

ERISA Disability
Benefits LitigationBy Horace W. Green
and C. Mark Humbert

Nolan v. Heald College may significantly reduce the advantage to counsel representing plan administrators of moving for summary judgment in abuse of discretion cases.

The Diminishing Role of Rule 56

Historically, ERISA disability benefit claim litigation has included a number of procedural devices that helped to effectuate Congress' expressed intent for economical and efficient resolution of ERISA cases. See U.S. Code

Congressional and Administrative News: Legislative History, 1974 U.S. Code Cong. & Admin. News 4639, 5000 ("The committee believes that all workers and plan beneficiaries should have the opportunity to resolve any controversy over their retirement benefits under qualified plans in an *inexpensive and expeditious manner.*") (Emphasis added.) These procedural aspects included the "abuse of discretion" standard of review, the near absence of discovery, and the ability to resolve litigation by motions for summary judgment under Rule 56, as opposed to bench or jury trials. See *Liston v. Unum*, 330 F.3d 19, 24 (1st Cir. 2003); *Barhan v. Ry-Ron Inc.*, 121 F.3d 198, 201-02 (5th Cir. 1997); *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 617-19 (6th Cir. 1998) (concurring opinion by Justice Gilman, joined by Justice Ryan); *Bendixen v. Standard Ins. Co.*, 185 F.3d 939 (9th Cir. 1999).

Over the last few years, however, this litigation has moved in the direction of the more traditional litigation model due to

a number of factors. For example, several state insurance departments have disapproved policy forms containing discretionary language. Also, the nature and extent of discovery is changing in the wake of *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), with the presumption now being that some discovery is allowable in "abuse of discretion" cases into the nature and extent of the "structural" conflict of interest and whether it affected the claims decision at issue. See *Denmark v. Liberty Life Assurance Co.*, 566 F.3d 1, 10 (1st Cir. 2009); *Strope v. UnumProvident Corp.*, 2009 WL 656300, 2009 U.S. Dist. LEXIS 19383 (W.D.N.Y. Mar. 11, 2009); *Kalp v. Life Ins. Co. of N. Am.*, 2009 WL 261189, 2009 U.S. Dist. LEXIS 7957 (W.D. Pa. Feb. 4, 2009); *Copus v. Life Ins. Co. of N. Am.*, 2008 WL 2794807, 2008 U.S. Dist. LEXIS 55099 (N.D. Tex. July 18, 2008); *Johnson v. Connecticut General Life Ins. Co.*, 2009 WL 928590, 2009 U.S. App. LEXIS 7398 (6th Cir. 2009); *Creasey v. CIGNA Life Ins. Co. of N.Y.*, 255 F.R.D. 481/255 FRD 483 (S.D.



■ Horace W. Green and C. Mark Humbert are partners in the San Francisco firm of Green & Humbert. Mr. Green and Mr. Humbert represent insurers, employers and administrators in life, health and disability insurance, ERISA, employment, and business litigation in California state and federal courts and the United States Supreme Court. Both authors are members of DRI's Life, Health and Disability Committee.

Ind. 2008/2009); *Fischer v. Life Ins. Co. of N. Am.*, 2009 WL 734705, 2009 U.S. Dist. LEXIS 22487 (S.D. Ind. Mar. 19, 2009); *Ehler v. Wheaton Franciscan Medical Plan*, 2009 WL 722065, 2009 U.S. Dist. LEXIS 22292 (N.D. Iowa Mar.18, 2009); *Santos v. Quebecor World LTD Plan*, 254 F.R.D. 643 (E.D. Cal. 2009); *Kohut v. Hartford Life Ins. Co.*, 2008 WL 5246163, 2008 U.S. Dist. LEXIS 103924 (D. Colo. Dec. 16, 2008); and *Golden v. Sun Life Financial, Inc.*, 2008 WL 2782736, 2008 U.S. Dist. LEXIS 53798 (M.D. Ala. July 15, 2008).

The third cost-saving aspect of ERISA disability benefits litigation, *i.e.*, the appropriate vehicle by which to bring the ultimate issue before the trial court for decision, is also changing. For years, courts across the circuits held that the most efficient way to conduct bench trials of benefit claims was via either motions or cross-motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. These courts treated Rule 56 motions as merely “the vehicle for bringing the question before the court, in which the usual rules of summary judgment do not apply.” *Orndorf v. Paul Revere*, 404 F.3d 510, 517 (1st Cir. 2005); *Bard v. Boston Shipping Ass’n*, 471 F. 3d 229, 235 (1st Cir. 2006); *Phelps v. C.T. Enters.*, 394 F.3d 213, 218 (4th Cir. 2005) (noting in dicta the problems that arise from “importing the summary judgment standard whole cloth into the ERISA context”); *Patton v. MFS/Sun Life Financial Dist., Inc.*, 480 F.3d 478, 484 (7th Cir. 2007); *Curran v. Kemper Nat. Servs., Inc.*, 133 Fed. Appx. 740, 2005 WL 894840, *7 (11th Cir. 2005) (unpub. *per curiam* opinion); *Bendixen v. Standard*, *supra*, 185 F.3d 939, 942.

What this meant was that the court was not required to give the benefit of every inference to the non-moving party. Instead, the court was allowed to weigh the evidence, make its own determinations as to which party’s evidence was more credible, and ultimately decide whether the administrator had abused its discretion (in discretionary review cases), or whether the claimant had successfully carried her burden of demonstrating entitlement to benefits or additional benefits (in *de novo* cases). See *Bartholomew v. Unum*, 588 F. Supp. 2d 1262, 1265–56 (W.D. Wash. 2008) (discussing the primary differences

between deciding motions under Rule 52 and Rule 56).

More recently, however, courts are increasingly holding that Rule 52, rather than Rule 56, provides the appropriate process for resolving ERISA disability claim cases. *Muller v. First Unum Life Ins.*, 341 F.3d 119, 124 (2d Cir. 2003); *Hess v. Hartford Life Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001); *Hoskins v. Bayer*, 564 F. Supp. 2d 1097, 1103 (N.D. Cal. 2009); *Mobley v. Continental Casualty Co.*, 405 F. Supp. 2d 42, 47 (D.D.C. 2005); *Neumann v. Prudential Ins. Co. of Am.*, 367 F. Supp. 2d 969, 979 (E.D. Va. 2005).

One recent case that highlights the reason for moving for judgment under Rule 52, rather than Rule 56, in abuse of discretion cases is *Nolan v. Heald College*, 551 F.3d. 1148 (9th Cir. 2009). In *Nolan*, the plaintiff successfully argued that the court needed to consider evidence extraneous to the administrative record in order to fully evaluate the effect of the plan administrator’s structural conflict of interest on the claims determination. The parties moved for summary judgment. As part of the determination of the summary judgment motions, the trial court considered the extraneous evidence, and decided that it was worthy of little weight in terms of the ultimate benefits issue. The trial court went on to grant summary judgment to the plan administrator.

However, on appeal, the Ninth Circuit held that the trial court erred in weighing the extraneous evidence and making its own determination regarding the weight of such evidence. The court acknowledged prior case law holding that in an ERISA benefits case brought before the trial court via motion for summary judgment the usual tests of summary judgment do not apply. However, the court went on to hold that the evidence submitted from outside the administrative record should, in accordance with traditional summary judgment rules, be given every inference for the benefit of the non-moving party. *Id.* at 1154–55. The Ninth Circuit remanded the case for a new determination. (The trial judge has since moved to the California Court of Appeal—the matter has been reassigned, and both parties have requested leave to file Rule 52 motions.)

If in fact, as *Nolan* holds, extra-record evidence must be construed in favor of

the non-moving party, this significantly reduces the advantage to counsel representing plan administrators of moving for summary judgment in abuse of discretion cases. To the contrary, this holding increases the likelihood that the trial court will decline to resolve a given case via summary judgment, opting instead to find triable issues of fact, thereby forcing the parties to proceed to a bench trial with the attendant expense.

Increasingly, it appears that moving for judgment under Rule 52, instead of moving for summary judgment under Rule 56, is a more efficient, economical means of resolving these cases. To that end, a number of courts have addressed this issue by choosing to interpret summary judgment motions as Rule 52 motions for judgment, thus granting themselves the ability to make credibility determinations and to resolve triable issues of fact. *Wiener v. Health Net of Connecticut, Inc.*, 311 Fed. Appx. 438, 2009 WL 427337, 2009 U.S. App. LEXIS 3542 (2d Cir. 2009) (unpub.); *Moody v. Liberty Life Assurance Co.*, 595 F. Supp. 2d 1090 (N.D. Cal. 2009); *Troutman v. Unum Life Ins. Co. of Am.*, 2008 WL 275708, 2008 U.S. Dist. LEXIS 53756 (N.D. Cal. July 14, 2008); *Juszynski v. Life Ins. Co. of N. Am.*, 2008 WL 877977, 2008 U.S. Dist. LEXIS 24928 (N.D. Ill. Mar. 28, 2008). *But see MacNally v. Life Ins. Co. of N. Am.*, 2009 WL 1458275, 2009 U.S. Dist. LEXIS 44423 (D. Minn. May 26, 2009); *Myers v. Life Ins. Co. of N. Am.*, 2009 WL 742718, 2009 U.S. Dist. LEXIS 22631 (N.D. Ill. Mar. 19, 2009); *Zurndorfer v. Unum Life Ins. Co. of Am.*, 543 F. Supp. 2d 242, 255 (S.D.N.Y. 2008).

There are some significant differences between the two procedures that counsel should bear in mind. First, unlike Rule 56, which requires only a determination of the existence or lack of triable issues of fact, Rule 52 requires the court to document its factual findings and legal conclusions, thus providing a clear record for review in the appropriate court of appeal. (Although the parties submit proposed findings, some appellate courts have frowned upon the trial court’s wholesale adoption of the prevailing party’s findings of fact and conclusions of law, preferring that judges prepare and publish their own findings. See *Silver v. Executive Car Leasing Service*, 466 F.3d 727 (9th Cir. 2006).) Second, the standard of



review in the court of appeal is different—grants of summary judgment are reviewed de novo, whereas a judgment under Rule 52 is reviewed for clear error.

Obviously, counsel's first step must be a review of the circuit rules, local rules, and the trial judge's own procedural rules, with respect to summary judgment motions. In the absence of any special jurisdictional procedures, the key question is then whether counsel's circuit applies the traditional Rule 56 burden of proof and evidentiary procedures (in particular, the requirement that the trial court give the benefit of every inference to the non-moving party), or whether the circuit instead merely views summary judgment motions as "the conduit for bringing the legal question before the Court."

If counsel's jurisdiction follows the former procedure, then the efficiency and economy of moving for summary judgment are seriously diminished. Of course, if there are *no* issues of material fact, summary judgment remains a viable option; otherwise, the main benefit of moving for summary judgment would be to get an advance look at the plaintiff's arguments and the court's inclinations prior to trial. Balancing this against the added cost of preparing, submitting, and arguing briefs that will be largely duplicative of one another is a strategy call that should be made in consultation with the client; it is no longer the

"no brainer" that it was under the former law and procedure.

A corollary issue under either procedure is the use of magistrate judges to conduct summary judgment hearings and other "pre-trial" procedures in ERISA disability benefit cases. Under the Magistrates Act, 28 U.S.C. §636, magistrates may only conduct *bench trials* with the consent of the parties. 28 U.S.C. §636(c). However, consent is *not* required for an Article III judge to refer a matter to a magistrate for pre-trial proceedings, such as evidentiary hearings and/or law and motion hearings, as long as the magistrate does not make a ruling that constitutes final disposition of the case. Magistrates are, however, authorized to prepare proposed findings and recommendations, to which the parties are given an opportunity to respond, prior to final disposition by the trial judge.

One notable exception to this rule is the Northern District of California. General Order No. 42 precludes referral to a magistrate of civil pretrial matters that are dispositive of a claim or defense and require a de novo review by a district judge, unless (a) the parties consent, or (b) the matter is limited to an evidentiary hearing that can be conducted by the magistrate without being repeated before a district judge. "Dispositive" motions include motions for summary judgment, motions for judgment on the pleadings, and motions to dismiss

for failure to state a claim. Counsel should review the local rules for similar orders.

Undoubtedly, this process works well in many different types of cases. In the ERISA context, however, it is less clear that a party whose summary judgment hearing was conducted by a magistrate, or who had the evidentiary hearing conducted and Rule 52 findings prepared by a magistrate, has truly received the benefit of the constitutional right to "trial" before an Article III judge. Unlike other types of cases, the summary judgment hearing (under Rule 56) or the evidentiary hearing (Under Rule 52) *is* the trial in an ERISA disability benefits case.

No matter how careful or searching the review, the non-prevailing party will always have some degree of doubt that the trial judge conducted her own searching review and determination of the evidence, as opposed to either merely accepting the magistrate's recommendations or, conversely, merely rejecting the magistrate's findings out of hand. While the trial court certainly could conduct its own follow up hearing, such a procedure constitutes neither economical nor efficient dispute resolution. For these reasons, counsel should consider carefully not only the question of whether to consent to a magistrate for all purposes, but also how to respond to the court in situations where the court refers the matter to a magistrate for conduct of pre-trial proceedings. 