



CYPEN & CYPEN NEWSLETTER for August 29, 2019

Copyright, 1996-2019, all rights reserved
Stephen H. Cypen, Esq., Founding Editor
Robert D. Klausner, Esq., Senior Editor

Never Forget September 11, 2001
and
Always Remember May 2, 2011

1. COURT RULES EXHAUSTION OF ADMINISTRATIVE REMEDIES ONLY MANDATORY IF PLAN SO PROVIDES:

When the long-term disability plan participant in this case sued to obtain denied benefits, the insurer argued her claim should be dismissed because she failed to exhaust the plan's administrative remedies before filing suit. The participant contended that the terms of the governing plan documents did not require exhaustion of the plan's claims process.

Despite the insurer's citations to multiple plan provisions to support its argument that the plan's language mandated exhaustion, the court disagreed. Citing Ninth Circuit precedent, the court explained that if a plan document could reasonably be read to make the administrative appeals process optional, exhaustion of remedies was not mandatory. The

court examined a provision requiring written denial notices to include a statement that employees had the right to appeal and the right to bring a civil action if an appeal was denied. But it held that “a right to appeal” is not the same as “an obligation to appeal.” In examining a second provision, stating that the right to appeal would be waived if an appeal was not made within a specified time frame, the court concluded that such language would not alert a reasonable participant that this would also prevent pursuit of a civil action. Finally, the insurer argued that the participant’s denial letter, which addressed the right to appeal, the appeal procedures, and the right to bring a civil action if the appeal was denied, was incorporated by reference into the plan and required exhaustion of remedies. However, the court determined the letter was not part of the plan and, even if it were, the language was ambiguous. Explaining that it was obligated to construe the language against the drafter, the court held that the plan did not explicitly require participants to exhaust administrative remedies before filing suit. EBIA Comment: Requiring a claimant to exhaust a plan’s administrative remedies before filing suit increases the likelihood that the dispute will be resolved without litigation. Claims procedure descriptions in plan related documents should use mandatory language (e.g., the words “shall” or “must,” instead of “may”) to make it clear that exhausting administrative remedies is not optional. In particular, special care should be taken with the model statement of ERISA rights, which some plan sponsors incorporate verbatim from the DOL’s SPD regulations and which provides that a plan participant “may file suit in Federal court” when a benefit claim is denied. Plan sponsors and administrators should consider adding a warning in plan documents and communications to employees about the need to exhaust the plan’s claims process before filing suit. For more information, see EBIA’s [ERISA Compliance](#) manual at Sections XXXVI.B (“Exhaustion of Plan Administrative Claims Procedures”) and XXXIV.C (Group Health Claims: Effective Dates and Consequences of Noncompliance). See also EBIA’s [Self-Insured Health Plans](#) manual at Section XXVI.J.1 (“Exhaustion of Plan Administrative Claims Procedures”). *Greiff v. Life Ins. Co. of N. Am.*, 2019 WL 2912757 (D. Ariz. 2019), EBIA Staff, EBIA, August 1, 2019.

2. CLIENT CONVERSATIONS: 10 THINGS YOU SHOULD KNOW ABOUT BEAR MARKETS:

Olympic athletes are at the peak of their careers, but even they need rest days to stay healthy. Sometimes financial markets need to reset from record-setting performance, too. Here’s what you need to know about bear, or down, markets.

- Watch for 20%: Market cycles are measured from peak to trough, so a stock index officially reaches bear territory when the closing price drops at least 20% from its most recent high. A new bull market begins when the closing price gains 20% from

its low.

- Stocks lose 36% on average in a bear market.¹ By contrast, stocks gain more than 108% on average during a bull market.
- Bear markets are normal. There have been 25 bear markets in the S&P 500 Index² in the last 90 years. However, there have also been 26 bull markets--and stocks have risen over the long term.
- Bear markets tend to be short-lived. The average length of a bear market is 299 days, or about 10 months. That's significantly shorter than the average length of a bull market, which is 989 days or 2.7 years.
- Every 3.6 years: That's the long-term average frequency between bear markets. The longest the market has gone without a bear market was from December 1987 until the dot-com crash in March 2000.
- Bear markets have been less frequent since World War II. Between 1928 and 1945 there were 12 bear markets, or one about every 1.4 years. In the 73 years since the war ended, there have been 13--one about every 5.6 years.
- Nearly half (48%) of the S&P 500 Index's strongest days occurred during a bear market. Another 28% of the market's best days took place in the first two months of a bull market--before it was clear a bull market had begun.³ In other words, the best way to weather a downturn could be to stay invested since it's difficult to time the market's recovery.
- A bear market doesn't necessarily indicate an economic recession. There have been 25 bear markets since 1929, but only 14 recessions during that time.⁴ Bear markets often go hand in hand with a slowing economy, but a declining market doesn't necessarily mean a recession is looming.
- Assuming a 50-year investment horizon, you can expect to live through about 14 bear markets, give or take. Although it can be difficult to watch your portfolio dip with the market, it's important to keep in mind that downturns have always been a temporary part of the process.
- Bear markets can be painful, but overall, markets are positive a majority of the time. Of the last 90 years of market history, bear markets have comprised only about 20 of those years. Put another way, stocks have been on the rise 77% of the time.

Ned Davis Research, Hartford Funds, 2019.

3. TRANSFORMING BENEFITS ADMINISTRATION:

Public employees increasingly want to know retirement administrators are applying best practices to protect retirement plans and they desire easy access to information about retirement options, as well as coaching to help make investment and retirement decisions.

These demands create new challenges around an essential but often underappreciated component of pension reform: benefits administration. This guide offers a formal framework for transformation of pension plan administration through modernizing workflow processes, investing wisely in new technology, and serving the needs of internal and external stakeholders. With a framework in place, administrators can contribute to the long-term viability of retirement programs and better meet the financial needs of public retirees. To learn more, view the handbook [here](#). *Governing*, 2019.

4. EX-ORLANDO POLICE OFFICER SUES, SAYS SHE WAS FIRED FOR CLAIMING DISABILITY AFTER ON-DUTY INJURY:

A former Orlando Police Department officer is suing the agency, claiming she was fired after seeking workers compensation benefits for an injury she suffered on duty in 2017. The suit, filed in Orange County circuit court last month, claims OPD fired Kathleen Tomas in June 2018 “after she was injured on the job, sought medical attention and filed a valid claim for Workers’ Compensation Benefits.” The firing, Tomas’ suit argues, violated laws that protect employees from termination while they are receiving such benefits. In an email, an Orlando Police Department spokesman declined to comment on the lawsuit, and added that the Equal Employment Opportunity Commission “issued a letter finding no cause as to any violation by the city or the Orlando Police Department.” Tomas, who retired from the Police Department in 2013 after a 28-year tenure and joined the agency’s Active Reserve Program that year, in an interview Tuesday said her firing was “totally undeserved.” At the time of her injury, Tomas was working as a contracted employee at Orlando International Airport. She had signed a one-year contract in November 2014 that was renewed annually for three additional years, the suit states. In the position Tomas was paid \$33 per hour to perform regular patrol duties at the airport, working no more than 39 hours per week, her contract shows. Tomas filed a discrimination complaint with the Equal Employment Opportunities Commission in July 2018, which later granted her the right to sue OPD for discrimination. Based on its own investigation, the EEOC told Tomas in April that it was unable to determine if OPD violated any statutes. The lawsuit claims OPD violated Florida law and the Florida Civil Rights Act when it fired Tomas, eliminating light duty accommodations it initially granted her through the American Disabilities Act. Tomas is requesting compensation in excess of \$15,000 for damages she says she suffered as a result of the firing, such as loss of earnings and mental anguish. At 65 years old, Tomas said she was just three years shy of retiring with full social security benefits. “So basically that’s three years of work that I didn’t get the chance to do to get that income,” she said. “... I’m not looking for a million bucks, but I feel that they owe me.” Tomas’ attorney Matthew Gunter said the Police Department indicated in its response to Tomas’ EEOC charge that light duty positions are reserved only for full-time employees who need such accommodations, and therefore not available for anyone under contract.

But the position Tomas volunteered for--a 6 p.m. to 4 a.m. shift--was one she said no other full-time employee on light-duty restrictions had wanted. "They were wanting to give full time employees preference over a contract employee, which again, our position is that's unlawful under the ADA," Gunter said. Tomas, who spent half of her 28 years at OPD as an Internal Affairs investigator, said she gave "more than 100 percent" in every role and consistently received high praise in yearly evaluations. She considered herself "one of the best," who had a strong work ethic, even when she was restricted to light duty. "I shouldn't have been treated like this," she said. "... Sometimes I think about it and I get teary eyed because... they didn't just take my job from me, they took my family, because the men and women that I work with, in police work, that's your family." The Fraternal Order of Police lodge that represents OPD officers does not provide grievance or arbitration services for members of the Reserve Unit, according to its president, Shawn Dunlap. Tess Sheets, Orlando *Sentinel*, July 17, 2019.

5. TAKING STOCK: PENSION LIABILITIES:

Pension liabilities are estimated to have risen 7.5% in the second quarter, as the corresponding discount rate proxy fell 32 basis points to 3.51% on June 30 from 3.83% on March 31, according to the FTSE Pension Liability Index. As a result, pension plans with a total-return allocation may have experienced a drop of over 2.0% in funded status for the quarter. However, plans with shorter durations, such as frozen plans, and those hedging interest-rate risk will likely see markedly less declines in funded status, staying flat or even showing a modest uptick in funded status as the increase in assets outpaced liabilities. To this end, we believe it is vital to [understand](#) your individual plan's liability profile and invest accordingly. The change in pension liabilities comes on the back of a strong quarter for equities and bonds. The S&P 500 Index posted gains of 4.3% for the three months ended June 30 and the Barclays Long Credit Index was up 7.0% in the same period, as the Federal Reserve maintained its accommodative stance and remains poised to cut rates in July. Interest rates fell around 30 basis points to 40 basis points across the Treasury yield curve, with parts of the curve remaining [inverted](#) during the quarter. To better understand the needs of your pension plan, please reach out to your NEPC consultant to discuss liability analyses and interest-rate hedging strategies. Lynda Dennen Costello, ASA, EA Senior Research Consultant, Asset Allocation, NEPC, July 17, 2019.

6. RELIEF ALLOWED FOR MISSED ROLLOVER DEADLINE:

Tax Court finds both that a bookkeeping error caused delay and that the petitioner was entitled to a hardship waiver. In *Burack v. Commissioner* (TC Memo 2019-83), the Tax Court ruled on whether a taxpayer rolled over an individual retirement account distribution into an IRA within 60 days despite the distribution not being recorded into the receiving IRA until after the 60-day period had expired. Internal Revenue Code Section 408(d)(3)

provides that a recipient of an IRA distribution can exclude from gross income any amount distributed from an IRA if the full amount is subsequently rolled over into an IRA not later than the 60th day after the recipient received the distribution.

Check Redeposited After 60 Days

In *Burack*, on June 25, 2014, petitioner received a \$524,980 distribution from her IRA, which was held with Capital Guardian/Pershing. She used this distribution to purchase her current home while waiting for the sale of her former home to close. She intended to roll over the distribution back into her IRA within 60 days of receipt. On Aug. 21, 2014, the sale of her former home closed, and on the same day, she received a cashier's check to redeposit back into the IRA. Petitioner testified that Capital Guardian assured her that she could redeposit the distribution into her IRA by overnighting the check to Capital Guardian. On Aug. 21, 2014, petitioner overnighted the check to Capital Guardian, and the check arrived at Capital Guardian on Friday, Aug. 22, which was 58 days after petitioner received the IRA distribution. On Aug. 26, 2014, 62 days after petitioner received the IRA distribution, the check was deposited into petitioner's IRA. What happened between Capital Guardian's receipt of the check and the deposit at Pershing wasn't entirely clear. Petitioner never communicated with Pershing and appeared to have communicated with Capital Guardian only about the account. The Commissioner subsequently issued a notice of deficiency, in which he determined that petitioner didn't repay the IRA distribution until more than 60 days after she received it. Accordingly, the Commissioner determined that petitioner was required to include \$524,980 of the IRA distribution in her 2014 gross income. Petitioner timely filed a petition with the Tax Court. The issue before the Tax Court was whether petitioner rolled over the distribution into an IRA within 60 days and therefore avoided taxation on the initial distribution. Despite the IRA distribution not being redeposited until 62 days after receipt, petitioner argued that: (1) the rollover wasn't recorded as timely because of a bookkeeping error by Capital Guardian; and (2) she's entitled to a hardship waiver under IRC Section 408(d)(3)(I).

Bookkeeping Error

The taxpayer relied on *Wood v. Comm'r* (93 T.C. 114 (1989)) for her first argument. In *Wood*, a taxpayer transferred stock to the custodian before the expiration of the 60-day rollover period with the instruction that the shares be deposited into his IRA. However, the custodian's records showed that the shares were deposited into a nonqualified account and rolled over into the IRA after the expiration of the 60-day rollover period. In deciding whether the transaction qualified for rollover treatment, the Tax Court looked at the substance of the transaction and the relationship between the taxpayer and the custodian. The court determined that when book entries conflict with the facts, the facts control and that the transaction at issue was entitled to rollover treatment because the custodian had

accepted the stock for deposit to the IRA rollover account and held the stock subject to the IRA trust instrument. The custodian's failure to record the transfer within 60 days was a bookkeeping error. The respondent counter argued that *Wood* was inapplicable because Pershing was the custodian, and, therefore, petitioner should have deposited the check directly with Pershing. However, the court pointed out that petitioner's IRA was held with both Capital Guardian and Pershing in a single account bearing the same account number and that the IRA statement listed both Capital Guardian and Pershing. The court stated that the substance of the relationship between petitioner and Capital Guardian showed that Capital Guardian was an appropriate institution for petitioner to send the check to. It was undisputed that Capital Guardian received the check 58 days after petitioner received the distribution, but the transaction wasn't recorded by Capital Guardian until 62 days after petitioner received the distribution. Because of this, the court found *Wood* to be applicable and that the late recording was due to a bookkeeping error. Although the court found that the existence of the bookkeeping error was enough to conclude that the distribution qualified for rollover treatment, as an alternative ground they also considered whether petitioner was eligible for a hardship waiver.

Hardship Waiver

Revenue Procedure 2003-16 provides guidance about hardship waivers and states that an automatic hardship waiver is granted only: (1) if the funds are deposited into an eligible retirement plan within one year from the beginning of the 60-day rollover period; and (2) had the financial institution deposited the funds as instructed, it would have been a valid rollover. Therefore, the court concluded that the petitioner was also eligible for the automatic hardship waiver. Michelle L. Ward, WealthManagement.com, Jul 16, 2019.

7. STUDENT-LOAN MATCHING HITS SNAGS:

Plan sponsors have shown a lot of interest in a recent ruling that allowed one company to make 401(k) matching contributions while employees repay their student loans, but two attorneys following the progress of the idea are doubtful that federal guidance allowing others to implement the idea will be issued any time soon. In August 2018, the Internal Revenue Service issued [a private letter ruling](#) allowing an unnamed company to amend its plan so workers who voluntarily agree to put at least 2 percent of pay toward a student loan would be eligible to receive an employer contribution equal to 5 percent of pay to their 401(k) plan. That letter addressed the issue facing 44 million graduates today: the \$1.5 trillion they carry in student loan debt. Organizations also are seeing a rapid rise in popularity for plans that ease the loan burdens of recent grads. Since that time, the IRS has met with trade groups to talk about possible federal guidance, said David Levine, a principal at Groom Law Group who was speaking at the Plan Sponsor Council of America's national conference in April. "The outcome of the meeting was not as optimistic

as one might hope for,” Levine said. Jeffrey Holdvogt, a partner with law firm McDermott Will & Emery, said that there are other ways to help employees with their student debt, but this private letter ruling was a strategic way to shoehorn the benefit into a tax-friendly vehicle. He suspected that other plan sponsors have been asking for similar private letter rulings, but the IRS has turned them down. He and Levine agreed that there may be unintended consequences in broadening the scope of the initial private letter ruling or offering separate rulings to other plans sponsors. First, the two agreed that the idea may get trumped by pending legislation. The Retirement Security & Savings Act, sponsored by Sens. Rob Portman, R-Ohio, and Ben Cardin, D-Maryland, would allow employers to make matching contributions with respect to student loan repayments. In addition, the Retirement Parity for Student Loans Act, sponsored by Sen. Ron Wyden, D-Oregon, would allow 401(k) and 403(b) plan sponsors to make matching contributions on qualified student loan repayments. Employees must submit to the employer proof of the student loan and the loan repayment. Next, Levine posed several questions about how this ruling, if expanded, could set a precedent for other repayment programs. It could get as crazy as someone buying a yacht and asking for compensation. The general issue of needing to pay off a large liability while saving for retirement fits the same scenario as the student debt question. “Where do you draw the line?” Levine asked. Levine cautioned that plan sponsors interested in adopting similar strategies in their 401(k) plans need to rely on the guidance exactly as it was outlined in the original private letter. Companies that simply follow the “spirit” of the private letter may wind up having issues with the IRS. Patty Kujawa, *Workforce*, July 22, 2019.

8. DID YOU KNOW BENJAMIN FRANKLIN SAID THIS?:

Many a man thinks he is buying pleasure, when he is really selling himself to it.

9. PONDERISMS:

Why do we ship by truck and send cargo by ship?

10. INSPIRATIONAL QUOTES:

What great thing would you attempt if you knew you could not fail? - Robert H. Schuller

11. TODAY IN HISTORY:

On this day in 2005, Hurricane Katrina makes 2nd and 3rd landfall as a category 3 hurricane, devastating much of the U.S. Gulf Coast from Louisiana to Florida Panhandle. Kills more than 1,836, causes over \$115 billion in damage.

12. REMEMBER, YOU CAN NEVER OUTLIVE YOUR DEFINED RETIREMENT BENEFIT.

