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ERISA: U.S. Supreme Court Confirms That Plan's Contractual Limitations Periods – And Accrual Dates – Are Enforceable

In a recent unanimous decision, the United States Supreme Court held in *Heimeshoff v. Hartford Life & Accident Insurance Co.*, No. 12-729 (Dec. 16, 2013), that a plan covered by the Employee Retirement Income Security Act of 1974 (ERISA) can contractually shorten the limitations period for bringing a claim to recover benefits due under the terms of that plan, as long as the period is not “unreasonably short” and a controlling statute does not demand otherwise. The Court held in *Heimeshoff* that since the parties may contract for a shorter limitations period, they can also contract around the default rule for accrual of the cause of action: “[t]he duration of a limitations period can be measured only by reference to its start date. Each is therefore an integral part of the limitations provision, and there is no basis for categorically preventing parties from agreeing on one aspect but not the other.”

Evidence Preservation: Hearings on Proposed Changes to Fed. R. Civ. P. 37(e)

In November, the Advisory Committee on the Civil Rules held a public hearing on proposed amendments to the Federal Rules of Civil Procedure, including Rule 37(e), which currently provides a safe harbor against sanctions for those who fail to provide ESI lost “as a result of the routine, good-faith operation of an electronic information system.” The proposed rule is a complete re-write, adding provisions to address a party's failure to preserve discoverable information (not simply ESI) that should have been preserved in the anticipation or conduct of litigation, as well as providing five factors courts should consider to assess a party's conduct in failing to preserve discoverable information. If information is lost, the rewritten Rule would permit an order for additional discovery, curative measures, or payment of reasonable expenses caused by the failure to preserve. Rule 37(b)(2)(A) sanctions and adverse-inference jury instructions would be prohibited unless (1) the failure to preserve was willful or in bad faith and caused substantial prejudice or (2) the loss of information irreparably deprived a party of any meaningful opportunity to present or defend against claims in the litigation. Discussions at the hearings related to proposed Rule 37(e) considered, among other items, whether the amendment would lessen or increase preservation costs.

Information about the proposed rule is available here: <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>, and all written comments regarding the proposed changes to the Federal Rules are due by February 15, 2014. Further hearings on the proposed amendments will be held in January and February 2014. The proposed amendments would become effective on December 1, 2015. If approved, consideration should be given to re-drafting document retention policies and litigation holds to ensure they cover all forms of discoverable information, not just ESI.

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