GROOM LAW GROUP

Publications

COBRA Notice Litigation Update: Recent Decision Signals Some Skepticism of Plaintiffs' Claims

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PUBLISHED
09/21/2023

SOURCE
Groom Publication

SERVICES
Employers & Sponsors
- Health & Welfare Programs

Health Services Litigation
- Health Services Litigation

Since 2016, plaintiffs' counsel have filed over 70 putative class actions, mostly against large plan sponsors, alleging deficiencies in election notice requirements as mandated under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). These complaints have been filed on behalf of putative classes that can contain thousands of potential members, on whose behalf plaintiffs' counsel seek statutory penalties that, while discretionary, could be as high as $110 per violation per day. Plan sponsor defendants have had mixed results on motions to dismiss these claims, although late last month in *Bryant v. Walgreen Co.* the district court was skeptical of the plaintiffs' claims and dismissed nearly all of them.

As of the date of this writing, only a handful of these cases are currently being litigated. A majority of the other filed lawsuits have settled, with a few having been resolved on a motion to dismiss. And lately the pace of new lawsuit filings appears to have slowed. Yet despite the sheer volume of COBRA notice cases, courts have issued relatively little guidance on the merits of the plaintiffs' claims—no case has proceeded to trial or gone so far as a decision on summary judgment, and only a few courts have issued decisions on contested motions for class certification.

Based on the decisions and proceedings to date, below are some trends indicating that, although COBRA notice litigation may present a risk for plan sponsors, there are also multiple potential merits and class-based defenses available to defendants.

1. Defendants Have Had Mixed Results in Seeking Dismissal of COBRA Notice Claims

Across the dozens of COBRA notice cases that have been filed, plaintiffs typically allege multiple technical issues in the notices that, according to plaintiffs, amount to violations of COBRA and its implementing regulations. Multiple defendants have filed motions to dismiss these allegations, raising a variety of arguments that the allegations fail to state a claim under Federal Rule of Civil Procedure 12(b)(6), and/or that the named plaintiffs lack standing under Article III of the Constitution.

The response by the courts to these motions has been a mixed bag. Some district courts have accepted as true the allegations of the complaint, albeit conclusory allegations, and determined that at the pleading stage the plaintiffs have adequately pled that COBRA notices violated the statute and regulations. Many of these courts have also accepted plaintiffs' allegations that they were injured (for instance, by losing insurance coverage and incurring medical expenses after declining COBRA continuation coverage), and that plaintiffs' alleged injuries were caused by the COBRA notice violations.

However, in the most recent motion to dismiss decision from a COBRA notice case, the court ended up dismissing nearly all of the plaintiff's claims. In *Bryant v. Walgreen Co.*, the plaintiffs alleged that they received COBRA notices that violated relevant regulations because the notice "failed to (1) provide the address to which payments should be sent [which was addressed in a second notice that the plaintiffs alleged was confusing and insufficient]; (2) identify the plan administrator; (3) explain how to enroll in COBRA and include a physical election form; (4) provide the correct election date; and (5) provide a notice written in a manner calculated to be understood by the average plan participant." No. 23 CV 1294, 2023 WL 5580415 (N.D. Ill. Aug. 29, 2023).

The court granted the defendant's motion to dismiss in multiple respects. For one, the court concluded that the COBRA regulations do not require notices to "identify the plan administrator," echoing decisions by other courts as discussed below. The court also rejected several of plaintiffs' other claims on the grounds that they "parrot[ed]" text from the regulations without any additional factual detail. The only allegation that the court permitted to proceed was the plaintiffs' claim that the COBRA notice failed to state the correct date by which the plaintiffs needed to elect COBRA continuation coverage.

As in *Bryant v. Walgreen Co.*, several other district courts have looked skeptically at an allegation raised in multiple complaints, that a COBRA notice violated COBRA regulations by failing to include the name of the "Plan Administrator." In *Carter v. Southwest Airlines Co.*, for example, the district court disagreed with plaintiffs that the COBRA regulations require a notice to name the "Plan Administrator," given that the regulations do not use that term and instead require a notice to include "the name, address and telephone number of the party responsible under the plan for the administration of continuation coverage benefits." No. 8:20-CV-1381, 2020 WL 7334504 (M.D. Fla. Dec. 14, 2020). Because the notice at issue undisputedly named the COBRA administrator, the court concluded that the notice complied with COBRA regulations as a matter of law and dismissed the claim. Notably, in this case the U.S. Department of Labor had filed an *amicus* brief explaining that the Department disagreed with plaintiffs' interpretation that COBRA regulations require identification of the "Plan Administrator."

Since *Carter*, other courts in addition to *Bryant v. Walgreen Co.* have agreed with the analysis and holding from that case. The court in *Thompson v. Ryder System, Inc.* cited *Carter* favorably and noted that it agreed with the analysis of *Carter* and the Department of Labor's *amicus* brief filed in that case, although the court ultimately denied the defendant's motion to dismiss on other grounds. No. 22-20552, 2022 WL 18776108 (S.D. Fla. Oct. 11, 2022). Similarly, in *Lites v. Amazon.com Services, LLC* (in which Groom represented the defendant), the court dismissed a claim that the COBRA notice at issue violated COBRA regulations by not naming the "Plan Administrator." No. 1:22-CV-20587, 2023 WL 2602297 (S.D. Fla. Jan. 20, 2023), *R&R adopted sub nom. Lites v. Amazon.com Servs., Inc.*, No. 22-20587, 2023 WL 2601815 (S.D. Fla. Mar. 22, 2023).

Given the potential upside of knocking out a complaint early or trimming a plaintiff's claims, defendants in COBRA notice cases have frequently filed motions to dismiss. So far multiple courts have pushed back against plaintiffs' claim that COBRA notices must name the "Plan Administrator," given that the claim has no basis in COBRA regulations. Also *Bryant v. Walgreen Co.* provides a good framework for courts to dismiss claims that are conclusory and/or merely restate the language of COBRA regulations without factual detail.

2. Class Certification

While certain of plaintiffs' claims may have survived the pleading hurdle, it remains to be seen whether they can clear the next one—class certification. This is a critical juncture in these lawsuits, because an individual statutory penalty claim generally would not have the financial exposure of that of a class certified to include possibly hundreds or thousands of such claims. For these reasons, class certification determinations can be as significant, if not more so, than decisions on the merits of plaintiffs' allegations.

Very few COBRA notice cases have proceeded to the point of receiving a decision on a contested motion for class certification, meaning there is currently little guidance regarding the viability of plaintiffs' class claims.

In *Vazquez v. Marriott International, Inc.*, an earlier decision, a court granted a class certification motion. No. 8:17-CV-116, 2017 WL 6947455 (M.D. Fla. Aug. 7, 2018). The defendant had opposed class certification by arguing that the court would need to make an individualized determination whether each putative class member understood the COBRA notice at issue. The court disagreed,

noting that an objective standard applies to whether a COBRA notice is "written in a manner calculated to be understood by the average plan participant," as COBRA regulations require.

In *Bryant v. Wal-Mart Stores, Inc.*, a magistrate judge recommended denying class certification because each of the three named plaintiffs lacked Article III standing. No. 16-24818, 2020 WL 4333452 (S.D. Fla. July 15, 2020). Specifically, the court concluded that none of the plaintiffs suffered an Article III injury: one did not actually have a lapse in coverage because she received insurance coverage from her domestic partner; another testified that he had no intention to elect COBRA coverage, regardless of any information provided in the notice; and the third testified that she knew she could not afford COBRA coverage. The court also rejected the plaintiffs' argument that they suffered an "informational" injury from merely the alleged technical violations in the COBRA notice, even if taken as true.

As evidenced by these two decisions, there remain a number of potential defenses to class certification that courts have yet to address. For instance, in class certification oppositions (filed in COBRA notice cases that resolved before the plaintiffs' class certification motions were decided), Groom has asserted (among other things) that (i) named plaintiffs lacked Article III standing for failing to establish that their alleged injuries were "fairly traceable" to the language of a COBRA notice; (ii) putative classes were not ascertainable because applicable statutes of limitations would need to be determined on a state-by-state basis for a nationwide class; and (iii) classes were not ascertainable, and individualized issues predominated over common issues, because courts would need to determine for each class member whether they suffered any injury (such as a break in coverage), and whether any injury was actually caused by the allegedly defective COBRA notice.

3. Settlement

A vast majority of the COBRA notice cases have been resolved through settlements—both on an individual and class basis. To date, courts have granted final approval to 17 class settlements in these cases. These settlements have involved classes with numbers of members ranging from about 900 to 92,000. The settlements are typically structured as "claims paid" settlements, meaning defendants pay an agreed-upon amount into a settlement fund and, after withdrawing amounts for class counsels' fees and certain costs, the remaining amount is distributed equally among class members. The settlement fund amounts have varied widely, ranging from $65,000 to $1.6 million.

GROOM INSIGHT: While the rate of new cases challenging COBRA notices is potentially slowing, there are still several open cases that plan sponsors should monitor as the cases progress. There are many issues—regarding the viability of class claims, as well as the merits of plaintiffs' allegations—that have yet to be resolved by district courts. And although the potential risk from such a case can be significant, a plan sponsor named as a defendant in a COBRA notice case has a variety of promising defenses and arguments that can be raised at multiple stages in a lawsuit, including the motion to dismiss, class certification, and merits stages.