

ASK AND YOU SHALL RECEIVE: ERISA'S REMEDIES FOR NON-DISCLOSURE

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*ERISA provides members of employer-provided benefit plans the right to request and receive essential documents that pertain to their rights under a plan, whether the plan is a retirement fund, a 401(k) fund, or health or disability insurance. Plan administrators who fail to disclose plan documents upon request are in non-compliance, triggering a private federal cause of action for civil penalties. The failure to recognize the protections granted and duties imposed by ERISA under these sections can lead to unnecessary and even catastrophic consequences for individuals as well as fiduciaries involved in ERISA litigation. This article will highlight the significance of ERISA's procedure for requesting documents and the cause of action this creates for non-compliance by providing an overview of how the federal circuits apply the provisions when awarding statutory penalties and granting other relief. Additionally, this article will argue that ERISA's provision for "other relief" should be considered restitutionary and utilized more broadly by the circuits, as modeled by the Eighth Circuit in *Brown v. Aventis*.*

I. INTRODUCTION

Under the Employee Retirement Income Security Act ("ERISA"),¹ participants and beneficiaries of employer-provided benefit plans² have a protected right in 29 U.S.C. section 1024(b)(4) to receive documents that govern the terms of provided plans.³ Often these requests are in response to a denial of benefits,⁴ a failure to provide pension or retirement funds,⁵ or an ERISA lien.⁶

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1. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (2006 & Supp. 2009).

2. 29 U.S.C. § 1002(1) (2006) (defining terms "employee welfare benefit plan" and "welfare plan" as "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services"); § 1002(2) (defining "employee pension benefit plan" and "pension plan" as one that "provides retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond"); § 1002(3) (defining "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan").

3. 29 U.S.C. § 1024(b)(4) (2006) (providing that "upon written request of any participant or beneficiary" the plan administrator shall "furnish a copy of the latest updated summary plan description . . . the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated").

4. See *Brown v. Aventis Pharms., Inc.*, 341 F.3d 822, 826-27 (8th Cir. 2003) (describing action seeking recovery of documents to convert life insurance benefits).

If a plan administrator fails to comply with a request for information within thirty days, the participant or beneficiary is provided a private cause of action to enforce the duty in federal court.⁷ Plan administrators who fail to disclose requested documents mandated by ERISA may be personally liable for fines and other penalties under 29 U.S.C. section 1132(c)(1)(B).⁸

Because section 1132(c)(1)(B) has been characterized as a basely punitive provision designed to punish non-compliance,⁹ plan administrators should be on notice of acts that give rise to statutory penalties.¹⁰ The court has discretion to impose penalties of up to \$110.00 a day,¹¹ as well as “such other relief as it deems proper” for a plan administrator’s failure or refusal to disclose documents.¹² As noted by the United States Supreme Court,¹³ “[f]aced with the possibility of \$100 a day in penalties under §1132(c)(1)(B), a rational plan administrator or fiduciary would likely opt to provide a claimant with the information requested . . . especially when the reasonable costs of producing the information can be recovered.”¹⁴

At the same time, when called on to enforce these penalty statutes, courts tend to construe the provisioned language narrowly.¹⁵ For this reason, participants and beneficiaries making requests must take care to adhere to the

5. *Leister v. Dovetail, Inc.*, 546 F.3d 875, 881 (7th Cir. 2008) (seeking recovery of employer’s contributions to employer-sponsored 401(k) plan).

6. *Sheet Metal Workers Local 27 Health & Welfare Fund v. Beenick*, No. CIV.A.08-CV-00346, 2008 WL 5156663, at *2 (D.N.J. Dec. 9, 2008) (describing action seeking declaratory judgment on subrogation lien validity).

7. 29 U.S.C. § 1132(a)(1)(A) (2006). The relevant part of the statute provides that “[a] civil action may be brought . . . by a participant or beneficiary . . . for the relief provided for in subsection (c) of this section.” *Id.*

8. 29 U.S.C. § 1132(c)(1)(B) (2006). The relevant part of the statute provides that “[a]ny administrator . . . who fails or refuses to comply with a request for any information . . . required by this subchapter to furnish . . . may in the court’s discretion be personally liable to such participant or beneficiary.” *Id.*

9. *See Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 (11th Cir. 1993). The court reasoned that:

Since a plan participant would rarely be able to demonstrate that the failure to provide a timely statement of benefits in itself prejudiced the participant, the intent of Congress in enacting section 1132(c) would be frustrated by such a requirement . . . [t]he penalty range of up to \$100 per day is unrelated to any injury suffered by the plan participant, suggesting that section 1132(c) is intended to punish noncompliance with the employer or administrator’s disclosure obligations and not to compensate the participant.

Id.

10. 29 U.S.C. § 1132(c)(1)(B) (2006).

11. 29 C.F.R. § 2575.502c-1 (2010).

12. 29 U.S.C. § 1132(c)(1)(B) (2006).

13. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989).

14. *Id.*

15. *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 654 (4th Cir. 1996) (rejecting the argument that section 1024(b)(4) should be construed broadly, the court reasoned that “Congress used language limiting [section 1024(b)(4)] . . . to ‘instruments under which the plan is established or operated. The clear and unambiguous meaning of this statutory language encompasses only formal or legal documents under which a plan is set up or managed’”). *See Christensen v. Qwest Pension Plan*, 462 F.3d 913, 919 (8th Cir. 2006); *Hughes Salaried Retirees Action Comm. v. Adm’r of Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 691 (9th Cir. 1995) (stating that section 1024(b)(4) “requires the disclosure of only the documents described with particularity and ‘other instruments’ similar in nature”).

statutory requirements embodied under section 1024(b)(4) because requests addressed to a person or entity not indicated by statute may be insufficient to trigger the protections granted under ERISA.¹⁶

Initially, this article will discuss the legislative history behind ERISA, often the backdrop for interpreting disclosure provisions.¹⁷ Next, the statutory request for documents under section 1024(b)(4) will be examined, including an overview of judicial interpretations of mandated elements.¹⁸ Then, this article will explore the federal cause of action granted under section 1132(c)(1)(B) by reviewing aspects of the statute encountered in litigation.¹⁹ Finally, this article will argue for a broader judicial interpretation of the remedies provided under section 1132(c)(1)(B) by analyzing the Eighth Circuit's restitutionary award for non-disclosure in *Brown v. Aventis*.²⁰

II. BACKGROUND

A. ERISA'S LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT

ERISA was enacted in 1974 to protect employee benefit plans for the well-being of employees and their beneficiaries.²¹ The uniform federal system was designed to balance the interests of the employer with those of the plan participants.²² Congress struck this balance by providing tax incentives and limited liability to employers²³ while at the same time placing stringent fiduciary obligations upon them.²⁴

Before ERISA, Congressional investigations revealed that many employer-provided pension and welfare plans were mismanaged or abused, resulting in

16. *Brown v. J.B. Hunt Transp. Servs., Inc.*, 586 F.3d 1079, 1088 (8th Cir. 2009) (dismissing a section 1132(c) claim against claims administrator, stating that the statute "only provides a cause of action against plan administrators"). See, e.g., *VanderKlok v. Provident Life & Accident Ins. Co.*, 956 F.2d 610, 618 (6th Cir. 1992).

17. See *infra* Part II.A.

18. See *infra* Part II.B.

19. See *infra* Part II.C.

20. See *infra* Part III.

21. 29 U.S.C. § 1001(b) (2006). The relevant part of the statute provides:

It is . . . the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Id. See Dana Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 B.C. L. REV. 201, 204 (1995).

22. PETER WIEDENBECK, *ERISA IN THE COURTS* 22 (Federal Judicial Center 2008). See also H.R. REP. NO. 93-533, 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639 (stating that "[t]he primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans").

23. WIEDENBECK, *supra* note 22, at 22; Muir, *supra* note 21, at 204.

24. S. REP. NO. 93-127, 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4838 (defining ERISA's paternalistic purpose "to strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare benefit plans . . . by mandating protective measures, and prescribing minimum standards for promised benefits").

losses that affected employees and their families by the millions.²⁵ Congress worked to eradicate the private sector's rampant abuse and mismanagement by enacting legislative precursors such as the Welfare and Pension Plans Disclosure Act ("WPPDA").²⁶ WPPDA regulation was based upon the principle of disclosure, viewed as the strongest deterrent against private sector abuses.²⁷ Ultimately, the legislation proved ineffective in providing protections intended by Congress.²⁸ This ineffectiveness stemmed largely from the Act's limited disclosure requirements and inadequate fiduciary standards as applied to employer plan providers.²⁹

In response to this failure, Congress drafted Title I under ERISA to mandate rigorous reporting requirements, "particularized" to the extent that an individual "knows exactly where he stands with respect to the plan."³⁰ The reporting scheme was designed to ensure that each participant understood "what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and . . . persons to whom the management and investment of his plan funds have been entrusted."³¹ Such detailed reporting was intended to empower a more informed workforce to better consider pertinent employment and financial options.³² Furthermore, by prescribing "stringent rules of conduct," ERISA would serve the paternalistic role originally intended under WPPDA.³³

This sweeping mandate for disclosure also functioned to discourage malfeasance by holding the private sector to a higher fiduciary standard.³⁴ Expansive disclosure would create the transparency necessary to ensure fiduciary responsibility.³⁵ "[I]f fiduciaries are aware that . . . their dealings will

25. *Harrold v. Coble*, 261 F. Supp. 29, 37 n.1 (M.D.N.C. 1966) (citing to 1958 U.S.C.C.A.N. 4137, 4137-4210).

26. H.R. REP. NO. 93-533, at 3-4 (stating that "[v]arious aspects of pension plans have been affected to some degree by . . . the National Labor Relations Act (1935), the Labor Management Relations Act (1947), . . . the Labor Management Reporting and Disclosure Act (1959), [and specifically] . . . the Welfare and Pension Plans Disclosure Act [1958]").

27. *Harrold*, 261 F. Supp. at 37 n.1.

28. S. REP. NO. 93-127, at 3 (stating that under the WPPDA, "the protection accomplished by statute has not been sufficient to accomplish Congressional intent"). See Muir, *supra* note 21, at 203-04 (discussing the 1963 Studebaker plant closing, which "inspired Congress to investigate the general lack of security for private pension plans").

29. H.R. REP. NO. 93-533, at 4.

30. *Id.* at 10.

31. *Id.*

32. See *id.*; S. REP. NO. 93-127, at 10. The Senate found that:

Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

Id.

33. WIEDENBECK, *supra* note 22, at 22; S. REP. NO. 93-127, at 2.

34. S. REP. NO. 93-127, at 2.

35. WIEDENBECK, *supra* note 22, at 27.

be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general," it was believed that the safeguarding effect provided under ERISA's fiduciary section would function efficiently.³⁶ It is to this end that Congress equipped individuals, as well as the federal government, with powerful measures to compel compliance.³⁷

Expanding enforcement powers to individuals gave bite to ERISA's bark.³⁸ Specially furnished with "broad remedies for redressing or preventing violations of the Act," participants and beneficiaries were granted "the full range of legal and equitable remedies" in both federal and state courts.³⁹ Ultimately, in making both legal and equitable remedies available to individuals, ERISA effectuated Congress's intent to remove obstacles that had hampered enforcement of fiduciary responsibilities and recovery of benefits.⁴⁰

Among ERISA's enforcement provisions is a multi-faceted section granting individuals a private cause of action for disclosure violations.⁴¹ To activate the powerful remedies available however, participants and beneficiaries must first meet the requirements under section 1024(b)(4) by submitting a proper request for documents.⁴²

B. REQUESTING DOCUMENTS UNDER 29 U.S.C. SECTION 1024(B)(4)

The statutory provision of section 1024(b)(4) is found within the reporting and disclosure duties mandated under Title I of ERISA.⁴³ This section imposes a duty upon plan administrators to provide specific documents to participants or beneficiaries upon written request.⁴⁴ Namely, the provision serves as a mechanism designed to grant individuals the right to documents at any time in order to determine where they stand in relation to a plan and to ensure that their benefits are properly administered.⁴⁵

This basic right can only be triggered if the participant or beneficiary makes a proper request pursuant to the statute.⁴⁶ To determine whether a proper request for documents has been made, the courts have adopted a variety of statutory interpretations regarding section 1024(b)(4).⁴⁷ These interpretations offer

36. *Id.*

37. *See id.* at 34.

38. *Mondry v. Am. Family Mut. Ins. Co.*, 557 F.3d 781, 793 (7th Cir. 2009) (explaining that "teeth are given to this obligation by 29 U.S.C. § 1132(c)(1)(B), which renders a non-compliant administrator liable for fines in the event he fails to timely produce requested plan documents").

39. H.R. REP. NO. 93-533, 16 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655.

40. *Id.*

41. 29 U.S.C. § 1132(c)(1)(B) (2006).

42. 29 U.S.C. § 1024(b)(4) (2006).

43. *Id.*

44. *Id.*

45. *See supra* notes 30-32 and accompanying text.

46. 29 U.S.C. § 1132(c)(1)(B).

47. *See infra* Part II.B.1-4.

guidance for accurately assessing the proper requesting party,⁴⁸ the proper recipient of a request,⁴⁹ the acceptable form of a request,⁵⁰ and the documents mandated for disclosure.⁵¹

1. The Proper Requesting Party: The Participant or Beneficiary

Specifically, section 1024(b)(4) provides that a plan administrator “shall, upon written request of any participant or beneficiary,” provide certain documents relating to the plan.⁵² To make a proper request under this section then, one must be either a participant or a beneficiary.⁵³ Under ERISA, a “participant” is:

any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.⁵⁴

Additionally, a “beneficiary” is a “person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.”⁵⁵

The Supreme Court has provided some clarity to these statutory concepts.⁵⁶ In *Firestone*,⁵⁷ the Court examined the meaning of “participant” within the context of standing to bring a claim under section 1024(b)(4).⁵⁸ The Court held that the term “participant,” under section 1002(7), referred to “all employees in covered employment and former employees with a colorable claim to vested benefits.”⁵⁹ The decision assists individuals with potential legitimate claims to receive information necessary for assessing benefit eligibility.⁶⁰

A significant issue pertaining to the proper requesting party is whether requests made by representing counsel activate ERISA’s non-disclosure provision.⁶¹ Section 1024(b)(4) states that disclosure be made “upon written

48. *See infra* Part II.B.1.

49. *See infra* Part II.B.2.

50. *See infra* Part II.B.3.

51. *See infra* Part II.B.4.

52. 29 U.S.C. § 1024(b)(4) (2006).

53. *Id.*

54. 29 U.S.C. § 1002(7) (2006).

55. 29 U.S.C. § 1002(8) (2006).

56. *See Firestone & Rubber Tire Co. v. Bruch*, 489 U.S. 101 (1989).

57. *Id.*

58. *Id.* at 117.

59. *Id.* at 118. *See also* *Jordan v. Tyson Foods, Inc.*, No. 07-5023, 2008 WL 3876422, at *7 (6th Cir. Aug. 19, 2008) (explaining that “the definition [of participant] found in 29 U.S.C. § 1002(7) must be read in the context of traditional concepts of standing, not in the context of adjudicating the ultimate issue of the merits of plaintiffs’ claim”).

60. *See Davis v. Featherstone*, 97 F.3d 734, 736-37 (4th Cir. 1996) (reasoning that in *Firestone*, “the Court recognized that the statute is intended to ensure that potentially legitimate claimants can get the information they need to determine whether they are in fact entitled to benefits”).

61. *Minadeo v. ICI Paints*, 398 F.3d 751, 758 (6th Cir. 2005).

request of any participant or beneficiary.”⁶² This has left an issue for the circuits as to whether an attorney’s request sent on behalf of a participant or beneficiary triggers the disclosure provisions under section 1024(b)(4).⁶³

In resolving this issue, the Tenth Circuit⁶⁴ has recognized that an attorney may request information on behalf of a participant “if the request is clear and puts the administrator on notice of the information sought.”⁶⁵ Similarly, the Third Circuit⁶⁶ has established that an attorney’s request triggers disclosure duties.⁶⁷ In the Sixth Circuit,⁶⁸ plan administrators receiving an attorney’s request for documents must “provide the requested information directly to the plan beneficiary,” or “inform the attorney that the information will be released upon the receipt of an authorization signed by the plan participant.”⁶⁹ Consequently, to protect against disclosure liability, plan administrators should disclose documents in response to an attorney’s request as such a request may put them on notice for disclosure liability.⁷⁰

2. Recipient of Request: Plan Administrator

According to section 1024(b)(4), a request made by a participant or beneficiary for documents should be addressed to the “administrator.”⁷¹ An “administrator” is one “specifically so designated by the terms of the instrument under which the plan is operated.”⁷² If there is no such designation made by the terms of the instrument, the person identified as the “plan sponsor” is deemed the plan administrator.⁷³ Under ERISA, the “plan sponsor” may be the employer or employers who “establish or maintain the plan.”⁷⁴

62. 29 U.S.C. § 1024(b)(4) (2006). See also DOL Op. No. 79-82A, 1979 WL 7019 (expressing the Department of Labor’s view that “information must be furnished to a third party [when] . . . the participant has authorized in writing the release of the information to such a third party”).

63. Roy Harmon, *ERISA Plan Information Requests (Unit 4): Who Is Entitled To Request Plan Information?*, Health Plan Law ERISA Group Plan Health Administration Blog, Nov. 22, 2006, <http://www.healthplanlaw.com>.

64. *Moothart v. Bell*, 21 F.3d 1499 (10th Cir. 1994).

65. *Id.* at 1503. See also *Bell v. Hawaiian Airlines, Inc.*, No. 02-16328, 2005 WL 1926427, at *1 (9th Cir. Aug. 11, 2005) (finding that attorney’s written request triggered plan administrator’s disclosure duties).

66. *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66 (3d Cir. 2001).

67. *Id.* at 77 (stating that chief among Congressional concerns in enacting ERISA was ensuring full access to relevant plan information for plan participants and beneficiaries, an objective “best served by a rule that a representation by an attorney . . . making a request on behalf of a participant or beneficiary triggers the duty to respond under § 1024(b)(4)”).

68. *Minadeo v. ICI Paints*, 398 F.3d 751 (6th Cir. 2005).

69. *Id.* at 758. See also *Kanoski v. Sterling Paper, Co.*, No. CIV.A.2:09-cv-00439, 2010 WL 3910483, at *4 (S.D. Ohio Oct. 4, 2010) (stating that a “plan administrator may not simply disregard [an attorney’s] written request for pension benefits . . . [i]nstead, the plan administrator should, like the *Bartling* plan administrator, seek written authorization when the participant’s attorney, rather than the participant, seeks benefits information”).

70. Harmon, *supra* note 63; *Moothart v. Bell*, 21 F.3d 1499, 1503 (10th Cir. 1994).

71. 29 U.S.C. § 1024(b)(4) (2006).

72. 29 U.S.C. § 1002(16)(A)(i) (2006).

73. 29 U.S.C. § 1002(16)(A)(ii) (2006).

74. 29 U.S.C. § 1002(16)(B) (2006). The relevant part of the statute provides:

The term “plan sponsor” means (i) the employer in the case of an employee benefit plan

Essentially, through the ability to establish, operate, and maintain a plan, the plan administrator has discretionary authority to control a plan.⁷⁵ Discretionary authority in this sense makes one a “fiduciary” under ERISA.⁷⁶ The term “fiduciary” echoes Congressional intent to root ERISA within traditional trust law, under which the fiduciary’s duty to beneficiaries requires full and truthful disclosure upon inquiry.⁷⁷

This fiduciary duty is manifested in part through section 1024(b)(4) liability, limited almost exclusively to plan administrators.⁷⁸ In fact, requests made to claims administrators or plans themselves are not likely to activate this particular disclosure provision.⁷⁹ It is important to note, however, that some courts have recognized a “de facto”⁸⁰ plan administrator status, imposing

established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

Id.

75. See C.F.R. § 2509.75-8 (Question and Answer D-3) (2010) (explaining that “a plan administrator or a trustee of a plan must, by the very nature of his position, have ‘discretionary authority or discretionary responsibility in the administration’ of the plan within the meaning of section 3(21)(A)(iii) of the Act”).

76. *Id.* (stating that persons holding such discretionary authority “will therefore be fiduciaries”).

77. Kimberly A. Butlak, *The Enron Afterman: Evaluating An Employer’s Affirmative Duty to Disclose Business Information to 401(K) Plan Participants Holding Company Stock*, 38 TEX. J. BUS. L. 32, 34 n.64 (2002) (citing RESTATEMENT (SECOND) OF TRUSTS § 173 (1959)). The pertinent part states that:

The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

Id.

78. See *Mondry v. Am. Family Mut. Ins. Co.*, 557 F.3d 781, 794 (7th Cir. 2009) (citing to *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998) (stating that “liability under section 1132(c)(1) is confined to the plan administrator,” and rejecting the contention that “other parties, including claims administrators, can be held liable for the failure to supply participants with the plan documents they seek”). See also *Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 631 (2d Cir. 2008) (citing *Lee v. Burkhart*, 991 F.2d 1004, 1010 (2d Cir. 1993)); *Sgro v. Danone Waters of N. Am., Inc.*, 532 F.3d 940, 945 (9th Cir. 2008); *Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833, 843-44 (6th Cir. 2007); *Ross v. Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 743-44 (8th Cir. 2002); *McKinsey v. Sentry Ins.*, 986 F.2d 401, 403-05 (10th Cir. 1993).

79. *Brown v. J.B. Hunt Transp. Servs., Inc.*, 586 F.3d 1079, 1088 (8th Cir. 2009); *Mondry*, 557 F.3d at 794; *Lee*, 991 F.2d at 1010; *Gore*, 477 F.3d at 844; *McKinsey*, 986 F.2d at 405. But see *Frye v. Metro. Life Ins. Co.*, No. CIV.A.3:10-0107, 2010 WL 5343287, at *16 (S.D. W. Va. Dec. 20, 2010) (requiring fiduciary not named as the plan administrator to pay attorney’s fees for failing to disclose documents).

80. Roy Harmon, *ERISA Plan Information Requests (Unit 5): Who Is Entitled To Request Plan Information?*, Health Plan Law ERISA Group Plan Health Administration Blog, Jan. 16, 2007, <http://www.healthplanlaw.com>; *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819, 824 (11th Cir. 2001) (citing to *Rosen v. TRW, Inc.*, 979 F.2d 191, 193-94 (11th Cir. 1992) (recognizing a de facto plan administrator category, the court reasoned “if the employer is administering the plan, then it can be held liable for ERISA violations, . . . even if these factual circumstances contradict the designation in the plan document”); *Warren Pearl Const. Corp. v. Guardian Life Ins. Co. of Am.*, 639 F. Supp. 2d 371, 380 (S.D.N.Y. 2009) (stating that “[a] plaintiff may pursue an equitable claim against a de facto administrator that failed to provide adequate disclosures”).

liability upon parties acting as fiduciaries in administering plans.⁸¹ Therefore, to ensure that the proper party receives a request, extra care should be taken by addressing requests to “multiple parties, including the plan sponsor,” directing further requests to any additional parties identified in correspondence.⁸²

3. Manner of Request

Section 1024(b)(4) also requires disclosure of documents upon “written request.”⁸³ Although an exception has been etched out in circumstances in which an oral request is sufficient to trigger penalties,⁸⁴ courts tend to construe the statutory provision literally.⁸⁵ As a result, the courts generally require that written requests clearly enumerate documents for disclosure to pass what has been deemed the “clear notice test.”⁸⁶

When applying the clear notice test, the courts look to what the administrator “should have known” at the time of the request, determined by the factual circumstances of each case.⁸⁷ Accordingly, a plan administrator in receiving requests should err on the side of disclosure, because a court will apply a fact-specific inquiry as to what the administrator “should have known” at the time of non-disclosure.⁸⁸

4. Documents Mandated for Disclosure

Upon the written request of a participant or beneficiary to a plan administrator, ERISA requires the disclosure of certain documents within thirty days.⁸⁹ Mandated documents include the latest updated summary plan

81. See *In re Managed Care Litig.*, 150 F. Supp. 2d 1330, 1354 (S.D. Fla. 2001) (stating that “[d]efendant managed care companies are de facto administrators if they have discretionary and ultimate decision making authority over the claim process”).

82. Harmon, *supra* note 80. See also Roger Baron, *Service of a ‘Proper Request’ Upon the Plan Administrator: A Key Step in Defending Against ERISA Reimbursement Claims*, 33 J. KAN. ASSOC. FOR JUST. 4, 7 (2010) (explaining that because the plan administrator is often the employer, “requesting documents from the plan administrator will notify the plan administrator (employer) of the plight of the beneficiary or participant”).

83. 29 U.S.C. § 1024(b)(4) (2006).

84. See *Crotty v. Cook*, 121 F.3d 541, 547-48 (9th Cir. 1997) (stating that “[i]f the participant requests something he was entitled to receive automatically, without any request, then the civil enforcement penalty provision applies without regard to whether the request was in writing”).

85. See *Hoskins v. Snap-On Inc. Ret. Plan*, No. C08-3069-MWB, 2010 WL 2899074, at *22 (N.D. Iowa July 20, 2010) (citing *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 948 (8th Cir. 1999) (stating “to recover on a claim for a § 1132(c) penalty, for a failure to comply with § 1024(b)(4), the claimant must prove (1) that he or she requested the plan description in writing and (2) that the plan administrator failed to provide it”). See also *Christensen v. Qwest Pension Plan*, 462 F.3d 913, 919 (8th Cir. 2006) (holding that a telephonic request was insufficient to trigger penalty provision).

86. Roy Harmon, *Third Circuit Explains and Applies ‘Clear Notice’ Rule In Statutory Penalties Case*, Health Plan Law ERISA Group Plan Health Administration Blog, May 16, 2007, <http://www.healthplanlaw.com>; *Kollman v. Hewitt Assoc., LLC*, 487 F.3d 139, 144-45 (3d Cir. 2007).

87. *Kollman*, 487 F.3d at 145; *Anderson v. Flexel, Inc.*, 47 F.3d 243, 250 (7th Cir. 1995); *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1071 (6th Cir. 1994); *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1077 (5th Cir. 1990).

88. *Kollman*, 487 F.3d at 145.

89. 29 U.S.C. § 1132(c)(1)(B) (2006).

description, the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract (including “insurance” contracts),⁹⁰ or “other instruments under which the plan is established or operated.”⁹¹

Each of these documents govern in some manner the plan’s operation.⁹² The first document, the summary plan description (“SPD”), must contain in plain language the terms of the plan and its benefits.⁹³ When a document does not contain mandated material, it may not be substantiated as an SPD, resulting in penalties imposed upon the administrator.⁹⁴ Specifically, ERISA mandates that the SPD provide the name and type of plan; the name and address of plan administrator(s), the person to receive service of legal process, and trustees; a description of collective bargaining agreement provisions; eligibility requirements for participants and beneficiaries under the plan;⁹⁵ a summary of any material modification to the plan (SMM);⁹⁶ a description of rights of participants and beneficiaries ascribed by ERISA pertaining to the plan, and any remedies for seeking redress of denied claims.⁹⁷

In *Curtiss-Wright Corp. v. Schoonejongen*,⁹⁸ the Supreme Court held that under section 1024(b)(4), a plan administrator must provide “currently operative, governing plan documents” upon written request.⁹⁹ Referring to this decision,

90. 29 C.F.R. § 2520.102-3(t)(2) (2010).

91. 29 U.S.C. § 1024(b)(4) (2006).

92. See 29 C.F.R. § 2520.102-3 (2010); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995).

93. 29 U.S.C. § 1022(a) (2006). The relevant part of the statute provides that an SPD:

[S]hall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification [SMM] in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

Id. See also 29 C.F.R. § 2520.102-2(c) (2010) (promulgating that summary plan descriptions “will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references and a table of contents”). Cf. *Ringwald v. Prudential Ins. Co. of Am.*, 609 F.3d 946, 949 n.3 (8th Cir. 2010) (noting that when the language of an SPD is inconsistent with its plan document, the SPD may control plan governance, unless the SPD purports to “enlarge” the rights of the plan over those of participants and beneficiaries).

94. *Sunderlin v. First Reliance Standard Life Ins. Co.*, 235 F. Supp. 2d 222, 232 (W.D.N.Y. 2002) (holding that a copy of an insurance policy was not an SPD, as the policy did not contain “name of the plan, the name or address of the person designated to receive service of legal process, or the name of the plan administrator . . .,” nor did the policy mention or describe “any remedies for seeking redress of denied claims,” and the policy was not “written in a clear, easy-to-read manner . . .”).

95. 29 U.S.C. § 1022(b) (2006).

96. See 29 C.F.R. § 2520.104b-3(a) (2010).

97. 29 U.S.C. § 1133 (2006). The section provides that:

[E]very 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.

Id.

98. 514 U.S. 73 (1995).

99. *Id.* at 84.

several courts have denied requests for “outdated” SPDs.¹⁰⁰ However, in *Mondry v. American Family Mutual Insurance Co.*,¹⁰¹ the Seventh Circuit held that outdated documents relied upon in governing a plan are subject to disclosure, “[t]o hold otherwise would, in our view, allow a claims administrator to ‘hide the ball’ from the participant, depriving her of access to the very documents that the claims administrator is saying are dispositive of her claim.”¹⁰²

The annual report (“Form 5500 Annual Return/Report”)¹⁰³ is another document a plan administrator must disclose upon request.¹⁰⁴ The annual report provides information regarding a plan’s funding structure.¹⁰⁵ Specifically, it declares a plan’s funding status and source of funding as well as its financial condition and coverage.¹⁰⁶ Determining whether a plan is self-funded or insured is crucial as it may determine whether state law will apply to the plan.¹⁰⁷

Finally, section 1024(b)(4) mandates disclosure of “any terminal report, the bargaining agreement, trust agreement, [insurance] contract, or other instruments under which the plan is established or operated.”¹⁰⁸ Language in this phrase has been interpreted by applying the rule of *ejusdem generis*,¹⁰⁹ which the Sixth Circuit¹¹⁰ has defined as follows: “when general words follow the enumeration of specific words in a statute, courts are to construe the general words in a manner that limits them to the same class of things enumerated by the preceding

100. *Staib v. Vaughn Indus., Inc.*, 171 F. Supp. 2d 714, 716 (N.D. Ohio 2001) (citing *Hughes v. K-Mart Corp.*, 983 F.2d 1066, No. 91-70552, 1993 WL 11830, at *10 (6th Cir. Jan. 20, 1993) (unpublished disposition) (stating that a plan sponsor or administrator is not under an “ERISA-mandated duty to furnish reports other than the most recent report”). See *Shields v. Local 705, Int’l. Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 903 (7th Cir. 1999) (citing *Shields v. Local 705, Int’l Bhd. of Teamsters*, No. 96 C 1928, 1996 WL 616548, at *10 (N.D. Ill. Oct. 23, 1996) (stating that “[w]e agree with the district court that ‘outdated plan descriptions do not fall into any of the categories of documents a plan administrator must provide to plan participants’ under section 1024(b)(4)”).

101. 557 F.3d 781 (7th Cir. 2009).

102. *Id.* at 801. The court reasoned that if a claims administrator were to “expressly rely on a superseded version of the plan, it would be treating that version (albeit in error) as the document that governs the operation of the plan; and for that reason the participant would be entitled to its production.” *Id.* at 800. See also *Bilello v. JPMorgan Chase Ret. Plan*, 649 F. Supp. 2d 142, 167-70 (S.D.N.Y. 2009) (applying section 1024(b)(4) “to the extent that the 1989 Plan, the Pre-1989 Plan, or any other predecessor plan is still an ‘instrument . . . under which the [current] plan is . . . operated,’ the Plan Administrator was required to disclose those documents”).

103. 29 C.F.R. § 2520.104b-10(a) (2010). Form 5500 documents may be found on-line. See *freeERISA.com*, <http://www.freeerisa.com> (last visited Feb. 23, 2011) (providing “free access to Department of Labor Form 5500 disclosure filings on more than 1 million retirement and health benefit plans”).

104. 29 U.S.C. § 1024(b)(4) (2006).

105. 29 U.S.C. § 1023 (2006).

106. 29 C.F.R. § 2520.104b-10(d) (2010).

107. Peter H. Wayne & Mark R. Taylor, *Beware the ERISA Health Plan Lien*, 43 TRIAL 12, 51 (Dec. 2007).

108. 29 U.S.C. § 1024(b)(4) (2006). See also 29 C.F.R. § 2520.102-3(t)(2) (2010) (promulgating that “upon written request,” plan administrators must provide to participants “insurance contracts”).

109. BLACK’S LAW DICTIONARY 594 (9th ed. 2009) (deriving from Latin: “of the same kind or class”).

110. *Allinder v. Inter-City Prods. Corp.*, 152 F.3d 544 (6th Cir. 1998).

specific words.”¹¹¹ Following this rule, the term “other instruments” has been held to apply to documents that refer to how a plan is “established or operated,” resulting in a variety of applications across the circuits.¹¹²

For example, the Sixth Circuit¹¹³ has held that actuarial reports are included under the umbrella of “instruments under which the plan is . . . operated” because the mandatory reports are “indispensable to the operation of the plan.”¹¹⁴ Reasoning that its interpretation advances the purpose of ERISA’s disclosure requirements, the Sixth Circuit consequently created a presumption that “courts should favor disclosure where it would help participants understand their rights.”¹¹⁵

This “presumption of disclosure” has been rejected by the Fourth Circuit,¹¹⁶ which asserts that section 1024(b)(4) is not to be broadly interpreted and should not be construed to encompass simply “any documents that would assist participants and beneficiaries in determining their rights under a plan and in determining whether a plan is being properly administered.”¹¹⁷ The court has held that disclosure should be limited to cover “formal or legal documents under which a plan is set up or managed.”¹¹⁸ Under this interpretation, the Fourth Circuit has found that funding and investment policies are documents requiring disclosure, while other documents, such as the ESOP’s cost sharing, funding policy, or bonding policy, as well as simply “any” trustee minutes, are not to be included under section 1024(b)(4)’s mandate.¹¹⁹

In a similar vein, the Second Circuit¹²⁰ has held that technical data, such as that contained in requested actuarial reports, are not included within the 1024(b)(4)’s document umbrella.¹²¹ The court noted that Congress limited the section language to “instruments,” and as broader terms are referred to elsewhere in ERISA disclosure sections (such as “documents,” “records,” or “reports”), the duty imposed under section 1024(b)(4) should not extend to those terms, as they were not included in the section language.¹²²

111. *Id.* at 549.

112. Roy Harmon, *ERISA Plan Information Requests (Unit 1): Statutory Purpose and Scope*, Health Plan Law ERISA Group Plan Health Administration Blog, Nov. 8, 2006, <http://www.healthplanlaw.com>.

113. *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994).

114. *Id.* at 1070. *But see* *Jordan v. Tyson Foods, Inc.*, No. 07-5023, 2008 WL 3876422, at *8-10 (6th Cir. Aug. 19, 2008) (stating that a plan enrollment form is unlike the actuarial reports at issue in *Bartling*: “an enrollment form is not ‘indispensable to the operation of the plan,’ but rather serves a ministerial function”); *Allinder v. Inter-City Prods. Corp.*, 152 F.3d 544, 550 (6th Cir. 1998) (rejecting the argument that claim forms fall under the mandatory disclosure section).

115. *Bartling*, 29 F.3d at 1070 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989) (quoting H.R.REP. No. 93-533, 11 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 4639, 4649 (1973))).

116. *Faircloth v. Lumdy Packing Co.*, 91 F.3d 648, 654 (4th Cir. 1996).

117. *Id.* at 653.

118. *Id.* at 654.

119. *Id.* at 654-59.

120. *Bd. of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139 (2d Cir. 1997).

121. *Id.* at 146.

122. *Id.* *But see* *Saltzman v. Independence Blue Cross*, No. 09-2965, 2010 WL 2340182, *5 (3d

Following the interpretations given by the Second and Fourth Circuits, the Seventh Circuit¹²³ has refused to require disclosure of plan fiduciaries by name absent allegations of relevance, holding that “only formal legal documents governing a plan” are within section 1024(b)(4).¹²⁴ Additionally, the Ninth Circuit¹²⁵ has held that disclosure of documents detailing only names and addresses of participants is not required under section 1024(b)(4)’s “other instruments under which the plan is operated.”¹²⁶



Cir. June 10, 2010). In reviewing a claim for benefits under section 1132(a)(1)(B), the Third Circuit held that a formulary is a document governing the terms of a plan:

The formulary is essential to the administration of the plan, as it categorizes specific drugs into the tier-system established in the plans. Indeed, the Prescription Drug Rider regularly references the formulary and directs participants to consult it to determine their benefits. Participants, therefore, must refer to the listings found in the formulary to determine the copayments associated with each. As such, the formulary describes the operation of the plan, specifies the basis upon which payments are made, and puts the plan participants on notice as to the scope of their benefits and is essential to a participant’s understanding of what copayment he or she will be required to pay for certain drugs.

Saltzman, 2010 WL 2340182, at *5. Such a designation may mandate disclosure of formularies within the Third Circuit. *Id.*

123. *Ames v. Am. Nat. Can Co.*, 170 F.3d 751, 758 (7th Cir. 1999).

124. *Id.* at 759.

125. *Hughes Salaried Retirees Action Comm. v. Adm’r of Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 690 (9th Cir. 1995).

126. *Id.* The dissenting opinion illustrates an inherent debate regarding disclosure requirements:

Section [1024(b)(4)] requires the disclosure of “other instruments under which the plan is established or operated.” The mailing list is necessarily an instrument under which the plan is operated because without it, an administrator could not possibly pay benefits or keep plan participants informed of plan administration. The purpose for which the Retirees seek the list, to police the administration of the plan, is precisely one of the reasons why Congress enacted § [1024(b)(4)].

Id. at 697. The Ninth Circuit further clarified its stance in *Shaver v. Operating Eng’rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1202 (9th Cir. 2003) (stating that the “broad term ‘other instruments’ should be limited to . . . legal documents that describe the terms of the plan, its financial status, and other documents that restrict or govern a plan’s operation”).

* * *

In summary, to properly request documents pursuant to section 1024(b)(4), participants and beneficiaries should sign written requests specifying documents relevant to the statutory provision.¹³⁸ Requests specifying documents in a

137. 29 U.S.C. § 1024(b)(4) (2000).

138. See Baron, *supra* note 82, at 8. In the article, Baron provides the following model request form:

date
(Name of Plan Administrator – should be set forth in SPD)
Plan Administrator for _____ Medical Plan
Street address
City, State, Zip Code

CERTIFIED MAIL: Return Receipt Requested

Dear Mr./Ms.,

My name is _____. Pursuant to my right as a participant and beneficiary of ___ Plan, I respectfully request copies of the following materials:

plainly enumerated format are more likely to pass the “clear notice” test.¹³⁹ Moreover, to avoid personal liability for a breach of fiduciary duty, plan administrators should promptly disclose any “currently operative, governing plan documents”¹⁴⁰ as they may be mandated for disclosure under the broad and complex umbrella of “other instruments under which the plan is operated.”¹⁴¹

C. THE CAUSE OF ACTION FOR NON-DISCLOSURE UNDER 29 SECTION U.S.C.
1132(c)(1)(B)

The statutes mandating disclosure under Title I of ERISA become enforceable through provisions granted under Title V, Administration and Enforcement.¹⁴² Thus, to put into effect duties ascribed within section 1024(b)(4), a participant or beneficiary must look to section 1132(c)(1)(B).¹⁴³

Considering the fiduciary status granted to plan administrators,¹⁴⁴ whether named as an administrator through plan language¹⁴⁵ or ascribed de facto administrator status by the courts,¹⁴⁶ fiduciaries receiving disclosure requests

Copies of the Summary Plan Description (SPD) and other Plan Documents relating to my health insurance coverage for the years __, __, __, and __. (year preceding date of injury through current year); and

Administrative Services Contract between __ (Employer/Plan) and __ (Plan Insurer(s)/Claims Administrator) for the years __, __, __, and __. (year preceding date of injury through current year); and

Copies of all contracts including, but not limited to: Insurance contracts, Stop Loss Contracts, Health Insurance Contracts, Insurance Intermediary Services Contracts, and Administrative Services Contracts related to __ Medical Plan serving (insert name of state or region encompassing client) participants for the years __, __, __, and __. (year preceding date of injury through current year); and

Amendments to the Plan Documents for __ Medical Plan (including, but not limited to the Summary Plan Description) for the years __, __, __, and __. (year preceding date of injury through current year); and

Copies of the SMM (Summary of Material Modifications) statements for the years __, __, __, and __. (year preceding date of injury through current year); and

Copies of form 5500, including all attached schedules, filed with the U.S. Department of Labor for the years __, __, __, and __. (year preceding date of injury through current year).

Please forward these materials to my attorney, Mr./Mrs. __, (address), (city), (state), (zip code).

Thank you.

_____ (signature)

(Name of Participant/Beneficiary – Printed)

Plan Participant

Plan Beneficiary

Id. See also Harmon, *supra* note 63.

139. See Kollman v. Hewitt Associates, LLC, 487 F.3d 139, 142-47 (3d Cir. 2007).

140. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 84 (1995).

141. 29 U.S.C. § 1024(b)(4) (2006); Harmon, *supra* note 127.

142. 29 U.S.C. § 1132 (2006).

143. 29 U.S.C. § 1132(c)(1)(B) (2006).

144. See *supra* notes 78-81.

145. 29 U.S.C. § 1002(16)(A)(i) (2006).

146. Hamilton v. Allen-Bradley Co., 244 F.3d 819, 824 (11th Cir. 2001); Warren Pearl Const. Corp. v. Guardian Life Ins. Co. of Am., 639 F. Supp. 2d 371, 380 (S.D.N.Y. 2009).

should provide requested material within thirty days.¹⁴⁷ Failure to do so may trigger statutory fines and other awards provided under section 1132(c)(1)(B), which imposes a penalty upon:

[A]ny administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.¹⁴⁸

The statute treats each violation concerning an individual participant or beneficiary separately.¹⁴⁹ In 1997, the penalty amount was increased to \$110.00 a day by the Department of Labor.¹⁵⁰

A plan administrator may plead affirmative defenses in the face of a non-disclosure claim.¹⁵¹ However, if a claim survives dismissal, the plan administrator faces the possibility of fines, which courts have imposed by applying a variety of factor analyses.¹⁵² Additionally, courts have discretionary authority to award "other relief"¹⁵³—relief that may provide participants and beneficiaries with restitution for non-disclosure violations.¹⁵⁴

1. Affirmative Defenses

Typically, a plaintiff asserting rights under a plan governed by ERISA must exhaust administrative remedies before bringing a cause of action in federal court.¹⁵⁵ Nevertheless, federal courts have noted that the doctrine of exhaustion should not be applied to claims asserted under section 1132(c)(1)(B).¹⁵⁶ As the Third Circuit has explained, federal court is the only appropriate forum in which to consider the statutory breach because there is "a strong interest in judicial

147. 29 U.S.C. § 1132(c)(1)(B) (2006).

148. *Id.*

149. 29 U.S.C. § 1132(c)(1) (2006).

150. 29 C.F.R. § 2575.502c-1 (2010).

151. *See infra* Part II.C.1.

152. *See infra* Part II.C.2.

153. *See infra* Part II.C.3.

154. *See infra* Part II.C.3-4.

155. *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 249 (3d Cir. 2002) (stating "[e]xcept in limited circumstances . . . a federal court will not entertain an ERISA claim unless the plaintiff has exhausted the remedies available under the plan" (quoting *Weldon v. Kraft, Inc.*, 896 F.2d 793, 800 (3d Cir.1990)); *Zipf v. Am. Tel. & Tel. Co.*, 799 F.2d 889, 892 (3d Cir. 1986). *See also Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980) (stating that "sound policy requires the application of the exhaustion doctrine in suits under [ERISA] . . . to help reduce the number of frivolous lawsuits . . . promote the consistent treatment of claims for benefits . . . provide a nonadversarial method of claims settlement; and to minimize the costs of claims settlement").

156. *Zipf*, 799 F.2d at 891-92; *Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 849-50 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987).

resolution of these claims, for the purpose of providing a consistent source of law to help plan fiduciaries and participants predict the legality of proposed actions.”¹⁵⁷ Additionally, the court reasoned, statutory interpretation is not simply the federal judiciary’s responsibility, “it is a matter within their peculiar expertise.”¹⁵⁸ For these reasons, the doctrine is considered an ineffective affirmative defense to claims under section 1132(c)(1)(B).¹⁵⁹

Plan administrators may also raise a statute of limitations defense; however such a claim may be problematic, as there is no limitations period provided under section 1132(c)(1)(B).¹⁶⁰ In the absence of a federal statute of limitations, courts look to state law for the most analogous limitations period in the forum that applies to the federal cause of action.¹⁶¹ Consequently, the circuits remain in disagreement as to how to characterize the claim, resulting in a plethora of state-based limitation periods within a circuit.¹⁶² For example, the Fourth and Eighth Circuits have characterized the provision as a “penalty or forfeiture” action,¹⁶³ the Fifth Circuit considers the action a “breach of fiduciary duty,”¹⁶⁴ while the Ninth Circuit views the action as a compensatory remedy.¹⁶⁵ As a consequence, litigating the issue can be costly, time consuming, and may promote forum-shopping.¹⁶⁶ At least one court has avoided this issue by holding that the applicable limitations period is the mandatory six-year period for “maintaining plan documents” under section 1027 of ERISA.¹⁶⁷

157. *Zipf*, 799 F.2d at 893.

158. *Id.* See also *Falcone v. Teamsters Health & Welfare Fund*, 489 F. Supp. 2d 490, 495 (E.D. Pa. 2007) (explaining that “the reasoning behind the *Zipf* exception to exhaustion is sound”).

159. See *Zipf*, 799 F.2d at 891.

160. 29 U.S.C. § 1132(c)(1)(B) (2006).

161. *White v. Sun Life Assurance Co. of Can.*, 488 F.3d 240, 245 (4th Cir. 2007) (citing *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985) (explaining that as section 1132 contains no statute of limitations, courts must “borrow the state law limitations period applicable to claims most closely corresponding to the federal cause of action”).

162. See *infra* notes 163-65.

163. *Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 337-39 (4th Cir. 2009) (applying three year statute of limitations for North Carolina); *Iverson v. Ingersoll-Rand Co.*, No. 03-3411, 2004 WL 3015433, at *76 (8th Cir. Dec. 30, 2004) (applying three year statute of limitations period for North Dakota).

164. *Delgado v. Plans Admin. Comm. of Citigroup Co.*, No. CIV.A.V-06-39, 2010 WL 786572, at *4 (S.D. Tex. Mar. 4, 2010) (applying four year statute of limitations) (citing *Hatteberg v. Red Adair Co., Employees' Profit Sharing Plan*, No. M 00-51109, 2003 WL 22510848, at *2 (5th Cir. Nov. 6, 2003) (explaining the Texas statute of limitations for breach of fiduciary duty)).

165. See *Stone v. Travelers Corp.*, 58 F.3d 434, 439 (9th Cir. 1995) (applying three year state statute of limitations for California). *But see* *Hakim v. Accenture U.S. Pension Plan*, 656 F. Supp. 2d 801, 822 (N.D. Ill. 2009) (applying three year limitations period for a penalty action, since “the purpose of [§1132(c)(1)] penalties is to induce the plan administrator to comply with the statutory mandate rather than to compensate the plan participant for any injury she suffered as a result of non-compliance”) (quoting *Mondry v. Am. Family Mut. Ins. Co.*, 557 F.3d 781, 806 (7th Cir. 2009)).

166. See generally *George Lee Flint, Jr., ERISA: Fumbling the Limitations Period*, 84 NEB. L. REV. 313 (2005). Flint argues that rather than look to the analogous state statutes of limitations, the federal statute of limitations under ERISA section 413 should apply to informational penalty claims. *Id.* at 354.

167. *Hollowell v. Cincinnati Ventilating Co.*, 711 F. Supp. 2d 751, 762 (E.D. Ky. 2010), (reasoning that because the document retention statute under section 1027 requires plan sponsors to maintain plan document records for six years starting on the date of filing the annual report, plan administrators are “responsible only for maintaining plan documents pertinent to the current plan for a period of six years . . . any claims regarding non-disclosure of plan documents prior to that date is not actionable”).

Plan administrators have also pled the defenses of excuse and mistake.¹⁶⁸ ERISA places stringent responsibilities upon the plan administrator as a fiduciary, mandating the supply of requested materials even though such documentation may have been provided to the requesting party previously in compliance with other notice requirements under the Act.¹⁶⁹ As a consequence, courts appear unwilling to consider mitigating factors outside of section 1132(c)(1)(B)'s statutory exception of "matters reasonably beyond the control of the administrator[.]"¹⁷⁰

2. Statutory Penalties

Plan administrators sued for non-compliance under section 1132(c)(1)(B) face penalties of up to \$110.00 a day.¹⁷¹ The authority to impose penalties, and subsequently, to determine fine amounts, is within the discretion of the court.¹⁷² As a result, courts have identified several factors relevant to a penalty inquiry; the most significant include bad faith on behalf of the administrator as well as prejudice suffered by the participant or beneficiary.¹⁷³

Although neither factor is a requisite for imposing penalties, some courts have held that egregious behavior such as ignoring participants' requests or terminating coverage before disclosing requested documents is an abuse of discretion and may merit the maximum penalty.¹⁷⁴ For example, in *Sziranyi v. Allan R. Dunn, M.D.*,¹⁷⁵ a Florida district court found the administrator's continued denial to provide requested documents justification for imposing maximum penalties.¹⁷⁶ The court explained its decision, stating that if the plan administrator "ever again hold[s] the position of administrator or trustee of an

168. See *Lowe v. SRA/IBM Macmillan Pension Plan*, No. 01 C 58, 2003 WL 1565841, at *3 (N.D. Ill. Mar. 25, 2003) (stating that "[d]efendants' lack of organization does not justify or excuse their failure to comply with statutory duties").

169. See 29 U.S.C. § 1021 (2006 & Supp. 2009) (mandating reporting and filing duties).

170. 29 U.S.C. § 1132(c)(1)(B) (2006). See *Lowe*, 2003 WL 1565841, at *3; *Phillips v. Netblue, Inc.*, No. C-05-4401 SC, 2006 WL 3647116, at *4 (N.D. Cal. Dec. 12, 2006) (stating that an administrator's actions "could not be rectified with an application of the doctrine of mitigation of damages, which focuses solely on the reasonableness of the plaintiff's actions").

171. 29 U.S.C. § 1132(c)(1)(B) (2006); 29 C.F.R. § 2575.502c-1 (2010).

172. 29 U.S.C. § 1132(c)(1)(B) (2006).

173. *Romero v. SmithKline Beecham*, 309 F.3d 113, 120 (3d Cir. 2002) (explaining that other circuits have studied relevant factors such as the administrator's intentional conduct or bad faith, length of delay, number of requests, and prejudice, concluding that "neither is a *sine qua non* to a valid claim under [§ 1132(c)(1)]") (citing *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 90 (2d Cir. 2001)). See also *Davis v. Featherstone*, 97 F.3d 734, 738-39 (4th Cir. 1996) (opining that as section 1132(c) has no compensatory damages provision, the requesting party need not prove monetary damages; rather, "frustration, trouble, and expense" incurred by the requesting party in having to go through the trouble and expense of hiring an attorney to obtain documents are relevant factors for a court to consider when determining whether to impose statutory penalties).

174. *Hoskins v. Metro. Life Ins. Co.*, 551 F. Supp. 2d 942, 946-47 (D. Ariz. 2008) (finding claim administrator's decision to terminate benefits prior to disclosing requested documents an abuse of discretion, and the court imposed the maximum penalty of \$110.00 per diem); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494-95 (11th Cir. 1993).

175. No. 07 CV 21762(SJ), 2009 WL 6613675 (S.D. Fla. Sept. 30, 2009).

176. *Id.* at *6.

employee benefits plan, it is crucial that he understand the significance of these designations."¹⁷⁷

In *Leister v. Dovetail, Inc.*,¹⁷⁸ the Seventh Circuit reversed a district court's denial to award statutory penalties.¹⁷⁹ The court found that the defendants' attempt to "leverage" their disclosure breach into a statute of limitations defense had prohibited the participant from attaining documents pertinent to asserting her plan rights.¹⁸⁰ As a result, the Seventh Circuit awarded the participant the maximum penalty, holding that "[g]iven the willful character of the defendants' [disclosure] breach," the award of zero penalties was an abuse of discretion.¹⁸¹

3. "Other Relief"

Beyond the authority to impose fines, section 1132(c)(1)(B) expressly grants courts the discretionary authority to award "such other relief as it deems proper."¹⁸² Establishing the types of relief available within a section is an issue the Supreme Court has deemed a "question of statutory construction."¹⁸³ Namely, the inquiry involves determining whether statutory limitations are present in a provision.¹⁸⁴

When addressing whether language in a provision operates as a statutory limitation, the Court has looked to the presence of terms that expressly restrict remedies.¹⁸⁵ Wholly absent from the statutory provision for remedies under section 1132(c)(1)(B) are terms limiting relief.¹⁸⁶ As a result, participants and beneficiaries may be provided with a cause of action that could restore them with benefits wrongly denied.¹⁸⁷ For example, in *Brown v. Aventis*,¹⁸⁸ the Eighth Circuit affirmed the district court's award of insurance coverage as "other relief."¹⁸⁹

Other decisions analogous to this interpretation can be found in the context of notice requirements pursuant to the Consolidated Omnibus Budget Reconciliation Act ("COBRA") and mandated under ERISA.¹⁹⁰ When applying

177. *Id.*

178. 546 F.3d 875 (7th Cir. 2008).

179. *Id.* at 884.

180. *Id.* at 883-84.

181. *Id.*

182. 29 U.S.C. § 1132(c)(1)(B) (2006).

183. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010).

184. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002).

185. *Id.* at 221.

186. 29 U.S.C. § 1132(c)(1)(B) (2006).

187. *See infra* Part III.

188. 341 F.3d 822 (8th Cir. 2003).

189. *See id.* at 826-29 (stating the purpose of the provision as restitutionary, aimed to "restor[e] plaintiffs to the position they were in before the defendants' actions," the court awarded relief ordering the plan to provide participant with a life insurance certificate worth \$39,000, as well as pay statutory penalties of \$11,550 and attorney fees for the plan administrator's failure to provide an SPD upon written request).

190. *See generally* 29 U.S.C. §§ 1001-3007 (2006 & Supp. 2009) (codifying COBRA as part of ERISA).

section 1132(c)(1) to enforce specific notice requirements of COBRA, these courts have awarded “other relief” in the form of unpaid medical expenses¹⁹¹ as well as attorney’s fees and costs.¹⁹²

Finally, the absence of statutory limitations within section 1132(c)(1)(B) may also protect against the enforcement of plan rights found to be improper.¹⁹³ For example, it has been argued that the discretionary authority to award “such other relief as it deems proper” should be utilized by the courts to deny subrogation.¹⁹⁴

4. Attorney’s Fees

In tandem with section 1132(c)(1)(B), participants, beneficiaries, and administrators should take note of section 1132(g)(1) of ERISA, which provides that a “court in its discretion may allow a reasonable attorney’s fee and cost of action to either party.”¹⁹⁵ A party who does not succeed in a claim for plan benefits may still be awarded attorney fees and costs.¹⁹⁶

In *Hardt v. Reliance Standard Life Ins. Co.*,¹⁹⁷ the Supreme Court held that “a fee claimant need not be a ‘prevailing party’ to be eligible for an attorney’s fees award under §1132(g)(1).”¹⁹⁸ Fiduciaries dealing with penalties for non-disclosure must also contend with the imposition of attorney fees and costs, as courts have not characterized awards for non-disclosure as a bar to awarding attorney fees.¹⁹⁹

III. ANALYSIS

Although courts utilize the discretionary authority provided by ERISA to

191. *Brown v. Neely Truck Line, Inc.*, 884 F. Supp. 1534, 1542 (M.D. Ala. 1995).

192. *Messer v. Bd. of Educ. of City of N.Y.*, No. 01-CV-6129, 2007 WL 136027, at *20 (E.D.N.Y. Jan. 16, 2007).

193. Reply Brief for Plaintiff Kroll, No. 10-2043, at p.12-13 (E.D. Wis. Sept. 1, 2010) (6th Cir. Jan. 20, 1993) (case rendered moot by settlement) (on file with author).

194. *Id.* The brief argued that:

[W]here the plan administrator persistently refuses to produce insurance contracts and administrative services contracts which would establish the ultimate recipient of the subrogated recoveries and which would disclose insurance on the risk – it would be appropriate for this court to enter an order denying reimbursement altogether.

Id.

195. 29 U.S.C. § 1132(g)(1) (2006).

196. *Davis v. Featherstone*, 97 F.3d 734, 738 (4th Cir. 1996) (remanding to district court to award plaintiff attorneys fees, despite plaintiff’s request for plan was “moot”).

197. 130 S. Ct. 2149 (2010).

198. *Id.* at 2151.

199. See *Huss v. IBM Med. & Dental Plan*, No. 07 C 7028, 2010 WL 2836743, at *4 (N.D. Ill. July 15, 2010) (awarding attorney fees in addition to imposing statutory penalties, the court explained that “the Seventh Circuit has on multiple occasions affirmed awards of both statutory penalties and attorneys’ fees”). See also *Mlsna v. Unitel Commc’ns, Inc.*, 91 F.3d 876, 883-84 (7th Cir. 1996); *Lowe v. McGraw-Hill Cos.*, 361 F.3d 335, 339 (7th Cir. 2004) (responding to administrator’s plea for lenity because his records were in “disarray,” the court affirmed the district court’s award of attorney’s fees in addition to statutory penalties, as the “‘dog ate my homework’ defense was no defense at all”) (citing *In re Riggs*, 240 F.3d 668, 670 (7th Cir. 2001)).

award civil penalties in the form of fines, the remedy of “other relief” within section 1132(c)(1)(B) remains grossly underutilized.²⁰⁰ Perhaps this latency is due to the section’s characterization by some courts as “punitive”—designed only to punish the plan administrator’s non-disclosure rather than to protect the participant or beneficiary.²⁰¹ Such a narrow view overlooks the potential legal and equitable relief available under the umbrella term “other relief” as provided by section 1132(c)(1)(B),²⁰² which may be awarded to the participant or beneficiary in addition to statutory penalties²⁰³ and attorney’s fees.²⁰⁴

Congress designed ERISA’s enforcement provisions to serve as the catalyst for addressing violations of the act.²⁰⁵ Legislative history denotes that ERISA was enacted to provide “adequate remedies” to participants and beneficiaries in order to effectively implement its provisions.²⁰⁶ This availability of adequate remedies is a principal mirrored within ERISA’s enforcement provisions, which equip participants and beneficiaries with “broad remedies” for non-compliance.²⁰⁷ Explicit within the legislative history is Congress’s intent to provide the “full range of legal and equitable remedies available” in order to ensure the “effective enforcement of fiduciary responsibilities . . . for recovery of benefits due to participants.”²⁰⁸

Viewed in this light, the provision “other relief” evinces the paternalistic purpose behind ERISA to empower individuals with legal and equitable remedies.²⁰⁹ Yet determining whether this remedial provision is by design powerful in its simplicity is a matter of parsing, resolved through statutory construction.²¹⁰

When faced with a question of statutory construction in the context of ERISA, the Supreme Court “assum[es] that the ordinary meaning of that language accurately expresses the legislative purpose.”²¹¹ As a result, the Court has been “especially ‘reluctant to tamper with [the] enforcement scheme’ embodied in the statute.”²¹²

An illustration of the Court’s strict adherence to this principal can be found

200. A term search for awards of “other relief” in cases brought under 29 U.S.C. § 1132(c)(1)(B) yielded one result: *Brown v. Aventis Pharms., Inc.*, 341 F.3d 822 (8th Cir. 2003).

201. See *Mondry v. Am. Family Mut. Ins. Co.*, 557 F.3d 781, 806 (7th Cir. 2009); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 (11th Cir. 1993).

202. 29 U.S.C. § 1132(c)(1)(B) (2006).

203. *Id.*

204. 29 U.S.C. § 1132(g)(1) (2006).

205. H.R. REP. 93-533, 16 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4655; S. REP. No. 93-127, 34 (1974) reprinted in 1974 U.S.C.C.A.N. 4838, 4871.

206. S. REP. 93-127, at 2.

207. H.R. REP. 93-533, at 16 (stating that “enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of the Act”).

208. *Id.*

209. *Id.* See *supra* notes 30-33 and accompanying text.

210. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010).

211. *Id.* (quoting *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009)).

212. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209-10 (2002) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)).

in *Great-West Life & Annuity Ins. Co. v. Knudson*.²¹³ In *Knudson*, the Court held that section 1132(a)(3)'s language granting "other appropriate equitable relief"²¹⁴ expressly limits remedies to those that are equitable.²¹⁵ The Court noted that in another provision, section 1132(a)(1)(B) of ERISA, Congress authorized the right of a participant or beneficiary to enforce plan rights, "without reference to whether the relief sought is legal or equitable."²¹⁶ This particular lack of distinction is dispositive because, as the Court notes, "Congress did not extend the same authorization to fiduciaries," as section 1132(a)(3) "by its terms, only allows for *equitable* relief."²¹⁷ "Equitable" relief, the Court explained, "must mean *something* less than *all* relief."²¹⁸ Therefore, the term "equitable" is a statutory limitation excluding legal remedies.²¹⁹ Otherwise, the Court added, such a reading would limit relief "*not at all*" and "render the modifier ['equitable'] superfluous."²²⁰

Following this decision, the Supreme Court examined the issue of whether the language of section 1132(g)(1) limits the availability of attorney fees.²²¹ In *Hardt v. Reliance Standard Life Ins. Co.*,²²² the Court once again relied upon a comparative analysis to determine whether an express limit was intended by Congress.²²³ Comparing section 1132(g)(2)²²⁴, which restricted fee awards to "prevailing parties,"²²⁵ to section 1132(g)(1)²²⁶, which expressly grants fees "to either party,"²²⁷ the Court stated:

The contrast between these two paragraphs makes clear that Congress knows how to impose express limits on the availability of attorney's fees in ERISA cases. Because Congress failed to include in § 1132(g)(1) an express "prevailing party" limit on the availability of attorney's fees [we] hold that a fee claimant need not be a "prevailing party" to be eligible for an attorney's fees award under § 1132(g)(1).²²⁸

Taken together, the Supreme Court decisions in *Knudson*²²⁹ and in *Hardt*²³⁰ stand for the proposition that the absence of terms that expressly limit remedies are to be viewed as purposeful omissions not to be read into a

213. 534 U.S. 204 (2002).

214. 29 U.S.C. § 1132(a)(3) (2006).

215. 534 U.S. at 221.

216. *Id.*

217. *Id.* (emphasis in original).

218. *Id.* at 209 (emphasis in original) (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993)).

219. *Id.* at 210.

220. *Id.* (emphasis in original) (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257-58 (1993)).

221. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010).

222. *Id.*

223. *Id.*

224. 29 U.S.C. § 1132(g)(2) (2006).

225. *Hardt*, 130 S. Ct. at 2156.

226. 29 U.S.C. § 1132(g)(2) (2006).

227. *Hardt*, 130 S. Ct. at 2156 (emphasis in original); 29 U.S.C. § 1132(g)(2) (2006).

228. *Hardt*, 130 S. Ct. at 2156.

229. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002).

230. *Hardt*, 130 S. Ct. at 2156.

statute.²³¹ Section 1132(c)(1)(B),²³² like section 1132(a)(3)²³³ in *Knudson*,²³⁴ authorizes the participant or beneficiary to enforce rights without reference to whether relief sought is legal or equitable.²³⁵ As the Court has stated, without a statutory limitation present, relief is read to be limited “not at all.”²³⁶ Indeed, the absence of any express limitation within the section language of “other relief”²³⁷ as compared to section 1132(a)(3)’s language of “other equitable relief”²³⁸ provides a contrast indicating that “Congress knows how to impose limits” upon available remedies.²³⁹ Therefore, because Congress failed to include express terms such as “equitable,” which the Supreme Court has defined as a limit upon relief,²⁴⁰ courts in their discretion may award legal or equitable relief to participants or beneficiaries under section 1132(c)(1)(B).

When viewed in the context of ERISA’s legislative history,²⁴¹ and in the absence of any qualifying terms such as “equitable,”²⁴² the section’s language “such other relief as it deems proper”²⁴³ should be read to include “the full range of legal and equitable remedies” available.²⁴⁴ This potential has been recognized in notice claims under COBRA,²⁴⁵ where courts have exercised their discretionary authority to award legal and equitable relief granted under section 1132(c)(1)(B).²⁴⁶ For example, in *Messer v. Board of Education of City of New York*,²⁴⁷ the court asserted that the remedies provided under section 1132(c)(1)(B) may include medical damages in addition to statutory penalties and attorney’s fees.²⁴⁸ Similarly, in *Brown v. Neely Truck Line, Inc.*,²⁴⁹ the court awarded the participant unpaid medical expenses,²⁵⁰ holding that the

231. *Id.*; *Great-West*, 534 U.S. at 221.

232. 29 U.S.C. § 1132(c)(1)(B) (2006) (providing that a non-compliant administrator is “personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such *other relief* as it deems proper”) (emphasis added).

233. 29 U.S.C. § 1132(a)(3) (2006) (providing that “a civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . to obtain *other appropriate equitable relief*”) (emphasis added).

234. *Great-West*, 534 U.S. at 221.

235. 29 U.S.C. § 1132(c)(1)(B) (2006).

236. *Great-West*, 534 U.S. at 210 (emphasis in original).

237. 29 U.S.C. § 1132(c)(1)(B) (2006).

238. 29 U.S.C. § 1132(a)(3) (2006).

239. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010).

240. *Great-West*, 534 U.S. at 209-10.

241. *See supra* notes 20-28 and accompanying text.

242. 29 U.S.C. § 1132(c)(1)(B) (2006).

243. *Id.*

244. H.R. REP. 93-533, 16 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4655.

245. *See generally* 29 U.S.C. §§ 1001-3007 (2006 & Supp. 2009) (codifying COBRA as part of ERISA).

246. *Messer v. Bd. of Educ. of City of N.Y.*, No. 01-CV-6129, 2007 WL 136027, at *20 (E.D.N.Y. Jan. 16, 2007); *Brown v. Neely Truck Line, Inc.*, 884 F. Supp. 1534, 1542 (M.D. Ala. 1995).

247. 2007 WL 136027 (E.D.N.Y. Jan. 16, 2007).

248. *Id.* at *20 (holding that plan administrators who fail to comply with ERISA notice requirements for COBRA are subject to “statutory damages of up to \$100 per day, attorney’s fees and costs, and medical damages” under section 1132(c)(1)).

249. 884 F. Supp. 1534 (M.D. Ala. 1995).

250. *Id.* at 1542 (imposing statutory penalties in addition to awarding other relief in the form of

objective of ERISA's remedies for non-disclosure, at minimum, is to restore participants to the position they would have been in had they been given "appropriate notice."²⁵¹

The only circuit court to recognize the remedial power of "other relief" has been the Eighth Circuit in *Brown v. Aventis Pharmaceuticals, Inc.*²⁵² Relying upon section 1132(c)(1)(B), the court awarded the participant "restitutionary" relief by affirming the district court's order that the plan administrator purchase and provide a life-insurance certificate worth \$35,000 for its failure to disclose an SPD upon request.²⁵³ In addition to granting an award of "other relief," the court employed the broad range of remedies available under section 1132(c)(1)(B), affirming the district court's award of statutory penalties and attorney's fees.²⁵⁴

The court in *Brown v. Aventis* considered the order to provide a life insurance certificate appropriate relief, which may be granted under ERISA.²⁵⁵ In making this finding, the Eighth Circuit made clear that it was "concerned not only with the technical differences between the types of awards, but also with restoring plaintiffs to the position they were in before the defendants' actions."²⁵⁶ For, the court stated, "if not for the improper actions of the defendant, the plaintiff would have continued to enjoy the benefits of the plan."²⁵⁷

The Eighth Circuit's decision in *Brown v. Aventis*²⁵⁸ reinforces the explicit purpose behind ERISA's disclosure provisions: to make available a broad range of remedies in order to enforce fiduciary duties under ERISA.²⁵⁹ This decision, in conjunction with the district courts' rulings in *Messer*²⁶⁰ and in *Brown*,²⁶¹ legitimizes the use of section 1132(c)(1)(B)²⁶² to award restitutionary relief to participants and beneficiaries who have been denied their rights to documents under section 1024(b)(4).²⁶³

satisfying the participant's "unpaid medical expenses minus the cost of the premiums . . . plus two percent, during the period she was not fully covered by a group health insurance plan").

251. *Id.* (explaining that "at the very least, the objective is to place the plaintiffs 'in the same position [they] would have been in had full continuation coverage been provided'" (citing *Gaskell v. Harvard Co-op Society*, 762 F. Supp. 1539, 1543 (D. Mass. 1991))).

252. 341 F.3d 822 (8th Cir. 2003).

253. *Id.* at 828.

254. *Id.* at 825, 828.

255. *Id.* at 828.

256. *Id.* (citing to *Howe v. Varsity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994)).

257. *Id.*

258. *Id.* at 827-28.

259. H.R. REP. 93-533, 16 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4655.

260. *Messer v. Bd. of Educ. of City of N. Y.*, No. 01-CV-6129, 2007 WL 136027, at *20 (E.D.N.Y. Jan. 16, 2007).

261. *Brown v. Neely Truck Line, Inc.*, 884 F. Supp. 1534, 1542 (M.D. Ala. 1995).

262. 29 U.S.C. § 1132(c)(1)(B) (2006).

263. 29 U.S.C. § 1024(b)(4) (2006).

IV. CONCLUSION

The cause of action for non-disclosure under section 1132(c)(1)(B) of ERISA can be a powerful weapon as it has been armed with multiple remedies capable of achieving several goals at once. Commonly used as a deterrent against non-disclosure through the imposition of statutory penalties of up to \$110.00 per day, the section is also equipped to grant equitable and legal relief. The Eighth Circuit's decision in *Brown v. Aventis* supports the application of section 1132(c)(1)(B) to award restitution, a practice already recognized in COBRA disclosure cases. These cases promote the judicial availability of a broad range of legal and equitable remedies, a practice deemed integral to ERISA's enforcement provisions. A broader judicial interpretation that recognizes the unlimited remedies available under section 1132(c)(1)(B)'s umbrella term of "other relief" should be embraced across the circuits to enable effective enforcement of protections granted under ERISA.