

Seeking Benefits Owed Under an ERISA Top-Hat Plan: A Primer for Litigators

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to protect the interests of participants and their beneficiaries in employee benefit plans by setting forth certain disclosure and reporting requirements, establishing fiduciary standards of care, and providing for appropriate remedies and sanctions exclusively through the federal courts.¹ However, not all benefit plans are treated equally under ERISA. Some are regulated less closely than others.² One such plan is a “top-hat plan,” an unfunded employee benefit plan established principally to provide deferred compensation for “a select group of management or highly compensated employees.”³

Recognizing that participants in top-hat plans possess sufficient influence to negotiate the design and operation of their deferred compensation plan, Congress excluded top-hat plans from ERISA’s participation and vesting requirements under 29 U.S.C.



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§§1051-1061, funding provisions under 29 U.S.C. §§1081-1086, and fiduciary responsibility provisions under 29 U.S.C. §§1101-1114.⁴ Yet, top-hat plans *are* subject to ERISA’s civil enforcement provisions. If an employer reneges on its obligation to provide benefits under a top-hat plan, a participant or beneficiary may commence an action “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan” under 29 U.S.C. §1132(a)(1)(B).⁵ This article explores fundamental issues litigators must address in any litigation over top-hat benefits.

Determining Statute of Limitations. ERISA does not identify a statute of limitations period for actions brought under 29 U.S.C. §1132(a)(1)(B). Courts in New York have looked to the statute

of limitations period for breach of contract, reasoning that a breach claim is the most analogous to a claim for benefits under 29 U.S.C. §1132(a)(1)(B), and have held that a six-year statute of limitations period applies.⁶

In New York, a claim for benefits due under an ERISA plan “accrues upon a clear repudiation by the plan that is known, or should be known,

Recognizing that participants in top-hat plans possess sufficient influence to negotiate the design and operation of their deferred compensation plan, Congress excluded top-hat plans from ERISA’s participation and vesting requirements, funding provisions, and fiduciary responsibility provisions. Yet, top-hat plans are subject to ERISA’s civil enforcement provisions.

to the plaintiff regardless of whether the plaintiff has filed a formal application for benefits” or when a claim for benefits has been made and rejected.⁷ In finding that no formal application for benefits is necessary to trigger

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the statute of limitations, the Second Circuit reasoned that a contrary rule would allow claims to be delayed for years, thereby diminishing access to witnesses and evidence.⁸ Consequently, the same statute of limitations may apply for a claim seeking payment of present benefits due and owing and a claim seeking declaratory judgment on the right to obtain future benefits.⁹

The limitations period may be subject to equitable tolling, which is described as an “extraordinary measure” to prevent unfairness to a plaintiff who was not at fault for commencing an action after the applicable statute of limitations period.¹⁰ For example, the Second Circuit found that equitable tolling applied where the administrator failed to comply with ERISA’s disclosure and reporting requirements by neglecting to inform the participant of his right to commence an action under ERISA for the denial of benefits.¹¹ The limitations period may also be tolled under the doctrine of fraudulent concealment if the defendant concealed the existence of plaintiff’s cause of action.¹² This doctrine is a misnomer because the focus is not on “the intention underlying defendants’ conduct, but whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action.”¹³ The doctrine of fraudulent concealment, for example, may be used to toll the statute of limitations where a participant receives misleading information about his rights under the plan.¹⁴

Prerequisites to Commencing an ERISA Action. Prior to commencing an action in federal court, the plaintiff must first exhaust all administrative

appeals unless the plaintiff can make a “clear and positive showing” that pursuing all administrative appeals would be futile.¹⁵ In the absence of showing that plaintiff exhausted all administrative appeals (or that such efforts would be futile), the court will dismiss plaintiff’s action, without prejudice, until such administrative appeals have been exhausted.¹⁶

Commencing an ERISA Action in Federal Court for Top-Hat Benefits. In commencing an action for recovery of benefits under 29 U.S.C. §1132(a)(1)(B),

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the plaintiff should identify the capacity in which each party in the lawsuit is being sued. On the plaintiff’s side, for example, courts have noted that only participants and beneficiaries have standing to recover benefits, enforce rights, or clarify rights to future benefits under the terms of an employee benefit plan.¹⁷ On the defendant’s side, courts have also noted that “only the plan and the administrators and trustees of the plan in their capacity as such may be held liable.”¹⁸ Therefore, in the event the administrator is also the plaintiff’s employer, the plaintiff should take due care to identify that the §1132(a)(1)(B) claim is asserted against the employer in its capacity as the administrator of the top-hat plan.

At the outset, we note that there is currently a circuit split as to whether courts should review a denial of benefits under a top-hat plan *de novo* or under an arbitrary and capricious standard.¹⁹ The Second Circuit has not yet reached this question, although at least one court has noted that in practice, courts within the Second Circuit have applied the arbitrary and capricious standard.²⁰

Determining the Scope of Benefits. Recognizing that a top-hat plan is exempt from certain substantive provisions of ERISA, courts have construed the enforcement of benefits under a top-hat plan in accordance with unilateral contract principles developed under ERISA when determining plaintiff’s rights.²¹ One important consideration when assessing those rights is whether the top-hat plan became irrevocable. A top-hat plan becomes irrevocable once a plaintiff becomes fully vested pursuant to the plan’s vesting schedule or, in the absence of a vesting provision, when a plaintiff continues in employment for the requisite number of years²² or upon retirement.²³

If the plaintiff is deemed to have a vested interest in the top-hat plan, then any change to the terms of the plan (including entitlement to benefits) that occurred after the date of vesting will have no impact on the plaintiff’s rights unless the plan explicitly reserved the right to amend the plan *after* plaintiff’s performance.²⁴ In analyzing whether a plan permits a retroactive amendment, the court will construe the terms of the plan as a whole, precluding any interpretation that would render any specific term illusory or meaningless.²⁵

In the event the terms of the plan do not permit retroactive amendments, then the court will enforce the terms of the plan as it existed as of the time the plaintiff vested.

Conclusion. Although top-hat plans are exempt from many substantive provisions of ERISA, they remain subject to ERISA's enforcement provisions. Thus, any party to a top-hat plan has ready and able access to federal court to enforce the plan's terms, and those terms will be interpreted using unilateral contract principles developed under ERISA.

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1. See generally 29 U.S.C. §1001.
2. *Bigda v. Fischbach*, 898 F. Supp. 1004, 1015 (S.D.N.Y. 1995) ("ERISA regulates different types of plans to different degrees. Pension plans are regulated closely and are subject to controls over both their substance and the procedures they employ, while employee benefit plans are exempted from most controls over their content and thus are regulated less closely.").
3. *Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 286-87 (2d Cir. 2000) (citing to 29 U.S.C. §§1051(2), 1081(a)(3), 1101(a)(1)).
4. *Wegmann v. Young Adult Inst.*, No. 15-CV-03815(KPF), 2016 WL 827780, at *3 (S.D.N.Y. March 2, 2016).
5. Under ERISA, a "participant" is defined as "any employee or former employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan," 29 U.S.C. §1002(7), and a "beneficiary" is defined as "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," 29 U.S.C. §1002(8).
6. *Miles v. New York State Teamsters Conference Pension and Ret. Fund Employee Pension Ben. Plan*, 698 F.2d 593, 598 (2d Cir. 1983); *Wegmann*, 2016 WL 827780, at *3.
7. *Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 49 (2d Cir. 1999); *Bilello v. JPMorgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 592-93 (S.D.N.Y. 2009).
8. *Carey*, 201 F.3d at 48.
9. *Id.* at 48-49.
10. *Veltri v. Bldg. Serv. 32B-J Pension Fund*,

393 F.3d 318, 322-23 (2d Cir. 2004).

11. *Id.* at 323-24.
12. *Id.* at 324.
13. *Id.* at 323.
14. See, e.g., *Harris v. Finch, Pruyn & Co.*, No. 1:05-CV-951, 2008 WL 2064972, *5 (N.D.N.Y. May 13, 2008) (denying summary judgment because triable issue of fact exists as to whether defendant provided misleading advice about plaintiffs' rights under the plan even though plaintiffs had access to plan documents).
15. *Wegmann*, 2016 WL 827780, at *4.
16. *Id.* at *5 (dismissing plaintiff's ERISA action for failing to exhaust all administrative appeals or establishing that such pursuit would have been futile); see also *Eastman Kodak v. STWB*, 452 F.3d 215, 219 (2d Cir. 2006) (identifying lower court's dismissal of plaintiff's complaint, without prejudice, until administrative remedies had been exhausted).
17. See *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. California*, 463 U.S. 1, 27 (U.S. 1983) ("ERISA carefully enumerates the parties entitled to seek relief under §502 ..."); *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 14 (2d Cir. 1991) ("29 U.S.C. §1132(a)[] specifies those who may bring actions under ERISA and the types of actions each may pursue" and "in the absence of some indication of legislative intent to grant additional parties standing to sue, the list in §502 should be viewed as exclusive.").
18. *Leonelli v. Pennwalt*, 887 F.2d 1195, 1199 (2d Cir. 1989).
19. Compare *Goldstein v. Johnson & Johnson*, 251 F.3d 433, 443 (3d Cir. 2001) (applying a de novo review because top-hat plans are akin to unilateral contracts where neither party's interpretation should be given greater weight over the other), with *Comrie v. IPSCO*, 636 F.3d 839, 842 (7th Cir. 2011) (applying arbitrary and capricious standard to denial of benefits under top-hat plan).
20. *Am. Int'l Grp. Amended & Restated Exec. Severance Plan v. Guterman*, 496 Fed. App'x 149, 151 (2d Cir. 2012) (summary order) (recognizing circuit split and stating that the court need not reach the question on the appropriate standard of review based on the facts of that case); *Levy v. Young Adult Inst.*, No. 13-CV-2861 (JPO)(SN), 2016 WL 6092705, at *8 (S.D.N.Y. Oct. 18, 2016) (accord); *Kelly v. Ret. Plan Comm.*, No. 3:11-CV-01890, 2016 WL 2963417, at *10 n.13 (D. Conn. May 20, 2016) (noting that in practice courts reviewed rights under top-hat plans using an arbitrary and capricious standard).
21. See *Eastman Kodak v. Bayer*, 369 F. Supp. 2d 473, 478 (S.D.N.Y. 2005) (*Eastman Kodak I*), vacated and remanded on other grounds by

Eastman Kodak v. STWB, 452 F.3d 215 (2d Cir. 2006) (*Eastman Kodak II*); *Aiena v. Olsen*, 69 F. Supp. 2d 521, 532-33 (S.D.N.Y. 1999); *Black v. Bresee's Oneonta Dep't Store Sec. Plan*, 919 F. Supp. 597, 602 (N.D.N.Y. 1996).

22. *Black*, 919 F. Supp. at 602 n.5 (recognizing plaintiff became fully vested per the plan's terms when he completed five years of service, contributed to the plan for 10 years, and reached age 65).

23. *Aiena*, 69 F. Supp. 2d at 532-33 (recognizing that a top-hat plan is a unilateral contract offer accepted upon retirement, at which time it becomes irrevocable); *Pauling-Jones v. Head Start of Rockland, Inc.*, 95 A.D.3d 1284, 1284 (N.Y. App. Div. 2012).

24. *Eastman Kodak I*, 369 F. Supp. 2d at 479 ("[I]t is settled that a 'top-hat' benefit plan may be retroactively amended after participants' rights have vested only if the 'explicit right to terminate or amend after participants' performance is reserved.") (quoting *Kemmerer v. ICI Americas*, 70 F.3d 281, 287-88); *Black*, 919 F. Supp. at 603 (concluding that amendment to plan would have no effect on those participants who fully performed or vested under the plan).

25. *Id.* ("[T]he specific language of each provision should be interpreted in the context of the whole [and] [] the provision of an ERISA plan should be construed as to render none nugatory and avoid illusory promises.") (internal citations omitted).