

# BENEFITS LAW JOURNAL

## **Ninth Circuit Goes 'Off the Rails' by Shifting the Burden of Proof in ERISA Claims**

*Emily Seymour Costin*

*As a general matter, a participant bears the burden of proving his entitlement to benefits. This makes sense in cases in which the participant has “better—or at least equal—access to the evidence to prove entitlement,” such as in the case of proving qualification for disability benefits.<sup>1</sup> But what happens when the company or employer solely controls the information that determines entitlement? Must a former employee who quit working for the company more than 25 years ago decipher the corporate structure of his former employer without access to necessary documents? Should he have saved all of his pay stubs on the off chance that his employer would demand proof that he worked the requisite number of hours to obtain a pension? Or should the company or employer bear this burden?*

*These are the very questions recently considered by the US Court of Appeals for the Ninth Circuit in *In Estate of Barton v. ADT Sec. Services Pension Plan*.<sup>2</sup> In a split decision, a majority of the Ninth Circuit panel held that ERISA<sup>3</sup> and “common sense”*

Emily Seymour Costin is a partner in the Washington, DC, office of Alston & Bird LLP, where her practice involves defending plan sponsors and fiduciaries in claims for breach of fiduciary duty under ERISA, particularly class actions. She also counsels plan sponsors and fiduciaries on regulatory compliance issues and litigation avoidance. Ms. Costin is a member of the Editorial Board of the *Benefits Law Journal*.

*dictate that the corporate defendant “should not lay that arduous task at the feet of former employees.”<sup>4</sup> This panel majority noted that “to hold otherwise would essentially reward Lucy for pulling the football away from Charlie Brown.”<sup>5</sup> Though a strong dissent contends the majority “goes off the rails” by shifting the burden of proof in this manner, this decision is now binding (at least in the Ninth Circuit).<sup>6</sup> While it remains to be seen whether this case will result in a new “burden shifting” standard or be limited to the unique facts of this particular case, this decision provides a good reminder for employers and plan administrators to revisit their policies and practices for retaining pertinent plan and employment records.*

## BACKGROUND

For more than 18 years (1967 to 1986), Bruce Barton worked for the American District Telegraph Company (ADT) or its affiliates. Notably, Tyco acquired ADT Inc. in 1997 and, therefore, obtained access to the pension records passed on by ADT Inc. as part of the transaction.

In 2010, Barton reached age 65 and contacted the pension record-keeper about his benefits. Barton maintained that, even though he stopped working before normal retirement age, he had 10 years of “continuous service” with the company, which would entitle him to benefits under the terms of the applicable plans.<sup>7</sup>

In response, the pension benefit administrator stated that it “could not find any information on [Barton’s] employment with ADT Security Services Inc.,” and enclosed instructions for navigating the pension claim procedure.<sup>8</sup> Barton then provided documentation regarding his employment with ADT-related entities. However, the pension record-keeper said the documents Barton had sent failed to establish that he had a vested pension. The pension record-keeper stated that Barton could file a claim with the Employee Benefits Committee if he had additional documentation—*e.g.*, a letter of vested benefits. In response to a further telephone inquiry, Barton was again informed that he was ineligible for a pension benefit.<sup>9</sup>

Barton filed a claim with the committee, noting that two former colleagues had provided similar documentation and received ADT pensions. However, the committee denied Barton’s claim, stating that:

[T]here are no Plan records indicating your eligibility for participation in the Plan, your actual participation in the Plan, or your eligibility for benefits under the Plan. In addition, it was unclear from the information you provided whether you had a

continuous term of employment or earned the required service to earn at least 10 Years of Continuous Service so as to be vested in a Plan benefit.<sup>10</sup>

The committee further explained that it was “not clear based on the information” that Barton provided that he met the terms of “continuous employment.”<sup>11</sup> In particular, the committee noted that the Federal Insurance Contributions Act (FICA) tax records and W-2s did not cover each year of claimed employment, and that some documents lacked identifying information. According to the committee, such information “did not override or contradict the Plan records.”<sup>12</sup> The claim denial letter detailed the appeals procedure and suggested Barton could “supply copies of any further evidence...that would indicate that [he is] entitled to a Plan benefit, such as certified Social Security records for the entire period of time from 1967 through 1986 or a pension benefit statement or written evidence that [he was] eligible to receive a Plan benefit.”<sup>13</sup>

The committee denied Barton’s appeal again, noting there was no “official record” of Barton’s participation in the plan and that the documentation he submitted “was insufficient to override the Plan records.”<sup>14</sup> As with the initial denial, the committee stated that “[i]t is not clear based on the information [Barton] provided that [he was] continuously employed with American District Telegraph Company.”<sup>15</sup> The committee also noted that the FICA records revealed that Barton had worked for companies in addition to ADT, which “*could* indicate that [he] did not have a continuous term of employment.”<sup>16</sup> Therefore, because Barton could not document that he worked 1,000 hours or more for each of the nearly 20 years he was employed by ADT and its affiliates, or that his employers participated in the plans, the committee determined that Barton could not prove he was entitled to a pension.<sup>17</sup>

## THE LAWSUIT

### *The US District Court*

On August 13, 2012, Barton filed suit in the US District Court for the Central District of California pursuant to ERISA against ADT Security Services Pension Plan (pension plan), Tyco International Management Company (plan sponsor), and Tyco International Management Company LLC Administrative Committee (plan administrator) seeking:

- (1) Declaratory relief that he was entitled to a pension;
- (2) Pension benefits based on his employment with ADT; and

- (3) Recovery of statutory penalties under 29 U.S.C. Section 1132(c)(1) based on the pension administrator's failure to comply with ERISA's disclosure obligations.

After a bench trial, the district court held that the applicable standard of review was "abuse of discretion" and that the committee did not abuse its discretion in denying Barton pension benefits.<sup>18</sup> In so doing, the district court placed the burden of proof on Barton to establish: (1) that his various ADT-related employers participated in the plan, and (2) that he worked the requisite hours per year. It declined to award Barton statutory penalties, holding that he lacked standing to assert a violation of ERISA's disclosure requirements because he did not have a colorable claim to pension benefits.

### ***The Ninth Circuit***

On appeal, the Ninth Circuit reversed and remanded. Reviewing the district court's choice and application of the standard of review *de novo*, the Ninth Circuit majority noted that the district court "faithfully applied [Ninth Circuit] precedent in reviewing the Committee's denial of benefits for abuse of discretion."<sup>19</sup> However, the Ninth Circuit majority disagreed with the district court's allocation of the burden of proof, finding that the district court "incorrectly placed the burden of proof on Barton for matters exclusively within defendants' control."<sup>20</sup>

As a threshold matter, the Ninth Circuit noted that, in certain situations, a claimant "may bear the burden of proving entitlement to ERISA benefits."<sup>21</sup> However, the court noted that, in other contexts, when the defending entity *solely* controls the information that determines entitlement, the claimant is left with "no meaningful way to meet his burden of proof."<sup>22</sup>

In this regard, the Ninth Circuit found two problems with the district court's approach in this case. *First*, the company/employer was in a far better position to determine whether a specific corporate entity was a "participating employer" in the plans—as the board of directors determined which employers participate in the plans. As such, the Ninth Circuit held that it would be "illogical and unfair" to require a participant, such as Barton—a long-retired employee—to prove whether the board authorized his employers to participate in the plans and which corporate sub-entities participate in the plans (especially when the corporate defendants *themselves* did not have any relevant records to answer this question). Significantly, the Ninth Circuit held that nothing in ERISA supports such a "Kafkaesque regime where corporate

restructuring can license a plan administrator to throw up his hands and say 'not my problem.'<sup>23</sup> Rather, the court held that "[e]mployers, plans, and plan administrators must know the terms and conditions of the benefits they offer and be able to identify covered employers and participating employees."<sup>24</sup> Accordingly, the Ninth Circuit held it is properly a defendant's (not a claimant's) burden to clarify what entities are covered under a plan in the first instance.<sup>25</sup>

*Second*, the Ninth Circuit held that it is "unreasonable" and "inconsistent with the goals of ERISA" to require a participant, like Barton, to prove the hours he worked over the course of two decades.<sup>26</sup> This is particularly true when, as here, nothing indicates that Barton was told or warned that he would need to keep a log of his hours to obtain pension benefits a generation or two later.

The majority of the Ninth Circuit panel held that "where a claimant has made a *prima facie* case that he is entitled to a pension benefit but lacks access to the key information about corporate structure or hours worked needed to substantiate his claim and the defendant controls such information, the burden shifts to the defendant to produce this information."<sup>27</sup> The majority went on to clarify more specifically that when a "claimant, through documentary or other objective evidence, has made a *prima facie* case that he is entitled to a pension but has no means except for information in the defendant's control to establish that his work was for a 'covered employer' and of sufficient duration, the burden then shifts to the defendant to produce such information."<sup>28</sup>

### ***The Dissent***

The dissent, on the other hand, accused the majority of going "off the rails" by adopting this "one-off burden shifting rule."<sup>29</sup> The dissent argued that the majority improperly created an "ad hoc rule" of burden of proof designed to help a sympathetic plaintiff (Barton), when it was supposed to be reviewing the plan administrator's decision solely for an "abuse of discretion." The dissent noted that ADT did not have any legal duty to maintain such information; indeed, even the majority implicitly acknowledges that no provision of ERISA requires a plan administrator to maintain a record of covered companies.<sup>30</sup> According to the dissent, putting the "risk of insufficient records" on the ERISA plan, as required by the majority, enhances the risk that uninsured claimants will draw funds away from the legitimate beneficiaries and that risk is in derogation of one of ERISA's core policies: to protect the "soundness and stability of plans with respect to adequate funds to pay promised benefits."<sup>31</sup>

### ***Petition for Rehearing***

The full Ninth Circuit denied the petition for panel rehearing and rehearing *en banc* on September 20, 2016.<sup>32</sup> Notably, however, eight judges on the Ninth Circuit dissented from the Circuit's refusal to rehear this case *en banc*, voicing concern that the majority improperly "abandon[ed] the abuse of discretion standard," and invented an "unprecedented burden-of-proof standard that only it seems to have had the foresight to impose on plan administrators."<sup>33</sup> The dissent went on to explain that:<sup>34</sup>

- (1) Supreme Court precedent doesn't permit for *ad hoc* exceptions to this standard of review;
- (2) Ninth Circuit precedent requires that Barton show the administrator's decision was illogical, implausible, or without any support of inferences in the record;
- (3) Even reviewing a plan administrator's decision *de novo*, the burden of proof remains on the claimant;
- (4) There is no precedent for shifting the burden of proof to the administrator; and
- (5) Ninth Circuit precedent clearly bars this burden shifting.

### **CONSIDERATIONS**

It remains to be seen whether the majority view in *Barton* will become the new standard, or whether this "strange rule" will be "confined to the limited facts of this case."<sup>35</sup> Nevertheless, this case serves as a good reminder for employers and plan administrators to periodically revisit their policies and practices for retaining pertinent plan and employment records—and for how long.

The plain language of Section 209 of ERISA requires employers to "maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees."<sup>36</sup> Such records would likely include:

- documents regarding employee employment history (including employment start and end dates);
- service information (for eligibility, vesting, and accrual purposes); and

- compensation and contribution information, elections, forms, and notices.

Of course, this mandate also logically includes governing plan documents and amendments to calculate the benefits owed. As *Barton* suggests, such records may also include evidence of corporate mergers, acquisitions, and restructuring, and board action to the extent that such corporate actions affect the calculation of employees' dates of service, continuity of service, and eligibility for benefits under various new or merged plans. Section 209 does not dictate any hard and fast rule for how long such documents must be maintained; rather, they must be kept for as long as they *might* be necessary to establish the amount of benefits owed.

Nothing in Section 209 requires employers to keep records for past participants who have already been fully paid. However, as a general matter, *after* benefits have been calculated and benefit payments have been made (or commenced), it is advisable to maintain records *at least* until the applicable statute of limitations for any benefit claim has run.<sup>37</sup> It is worth noting that the statute of limitations for a benefit claim does not necessarily begin to run from the date benefits are paid or payment is initiated. Rather, courts have nearly uniformly held that the statute does not begin to run until a participant has "reason to know" that the claim administrator has "clearly repudiated" his claim.<sup>38</sup> In certain circumstances, this may be years—or even decades—after the employee retired or initially received benefits. Although it may seem unduly burdensome to require a plan administrator to indefinitely maintain records on the off chance that a former participant will resurface and challenge the amount of benefits he was paid decades ago, the cautious approach is to maintain such records for as long as possible.

## NOTES

1. *In re Estate of Barton v. ADT Sec. Services Pension Plan*, 820 F.3d 1060, 1066 (9th Cir. 2016). For example, when an employee must establish an illness to qualify for disability benefits, the burden lies most sensibly with the claimant, who can provide test results, physician reports, and other evidence about her condition.

2. 820 F.3d 1060 (9th Cir. 2016).

3. Employee Retirement Income Security Act of 1974, as amended (ERISA).

4. *Id.* at 1069–70.

5. *Id.* at 1070.

6. *Id.*

7. Two different plans governed his eligibility for a pension benefit: the plan in effect January 1, 1968 (1968 Plan) and the plan in effect January 1, 1985 (1985 Plan). *Id.* at 1062.

8. *Id.* at 1063.
9. *Id.*
10. *Id.* at 1064.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 1064–65.
15. *Id.*
16. *Id.* at 1065.
17. *Id.*
18. *Barton v. ADT Security Services Pension Plan*, No. CV 12-06971 (BRO), 2013 WL 3791448 (C.D. Cal. July 19, 2013).
19. *In re Estate of Barton*, 820 F.3d at 1065.
20. *Id.* at 1065.
21. *Id.*
22. *Id.* at 1066.
23. *Id.*
24. *Id.* at 1067.
25. *Id.* at 1067.
26. *Id.* at 1068.
27. *Id.*
28. *Id.* at 1069.
29. *Id.* at 1070.
30. *Id.* at 1072.
31. *Id.* 29 U.S.C. § 1001(a).
32. 837 F.3d 1014 (9th Cir. 2016).
33. *Id.* at 1016.
34. *Id.* citing *Muniz v. Amec Constr. Mgmt., Inc.*, 623 F.3d 1290, 1294–95 (9th Cir. 2010).
35. *Id.* at 1075.
36. 29 U.S.C. § 1059(a)(1).
37. ERISA does not explicitly contain a limitations period for claims to recover benefits under Section 502(a)(1)(B). However, it is well-settled that a district court would borrow the forum state's "most analogous" limitations period from the state in which the action is brought. See *Redmon v. Sud-Chemie Inc. Retirement Plan for Union Employees*, 547 F.3d 531, 534–35 (6th Cir. 2008) ("[I]n the absence of a federally mandated statute of limitations, the court should apply the most analogous state law



statute of limitations.”) In this regard, courts have nearly “uniformly” characterized Section 502(a)(1)(B) claims as “breach of contract” claims for purposes of determining the most analogous statute of limitations under state law. *See Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 195 (6th Cir. 1992).

38. *See, e.g., Witt v. Metro. Life Ins. Co.*, 772 F.3d 1269, 1275–78 (11th Cir. 2014).

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