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Ninth Circuit Decision Creates Uncertainty Regarding the Burden of Proof in Benefit Claim Cases

JOSEPH C. FAUCHER

Citing the 1977 animated TV special *It's Your First Kiss, Charlie Brown*, the Ninth Circuit Court of Appeals recently issued a decision that might have a significant impact on who has the burden of proof in ERISA benefit claims. In *Estate of Barton v. ADT Security Services Pension Plan*, No. 13-56379 (9th Cir. April 21, 2016), the Court held on the facts of the case, that when the information regarding eligibility for benefits is in the exclusive control of the defendants, defendants have the burden of proving that participants and beneficiaries are not entitled to benefits. The Court reached this conclusion (1) despite longstanding authority holding that plan participants — not administrators — bear the burden of proof in benefit claim cases, and (2) over a strongly worded dissent criticizing the majority opinion for running afoul of the U.S. Supreme Court's instruction that courts should not make "ad hoc" exceptions to the normal burden of proof in benefit claim cases.

It is too soon to tell what impact *Estate of Barton* will have. Plaintiffs' attorneys are sure to argue that their cases fit within *Barton's* rationale, and attempt to shift the burden of proof from where it has traditionally rested (on the shoulders of benefit claimants to show that they are entitled to benefits) and onto plan administrators, to prove that plaintiffs are not entitled to plan benefits. Defense attorneys will certainly argue that if *Barton* remains good law, its holding should be limited to a narrow range of cases with unusual facts. One thing is certain: as long as *Barton* remains the law, there is likely to be an additional layer of litigation in benefit claim cases pending in courts within the Ninth Circuit about who, exactly, bears the burden of proof. To understand how we arrived at this uncertain juncture, it helps to understand *Barton's* facts.

Bruce Barton worked for the American District Telegraph Company (ADT), and/or for some of its affiliated companies, from 1967 to 1986, when he resigned in his early 40s. (The dissenting opinion — discussed below — was more specific than the majority opinion in describing the evidence about the companies Barton worked for and when.) When he reached age 65 in 2010, he applied for a benefit under ADT's pension plan. Tyco acquired ADT in 1997 and had access to ADT's pension records. During the period of time that he was employed by ADT, he was apparently also employed by a moving company for a short period of time in 1968, and served in the Marine Reserves from 1965–1971.

One of the main issues in the case was whether Barton had enough years of "Continuous Service" to be entitled to a vested benefit under the plan. A pension benefit administrator (presumably, a

third party vendor for the plan) concluded that the documents Barton submitted failed to establish that Barton had a vested benefit under the plan, and advised Barton he could file a claim with the Employee Benefits Committee. Barton subsequently submitted a formal benefits claim and presented evidence indicating that he was employed by American District Telegraph Co. at various times from 1968 to 1986, including Social Security documentation reflecting FICA withholding from 1968–1980.

The plan committee reviewed that documentation and other documents that tended to substantiate Barton's employment, but concluded that there were "... no Plan records indicating your eligibility for 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." The committee also stated that the records Barton presented did not cover each year of claimed employment and that some documents lacked identifying information. The Committee concluded that Barton's documentation "did not override or contradict the Plan records" and denied Barton's claim. The Committee invited Barton to present additional information. Barton responded, and requested certain Plan-related documents, including a Summary Plan Description and an example of a pension benefit statement. The committee responded, but apparently did not provide a full Summary Plan Description or any exemplars of a pension benefit statement as Barton had requested.

Barton appealed and provided additional FICA documents, reflecting his employment as an hourly employee from 1967–1977 and as a salaried employee from 1978–1986. The committee denied Barton's appeal, noting that his documentation "was insufficient to override the Plan records. The Committee also noted that the FICA records Barton presented reflected employment by companies other than ADT, which according to the Committee "*could indicate* that [he] did not have a continuous term of employment. (The Ninth Circuit interpreted this to mean that because Barton could not document that he worked 1000 hours or more for each of the years he was employed by ADT and its affiliates, or that his employers participated in the Plans, he could not prove he was entitled to a pension.)

Barton sued the Plan and the Committee, and the District Court ruled in favor of the defendants, concluding that (1) the Committee's decision was subject to an "abuse of discretion" standard of review, and (2) the Committee did not abuse its discretion in denying pension benefits to Barton.

The Ninth Circuit held that the District Court "... faithfully applied our precedent in reviewing the Committee's denial of benefits for abuse of discretion" but went on to create a new burden of proof applicable in cases where "the defending entity solely controls the information that determines entitlement, leaving the claimant with no meaningful way to meet his burden of proof." Concluding that this was just such a case, the Court held that the District Court "... incorrectly placed the burden of proof on Barton for matters within defendants' control." The Court stated that placing the burden of proof on Barton was inappropriate because "... defendants are in a far better position to ascertain whether an entity was a participating employer" but had claimed in the district court that they had "no records indicating whether the entities [identified as Barton's employers in the Social Security records] were Participating Subsidiaries in the Plan at any time."

The majority's most significant concern appears to have been the Committee's inability to explain

why they could not identify which of the ADT-affiliated companies participated in the plans, or how Barton could have obtained that information. The defendants, meanwhile, contended that they had no evidence of Barton's service in their records to demonstrate that he worked for a participating employer. The Court questioned how Barton could have proven whether the Board of Directors ever authorized Barton's employers to participate in the plan. Consequently, the Court concluded that if Barton has made a "prima facie case" that he is entitled to pension benefits, "... it is properly defendants' burden to clarify what entities are covered under the Plans in the first instance. Employers, 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." (The Court did not specifically state what it takes for a benefit claimant to present a "prima facie case" that he is entitled to a benefit, leaving that determination up to the district court, but instructed that "objective documentation of prior employment" such as Social Security records, W-2 forms, income tax returns and pay stubs would be appropriate evidence to consider.)

The Court was also concerned about requiring Barton to prove that he had worked the requisite 1,000 hours per year for each of the years in question, since "... nothing indicates that Barton was warned at the start of his career that he needed to retain a log of his hours to obtain pension benefits a generation or two later." The Court reasoned that it has "... previously shifted the burden of proving the number of hours an employee works where the calculation of damages is uncertain due to defendants' failure to keep statutorily required records." The Court concluded that to hold otherwise "would essentially reward Lucy for pulling the football away from Charlie Brown ..."

The majority opinion leaves room for future litigants to argue that the ruling does not apply in all benefit claim contexts. Specifically, the Court held that it makes sense to require benefit claimants to bear the burden of proving entitlement to benefits "... where the claimant has better — or at least equal — access to the evidence needed to prove entitlement." The Court cited the example of a disability plan benefits claim, in which "... the burden lies most sensibly with the claimant, who can provide test results, physician reports, and other evidence about her condition." But the Court also held that "... in other contexts, the defending entity solely controls the information that determines entitlement, leaving the claimant with no meaningful way to meet his burden of proof. This is one of those cases." The decision, unfortunately, draws no bright lines between cases where claimants should bear the burden of proof, and cases where the burden should rest with administrators.

Circuit Judge Ikuta launched a particularly sharp dissent with "Today the majority goes off the rails." The dissent noted that when the plan document at issue confers discretion upon a plan administrator to determine entitlement to benefits, the administrator's decision is reviewed to determine whether the administrator abused that discretion. Even if the plan does not confer discretion, and the court reviews the administrator's decision "*de novo*," the burden of proving eligibility for, and entitlement to, benefits rests with the claimant.

The dissent also pointed to a fact about which the majority opinion was silent — the plan administrator had a system to maintain and update records regarding employees' pension eligibility, and those records contained no evidence that Barton was a participant in the plan or that certain of the ADT-affiliated companies for whom he worked participated in the plan.

The dissent accused the majority of "invent[ing] a burden-of-proof standard (along with a burden-shifting approach) that is in direct conflict with our abuse of discretion standard" and contrary to the

Supreme Court's directive that courts should not make "ad hoc" exceptions to the abuse of discretion standard. The dissent was also concerned about the majority opinion's requirement that plan administrators must "reveal which companies did in fact participate in their plans," since "the plan administrator here elected to fulfill its fiduciary duty by maintaining and updating a record of past and present employees who are entitled to pensions, rather than by listing covered companies."

The dissent saved its harshest criticisms for the conclusion:

> In short, the majority's ad hoc rule designed to help Barton in this case is a disaster. The majority's requirement that the district court allocate a burden of proof when it is supposed to be reviewing a plan administrator's decision for abuse of discretion makes no sense and is contrary to our case law. And the rule itself, which verges on the incomprehensible, will defy district courts' efforts to apply it. Given that this rule was apparently developed to help a single claimant, one can only hope that this strange rule will be confined to the limited facts of this case.

The dissent's concern is a valid one. While there are strong arguments that Barton's holding should at least be limited to its facts — and perhaps only to this one case — there is nothing that prevents plaintiffs' attorneys from arguing that its burden-shifting approach should be applied in a broader range of cases. Only time will tell how far the decision might extend.

In the meantime, and unless the decision is modified on a rehearing, *Barton* is the law in the Ninth Circuit. The employers that are perhaps the most likely to have to navigate the decision are large companies with a long history of mergers and acquisitions that sponsor defined benefit plans. The corporate structure and history of those companies, and the plans they sponsor, can be complex. *Barton* shows how important it is that the employees responsible for administering the plan be prepared to explain its history — including its recordkeeping processes — and describe the classes of employees who are and who are not entitled to a benefit.

More generally, administrators should take care during the administrative claim process to explain exactly why benefits are being denied. Administrators should ask themselves whether a reasonable person could understand the reasons that underlie the decision. If the benefit decision requires the administrator to conduct historical research (as ADT may need to do to get to the bottom of whether Barton's employers participated in the plan), the administrative record should reflect the steps that the administrator went through to answer the question, and explain its conclusions.

We will continue to monitor *Barton*, and the cases that arise in its wake.

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