, Sections 2520.102-2(b), 2520.102-3(s); 2560.503-1(a), (b), (f)(3), (g)(1)(iv), (h), (j)(4).

## INTRODUCTION

This Court should grant certiorari to resolve the conflict among the circuits over the important questions raised here: When does an ERISA plan's statute of limitations begin to run or accrue, what notice of the time limits for judicial review must ERISA plans provide to beneficiaries, and what is the remedy for the failure to provide that notice?

The courts have adopted three conflicting approaches to answer the question of accrual:

(1) A plan's statute of limitations cannot begin running until the claimant has exhausted administrative remedies and the plan has issued a formal, final adverse determination (Fourth and Ninth Circuits);[1]

(2) A plan's pre-denial statute of limitations is enforceable if "reasonable," as determined on a case-by-case basis (Second, Sixth, Seventh, Eighth, and Tenth Circuits);[2] and

(3) The plan must notify the claimant of the time limits for judicial review, in the SPD and adverse determinations, in compliance with ERISA

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[1] *White v. SunLife Assurance Co.,* 488 F.3d 240 (4th Cir. 2007); *Price v. Provident Life & Accident Ins. Co.,* 2 F.3d 986 (9th Cir. 1993).

[2] *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan,* 572 F.3d 76 (2d Cir. 2009); *Rice v. Jefferson Pilot Fin. Ins. Co.,* 578 F.3d 450 (6th Cir. 2009); *Abena v. Metro. Life Ins. Co.,* 544 F.3d 880 (7th Cir. 2008); *Blaske v. UNUM Life Ins. Co. of Am.,* 131 F.3d 763 (8th Cir. 1997), *cert. denied,* 525 U.S. 812 (1998); *Salisbury v. Hartford Life And Acc. Co.,* 583 F.3d 1245 (10th Cir. 2009).

regulations;[3] and if it does not, the court will not allow the plan to assert the plan's limitations defense[4] or will equitably toll the limitations period[5] (First Circuit and a District Court in Second Circuit).

This lack of uniformity causes unequal access to judicial review, in violation of ERISA, 29 U.S.C. § 1001(b), requiring "ready access to Federal courts", and this Court's recognition of "higher-than-marketplace" standards required of ERISA fiduciaries. *Metropolitan Life Ins. Co. v. Glenn,* 554 U.S. 105, 115 (2008). A uniform accrual time for benefits-due statute of limitations is necessary to level the playing field for American workers and employers and protect access to judicial review. *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996); 29 U.S.C. §§ 1001(b); 1104(a)(1).

The first approach—that of the Fourth and Ninth Circuits—provides **a bright-line accrual time** for the statute of limitations, consistent with ERISA's goals for plan fiduciaries to act in the sole interests of beneficiaries, and also with the general purposes of statutes of limitations.

The third approach relies on the principle that judicial review is an integral part of the review process that ERISA guarantees to claimants. This solution, like that of the Fourth and Ninth Circuits, also satisfies ERISA's goals and gives clear notice to

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[3] 29 C.F.R. § 2560.503-1(b)(1), (2); (g)(1)(iv); (j)(4); 29 C.F.R.§§ 2520.102-2; 2520.102-3(s).

[4] *Novick v. Metropolitan Life Ins. Co.,* 764 F.Supp.2d 653 (S.D.N.Y. 2011).

[5] *Ortega Candelaria v. Orthobiologics LLC,* 661 F.3d 675 (1st Cir. 2011).

claimants to allow them their day in court. It resolves the tension between requiring exhaustion of administrative remedies and allowing plans to write their own limitations provisions, provides clarity to employees, courts, and the legal system, and benefits claimants as Congress intended through ERISA.

The remaining circuits, without enforcing the notice required by the regulations, impair the rights to judicial review, contrary to the ERISA statute, regulations, and Supreme Court decisions. These circuits enable plans to create moving accrual times for their limitations periods, tied to "proof of loss" provisions which allow the plan to require additional information and extend the time limits for administrative review, all the while running the countdown on the plan's statute of limitations for judicial review. Each further day of delay deprives claimants of that time to review their options and prepare for litigation. All this occurs without the plan fiduciary notifying the claimant of the time limits for judicial review, in violation of ERISA minimum regulations requiring such notice.[6] The evidence shows that the confusion and lack of uniformity among courts[7] deters claimants from pursuing their right to have claims denials reviewed in court,[8] and encourages forum shopping.[9]

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[6] 29 C.F.R. §2560-503.1(b)(1), (2); (g)(1)(iv); (j)(4); 29 C.F.R.§§2520.102-2; 2520.102-3(s).

[7] Research has revealed 110 decisions in federal appellate and district courts in every circuit since 2002 addressing these ERISA statutes of limitations issues, demonstrating the widespread scale of these issues.

[8] "[E]vidence suggests that participants are often too discouraged to exhaust their appeal rights after an initial adverse decision, even under circumstances where the review

This case presents the opportunity for this Court to rectify the inconsistency among courts and guide them back to the role Congress originally intended, that is, "for federal judges to … 'fill the gaps' left by the statute in ways that furthered the purpose of protecting plan participants."[10] That purpose is to hold ERISA plan fiduciaries to higher-than-marketplace standards, interpreting plans "solely in the interests of the participants and beneficiaries". *Glenn,* 554 U.S. at 115; 29 U.S.C. §1104(1)(a), and to protect the right to judicial review of adverse benefit determinations. *Varity Corp. v. Howe,* 516 U.S. 489 (1996); 29 U.S.C. §1104(1)(a).

## STATEMENT OF THE CASE

### 1. Heimeshoff's Benefits Claim.

Julie Heimeshoff, a Senior Public Relations Manager who worked for Wal-Mart since April 29, 1986, became eligible for Wal-Mart's ERISA plan (Group Long Term Disability Plan for Employees)

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will be 'external' and hence arguably neutral." Andrew Stumpff, *Darkness At Noon: Judicial Interpretation May Have Made Things Worse for Benefit Plan Participants Under ERISA Than Had The Statute Never Been Enacted,* 23 St. Thomas L. Rev. 221, 238 n.75 (Spring 2011)(citing Karen Pollitz et al., *Assessing State External Review Programs and the Effects of Pending Federal Patients' Rights Legislation* 5 (2002), available at http://www.kff.org/insurance/externalreviewpart2rev.pdf).

[9] *E.g.,* Aaron A. Reuter, *Limiting ERISA's Limitations Period Through The Use of Contractual Accrual Dates,* The ERISA Litigation Newsletter (April 2012), http://www.proskauer.com/publications/newsletters/erisa:litigation-newsletter-april-2012/, **Pet.App.97**. *See also* **Pet.App.90-113**.

[10] Stumpff, 23 St. Thomas L.Rev. at 236 (citing Oringer, at 429).

(the "policy" or "plan"), administered by Hartford. In January 2005, she began suffering from symptoms of fibromyalgia, chronic pain, and other conditions. She stopped working on June 8, 2005. **Pet.App.6**.

Heimeshoff filed a claim for long term disability (LTD) benefits with Hartford on **August 22, 2005. Pet.App.7**. Hartford asked for clarification regarding her application on **November 21, 2005, Pet.App.72**, stating that under the policy, Heimeshoff needed to submit "[w]ritten proof of loss to The Hartford within 90 days after the start of the period for which The Hartford owes payment".

This letter informed Heimeshoff that her claim would not be affected if the proof was not submitted by that time if "it was not possible to give proof within the required time", so long as it was given "not later than 1 year after it is due". **Pet.App.73**. Hartford also wrote Heimeshoff on **November 29, 2005,** indicating the benefits decision period could be extended. **Pet.App.74**.

On **December 8, 2005,** Hartford denied Heimeshoff's claim. **Pet.App.75**. Hartford denied the claim because it allegedly did not receive certain clarifying information from Heimeshoff's doctor. Nevertheless, even after the denial, Hartford made clear that Heimeshoff could still provide this information. *See* **Pet.App.77** (advising that "[t]he following information, not previously submitted, is necessary for a determination of your claim.")

This "adverse benefit determination"[11] letter informed Heimeshoff of the right to administratively

[11] 29 C.F.R. §2560.503-1(b).

appeal the decision and "receive a full and fair review" by writing Hartford within 180 days. **Pet.App.78**. The letter stated that Heimeshoff was required to exhaust her administrative remedies before she could file suit: "After your appeal, and if we again deny your claim, you then have the right to bring a civil action under Section 502(a) of ERISA." **Pet.App.79**. The letter did not provide the time limit for Heimeshoff to bring a civil action, if her claim was denied.

Heimeshoff retained counsel in **May 2006,** to assist in appealing the December 2005 denial of benefits. **Pet.App.8**. On **May 31, 2006**, Hartford wrote Heimeshoff, explaining that she need not file a "formal appeal" and if Hartford received clarification of Heimeshoff's functionality, "we will reopen the claim." **Pet.App.80**.

On **May 24, 2007**, Heimeshoff provided the additional clarifying information to Hartford. **Pet.App.14**. On **June 5, 2007**, Hartford extended the deadline for filing additional information to **September 30, 2007. Pet.App.14**.

On **September 26, 2007**, Heimeshoff appealed Hartford's benefits denial. **Pet.App.9**. Hartford denied this appeal by letter dated **November 26, 2007, Pet.App.81**, informing Heimeshoff that her internal appeal remedies had been exhausted, and stating this was "our final decision and the file remains closed." **Pet.App.89**. This final adverse determination notified Heimeshoff that she could "bring a civil action under Section 502(a) of the Employee Retirement Income Security

Act of 1974 ("ERISA"). **Pet.App.89**. It did not provide time limits for filing a lawsuit.

### 2. Hartford Policy's Statute of Limitations.

Hartford's policy had the following deadlines for review of benefits denials: Under "Claims: … Proof of Loss", it required "[w]ritten proof of loss must be sent to The Hartford within 90 days after the start of the period for which The Hartford owes payment. After that, The Hartford may require further written proof that you are still Disabled." **Pet.App.56**.

Under "Legal Actions", the policy stated: "[l]egal action cannot be taken against The Hartford: … after the shortest period allowed by the laws of the state where the policy is delivered. This is 3 years after the time written proof of loss is required to be furnished according to the terms of the policy." **Pet.App.56**.[12]

Hartford's SPD did not set forth the time limit for filing a judicial action. **Pet.App.57-71**. It did, however, require Heimeshoff to exhaust her administrative remedies. **Pet.App.65-66**.

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[12] It is unclear from this provision which state's statute of limitations applies. If the policy was delivered in Arizona where Heimeshoff worked, the state statute is six years for contract actions applied to ERISA cases in the 9th Cir. *Wise v. Verizon*, Ariz.Rev.Stat. § 12-548; *Gonsor v. Continental Casualty Co.*, 515 F. Supp 2d 929 (ED Ark 2007). If the policy was delivered in Arkansas where WalMart is headquartered, the statute is five years for contract actions. Ark.Code Ann. § 16-56-105.

Initial subject matter jurisdiction was based on 29 U.S.C. §§ 1132(e)(1) and (f), and 28 U.S.C. §1331, as this matter arose under the Employee Retirement Income Security Act (ERISA), a federal law. The Second Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

## REASONS FOR ALLOWING THE WRIT

### A. The Circuits Conflict Over The Accrual Time For ERISA Statutes of Limitation.

The reason courts have struggled with accrual of ERISA plans' statutes of limitation is that starting a limitations period before the plan finally denies a beneficiary's claim contradicts ERISA's well-established requirement that the beneficiary exhaust her administrative remedies before filing suit. *E.g., White v. Sun Life Assur. Co.,* 488 F.3d 240, 247 (4th Cir. 2007)(listing circuit cases); Andrew M. Campbell, J.D., *Exhaustion Of Administrative Remedies As Prerequisite To Suit Under ERISA,* 162 A.L.R. Fed. 1, §[2a] (1997-2005; Supp. 2012). Indeed, Hartford's plan, like many, **requires** the claimant to exhaust her administrative remedies before filing suit. **Pet.App.65-66**. At the same time, the limitations period begins running and wastes away while the claimant is going through the administrative review process.

In the comprehensive decision of *White*, the Fourth Circuit held this type of wasting limitations provision is unreasonable per se: under *White's* rule, the limitations period at issue does not accrue until

the plan has formally denied a benefits claim. The Ninth Circuit has followed this approach. *Price v. Provident Life & Accident Ins. Co.,* 2 F.3d 986, 988 (9th Cir. 1993).

The Second Circuit in *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan,* 572 F.3d 76, 81 (2d Cir. 2009) declared it was joining the Fifth,[13] **Sixth, Seventh, Eighth and Tenth Circuits** "in upholding written plan terms including limitations periods which may begin to run before a claimant can bring legal action." Allowing wasting limitations provisions in this case-by-case manner is contrary to ERISA law and regulations guaranteeing a right of judicial review, and contrary to the purposes of a statute of limitations, **as there is no bright line** clearly telling claimants or ERISA fiduciaries when the clock starts running or when the limitations period expires. *See Rice v. Jefferson Pilot Fin. Ins. Co.,* 578 F.3d 450, 456 (6th Cir. 2009)("Because the parties have not provided any reason to ignore the plain language of the contract, and because we cannot find one, we hold that **the clear repudiation rule does not apply** and that the language of the contract governs"); *Abena v. Metro. Life Ins. Co.,* 544 F.3d 880, 884 (7th Cir. 2008) ("**in these circumstances,** application of the contractual limitations period is not unreasonable"); *Blaske v. UNUM Life Ins. Co. of Am.,* 131 F.3d 763, 764 (8th Cir. 1997) (claimant had time remaining

[13] The Fifth Circuit later noted that it had not joined these circuits and that *Burke* was incorrect in so stating. *Baptist Mem. Hosp.-Desoto, Inc. v. Crain Auto., Inc.,* 392 Fed. Appx. 289, 295 (5th Cir. 2010)(Fifth Circuit has not addressed whether plan's limitation period can begin to run before claimant has exhausted her remedies).

after plan's period expired; policy "is more liberal" than Minnesota statute), *cert. denied,* 525 U.S. 812 (1998); *Salisbury v. Hartford Life And Acc. Co.,* 583 F.3d 1245, 1249 (10th Cir. 2009) ("[w]e are not persuaded" by reasons advanced "for refusing to enforce the contractual limitations provision simply because the plan allowed the claimant's cause of action to accrue before the end of the administrative process") (all emphasis added).

A few courts have resolved the tension between ERISA's exhaustion of remedies requirement and contractual pre-denial accrual provisions by enforcing the notice regulations, §§ 2560.503-1(g)(1)(iv) and (j)(4), to require the insurer to provide time limits for judicial review. *See Novick v. Metro. Life Ins. Co.,* 764 F.Supp.2d 653 (S.D.N.Y. 2011)(insurer's failure to provide notice of time limits precluded it from asserting its contractual limitations defense; supplying forum state's six-year statute of limitations); *Ortega Candelaria v. Orthobiologics LLC*, 661 F.3d 675 (1st Cir. 2011)(insurer's failure to provide the time limits for judicial review justified equitably tolling the plan's limitations period); *Veltri v. Building Service 32B-J Pension Fund,* 393 F.3d 318 (2d Cir. 2004)(same). *See also Chappel v. Laboratory Corp. of America,* 232 F.3d 719 (9th Cir. 2000) (failure to provide notice of post-administrative arbitration requirement voided plan's time limit for arbitration).

*Novick* and *Ortega Candelaria's* remedies for notice violations honor ERISA's mandates and are consistent with acting solely in the interest of beneficiaries. 29 U.S.C. § 1104(a)(1).

Contrary to the Fourth and Ninth Circuits, in this case, the Second Circuit affirmed the District Court's dismissal of Heimeshoff's benefits-denial action based on its prior decisions in *Burke* and *Veltri*. The court first concluded it was bound by *Burke* to allow Hartford's three-year limitations period to begin running before Heimeshoff exhausted her administrative remedies:

> In this Circuit, a statute of limitations specified by an ERISA plan for bringing a claim under 29 U.S.C. §1132 may begin to run before a claimant can bring a legal action. *See Burke,* 572 F.3d at 81.
>
> Hartford's plan provided that its three-year limitations period ran from the time that proof of loss was due under the plan. The policy language is unambiguous and it does not offend the statute to have the limitations period begin to run before the claim accrues. *See id.*

**Pet.App.3**.

The court then held that under *Veltri,* Hartford was relieved of the minimum requirement in 29 C.F.R. § 2560.503-1(g)(1)(iv) to notify Heimeshoff, in its adverse determination letters, of the time limits for filing a civil action, because Hartford had provided Heimeshoff's counsel with a copy of the plan. The court equated providing the plan to a claimant's attorney with actual knowledge of Hartford's wasting limitations provision, and ruled Heimeshoff could not request equitable tolling

based on Hartford's inadequate notice. **Pet.App.4** (quoting *Veltri,* at 326). Accordingly, the court determined it did not need to address Hartford's failure to satisfy the regulation's notice requirements. The Second Circuit did not, therefore, require the insurer to meet the minimum notice regulations. *See* 29 C.F.R. §§ 2560.503-1(b)(2); (b)(3); (f)(3); (g); (h); (j).

The Second Circuit's decision allows ERISA plans and their fiduciaries to:

(1) Start the clock on the statute of limitations before the claimant has exhausted her administrative remedies and therefore before she could file any lawsuit:

(2) Avoid ERISA minimum regulations' requirement to notify the claimant in any adverse determination letter:

> (a) when the time limits for judicial review begin to run, as well as
>
> (b) the date when she must file her action (or lose the right to judicial review);

(3) Escape ERISA minimum regulations' requirement to notify the claimant of the time limits for judicial review in the SPD; and

(4) Escape ERISA's minimum notification requirements by simply giving the claimant's lawyer a copy of the plan.

### B. Certiorari Is Warranted To Preserve Judicial Review, Denied By Circuits That Ignore ERISA Statutes, Regulations, And Higher-Than-Marketplace Standards For ERISA Fiduciaries.

The conflict among the circuits over accrual of ERISA statutes of limitations to deny judicial review, allows courts and ERISA plans to avoid ERISA's mandates, standards, minimum regulations, and basic purposes of statutes of limitations. Contrary to *Metropolitan Life Ins. Co. v. Glenn,* 554 U.S. 105 (2008), and the ERISA statute (29 U.S.C. § 1104 and 1001(b)(a)(1)) and regulations (29 C.F.R. § 2560.503-1; 29 C.F.R. § 2520.102-3(s), many courts have interpreted ERISA to allow plans to strip beneficiaries of their ability to file suit. *See, e.g., Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan,* 572 F.3d 76, 81 (2d Cir. 2009); *Rice v. Jefferson Pilot Fin. Ins. Co.,* 578 F.3d 450 (6th Cir. 2009); *Abena v. Metro. Life Ins. Co.,* 544 F.3d 880, 884 (7th Cir. 2008); *Blaske v. UNUM Life Ins. Co. of Am.,* 131 F.3d 763 (8th Cir. 1997); *Salisbury v. Hartford Life And Acc. Co.,* 583 F.3d 1245 (10th Cir. 2009). Setting an accrual time before denial, allowing the insurer to avoid telling the claimant the time limits for judicial review in the SPD or any adverse determination letter, and permitting the insurer to avoid notice regulations when the attorney has a copy of the plan, as the Second Circuit did here, individually or cumulatively, run counter to Congress's and the Court's purposes for ERISA by denying a claimant the right to judicial review. That right is critical for the protection of ERISA beneficiaries, as recognized by this Court and

expressly stated in the ERISA statute. *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996); 29 U.S.C. §§ 1001(b); 1104(a)(1).

In *Metropolitan Life Ins. Co. v. Glenn,* 554 U.S. 105 (2008), this Court noted that ERISA "permits a person denied benefits under an employee benefit plan **to challenge that denial in federal court**". *Id.* at 108 (emphasis added; citing 29 U.S.C. §1001 *et seq.*; §1132(a)(1)(B)). Based on Congress's intent and purposes in enacting ERISA, including the requirement to act "**solely in the interests of" plan participants and beneficiaries**, the Court in *Glenn* declared that insurers administering an ERISA plan are held to **higher-than-marketplace standards.** Explicitly stated in these standards is the ERISA fiduciary's duty to ensure that beneficiaries have ready access to federal courts:

> ERISA imposes higher-than-marketplace quality standards on insurers. It sets forth a special standard of care upon a plan administrator, namely, that the administrator "discharge [its] duties" in respect to discretionary claims processing "solely in the interests of the participants and beneficiaries" of the plan, §1104(a)(1); it simultaneously underscores the particular importance of accurate claims processing by insisting that administrators "provide a 'full and fair review' of claim denials," *Firestone [Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 113,…(1989)](quoting §1133(2)); and it supplements marketplace and

> regulatory controls **with judicial review of individual claim denials,** *see* 29 U.S.C. §1132(a)(1)(B).

*Id.* at 115 (emphasis added).

Previously, *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996) acknowledged ERISA's stated objective of providing "'ready access to the Federal courts'" and expressed its disfavor with an interpretation of the statute that would strip beneficiaries of ability to file suit:

> ERISA's basic purposes favor a reading of the third subsection that provides the plaintiffs with a remedy. The statute itself says that it seeks
>
> > "to protect...the interests of participants ... and ... beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... providing for appropriate remedies...and ready access to the Federal courts." ERISA §2(b).
>
> Section 404(a), in furtherance of this general objective, requires fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries." Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary

> obligation that harm individuals by denying injured beneficiaries a remedy.

*Id.* at 513. Moreover, this Court has rejected a proposed accrual rule deemed "at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and **certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities**." *Rotella v. Wood,* 528 U.S. 549, 555 (2000)(emphasis added).

ERISA's minimum regulations spell out the insurer's duty to inform beneficiaries about their right of judicial review, including time limits. The regulations requiring notice of the right to file an action were promulgated under Congress's mandate that ERISA employee benefit plans "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied," 29 U.S.C. § 1133(1), and "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review," *id.* § 1133(2).

This clear and specific mandate was part of Congress's response to the "lack of employee information and adequate safeguards concerning" the operation of these plans, which threatened the "continued well-being and security of millions of employees and their dependents." *Id.* § 1001(a). Through ERISA, Congress intended to "protect ... the interests of participants in employee benefit plans and their beneficiaries, by ... establishing standards of conduct, responsibility, and obligation for fiduciaries ... and by providing for appropriate

remedies, sanctions, and **ready access to the Federal courts**." *Id*. §1001(b) (emphasis added).

It is undisputed that Hartford did not notify Heimeshoff of the time limit for judicial review in any adverse determination letter or any other letter. This is required by **29 C.F.R. § 2560.503-1(g)(1)(iv) and (j)(4)**:

> (**g) Manner and content of notification of benefit determination.** (1) Except as provided in paragraph (g)(2) of this section, the plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination.… **The notification shall set forth, in a manner calculated to be understood by the claimant** –
>
> …(iv) A description of the plan's **review procedures** and **the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action** under section 502(a) of the Act following an adverse benefit determination on review[.]
>
> * * *
>
> **(j) Manner and content of notification of benefit determination on review.** The plan administrator shall provide a claimant with written or electronic notification of a plan's benefit determination on review.… In the case of an adverse

> benefit determination, the notification shall set forth, in a manner calculated to be understood by the claimant –
>
> … (4) A statement describing any voluntary appeal procedures offered by the plan and the claimant's right to obtain the information about such procedures described in paragraph (c)(3)(iv) of this section, **and a statement of the claimant's right to bring an action** under section 502(a) of the Act[.]

(Emphasis added.)

It is also undisputed that Hartford did not provide the time limit for judicial review in the SPD. *See* 29 U.S.C. § 1022(a), (b)(listing information required in SPD); 29 C.F.R. § 2520.102-2(b); 29 C.F.R. § 2520.102-3(s) (plan must include in the SPD all claims procedures and time limits for appealing adverse benefit determinations).

### C. Contrary to the Second and Other Circuits Following A Reasonableness Inquiry, The Fourth And Ninth Circuit's Rule Setting Accrual At Final Denial Provides A Bright Line Consistent With ERISA's Mandates and The Purposes of Statutes of Limitations.

#### 1. The Fourth And Ninth Circuits Ensure Ready Access To Court By Setting Accrual At Final Denial.

The Fourth Circuit held in *White*:[14]

[14] *See also Belrose v. Hartford,* 2012 U.S. App. LEXIS 7506 (4th

> [A] cause of action under ERISA for benefits does not accrue until a claim of benefits has been made and formally denied.... **This means that the statute of limitations begins to run at the moment when the plaintiff may seek judicial review, because ERISA plaintiffs must generally exhaust administrative remedies before seeking judicial review.**

*Id.* at 246 (emphasis added). Starting the limitations period before the claimant exhausted administrative remedies "flies in the face of the ERISA statutory framework." *Id.* at 246.

The Fourth Circuit refused to adopt a case-by-case, fact-intensive assessment of the reasonableness of the accrual provision, concluding this would immerse "courts in an extra-contractual and extra-statutory endeavor that is incompatible with ERISA's written-plan requirement." *Id.* at 246. Such an approach "would impose upon courts a federal common law methodology less compatible with the ERISA framework than the familiar accrual rule that federal courts have presumptively applied." *Id.* at 250. The reasonableness inquiry runs "counter to the values of certainty and predictability at the heart of most accrual and limitations rules", and is particularly incompatible with ERISA's "directive that plans makes the rights of their participants clear to nonlegal readers." *Id.* at 250 (citing 29 U.S.C. §1133(1)). Rather than enforcing plans "as written", "the opposite result obtains … where the

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Cir. 2012)(confirming *White*'s rule).

interplay of accrual and limitations provisions and the tensions between internal and judicial review would only magnify the uncertainty that ERISA's framework of written instruments with clear rules and plain notice was designed to prevent." *Id.* at 253. The cases since *White* confirm this prediction of uncertainty and inconsistency.

*White* clearly articulated concerns that the Second Circuit in *Burke* later dismissed on the ground that the 2000 ERISA regulations would resolve them:[15] if allowed to start limitations periods running before the end of the administrative process, insurers would "write over the constraints established by federal law" by "starting the clock on its participants' claims before the participants can even file suit." *Id.* at 247. That is exactly what they have done through deliberate "plan design". Rumeld, **Pet.App.105**.

*White* held that the insurer's "accrual provision runs afoul of the statute's scheme of mutually reinforcing remedies by using the internal review mechanisms mandated by ERISA in a manner that **undermines and potentially eliminates the ERISA civil right of action."** *Id.* (emphasis added). **While internal appeals are "one cornerstone of ERISA[,]…judicial review is another".** *Id.* (citing 29 U.S.C. §1132(a); *Varity Corp. v. Howe,* 516 U.S. 489, 513 (1996)). These two remedies "must be interpreted in light of each other.… [C]ourts have universally found an exhaustion requirement in part because statutory text and structure establish **these twin remedies**

[15] *Burke,* 572 F.3d at 80.

**of administrative and judicial review as parts of a single scheme.**" *Id.* at 247 (emphasis added).

The *White* court quoted the very same notice regulation at issue here, 29 C.F.R. §2560.503-1(g)(1)(iv), as evidencing the "symbiotic nature of ERISA remedies" in that "[t]he civil action **is treated as an integral part of this review"** when the regulation requires the plan to provide the time limits for the plan's review procedures, including the right to bring a civil action. *Id.* at 247 n.2 (emphasis added). "This interlocking remedial structure does not permit an ERISA plan to start the clock ticking on civil claims while the plan is still considering internal appeals." *Id.* at 247.

> Benefit plans would have the incentive to delay the resolution of their participants' claims, because every day the plan took for its decision-making would be one day less that a claimant would have to review the plan's final decision, decide whether to challenge it in court, and prepare a civil action if need be. Indeed, a plan that did not reach a final decision until after the statute of limitations had run would deprive a participant of the right to file a civil claim at all. These incentives to delay would undermine internal appeals processes as mechanisms for "full and fair review," *see* 29 U.S.C. §1133(2), and **undermine the civil right of action as a complement to internal review,** *see Varity*, 516 U.S. at 513 (noting ERISA is designed to

> develop "a sensible administrative system").

*Id.* at 247-48 (emphasis added).

The case-by-case reasonableness approach does not reconcile internal and judicial review, but comes "at the expense of ERISA's 'written plan' and participant-notification requirements, as well as the values of notice and certainty that these requirements serve." *Id.* at 248-49. It requires courts to determine when the plan's compression of the limitations period is too severe and whether an accrual provision changes each day the plan does not issue a final decision. This approach does "not eliminate the perverse incentives to delay the resolution of claims." *Id.* at 248. Instead of informing participants of their rights, under the reasonableness method, the written plan misleads "claimants by setting forth a purported time limitation that would, in reality apply only if it satisfied a reasonableness analysis described nowhere in the plan." *Id.* at 249. It is a subjective standard, the application of which would shift over time, so that neither a participant "**nor even a court could determine**" when the cause of action would accrue. *Id.* (emphasis added).

*White* did not dispute plans' ability to set time limits for review, but its "quarrel" was "with the **lack of fair notice** to claimants" in the insurer's proposal. *Id.* at 250 (emphasis added). The case-by-case assessment also "lays waste to limitations periods' critical purpose of providing potential plaintiffs with **meaningful notice** of the timeliness of their actions and providing potential

defendants **an equally clear sense of when the time on possible claims has run**." *Id.* at 251 (emphasis added).

All this remains true today and is manifested in the many cases addressing insurers' ongoing efforts to undermine the right of judicial review by setting accrual of contractual limitations provisions before benefits are finally denied.

*White* relied on the Ninth Circuit's decision in *Price v. Provident Life & Accident Ins. Co.,* 2 F.3d 986, 988 (9th Cir. 1993), where the court held a limitations provision accruing before administrative remedies were exhausted was unenforceable. The Ninth Circuit concluded "ERISA does not permit" the result in which the insurer simply buries a denial of coverage and wait for the statute of limitations to run. *See also Mogck v. Unum Life Ins. Co. of Am*., 292 F.3d 1025, 1028-29 (9th Cir. 2002)(contractual limitation unenforceable because plan did not inform beneficiary in denial, with policy language, that contractual time limitation would begin to run; not deciding whether California regulations required insurer to inform claimant of contractual limitations period). As the court held in *Wise v. Verizon Communications, Inc.,* 600 F.3d 1180 (9th Cir. 2010)*:*

> [T]here is no reason to think that Congress wanted ERISA benefits-recovery suits to be bogged down by collateral litigation over the applicable statute of limitations…. Avoiding procedural uncertainty helps every actor in a benefits-recovery action: the

> plaintiff, the plan defendant, and the court adjudicating the claim. **All benefit from having a bright line rule on the necessary procedures for claims.**

*Id.* at 1185-86 (emphasis added; discussing *Wilson v. Garcia,* 471 U.S. 261, 266-67 (1985),[16] choosing one limitations period applicable to 29 U.S.C. §1132(a)(1)(B) actions in each state).

District courts in the First,[17] Third, and Eleventh Circuits agree with the Fourth and Ninth Circuits, confirming their reasoning in recent decisions. *See, e.g., Tuttle v. Cigna Group Ins.,* 2011 U.S.Dist.LEXIS 77987, at *6-7 (S.D.Miss. July 18, 2011)(summarizing cases). In *Whittaker v. Hartford Life Ins. Co.,* 2012 U.S. Dist. LEXIS 166983 (E.D. Pa. Nov. 25, 2012), based on the same Hartford limitations provision involved here, noting the Third Circuit had not decided whether a claim could accrue before the claimant exhausted his remedies,[18] the court chose the final termination letter as the accrual date.

*Whittaker* held "it would be unfair and inequitable to hold Plaintiff to any disadvantage

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[16] *Superseded by statute on other grounds*, Pub. L. No. 101-650, 104 Stat. 5089, 5114-15 (1990).

[17] *Island View Residential Treatment Ctr., Inc. v. Bluecross Blueshield of Mass., Inc.,* 2007 U.S.Dist.LEXIS 94901, at *43 (D.Mass. Dec. 28, 2007), *aff'd,* 548 F.3d 24 (1st Cir. 2008)(setting accrual at plan's final denial of the claimants' administrative appeals, "despite the contractual language", noting this made "sense from a policy perspective as well").

[18] Citing *Rumpf v. Metro. Life Ins. Co.,* Civ. A. No. 09-557, 2010 U.S.Dist. LEXIS 74388 (E.D. Pa. July 23, 2010).

because she followed the instructions in the letter she received...denying her benefits …. [I]t would be a miscarriage of justice to find that the accrual date started any earlier than" the date on which the plaintiff's appeal was denied. *Id.* Likewise, in *Whittaker,* as here, Hartford's denial letters stated, "After your appeal, and if we again deny your claim, you then have the right to bring a civil action under Section 502(a) of ERISA." The court adopted the date of the final appeal denial for accrual, noting that had the claimant filed before her administrative appeal was denied, her case would have been dismissed:

> To start the running of the limitations period before the conclusion of the administrative appeals process would encourage plan administrators to drag their feet in deciding administrative appeals so as to minimize the amount of time a plaintiff has to prepare her case."

*Id.* at *20-22.

While the Eleventh Circuit "has not directly answered the question whether the limitations period is triggered by the date of proof of loss or the date of the final claims decision" it has required exhaustion of administrative remedies. *Amos v. Hartford Life & Accident Ins. Co.,* 2009 U.S.Dist.LEXIS 53287, at *3-4 (N.D.Ala. June 24, 2009). Following *White,* the court held "'Common sense and basic fairness dictates [sic] that **if we are willing to read in an exhaustion requirement, we must toll the limitations period while exhaustion occurs**.'" *Id.* at *5-6 (emphasis added;

quoting *Jeffries v. Trustees of Northrop Grumman Savings & Inv. Plan,* 169 F.Supp.2d 1380, 1382 (M.D.Ga. 2001)). *See also Zorn v. Principal Life Ins. Co.,* 2012 U.S.Dist.LEXIS 3833,at *29-30 (S.D.Ga. Jan. 12, 2012)("Courts in this Circuit dealing with contractual limitations periods for §1132(a)(1)(B) claims have determined that limitations periods are tolled until the end of an administrative review process.")

### 2. The Second, Sixth, Seventh, Eighth, Tenth Circuits' Case-By-Case Reasonableness Approach Allows Plans To Undermine Judicial Review.

Among the circuits using the reasonableness inquiry--the **Second, Sixth, Seventh, Eighth and Tenth Circuits**[19]**--** many courts (apart from *Burke*) nevertheless recognize the "procedural quagmire"[20]

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[19] The Fifth Circuit in *Baptist Mem. Hosp.- Desoto, Inc. v. Crain Auto., Inc.,* 392 Fed.Appx. 289 (5th Cir. 2010). **corrected** the *Burke* court's erroneous assumption that it had "joined" the courts disagreeing with the Fourth and held that an administrator cannot assert a shorter-than-statutory limitations period when it fails to comply with procedural obligations. *Id.* at 295-96.

[20] In *Wolfe v. 3M Short-Term Disability Plan*, 176 F.Supp.2d 911, 916-19 (D.Minn. 2001), the court invoked equitable tolling while the claimant exhausted administrative remedies, recognizing "the procedural quagmire" that confronts a claimant who is forced to pursue internal administrative processes "if tolling is not applied":

> If a plaintiff files her complaint to avoid the running of the limitations period but prior to fully exhausting her internal remedies, she risks dismissal of her claim for failure to exhaust her administrative remedies.

resulting from allowing the limitations period to run out before the claimant can file suit.

While the Second Circuit in this case determined it was bound by *Burke,* the parties did not raise in *Burke* the minimum notice regulations involved in this case, and the court did not address them. Moreover, *Burke,* though issued in 2009, did not cite *Glenn* and ignored *Glenn*'s requirement of higher-than-marketplace standards for ERISA insurers.

Both the district court and court of appeal in *Burke* articulated the concern that an "insurer [could] simply bury a denial of coverage and wait for the statute of limitations to run." *Burke*, 537 F.Supp.2d at 550 (quoting *Price*, 2 F.3d at 988). The courts also noted the possibility that a plan administrator would use the administrative process to undermine and potentially eliminate the ERISA civil right of action; and could "eat up the entire limitations period" even under the 2000 regulations. *Burke*, 537 F.Supp.2d at 550 (citing *White,* 488 F.3d at 247, 251); *Burke*, 572 F.3d at 80. But the court concluded that the Department of Labor's regulations issued in 2000 would alleviate those concerns: "The time remaining after the administrative appeal process has run its course under the DOL regulations, as well as the protections provided should the plan administrator

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> Conversely, a plaintiff who exhausts her internal remedies as required under the plan itself, ERISA and applicable caselaw, there is a risk that, absent tolling, the limitations period will expire before she files suit in federal court.

*Id.* at 918.

be dilatory, support enforcing the contractual limitations provision in this case." *Burke,* 572 F.3d at 80.

Unfortunately, the regulations did not remove the incentives insurers have to delay resolution of a claim while limitations periods tied to proof of loss are wasting. The pre-appeal period still is counted against a claimant who requires time to obtain relevant or additional materials and present an appeal. The plan can still drag the time out: "by requesting more information for its determination, a plan can toll time constraints that the regulations impose on its consideration, even as the limitations period in the plan document would continue to run against the claimant….The regulations … thus fail to alleviate the concerns we have expressed regarding incentive effects, constantly shifting time periods, the absence of fair notice to all parties, and the continual tension between internal appeals and judicial review." *White,* 488 F.3d at 252.

The real solution holds insurers to the minimum regulations requiring them to notify claimants in the adverse determination letters and the SPD of the time limits for judicial review, including when the period begins to run and how much time remains, regardless of whether or not an attorney is involved.

Even under the reasonableness approach, the **Eighth Circuit** declined to allow Hartford's wasting limitations provision (three years after proof of loss was required to be furnished) to begin running before formal denial or clear repudiation made known to the beneficiary. *Wilkins v. Hartford Life &*

*Accident Ins. Co.*, 299 F.3d 945, 948-49 (8th Cir. 2002).

Similarly, the **Tenth Circuit,** in *Salisbury v. Hartford Life & Accident Ins. Co.,* 583 F.3d 1245, 1249 (10th Cir. 2009), acknowledged the tension with the exhaustion requirement:

> Less drastic remedies that would take account of both the Plan's right to set a limitations period and the claimant's need to exhaust administrative remedies would be to allow a claimant at least a reasonable time after exhaustion of administrative remedies or to apply equitable tolling during the pendency of the administrative review process.

*Id.* at 1249 (citing *Wilkins*, at 949 (8th Cir.) and *Doe v. Blue Cross & Blue Shield United of Wis.,* 112 F.3d 869, 876 (7th Cir. 1997)(if defendant "through representations or otherwise prevents the plaintiff from suing within the limitations period, the plaintiff may add to the remaining limitations period the entire period during which the defendant's action was effective in delaying the suit.”))

These cases, however, do not enforce the regulations' notice requirements, *see Novick v. Metro. Life Ins. Co.,* 764 F.Supp.2d 653 (S.D.N.Y. 2011), and they do not create a bright line for determining accrual of the statute of limitation for potential litigants.

### 3. Courts Have Reconciled the Tension Between Exhaustion And Pre-Denial Accrual By Holding Insurers To ERISA's Notice Requirements.

This Court has observed:

> While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.

*Reiter v. Cooper,* 507 U.S. 258, 267 (1993). ERISA statutes do not indicate any reason to infer the odd result created and perpetuated by ERISA insurers. This Court's guidance is needed to arrest the erosion of claimants' right to judicial review.

Insurers' failure to disclose time limits for judicial review must be viewed in light of the regulatory notice requirement and Congress's policy of protecting the interests of plan participants by ensuring "disclosure and reporting to participants" and "ready access to the Federal courts." 29 U.S.C. § 1001(b). The notice regulation assumes that a reasonable beneficiary would not otherwise be aware that she has the right to file a court action to review her benefits denial. The congressional policy favors placing the burden of disclosure on plans and exercising caution before closing the courthouse door. Failure to comply with the regulatory obligation to disclose the existence of a cause of

action to the plan participant whose benefits have been denied is tantamount to the type of concealment that has led some courts to equitably toll the statute of limitations. *See Veltri,* 393 F.3d at 318.

Why would insurers resist the seemingly straightforward step of notifying claimants of the time limits? ERISA defense counsel candidly admit that insurers choose to "protect the plan" over the Congressional mandate to act solely in the interests of beneficiaries. *See* Rumeld, **Pet.App.105-112**. *See also* Reuter, **Pet.App.97-104**; Begos, **Pet.App.90-96**.[21]

The remedy adopted in *Novick* and *Ortega Candelaria* resolves the tension between ERISA's exhaustion requirement and permits insurers to draft the limitations provisions they desire, so long as they tell beneficiaries when the time to file a judicial action runs out. If insurers do not follow the regulations, they cannot assert the statute of limitations defense.

*Novick* simply and logically applied ERISA's minimum notice regulations to require that the insurer inform the beneficiary, in the adverse determination letters and the SPD, of the time limits for filing an action in court. Integral to *Novick* is the court's holding that a civil action under 29 U.S.C. §1132(a) is part of the plan's review procedures, such that the regulations require the plan to notify the claimant of the time limits for judicial review: "the applicable regulations and the Plan itself make a

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[21] Hartford's counsel admitted it was possible to give notice of time limits for judicial review. **Pet.App.40.**

claimant's ability to seek judicial review part of such procedures; and, therefore,… disclosure of the applicable time limit is required." *Id.* at 661 (discussing *Chappel v. Laboratory Corp. of America,* 232 F.3d 719 (9th Cir. 2000)).[22]

The *Novick* court supplied overwhelming authority for this remedy. *Novick* employed statutory construction of the "plain", "unambiguous" ERISA minimum regulations, §2560.503-1(g) and (j), *id.* at 660-61, reading them together with:

- Congress's desire in ERISA to permit plans to establish the limitations period for judicial review themselves (instead of by law), *id.* at 661;
- Support from the Ninth and Fourth Circuits;
- The SPD's statement of the contractual limitations period in the same section of the plan including judicial review, *id.* at

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[22] *Chappel* held that post-denial arbitration of ERISA claims was part of the "plan's review procedures" such that the insurer was required to give the claimant written notice of the "steps to be taken to obtain external review". *Id.* at 726-27 (based on regulations before those currently effective).

> **It would have been a simple matter, when the Plan administrator sent a letter to Chappel notifying him of its denial of his appeal, for the administrator to have notified Chappel in that same letter of the arbitration clause and its required procedures.**

(Emphasis added.)

In the present case, Hartford's counsel admitted the plan could have given notice of the time limits for judicial review. **Pet.App.40**.

662;

- The ERISA statutory scheme as a whole; and
- Significant secondary sources recommending that plans include stated time limitations for bringing suit in all claim and claim appeal determinations, *id.* at 663.

By mandating that plans notify the claimant of the limitations deadline in the denial letter, "the court imposed a simple rule that would have eliminated several recent appellate rulings on contested limitations periods because the accrual of the limitations period was confusing." Mark D. DeBofsky, *Courts struggle with when limitation periods accrue,* Daley DeBofsky & Bryant (March 21, 2011), www.ddbchicago.com/articles-and-archives/articles- by-mark-d-debofsky/courts-struggle. P**et.App.113.** The author notes the clarity of *Novick*'s approach, as statutes of limitations are supposed to work:

> Even if the wrong date is communicated, so long as the plaintiff files suit prior to when the plan asserts the limitations period would expire, no plaintiff will be barred from proceeding with his or her claim. Such a rule would avoid the situations that occurred in several recent appellate rulings.

*Id.*

*Novick* contrasts with the cases rejecting

*White* and those adopting the case-by-case reasonableness approach. *See, e.g., Burke; Abena v. Metropolitan Life Ins. Co.,* 544 F.3d 880 (7th Cir. 2008).

> Given such inconsistency, and on account of the risk of uncertainty as to the accrual of the limitations period posed by the cases cited above, *Novick* is a particularly instructive ruling in its holding that the communication of the date the limitations period would expire leaves no doubt as to the parties' rights.

*Id.*

In this regard, at oral argument, Hartford's counsel conceded that Hartford could have notified Heimeshoff of the time limits for judicial review:

> THE COURT 3: So what you're saying is there might be some instances, not here, where the three years will run from the denial.… Nobody's going to worry about those folks.
>
> The point is, in a lot of places … it begins running a lot earlier, like here, two years earlier, and don't you think as a matter of fairness the policy holder ought to know that, a noncounseled policy holder?
>
> MR. BEGOS: … [W]hat I would say is that **a claim administrator certainly could make that type of disclosure on a voluntary basis,** but

> it's not required by the regulations, and I think the --
>
> THE COURT 3: Unless the text of this regulation reads -- is read to mean what it says.

**Pet.App.40-41.** If they could give notice, why did they not give notice?

The text does mean what it says. In the regulation, the word "including" in subsection (g) follows a comma after directing the plan to provide both a description of the plan's review procedures and the "time limits" applicable to those procedures. This means the requirement to disclose "the claimant's right to bring a civil action" modifies, at a minimum, the antecedent "time limits". And because the regulation is in the conjunctive ("and"), it also modifies the plan's review procedures, of which the right to bring a civil action is "includ[ed]".

"[W]here several words are followed by a general expression … which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all." *United States v. Standard Brewery, Inc.,* 251 U.S. 210, 218 (1920)(quotation omitted). The legislative history fully supports this construction, since the DOL's comments to the 2000 regulations (above) make clear that ERISA guarantees the right of judicial review.

In *Ortega Candelaria,* the court also read the regulation in this way, rejecting in dictum the construction urged by Hartford and adopted by the District Court in this case:

> [I]t could be argued that notice of the right

> to sue under ERISA is in addition to, and divorced from, notice of review procedures and the time frame pertaining to such procedures.…We think it clear that the term "including" indicates that an ERISA action is considered one of the "review procedures" and thus notice of the time limit must be provided.

661 F.3d at 680 n.7.

Four recent articles by ERISA practitioners (including Hartford's counsel) further demonstrate the need for this Court's review and articulation of a uniform accrual rule:

(1) Mark D. DeBofsky, *Courts struggle with when limitation periods accrue,* Daley DeBofsky & Bryant (March 21, 2011), www.ddbchicago.com/articles-and-archives/articles-by-mark-d-debofsky/courts-struggle/. **Pet.App.113.**

(2) Patrick Begos, *Statute of Limitations Can Start Running Before Claim Accrues,* ERISA Claim Defense Blog (Sept. 24, 2012), www.erisaclaimdefense.com/statute-of-limitations-can-start-running-before-claim-accrues/, **Pet.App.90**.

(3) Myron D. Rumeld, Russell L. Hirschhorn and Brian Neulander**,** *ERISA's Statute of Limitations for Benefit Claims: Where To Begin?,* The ERISA Litigation Newsletter (July 2010), http://www.proskauer.com/publications/newsletters/erisa-litigation-newsletter-july-2010/. **Pet.App.105**.

(4) Aaron A. Reuter, *Limiting ERISA's Limitations Period Through the Use of Contractual*

*Accrual Dates*, The ERISA Litigation Newsletter (April 2012), http://www.proskauer.com/publications/newsletters/erisa-litigation-newsletter-april-2012/. **Pet.App.97**.

Begos (Hartford's counsel) broadly states: "in many circuits, the statute of limitations clock can begin to run well before administrative remedies are exhausted"; omitting the Ninth Circuit's consistency with the Fourth Circuit's approach in *White*. *Cf.* Reuter (Ninth Circuit is aligned with the Fourth Circuit; both refuse "to enforce accrual provisions derived from ERISA plan statute of limitations language" and "instead apply the 'clear repudiation rule.'")

Reuter describes the conflict as dividing over whether to apply federal common law to decide the time of accrual, instead of honoring the contractual language in its entirety: "the federal discovery rule…can require plans to defend the merits of dated claims." Reuter advocates for a rule allowing plans to eviscerate statutes of limitation on the right to judicial review and create variable, non-uniform results. He concludes the reasonableness approach "is more consistent with the enforcement of the contractual provisions of ERISA plans because these courts allow for the adoption of *both* reasonable temporal lengths and accrual dates for statute of limitations purposes."

> It seems illogical to only adopt one half of the provision; indeed, how can the reasonableness of a time period be established without considering when it starts?

> While the *Miller* [*v. Fortis Benefits Ins. Co.,* 475 F.3d 516 (3d Cir. 2007)] decision seems to follow the reasoning of the **Fourth and Ninth Circuits**, its decision in *Klimowicz [v. Unum Life Insurance Co. of America* 296 Fed. Appx. 248 (3d Cir. 2008)] appears to find a middle ground. Where a contractual accrual provision is either unreasonable or not available, it makes sense to utilize the clear repudiation rule. Where, however, there is a reasonable contractual accrual provision, it should be adopted and applied along with the rest of the contractual statute of limitations provision.

(Emphasis added; footnotes omitted.)

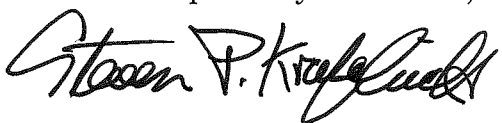
Reuter and Begos are attorneys representing ERISA plans and their insurers. They both recognize the conflict among the circuits and urge strict construction of the contracts. However, they ignore basic ERISA requirements set out in the statute, regulations, and Supreme Court precedent. DeBofsky, a plaintiff's attorney, concurs that a circuit conflict exists and explains the need to enforce the ERISA regulations. **Pet.App.113.**

## CONCLUSION

Petitioner Julie Heimeshoff prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to resolve the conflict in the circuits over when ERISA statutes of limitation accrue. This has been a growing problem which the circuits have addressed in three different ways: (1) a bright-line rule setting accrual at final denial; (2) a case-by-case inquiry to determine the reasonableness of a contractual pre-denial statute of limitations; and (3) requiring notice of the plan's time limits for judicial review, in the SPD and adverse benefit determinations.

No bright line exists for accrual of statute of limitations in ERISA cases though one is sorely needed. The remedy for this conflict is to enforce higher-than-marketplace standards, *Metropolitan Life Ins. Co. v. Glenn,* 554 U.S. 105, 115 (2008), protect access to judicial review, *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996); 29 U.S.C. §§ 1001(b), and require plans to notify claimants of the time limits for judicial review in adverse determination letters and the SPD. *See* 29 C.F.R. §§ 2520.102-2(b), 2520.102-3(s); 2560.503-1(b)(2); (b)(3); (f)(3); (g); (h); (j).

Respectfully submitted,



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