

TYPES NOT MAPPED YET April 03, 2017 | TTR not mapped yet | Richard J. Pautler

Halo looms over new decision that adds to ERISA risks for claims administrators

The latest decision to rely on the influential *Halo v. Yale Health Plan* decision from the 2nd Circuit adds to a worrisome pattern of courts applying the strictest possible review to lawsuits brought by aggrieved plan participants.

In *Schuman v. Aetna Life Ins. Co.*, decided March 20, 2017, the District of Connecticut relied upon *Halo v. Yale Health Plan*, 819 F.3d 42 (2d Cir. 2016) to dispel the arbitrary and capricious standard of review and to impose *de novo* review. In my [March 8, 2017 article](#) regarding *Salisbury v Prudential Ins. Co. of America*, I warned that the holding in *Halo*—that an administrator had to strictly comply with DOL claim regulations or lose the benefit of the arbitrary and capricious standard of review—created a serious risk to administrators. I predicted that it would entangle courts in the minute details of claims administration, possibly to the regret of the courts. The *Schuman* decision substantiates my concerns.

Four alleged violations

The *Schuman* court addressed numerous alleged violations of DOL regulations that the plaintiff argued meant the court should apply *de novo* review. First, during the administrative appeal proceedings, Schuman submitted an additional vocational assessment (the “Bailey Report”). The Administrative Record proved that a podiatrist had reviewed the Bailey Report, but nothing in the Administrative Record proved either that the Review Specialist for Aetna or any vocational expert retained by Aetna had reviewed the Bailey Report. Schuman argued that the failure to have a vocational expert review the Bailey Report meant he had not been given a full and fair review in violation of DOL regulations.

Second, Schuman argued the fact that (1) the Bailey Report had not been reviewed by a vocational expert and (2) the final appeal denial letter had failed to address Schuman’s objections to Aetna’s original vocational report. He claimed this indicated the Review Specialist had given improper deference to the initial denial, in violation of DOL regulation.

Third, during the administrative proceedings, Schuman had requested the internal policy guidelines upon which Aetna had relied. Aetna had failed to provide these guidelines until they were produced in discovery after the lawsuit had been filed. The court found this failure to be a second violation of DOL regulations.

Fourth, Aetna had problems determining which of four versions of the plan applied to Schuman. During the course of his claim, Schuman was provided with four different versions of the applicable certificate or summary plan description (SPD). Some of these documents stated the own occupation standard applied for 12 months and at least one said it applied for 24 months. Schuman argued that DOL regulations required Aetna to have processes in place to ensure that similarly situated claimants were treated similarly and that Aetna’s inability even to produce the “correct” version of the plan demonstrated that Aetna did not have safeguards in place to assure similar treatment.

The court concluded that “together, the violations discussed above are sufficient under *Halo* to trigger *de novo* review of the defendants’ determination that Schuman did not meet the “reasonable occupation” test.” One is left to wonder if the court would have held that *de novo* review was appropriate if Aetna had committed only one of the sins above.

In a curious twist, the court granted the defendants’ request for remand to the administrator because “additional ambiguities in the Administrative Record cloud the viability” of the court’s review. The court said that discovery outside the Administrative Record would be helpful, but that the court was not supposed to become a substitute administrator. Thus, it deemed remand the appropriate course.

It is unclear whether even after a further review by the administrator on remand the court will apply *de novo* review. If Aetna has a vocational expert and the Review Specialist studies the Bailey Report and in its new denial letter addresses Schuman's objections to the original Aetna vocational report and Bailey's Report, might it succeed in resuscitating the arbitrary and capricious standard of review? Or has its failure to provide the guidelines when first required doom it to *de novo* review? The court does not address these issues.

Takeaways

The *Schuman* decision prompts several questions and offers several teaching points.

1. Plan Administrators frequently fail to respond timely to a participant's written request for the plan document or the SPD, which is in violation of ERISA's statutory provision. Will such a failure now mean that the claims administrator's decision will be subject to *de novo* review? Or is it only "failures" by the claims administrator and violations of DOL regulations that invite *de novo* review?
2. Confusion frequently reigns over which version of a plan applies. If a participant becomes disabled in 2010 and receives benefits for five years before the administrator terminates benefit payments in 2015, which version of the plan applies, the 2010 version or the 2015 version? The real answer is both: The substantive provisions of the 2010 version apply, but the 2015 version controls procedural issues such as forum selection clauses, limitations and newly added Firestone language. But what happens when a participant asks for the plan document or SPD that applies to his claim and only one of the two plans is provided?
3. Most insurers are reluctant to release internal guidelines and when asked to produce the guidelines they used to make their determinations, they sometimes respond that there were none. But what if a court during the course of litigation determines that the insurer did in fact rely or should have relied upon an internal regulation? Will that finding *ipso facto* mean that the insurer failed to comply with DOL regulations by failing to have provided the internal regulation the court found relevant?
4. Sometimes the paper trail showing who reviewed what documents in the Administrative Record is not good. This deficiency could cost the administrator the arbitrary and capricious standard of review. The *Halo* court places upon the administrator the burden of showing it complied with the regulations. Thus, it is important to create a clear and complete record of what documents were reviewed and by whom.

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