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OLIVAR AND BURTON CASES JOINED IN COLORADO SUPREME COURT

BRENDA OLIVAR V. PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN

CAROLINE BURTON V. COLORADO ACCESS

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OPINION OF THE SUPREME COURT OF COLORADO (FEBRUARY 12, 2018)

THE SUPREME COURT OF THE
STATE OF COLORADO

CAROLINE BURTON,

Petitioner,

v.

COLORADO ACCESS, A/K/A COLORADO ACCESS LONG TERM DISABILITY PLAN.,

Respondent.

Supreme Court Case No: 15SC801
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 14CA728

BRENDA OLIVAR,

Petitioner,

v.

PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN,

Respondent.

Supreme Court Case No: 16SC163
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 14CA1734

Before: Justice HOOD

Caroline Burton and Brenda Olivar submitted claims for long-term disability benefits to insurance companies under employee-benefits plans set up by their employers ("the Plans"). Both Burton's and Olivar's employers created the Plans by purchasing long-term disability policies from insurance companies. The insurance companies denied Burton's and Olivar's claims. Burton and Olivar sued the Plans under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B) (2016), for benefits due to them under the insurance policies. But neither served the Plans. Rather, they each served complaints on the United States Department of Labor Secretary, relying on an ERISA provision allowing such service when a plan hasn't designated "an individual" as an agent for service of process. *Id.* § 1132(d)(1). In both cases, the Labor Secretary never forwarded the complaint to the Plans' designated agents for service of process, the Plans failed to answer, and Burton and Olivar obtained default judgments in their favor.

Eventually, the Plans moved to set aside the default judgments for improper service, which the trial courts granted in both cases. Later, the Plans moved for summary judgment, arguing the insurers, which were obligated to make all eligibility determinations and payments under the Plans' terms, were the only proper party defendants. The trial courts

agreed, granting the Plans summary judgment. A division of the court of appeals affirmed.

In this opinion, we consider whether ERISA § 1132(d)(1)'s use of "individual" provides that service on the Labor Secretary is sufficient when an employee-benefit plan designates a corporation (instead of a natural person) as its administrator and agent for service of process. We think not. We hold "individual" in this context includes a corporation and service on the Labor Secretary is proper only when a plan fails to designate either a plan administrator or some other person as agent for service of process. We further hold that judgments void for lack of service may be set aside at any time. Finally, we address which party is the proper defendant in an ERISA claim for benefits due. We hold the insurer, not the Plan, is the only proper defendant in an ERISA claim for benefits due when the Plan's terms provide that only the insurer is obligated to pay and to determine eligibility for benefits.

Accordingly, we affirm.

I. Facts and Procedural History

The Burton and Olivar cases concern ERISA claims for benefits filed against their employee-benefit plans under ERISA's civil-enforcement provision, 29 U.S.C. § 1132(a)(1)(B). And though the facts of these cases are quite similar,[1] for clarity we discuss them separately here.

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[1] We note that both petitioners retained the same counsel to represent them in their respective lawsuits.

A. Facts in *Burton v. Colorado Access*

Caroline Burton's former employer, Colorado Access, offered an ERISA-governed plan that it created by purchasing a long-term disability insurance policy issued and administered by Unum Life Insurance Company of America ("Unum"). The policy was the Plan's governing instrument, and the summary plan description designated Colorado Access as the plan administrator and agent for service of process.

Burton collected disability benefits under the plan for almost two years before Unum terminated her benefits. After exhausting administrative remedies for Unum's benefits-denial decision, Burton filed a complaint in May 2007 against the Colorado Access Plan ("CA Plan") for benefits due under the long-term disability policy. 29 U.S.C. § 1132(a)(1)(B) (allowing beneficiaries to sue for benefits due under plans governed by ERISA). But she didn't serve Colorado Access the complaint. Rather, she served the complaint only on the United States Department of Labor Secretary ("Labor Secretary"), reasoning such service was proper under § 1132(d)(1).[2]

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[2] Section 1132(d)(1), the provision on which both petitioners relied in serving the Labor Secretary, provides in relevant part:

> In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the [Labor] Secretary shall constitute such service. The [Labor] Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

The Labor Secretary didn't forward the complaint to Colorado Access, so the CA Plan failed to file an answer. Thus, Burton sought and obtained a default judgment in May 2008 against the CA Plan for back benefits and interest, a monthly payment until Burton turned 65, and attorney fees.

Over four years after the trial court entered the default judgment, the CA Plan filed a motion to set aside and vacate the judgment under C.R.C.P. 60(b)(3). Because Burton failed to serve Colorado Access the complaint, it argued the trial court lacked personal jurisdiction over the CA Plan when entering judgment, which rendered the default judgment void. The trial court agreed and vacated the judgment.

The CA Plan then moved for summary judgment, reasoning that because Unum alone determined eligibility and was obligated to pay benefits under the plan's terms, only Unum could be held liable under § 1132(a)(1)(B). To support its motion, the CA Plan attached the Unum insurance policy and an affidavit from Colorado Access's Vice President of Administrative Services and Corporate Compliance Officer. Both documents confirmed the following: the CA Plan's only governing document was the insurance policy; any benefits approved were paid only by Unum; and the CA Plan played no role in determining or paying benefits.

The trial court granted the CA Plan summary judgment, finding it wasn't liable for any benefits Unum decided not to pay because the plan document didn't require the CA Plan to pay benefits or to determine eligibility for benefits. Burton appealed, arguing the trial court erred as follows: (1) that it improperly set aside the default judgment because

service on the Labor Secretary was proper under § 1132(d)(1); and (2) that it erred in granting summary judgment because the CA Plan was liable to pay Burton benefits due under § 1132(a)(1)(B).

A division of the court of appeals affirmed. In a published, unanimous opinion, it concluded the following: (1) the trial court correctly set aside the default judgment, because service on the Labor Secretary under § 1132(d)(1) is proper only where the summary plan description fails to designate either a plan administrator or some other person as an agent for service of process; and (2) the trial court correctly granted the CA Plan summary judgment because it was not a proper defendant to Burton's ERISA benefits claim.

B. Facts in *Olivar v. Public Service Employee Credit Union*

Brenda Olivar's former employer, Public Service Employee Credit Union ("PSCU"), offered an ERISA-governed plan that it created by purchasing a long-term disability insurance policy issued and administered by Standard Insurance Company ("Standard"). The policy was the Plan's governing instrument. The summary plan description under the policy designated PSCU as the plan administrator and listed the agent for service of process as "Plan Administrator." The summary plan description also required additional notice of legal process involving benefits claims be sent to Standard.

After a car accident and a separate incident in which she fell down some stairs, Olivar submitted a claim to Standard for disability insurance benefits, which it denied. Olivar appealed, exhausting all

administrative remedies for benefits. After losing, she sued the Public Service Employee Credit Union Plan ("PSCU Plan") for benefits due under ERISA § 1132(a)(1)(B). Like Burton, Olivar didn't serve PSCU the complaint—instead, she served only the Labor Secretary, also relying on § 1132(d)(1). The Labor Secretary didn't forward the complaint, so the PSCU Plan never answered and the trial court eventually entered a default judgment against it. In 2011, the trial court ordered PSCU to pay the default judgment amount as garnishee, so PSCU paid Olivar back benefits and began making monthly payments to her.

About two years later (and over six years after the trial court entered the default judgment), the PSCU Plan filed a motion to set aside and vacate the default judgment against it as void under C.R.C.P. 60(b)(3) due to improper service of process. The trial court agreed and set aside the default judgment. Olivar then submitted a motion to reconsider setting aside the default judgment, which the trial court also rejected.

The PSCU Plan moved for summary judgment, raising essentially the same arguments as the CA Plan in Burton's case. The PSCU Plan also submitted the Standard insurance policy and an affidavit from PSCU's Senior Vice President and Chief Operating Officer. Both documents confirmed the following: the PSCU Plan's only governing document was the insurance policy; any benefits approved were paid only by Standard; and the PSCU Plan played no role in determining or paying benefits.

The trial court granted the PSCU Plan summary judgment, and Olivar appealed, raising the same issues Burton raised in her appeal. Relying largely on the

division's analysis in *Burton v. Colorado Access*, 2015 COA 111, ¶¶ 25-35, ___ P.3d ___, a different division of the court of appeals affirmed the trial court in Olivar's case.

Burton and Olivar petitioned this court for writs of certiorari, and we granted their petitions.[3]

II. Standard of Review

This case presents three types of issues—statutory interpretation, a trial court's decision to grant relief under C.R.C.P. 60(b)(3), and a trial court's decision granting summary judgment—all of which we review de novo. *OXY USA Inc. v. Mesa Cty. Bd. of Comm'rs*, 2017 CO 104, ¶ 12, 405 P.3d 1142, 1144 (statutory interpretation); *First Nat'l Bank of Telluride v. Fleisher*, 2 P.3d 706, 714 (Colo. 2000) (relief under

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[3] We granted certiorari to review the following issues in both cases:

1. Whether service upon the Secretary of the Department of Labor is sufficient under 29 U.S.C. § 1132(d)(1) when an employee benefit plan designates a corporation as its administrator and agent for service of process.

2. Whether the district court erred in setting aside the default judgment as void under C.R.C.P. 60(b)(3) because the petitioner served the Complaint only on the Secretary of Labor pursuant to the terms of 29 U.S.C. § 1132(d).

3. Whether it is proper to grant and affirm summary judgment to the respondent under the rationale the respondent is not a proper defendant because it is an insurance-funded ERISA plan, as opposed to a self-funded ERISA plan.

C.R.C.P. 60(b)(3)); *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004) (summary judgment).

III. Analysis

First, we analyze whether service on the Labor Secretary alone is sufficient under § 1132(d)(1) when an employee-benefit plan names a corporation—instead of a natural person—as its administrator and agent for service of process. Because we conclude it is not, we next decide whether the trial courts in these cases erred in setting aside and vacating the default judgments as void under C.R.C.P. 60(b)(3). We conclude they did not. Finally, we explore whether the trial courts properly granted the CA Plan and PSCU Plan summary judgment. Because we conclude that the insurers, not the Plans, are the proper defendants for benefits due under the terms of the Plans, we conclude the trial courts properly granted summary judgment.

A. Service on the Labor Secretary

The parties dispute whether service of process on the Labor Secretary is proper under § 1132(d)(1) when a plan lists a corporation (instead of a natural person) as its administrator and agent for service of process.

To answer this question, we must interpret ERISA's provisions. Thus, "we turn to the well-established rules of federal statutory interpretation." *Copeland v. MBNA Am. Bank, N.A.*, 907 P.2d 87, 90 (Colo. 1995).

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the

particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). We determine whether statutory language has a plain and unambiguous meaning "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. In looking at the language itself, we give the words used their ordinary meaning. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012). And it's "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation and citation omitted). Similarly, we avoid interpreting a statute in a way that creates absurd results "if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

ERISA § 1132(d)(1) provides in relevant part:

> Service of . . . legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the [Labor] Secretary shall constitute such service. The [Labor] Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(Emphases added.) Further, ERISA defines "administrator," in relevant part, as "the person specifically so designated by the terms of the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A)(i) (2016) (emphasis added). And "person" includes, among other things, a "corporation." *Id.* § 1002(9) (2016). ERISA also provides a plan may designate "the name and address of the person designated as agent for the service of legal process, if such person is not the administrator." 29 U.S.C. § 1022(b) (2016) (emphases added) (listing requirements for a summary plan description). But ERISA doesn't define "individual."

Here, there's no dispute that the summary plan descriptions named Colorado Access and PSCU as the plan administrators and agents for service of process. But petitioners contend that service of process on the Labor Secretary was proper because the Plans listed corporations, not individual human beings, as agents for service of process in the summary plan descriptions. The Plans disagree. Thus, our answer hinges on what "individual" means in § 1132(d)(1).

Seizing on the above-listed provisions, with statutory construction canons and case law interpreting "individual" in other statutory contexts to aid them, the parties make compelling arguments for construing "individual" to favor each side. The Plans' argument connects the dots: Service of process on a plan administrator constitutes service on the Plan and a plan administrator may be a corporation, or a plan may designate some person other than the plan administrator as an agent for service of process, and this too can be a corporation. Either way, ERISA plainly allows a corporation to serve as agent for service of process.

It follows then, the Plans contend, that "individual" is not limited to natural persons, but rather "individual" includes a corporation when looking at § 1132(d)(1)'s language in the context of ERISA as a whole. Persuaded by this logic, a division of the court of appeals concluded that service on the Labor Secretary is merely a substituted service provision—that is to say, such service is proper only where the summary plan description fails to designate the plan administrator or some other person, including a corporation, as agent for service of process.

Yet, petitioners make strong textual arguments for why "individual" in § 1132(d)(1) refers only to a natural person. They argue when ERISA uses "individual" as a noun in many of its other provisions, it always refers to a natural person. For example, petitioners point to this excerpt from the "Criminal penalties" section:

> Any person who willfully violates any provision of part 1 of this subtitle . . . shall upon conviction be fined not more than $100,000 or imprisoned not more than 10 years, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $500,000.

29 U.S.C. § 1131(a) (2016) (emphases added). Petitioners reason Congress could have used the word "person" or just left out "an individual" in § 1132(d)(1) if its intent had been the conclusion reached by the court of appeals. And so, they claim construing "individual" to include a corporation here writes "individual" out of the statute entirely.

We disagree. We are persuaded by the division's opinion on this issue for three reasons. First, reading "individual" to mean only a natural person here yields an absurd result: Why would Congress expressly allow a plan to designate a corporation as agent for service of process (whether as the plan administrator or not) and then, simultaneously, allow the plaintiff to ignore the designated agent for service of process because it's a corporation? We avoid this absurd result by construing "individual" in § 1132(d)(1) to include a corporation.

Second, as the court of appeals pointed out, the ordinary meaning of "individual" isn't limited to natural persons. *See Individual, Webster's New College Dictionary* (2005) (defining as "a single thing, being, or organism") (emphasis added); *Individual, Black's Law Dictionary* (10th ed. 2014) ("Of, relating to, or involving a single person or thing . . . .") (emphasis added).

Finally, our interpretation doesn't read "individual" out of the statute. Rather, it better achieves what Congress intended § 1132(d)(1) to be—a substituted service provision. The Supreme Court has observed "individual" doesn't "invariably mean[] 'natural person' when used in a statute," but there must be "some indication Congress intended" to give the word "a broader or different meaning" in a given statute. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012). Tellingly, the Court then remarked that Congress indicates its intent for "individual" to have a broader or different meaning than natural person in situations exactly like the one here: where reading "individual" to mean natural person would lead to an absurd result. *Id.* (citing *Clinton v. City of New York*,

524 U.S. 417, 429 (1998) (finding Congress intended "individual" to be synonymous with "person" in the Line Item Veto Act, because a contrary reading would produce an absurd result)). And, though petitioners correctly observe that there are other provisions in ERISA where "individual" clearly refers to only a natural person, such occurrences don't undermine our broader reading of the word in § 1132(d)(1). Indeed, the Supreme Court has "several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, ___ U.S. ___, 135 S.Ct. 1074, 1082 (2015) (emphasis added).

Thus, we agree with the court of appeals and hold the following: (1) in the context of ERISA as a whole, "individual" in § 1132(d)(1) includes a corporation; and (2) the provision on which petitioners rely is a substituted service provision, so service on the Labor Secretary is proper only where the summary plan description fails to designate either the plan administrator or some other person, including a corporation, as agent for service of process.

But did the courts below err in setting aside the judgments as void? We turn to that question next.

B. Void Judgments Under C.R.C.P. 60(b)(3)

Having determined above that petitioners' service only on the Labor Secretary was insufficient, we must now decide whether the courts below nonetheless erred in vacating the default judgments against the Plans.

C.R.C.P. 60(b)(3) provides a court may set aside a judgment that is void. Yet, as petitioners point out,

the rule then provides that such a "motion shall be made within a reasonable time." C.R.C.P. 60(b) (emphasis added). Petitioners contend the Plans' motions to set aside the default judgments were not made within a reasonable time, emphasizing that the CA Plan's motion came more than four years after the trial court entered the judgment and the PSCU Plan didn't move to set aside the default judgment against it until more than six years after it was entered and a full two years after PSCU itself paid back benefits and began making monthly payments to Olivar.

Again, we disagree. Petitioners' arguments overlook a fundamental principle: "[A] default judgment entered by a court without personal jurisdiction over the defendant, *e.g.*, due to an invalid service of process, is a nullity and without effect." *Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 315 (Colo. 2010). It follows, then, that because a void judgment is "without effect," it may be attacked at any time. *See Davidson Chevrolet, Inc. v. City & Cty. of Denver*, 330 P.2d 1116, 1119 (Colo. 1958) ("Being naught, [a void judgment] may be attacked directly or collaterally at any time."); *In re Marriage of Stroud*, 631 P.2d 168, 170 n.5 (Colo. 1981) ("[W]here the motion alleges that the judgment attacked is void, C.R.C.P. 60(b)(3), the trial court has no discretion. The judgment either is void or it isn't and relief must be afforded accordingly.").

Because petitioners failed to properly serve the Plans, the trial courts that entered the default judgments in these cases had no personal jurisdiction over them. *See Weaver Constr. Co. v. Dist. Court*, 545 P.2d 1042, 1045 (Colo. 1976). And, as a result, petitioners' reasonable-time arguments necessarily

fail. Moreover, we think it's clear that C.R.C.P. 60(b)'s reasonable-time language doesn't apply here where the underlying rationale for vacating is "on the grounds that such lack of notice constitutes a due process violation." First Nat'l Bank of Telluride, 2 P.3d at 712 (emphasis added).

Thus, because we hold judgments void for lack of service may be set aside at any time, we conclude the trial courts didn't err in vacating the default judgments in these cases.

Still, did the trial courts err in granting the Plans summary judgment? We explore that issue below.

C. Proper Party Defendants in Insurance-Funded ERISA Plans

As the division of our court of appeals and other courts confronting this issue have aptly noted, ERISA expressly provides who may bring a claim for benefits due, but not whom is the proper party for them to sue. *See* § 1132(a)(1)(B). So, is the plan or the insurer the proper party defendant where only the insurer determines eligibility and is obligated to pay benefits? Petitioners argue the plan is always a proper defendant. The Plans contend the insurers are the only proper defendants here, because the plans were insurance-funded and the insurers alone determined eligibility for benefits and had the obligation to pay them.

Because of this statutory gap, courts are split on the issue. Some courts have held the plan is always a proper party defendant in actions under § 1132(a)(1)(B). *See, e.g.*, *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506, 509–10 (2d Cir. 2002).

These courts reach this conclusion from the plain language in §§ 1132(a)(1)(B) and 1132(d)(1), (2). *See id.* at 509. Section 1132(a)(1)(B) provides: "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan . . . ." And §§ 1132(d)(1) and (2) note an "employee benefit plan may sue or be sued under this subchapter as an entity," and any "money judgment . . . against an employee benefit plan shall be enforceable only against the plan as an entity." Thus, courts on this side of the split reason that these provisions "make plain that a plan can be held liable in its own name for a money judgment," and that arguing the plan isn't liable merely because it contracts with an insurer to pay beneficiaries "is wholly unsupported by the language of the statute." *Chapman*, 288 F.3d at 509.

Other courts take a more functional approach in resolving this issue, holding the proper defendant is the party that exercises control over the administration of the plan. *E.g.*, *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997) (per curiam). Courts following this functional approach reason that the statutory provisions on which opposing courts rely merely establish "that an employee benefits plan is an ERISA entity and is subject to suit in some instances, [but] that proposition does not mean that a plan is a proper party in every ERISA case." *Milton v. Life Ins. Co. of, N. Am.*, CV-12-BE-864-E, 2012 WL 2357800, at *2 (N.D. Ala. June 20, 2012) (dismissing plan named as defendant where insurer was sole party handling and making claims decisions).

Lately, there has been a trend of courts broadening the scope of who may be a proper defendant under

§ 1132(a)(1)(B). For example, the Ninth Circuit, which had previously held that only the plan (and in some circumstances the plan administrator) is a proper defendant, changed course in *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011) (en banc). There, an employee seeking increased long-term disability benefits sued the insurer that denied her claim, though it wasn't designated the plan administrator. *Id.* at 1204. In expanding the scope of potential defendants under § 1132(a)(1)(B) to include insurers, the *Cyr* court remarked that a "plan administrator under ERISA has certain defined responsibilities involving reporting, disclosure, filing, and notice," but "the plan administrator can be an entity that has no authority to resolve benefit claims or any responsibility to pay them." *Id.* at 1207. Because the plan administrator "had nothing to do with denying [the employee's] claim for increased benefits" and the insurer denied the claim and "was responsible for paying legitimate benefits claims," the *Cyr* court concluded the insurer was "a logical defendant." *Id.*

The Seventh Circuit too more recently deviated from the *Chapman* approach, when it held:

> Although a claim for benefits ordinarily should be brought against the plan (because the plan normally owes the benefits), where the plaintiff alleges that she is a participant or beneficiary under an insurance-based ERISA plan and the insurance company decides all eligibility questions and owes the benefits, the insurer is a proper defendant in a suit for benefits due under § 1132(a)(1)(B).

Larson v. United Healthcare Ins. Co., 723 F.3d 905, 915-16 (7th Cir. 2013). In reaching this conclusion,

the court observed "a cause of action for 'benefits due' must be brought against the party having the obligation to pay. In other words, the *obligor* is the proper defendant on an ERISA claim to recover plan benefits." *Id.* at 913. Thus, it concluded because the insurers decided eligibility questions and had the obligation to pay, the insurance companies were the obligors and could be sued for benefits due under ERISA. *Id.*

At least one court has read *Larson* to mean liability isn't limited to just the obligor insurance company that pays and decides claims. *See OSF Healthcare Sys. v. Insperity Grp. Health Plan*, 82 F.Supp.3d 860, 864 (C.D. Ill. 2015). Rather, the *OSF* court concluded *Larson* merely allows insurers to be sued, and plans are still proper defendants under common law contract principles even if an insurance company controls payment and determines eligibility for plan benefits. *Id.*

But regardless of *Larson*'s actual reach, we still think the trial courts properly granted the Plans summary judgment. In the end, holding that the plan is <u>always</u> a proper defendant overstates the whole point of petitioners' claims: Section 1132(a)(1)(B) allows a beneficiary to sue "to recover benefits due to him <u>under the terms of his plan</u>." (Emphasis added.) In this case, we're persuaded Unum and Standard—not the Plans—are the only proper defendants because the following is undisputed:

- The Plans were funded as insurance policies and had no assets;
- The only governing instruments were the insurance policies;

- Only Unum and Standard determined benefits eligibility;
- Only Unum and Standard were obligated to pay benefits;
- And the Plans played no role in handling petitioners' claims for benefits.

Indeed, to use *Larson*'s terminology, we think these facts make Unum and Standard the obligors and, thus, the proper defendants on petitioners' ERISA claims to recover benefits due under the terms of their plans. *See* § 1132(a)(1)(B).

Petitioners' only compelling argument[4] on this issue is that cases on *Chapman*'s side of the split got it right and, thus, this court should adopt that approach here. However, here, like in *Cyr*, it's clear that the Plans had "no authority to resolve benefit claims or any responsibility to pay them," unlike Unum and Standard, which are the "logical" defendants. 642 F.3d at 1207. Indeed, the Plans argue (and petitioners don't adequately rebut) that even if this court agreed with petitioners and reversed summary judgment, the Plans have no assets to pay any potential judgments against them.

That's not to say an insurance-funded plan may never be sued. Rather, we think that just because

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[4] We disagree with petitioners that *Geddes v. United Staffing Alliance Employee Medical Plan*, 469 F.3d 919 (10th Cir. 2006), stands for the proposition that an insurer is not a proper defendant. *Geddes* involved a third-party administrator, *id.* at 922, not an insurer that solely determined eligibility for benefits and was obligated to pay them under the plan, and is therefore factually inapposite.

ERISA allows plans to be sued, § 1132(d)(1), doesn't mean they can be sued when they have no legal obligation to provide benefits under the plan's terms. *See Larson*, 723 F.3d at 913. Thus, we conclude the insurers, not the plans, are the only proper defendants in ERISA claims for benefits due, when the plans' terms provide that only the insurers are obligated to pay and to determine eligibility for benefits.

IV. Conclusion

We hold "individual" in ERISA § 1132(d)(1)'s context includes a corporation and that service on the Labor Secretary is proper only when a plan fails to designate either a plan administrator or some other person as agent for service of process. Further, we hold that judgments void for lack of service may be set aside at any time. Thus, we conclude that service on the Labor Secretary was insufficient here and the trial courts properly set aside and vacated the default judgments against the Plans as void. We also hold the insurer, not the plan, is the only proper defendant in an ERISA claim for benefits due when the plan's terms provide that only the insurer is obligated to pay and to determine eligibility for benefits. Accordingly, we conclude the trial courts properly granted the Plans summary judgment because the insurers in these cases are the proper defendants.

Therefore, we affirm the court of appeals in both cases.

OPINION OF THE COLORADO COURT OF APPEALS (JANUARY 21, 2016)

COLORADO COURT OF APPEALS

BRENDA OLIVAR,

Plaintiff-Appellant,

v.

PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN,

Defendant-Appellee.

Court of Appeals No. 14CA1734

City and County of Denver District Court
No. 06CV11967 Honorable Shelley I. Gilman, Judge

Before: FOX, TAUBMAN, and MILLER, JJ.,

Brenda Olivar appeals the trial court's order setting aside her default judgment against the Public Service Employee Credit Union Long Term Disability Plan (the Plan). She also appeals the trial court's summary judgment in favor of the Plan on a benefit claim under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1)(B) (2012). We affirm.

I. Background

Olivar's employer, the Public Service Employee Credit Union (PSCU), offered long-term disability insurance through the Plan. The Plan was created upon the purchase of a group long-term disability insurance policy from Standard Insurance Company (Standard). The policy was the Plan's governing instrument. Claims for benefits under the Plan were made directly to Standard, and Standard had the sole authority to review and then grant or deny claims. PSCU sponsored the Plan and was also the plan administrator. As plan administrator, PSCU was the agent for service of legal process under the policy. The Certificate and Summary Plan Description (SPD), a supplement to the policy, also required that additional notice of legal process involving claims for benefits under the policy be sent to Standard.

Olivar initially submitted a claim to Standard for disability insurance benefits, which Standard denied. Olivar later filed a claim against the Plan, under section 1132(a)(1)(B) of ERISA, seeking benefits. Olivar did not serve or attempt to serve the Plan or Standard with the complaint and instead served the United States Secretary of Labor, relying on 29 U.S.C. § 1132(d)(1).[1] The Secretary did not forward the

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[1] "An employee benefit plan may sue or be sued under this subchapter as an entity. Service . . . upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any

complaint to the Plan, and the Plan did not answer the complaint. Olivar later successfully moved for a default judgment against the Plan. After the trial court ordered PSCU to pay the default judgment amount as garnishee, PSCU paid Olivar back benefits and began making monthly payments to her.

The Plan later moved to set aside the default judgment, claiming that Olivar never properly served the Plan, and, accordingly, the trial court lacked personal jurisdiction over the Plan when it entered the default judgment. The trial court agreed and set aside the default judgment.

The Plan later moved for summary judgment, arguing that, under the policy, only Standard could be liable for Olivar's claim for insurance benefits. In support of the motion, the Plan submitted an affidavit from PSCU's Vice President and Chief Operating Officer, Evonna Thorburn, attesting:

- PSCU sponsored the Plan which made long-term disability insurance available to eligible PSCU employees.
- The Plan was created by PSCU's purchase of a group policy from Standard.
- The Plan's only governing document was the Standard group policy.
- Only Standard approved and paid benefits under the policy.
- The Plan played no role in making benefit decisions or paying benefits.

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trustee of the plan of receipt of such service." 29 U.S.C. § 1132(d)(1) (2012).

- "The Plan was merely a technical legal entity that existed for the sole purpose of providing insurance under the [p]olicy to eligible PSCU employees. The Plan had no operations, no activities, no employees, no assets, and no means of paying insurance benefits . . . ."
- The Plan played no role in any aspect of Olivar's claim.

The Plan also submitted the Standard group insurance policy with its motion. The policy, which included the SPD, stated:

- Employees were required to send all claims to Standard.
- Standard would make all benefit payments and determine eligibility for benefits.
- PSCU was the plan sponsor, administrator, and agent for service of legal process.
- If legal process involved claims for benefits under the policy, additional notice of legal process must be sent to Standard.
- Standard funded the Plan.

Before the trial court ruled on the Plan's motion for summary judgment, Olivar moved the court to reconsider its order setting aside the default judgment in light of two unpublished cases from the United States Court of Appeals for the Tenth Circuit. The trial court denied Olivar's motion, finding that the cases did not apply to Olivar's situation. The trial court granted the Plan's motion for summary judgment, agreeing with the Plan that it was not the proper

defendant because the undisputed facts showed that it had no obligation to provide benefits.

II. Default Judgment

Olivar contends that the trial court erred when it set aside her default judgment, disregarding her service on the Secretary of Labor. She also argues that the trial court erred when it denied her motion to reconsider the order setting aside the default judgment, disregarding two unpublished Tenth Circuit opinions. We disagree.

A. Preservation and Standard of Review

It is undisputed that Olivar preserved her claims for appeal.

We review de novo a trial court's decision on a motion to set aside a default judgment under C.R.C.P. 60(b). *First Nat'l Bank v. Fleisher*, 2 P.3d 706, 714 (Colo. 2000). Similarly, the trial court's ruling on Olivar's motion to reconsider presented a legal determination which we review de novo. *See MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010).

B. Law

C.R.C.P. 60(b)(3) states that a trial court may set aside a default judgment that is void. *First Nat'l Bank*, 2 P.3d at 713. If the defaulting party's due process right was violated by lack of notice o the default proceeding, then relief is mandatory. *Id.* No time limit applies to C.R.C.P. 60(b)(3) relief. *Davidson Chevrolet, Inc. v. City & Cty. of Denver*, 138 Colo. 171, 175, 330 P.2d 1116, 1118-19 (1958); *In re Petition of C.L.S.*, 252 P.3d 556, 561 (Colo. App. 2011).

A judgment is void if the court that entered it lacked subject matter jurisdiction or personal jurisdiction over the defendant. *Davidson Chevrolet*, 138 Colo. at 175, 330 P.2d at 1118. If a plaintiff fails to properly serve a defendant with a complaint, the court does not have personal jurisdiction over the defendant. *See Weaver Constr. Co. v. Dist. Court*, 190 Colo. 227, 232, 545 P.2d 1042, 1045 (1976); *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473, 476-77 (Colo. App. 1992). A default judgment entered against a defendant without proper notice may also violate a defendant's due process rights and be void. *See First Nat'l Bank*, 2 P.3d at 714.

Determining whether Olivar properly served the Plan requires us to construe various provisions of ERISA, and, in doing so, we apply federal rules of statutory construction. *Copeland v. MBNA Am. Bank, N.A.*, 907 P.2d 87, 90 (Colo. 1995). We consider "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," giving the words their ordinary meaning. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. ___, ___, 132 S. Ct. 1350, 1356 (2012) (citation omitted). Words in a statute must not be viewed in a vacuum; rather, we must read the words in their context and with a view to their place in the overall statutory scheme. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). We avoid reading the language in a manner in which a clause, sentence, or word is rendered superfluous, void, or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). And, we must avoid interpretations of the language which produce absurd results. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

C. Analysis

Recently, another division of this court decided claims almost identical to Olivar's; we find its analysis persuasive and adopt much of it here. *See Burton v. Colo. Access*, 2015 COA 111, ¶¶ 9-22.

1. Improper Service

Section 1132(d)(1) of ERISA provides that service of legal process on an administrator of an employee benefit plan constitutes service on the plan. "The term 'administrator' means . . . the person specifically so designated by the terms of the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A)(i) (2012). A corporation is a "person" for purposes of ERISA. § 1002(9).

In the event the plan has not "designated in the summary plan description . . . an individual as agent for the service of legal process, service on the Secretary [of Labor] shall constitute such service." § 1132(d)(1).

Reading these provisions together, we conclude that a party intending to sue a plan must serve the plan administrator where it is designated as agent for service of process. It is only where the summary plan description fails to designate a person as agent for service of process that service on the Secretary of Labor is allowed. *Burton*, ¶ 16.

The policy documents, including the Certificate and SPD which were in Olivar's possession, designated PSCU as the Plan's sponsor, plan administrator, and agent for service of process. Although Olivar had interacted with PSCU and Standard personnel throughout the ERISA benefit claims process, she failed to serve PSCU and failed to notify Standard of the

legal proceedings, as required by the SPD. Because service was improper under ERISA, the trial court lacked personal jurisdiction to enter default judgment against PSCU. Because the trial court lacked personal jurisdiction, the judgment was void and the trial court properly set aside its earlier judgment pursuant to C.R.C.P. 60(b)(3).

Olivar argues that her service was proper under section 1132(d)(1), which allows service on the Secretary of Labor, because the SPD did not designate an "individual" as agent for service of process. She argues that an individual can only be a natural person. We disagree with both contentions.

Section 1132(d)(1) allows for substituted service when the SPD does not identify an individual for service of process. It makes little sense for Congress to allow for the designation of a corporation as plan administrator or agent for service of process but then allow claimants to ignore that designation and serve only the Secretary of Labor. *Burton*, ¶ 19. This is the sort of absurd result we avoid in interpreting statutory language. *See Griffin*, 458 U.S. at 575.

Moreover, courts construing other federal statutes have concluded that the statutory context may make clear that the word "individual" includes entities other than natural persons. *See*, *e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 428-29 (1998) ("[I]n the context of the entire [statutory] section Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person.'"); *United States v. Middleton*, 231 F.3d 1207, 1210-13 (9th Cir. 2000) ("[T]o the extent that a word's dictionary meaning equates to its 'plain meaning,' a corporation can be referred to as an 'individual.'"). Therefore, con-

sidering section 1132(d)(1) in the context of ERISA as a whole, we conclude that the term "individual" includes a corporation. *Burton*, ¶ 21.[2]

2. Motion to Reconsider

Olivar next argues that the trial court erred when it denied her motion to reconsider the order setting aside the default judgment, and ignored two new unpublished cases from the Tenth Circuit Court of Appeals. *See Bigley v. CIBER, Inc. Long Term Disability Coverage*, 570 F. App'x 756, 760 (10th Cir. 2014); *Hart v. Capgemini U.S. LLC Welfare Benefit Plan Admin. Document*, 547 F. App'x 870, 872 (10th Cir. 2013). But, neither of the cited cases decided whether the term "individual" in section 1132(d)(1) of ERISA includes a corporate entity. Instead, these cases each established that service of process on the Secretary of Labor is not sufficient when the listed agent for service of process is the "general counsel" or a department of an entity. *Bigley*, 570 F. App'x at 760; *Hart*, 547 F. App'x at 872. Because these cases do not alter the analysis of whether Olivar's service on the Secretary of Labor was sufficient, the trial court did not err when it denied Olivar's motion for the trial court to reconsider its order setting aside

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[2] Olivar further argues that the Plan did not learn of Olivar's substituted service because it failed to maintain its Form 5500 annual reporting to the Department of Labor. She argues that service on the Secretary of Labor would have adequately notified the Plan if the Plan had maintained current Form 5500 reports with the labor department. She also argues that the Plan is at fault for its lack of notice of Olivar's claim and default judgment. Because we conclude that the Secretary of Labor was not a proper agent for service of process in this case, the Plan's filings are irrelevant.

the default judgment. *See MDC Holdings*, 223 P.3d at 717.

III. Summary Judgment

Olivar contends that the trial court erred when it entered summary judgment in favor of PSCU. We disagree. The division in Burton also addressed similar contentions, and we follow much of the division's analysis here. *See Burton*, ¶¶ 23-35.

A. Preservation and Standard of Review

It is undisputed that Olivar preserved her claim for appeal.

We review the trial court's decision granting summary judgment de novo. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1256 (Colo. 1995). Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c); *see also HealthONE v. Rodriguez*, 50 P.3d 879, 887 (Colo. 2002).

B. Law

Section 1132(a)(1)(B) of ERISA states: "A civil action may be brought . . . by a participant or beneficiary . . . 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 . . . ." While the section does not plainly state who may be sued under ERISA, it is clear that "[b]y necessary implication, . . . a

cause of action for 'benefits due' must be brought against the party having the obligation to pay. In other words, the *obligor* is the proper defendant on an ERISA claim to recover plan benefits." *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913 (7th Cir. 2013) (emphasis in original).

> Typically the plan owes the benefits and is the right defendant . . . . [b]ut not always. Health plans are often structured around third-party payors. When an employee-benefits plan is implemented by insurance and the insurance company decides contractual eligibility and benefits questions and pays the claims, an action against the insurer for benefits due "is precisely the civil action authorized by § 1132(a)(1)(B)."

Id. (quoting *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (en banc)). The proper defendants in such an action are the entities who make eligibility or payment decisions or are obligated to pay benefits. *See, e.g.*, *Layes v. Mead Corp.*, 132 F.3d 1246, 1249-50 (8th Cir. 1998); *Daniel v. Eaton Corp.*, 839 F.2d 263, 299 (6th Cir. 1988).

C. Analysis

Here, it is undisputed that, under the policy, Standard made all decisions regarding eligibility for any payment of benefits. It is also undisputed that only Standard was obligated to pay any benefits owed on any claim granted. Standard, not the Plan, therefore was the only proper defendant for Olivar's benefits claim. We therefore conclude that because Standard was the only proper party for Olivar's action under the Plan's group insurance policy, the trial court did

not err when it entered summary judgment in favor of the Plan. *Burton*, ¶ 26; *see also Larson*, 723 F.3d at 913; *HealthONE*, 50 P.3d at 887.

Olivar argues that the trial court disregarded the Second Circuit's decision in *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506 (2d Cir. 2002). Not only is *Chapman* not binding, it is also distinguishable. The court in *Chapman* relied on section 1132(d) in rejecting the argument that only the decision-making insurance company could be held liable on a section 1132(a)(1)(B) claim. *Id.* at 509. The statute states that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity," § 1132(d)(1), and that "[a]ny money judgment . . . against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter," § 1132(d)(2). Section 1132(d)(1) is a mechanism for shifting from certain common-law liability and trust laws—it treats an ERISA plan differently from trust liability. *See Burton*, ¶ 29; *see also Larson*, 723 F.3d at 914. Accordingly, section 1132(d) does not create a rule that a plan is always subject to liability under section 1132(a)(1)(B).

Similarly, we disagree with Olivar's argument that federal cases mandate that a benefits plan is always an appropriate defendant in an ERISA action. *See Geddes v. United Staffing Alliance Emp. Med. Plan*, 469 F.3d 919, 931 (10th Cir. 2006). Geddes is inapplicable because here only a third-party insurer—Standard—made eligibility decisions and paid benefits under the Plan. *See Burton*, ¶ 31. We agree with the

Burton division that, in cases such as this, "the obligor is the proper party defendant on an ERISA claim to recover plan benefits." *Id.* (quoting *Larson*, 723 F.3d 911, 913).

We reject Olivar's claim that there remained disputed issues of material fact. Olivar claims that it remained to be decided whether the Plan owed benefits under ERISA and whether an entity other than Standard retained enough control over the Plan to justify suit against the Plan. The undisputed terms of the Plan established that Standard was the only entity with decision-making authority regarding claims and the only party liable for payments. As to Olivar's "control" claim,[3] the trial court's order requiring PSCU to pay the benefits was eventually reversed by the trial court in setting aside its default judgment. The fact that PSCU, as plan administrator, complied with the original order to avoid being held in contempt does not create an issue of material fact regarding whether anyone other than Standard was the proper party defendant to Olivar's claim. *See Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 858 (Colo. App. 2007).

Therefore, the trial court did not err when it granted summary judgment for the Plan.

IV. Conclusion

The judgment and order are affirmed.

JUDGE TAUBMAN and JUDGE MILLER concur.

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[3] Olivar contends that because PSCU was listed as plan administrator and paid Olivar's back benefits after the garnishment proceedings, PSCU was in control of the Plan, making the Plan a proper defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (JULY 21, 2014)

DISTRICT COURT,
CITY AND COUNTY OF DENVER, COLORADO

BRENDA OLIVAR,

Plaintiff,

v.

PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN,

Defendant.

Case No: 2006CV11967
Court Room: 269

Before: Shelley I. GILMAN, District Court Judge

This case is before the Court on Defendant's Motion for Summary Judgment. The Court, having reviewed the motion, the responsive pleadings, the Court's file, and the applicable legal authorities, finds, concludes and orders as follows:

Undisputed Facts[1]

1. Plaintiff was an employee of Public Service Employee Credit Union and participated in its long-term disability insurance plan ("the Plan").

2. Under the Plan, employees could obtain long term disability insurance through a policy issued by Standard Insurance Company ("Standard").

3. Standard Insurance Company is the funding medium for the Plan.

4. The Summary Plan Description for the long term disability insurance policy designates the Plan Administrator, Public Service Employee Credit Union, as the agent for service of legal process; however, if legal process involves claims for benefits under the group policy, additional notification of legal process must also be sent to Standard.

5. The Plan existed solely as a means through which employees could obtain long term disability insurance from the policy with Standard. The Plan does not have assets or employees, and was only used as a conduit through which long term disability insur-

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[1] Plaintiff asserts that the undisputed facts set forth by Defendant previously had not been disclosed to Plaintiff. More specifically, Plaintiff asserts that Defendant submitted no initial disclosures and, therefore, the Court should not rely on the exhibits submitted. The Court notes that the trial in this matter is scheduled to begin on August 19, 2014. Defendant has participated in this case since September 2013. Despite this, Plaintiff previously has not raised any concerns about Defendant failing to disclose information. Further, in her own initial disclosures, Plaintiff disclosed the Standard policy and the summary plan description. Accordingly, the Court denies Plaintiff's request to strike Defendant's exhibits.

ance could be made available to Public Service Employee Credit Union employees.

6. The policy was the only document governing the Plan, and the only benefits available under the Plan were through the Standard policy.

7. Under the Standard policy, Standard had "full and exclusive authority to control and manage the Group Policy, to administer claims, and to interpret the Group Policy and resolve all questions arising from the administration, interpretation, and application of the Group Policy." (Group Long Term Disability Insurance Policy, p. 15.) Accordingly, under the policy, Standard paid and administered all claims, and was solely responsible for the interpretation and application of the policy.

8. The Plan did not participate in making any decisions about claims, and did not pay claims itself.

9. On June 15, 2003, Plaintiff made a claim for benefits under the policy, which she submitted to Standard. Standard rejected Plaintiff's claim. Plaintiff sought reconsideration from Standard regarding Standard's denial of her claim.

10. In November 2006, Plaintiff filed her Complaint against Public Service Employee Credit Union Long Term Disability Plan. Prior to the commencement of this action, Plaintiff solely dealt with Standard. Defendant was not involved in any decision-making regarding the denial of Plaintiff's long term disability claims.

11. The parties agree that ERISA governs the application and interpretation of the Plan.

Law and Analysis

Under Rule 56(c), summary judgment is proper only if the pleadings and supporting documents establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Civil Service Commission v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). The moving party bears the burden of establishing the non-existence of a genuine issue of material fact. *Id.* If the moving party meets that initial burden, the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987).

I. Defendant's Argument That the Plan Is Not a Proper Defendant in This Case

In its brief in support of the motion for summary judgment, Defendant argues that it is not a proper party to this case. More specifically, Defendant asserts that, because it was not responsible for paying or administering claims, had no ability under the insurance policy to interpret or apply that policy, and was unable to participate in decision-making about specific claims, including Plaintiff's rejected claim, it should not have been named as a defendant in this case. For the reasons set forth below, the Court agrees.

Under ERISA, every employee benefit plan must be established and maintained through a written instrument. 29 U.S.C. § 1102(a)(1). Each plan is required to specify the basis on which payments are made to or from the plan. 29 U.S.C. § 1102(b)(4). A civil action to recover benefits due under the terms of the plan, may be brought by a participant or beneficiary of a plan. 29 U.S.C. § 1132(a)(1)(B)(emphasis added).

Thus, a party asserting claims for benefits under a plan is limited to the terms set forth in the plan. Where the plan documents are not ambiguous, they may be construed as a matter of law. *See Cardoza v. United of Omaha Life Ins. Co.*, 708 F.3d 1196, 1203 (10th Cir. 2013).

Here, the Standard policy provides the sole means by which claims for long term disability insurance may be administered or paid. As noted in the Summary Plan Description, Standard is the funding medium for the Plan. Although the agent for service of legal process is the Plan Administrator, if legal process involves claims for benefits under the group policy, additional notification of legal process must also be sent to Standard. Under the policy, the Plan itself had no ability to accept, reject, or otherwise administer claims, had no decision-making responsibility in this particular instant where Plaintiff's claim was rejected, and had no responsibility to pay claims. Importantly, Plaintiff submitted her claim for long term disability insurance to Standard. Standard rejected Plaintiff's claim. All further communications about the claim, including Plaintiff's request to reconsider the denial of her claim and her appeal, were submitted to Standard. Based on these circumstances, benefits under the plan should have been sought through Standard.

Although this matter has not specifically been addressed by Colorado appellate courts, federal courts have found that, in situations where an ERISA plan is wholly funded by an insurance provider, an insurer is a proper party under an ERISA plan. For example, in *Larson v. United Healthcare*, the 7th Circuit found that an insurer may be sued under 29 U.S.C. § 1132. *See* 723 F.3d 905, 913-16 (7th Cir. 2013). Although

federal courts have recognized that an ERISA plan is normally the proper defendant in a claim for benefits due, those courts also have determined that "a cause of action for 'benefits due' must be brought against the party having the obligation to pay. In other words, the obligor is the proper defendant on an ERISA claim to recover plan benefits." *Larson*, F.3d at 911-13. "When an employee-benefits plan is implemented by insurance and the insurance company decides contractual eligibility and benefits questions and pays the claims, an action against the insurer for benefits due is precisely the civil action authorized by § 1132(a)(1)(B)." *Id* (internal quotation marks and citation omitted); *see also Cyr v. Reliance Standard Life Insurance Co.*, 642 F.3d 1202, 1206-07 (9th Cir. 2011). Accordingly, an insurance provider clearly may be sued under ERISA.

Federal cases also have determined that, in cases where the insurance provider is solely responsible for administering claims, and the employer's benefit plan has no involvement in the decision-making process regarding claims, an action for wrongful denial of benefits may not be brought against the Plan itself. *See Milton v. Life Ins. Co. of North America*, 2012WL2357800 *1-*4 (N.D. Ala. 2012); *Portz v. Hartford Life and Acc. Ins. Co.*, 2008WL2986272 *2-*7 (D. Neb. 2008); *Slayhi v. High-Tech Institute, Inc.* 2007WL4284859 *6 (D. Minn. 2007). As noted in Milton, "the appropriate party defendant in a claim 29 U.S.C. § 1132(a)(1)(B) for wrongful denial of benefits is the entity or entities making that decision. Where the allegations of the Complaint state that [the insurance company] is the sole party handling claims and making claims decisions, and where [the insurance company's]

Answer confirms those allegations, [the insurance company] is the only proper Defendant as to those claims." 2012WL2357800 *4. Whether a defendant plan is listed as the plan administrator does not, in itself, affect whether the plan is a proper defendant. *See Portz*, 2008WL2986272 *7-*9. Instead, in determining whether a defendant is properly named in an ERISA benefits action, a court must consider whether the defendant influenced the handling of the plaintiff's claim. *Sawyer v. Potash Corp. of Saskatchewan*, 417 F.Supp.2d 730, 737 (E.D.N.C. 2006).

Here, Defendant clearly had no influence over the handling of Plaintiff's claim. Further, although Public Service Employee Credit Union is listed as the Plan Administrator, Standard had sole responsibility for handling claims. Plaintiff however, asserts that a plan is always a proper defendant. The Court rejects this argument. First, while 29 U.S.C. § 1132(d)(1) provides that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity[,]" this does not establish that ERISA plans are the only possible defendants in suits for benefits. *See Slayhi*, 2007WL4284859, at *6-*7. Rather, subsection (1) of § 1132(d) establishes that ERISA plans are among the possible defendants in suits for benefits. *See id.* (noting that "[i]n some cases . . . the 'plan' simply does not exist as an entity."). Further, while a plan may be sued for benefits, this does not mean that an ERISA plan is always a proper defendant in a claim of benefits under ERISA.[2] Finally, although an ERISA

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[2] The Court finds Plaintiff's cited cases unpersuasive. First, several of Plaintiff's cited cases, such as *Hall v. Lhaco, Inc.*, 140 F.3d 1190 (8th Cir. 1998) and *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414 (9th Cir. 1990) clearly apply to self-funded

plan may be sued, this does not establish whether a particular plan is liable for a specific claim for benefits. Again, Defendant here clearly had no liability for payment of claims, and did not have any decision-making responsibility for the handling of claims, including Plaintiff's claim. Accordingly, under the clear terms of the policy, Defendant has no liability to Plaintiff. Defendant is, therefore, not a proper party to this case.

CONCLUSION

For the reasons set forth above, this Court Grants Defendant's Motion for Summary Judgment.

BY THE COURT:

/s/ Shelley I. Gilman
District Court Judge

Dated: July 21, 2014

ERISA plans. Further, Plaintiff has cited *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996) and *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279 (9th Cir. 1990). These cases rely on *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324 (9th Cir. 1985), which was overruled by *Cyr*, 642 F.3d 1202, 1206-07 (9th Cir. 2011). Finally, although *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506 (2nd Cir. 2002), held that the plan in that case could be held liable for a money judgment against it even when an insurance company was responsible for payment of benefits, that case did not directly address the factual situation raised in the instant case. More specifically, it is unclear from *Chapman* whether the plan was self-funded, permitted to administer the claims raised by the plaintiff, or otherwise able to make decisions about the claims.

ORDER ON PLAINTIFF'S MOTION TO RECONSIDER (JULY 21, 2014)

DISTRICT COURT,
CITY AND COUNTY OF DENVER, COLORADO

BRENDA OLIVAR,

Plaintiff,

v.

PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN,

Defendant.

Case No: 2006CV11967
Court Room: 269

Before: Shelley I. GILMAN, District Court Judge

This case is before the Court on Plaintiff's Motion to Reconsider the Court's Order re: Defendant's Motion to Set Aside Default, to Vacate Default Judgment, and for Leave to Respond to Complaint Based on New 10th Circuit Court of Appeals Opinion. The Court, having reviewed the motion, the responsive pleadings, the Court's file, and the applicable legal authorities, finds, concludes and orders as follows:

Factual Background

1. Plaintiff participated in a long term disability plan ("the Plan") offered through Public Service Employee Credit Union.

2. Pursuant to the Summary Plan Description, the agent for service upon the Plan is the Plan Administrator. As set forth in the Summary Plan Description, the Plan Administrator is the Plan Sponsor. The Plan Sponsor is Public Service Employee Credit Union. The address and telephone number for the Plan Sponsor is provided in the Summary Plan Description.

3. Plaintiff submitted a claim requesting long term disability benefits which was subsequently denied.

Procedural Background

1. On November 15, 2006, Plaintiff filed her Complaint, in which she alleged that Defendant had wrongfully withheld benefits owed to her. Plaintiff noted that the provisions of ERISA applied to her claim, asserted that the Plan had not designated an individual as agent for service, and suggested that, under ERISA, service on the Secretary of Labor was sufficient.

2. On January 21, 2007, Plaintiff filed a return of service, indicating that Plaintiff had obtained service of Defendant by serving the Secretary of the United States Department of Labor in Washington, DC.

3. On March 19, 2007, Plaintiff filed a motion for entry of default, indicating that the service on the Secretary of the United States Department of Labor was proper service under ERISA, and that Defendant had failed to file an answer or otherwise respond.

The Court granted the motion on March 27, 2007, and entered default against Defendant.

4. On May 3, 2007, Plaintiff filed a motion for default judgment, in which she requested that the Court enter judgment against Defendant. On May 11, 2007, the Court entered default judgment against Defendant in the total amount of $95,077.27.

5. Defendant's Motion to Set Aside Default, to Vacate Default Judgment, and for Leave to Respond to Complaint was filed on September 16, 2013. There, Defendant asserted that Plaintiff never attempted to serve the agent for service designated under the Plan. Defendant further asserted that it had been unaware of the lawsuit until Plaintiff attempted to garnish the Plan's sponsor.

6. On November 4, 2013, the Court granted Defendant's motion. The Court noted that resolving disputes on their merits is favored, that the requirements for vacating default judgments should be liberally construed, and that the underlying goal is to promote substantial justice. The Court further found as follows:

> [T]he Court rejects Plaintiff's legal argument that service was proper. Though the Court originally found that service was proper under the statute . . . the Court was not fully informed of the legal authority from other Denver District Court judges regarding Plaintiff's counsel's service tactics. In the 2.5 years leading up to the August 2011 hearing, there were three cases from the Denver District Court in which the court set aside defaults that had

previously been entered in favor of parties also represented by this Plaintiff's Counsel and where the Secretary of Labor had received the service. *See Cave v. Group Long Term Disability [sic] of Convergys Corp.*, Case No. 07-CV-6981 (Stern, J.) . . . ; *Hart v. CapGemini US LLC Welfare Benefit Plan*, Case No. 07-CV-6765 (Mansfield, J.) . . . ; *Cobler v. The American General Long-Term Disability Plan for Employees*, Case No. 07-CV-12520 (Stern, J.) . . . . Two of these set asides were ordered by Judge Stern, the judge who originally issued default judgment in the instant action. This Court is persuaded by this local authority against Plaintiff's Counsel's method of service.

This Court is also persuaded by a more recent oral order from Judge Martinez dated April 23, 2013 in *Burton v. Colorado Access Benefit Plan*, No. 07CV4421 . . . . Therein, Judge Martinez stated that it is "far-fetched" to interpret the ERISA provision as allowing for service on the Secretary of the Department of Labor as an alternative agent for service whenever an employee benefits plan names a corporation or other non-natural entity as the agent for service. Judge Martinez found Plaintiff's counsel's interpretation particularly unpersuasive because he provided no cases supporting his distinction between "individuals" and "non-natural entities" as agents for service of process in the ERISA context. As Judge Martinez explained, the lack of supporting

> case authority is especially concerning given that ERISA is the subject of much litigation and there is a wealth of case law interpreting its provisions.
>
> Ultimately, Judge Martinez concluded that this ERISA provision, which provides for alternative service on the Secretary of Labor, is really intended to prohibit an employee benefits plan from insulating itself from claims by neglecting to designate an agent for service. The Court agrees with Judge Martinez's assessment and finds that Plaintiff's service in the instant action was improper.

(Order re: Defendant's Motion to Set Aside Default, to Vacate Default Judgment, and for Leave to Respond to Complaint, November 4, 2013, pp. 2-4.)

7. On July 7, 2014, Plaintiff filed the instant motion to reconsider, in which Plaintiff argues that the unpublished 10th Circuit cases *Hart v. Capgemini U.S. LLC Welfare Ben. Plan Admin. Document*, and *Bigley v. CIBER, INC. Long Term Disability Coverage*, which were decided after the entry of the above Order, establish that Plaintiff's prior service of the Secretary of the United States Department of Labor was in fact proper.

Law and Analysis

Under ERISA, a summary plan description must contain the name and address of the person designated as agent for the service of legal process, if such person is not the administrator. *See* 29 U.S.C. § 1022(b). This provision allows the administrator of a plan to

be designated as the agent for service. Under 29 U.S.C. § 1132(d)(1), service upon an administrator of a plan constitutes service upon the plan. Section 1132(d)(1) further provides for service upon the Secretary "where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process."

In the November 4, 2013 Order, the Court found that the Plan properly named Public Service Credit Union as its agent for service of process and the Plaintiff improperly served the Secretary since the Plan designated an agent for service of process. Neither *Bigley* nor *Hart* challenge this determination. In both cases, the 10th Circuit concluded that the trial courts properly set aside default judgments based on improper service on the Secretary of Labor.

In *Bigley*, the plaintiff had served the defendant by serving the United States Secretary of Labor. The 10th Circuit noted that the term "individual" is not defined under ERISA, and that courts should consider how Congress has used the term "individual" in the ERISA statutes. *Bigley v CIBER, INC. Long Term Disability Coverage*, 2014 WL 2958590, *3 (10th Cir. July 2, 2014). The *Bigley* Court then found that, under ERISA, an "individual" may be identified by specific job titles or with the general class of professionals. *Id.* The *Bigley* Court further found that, as a practical matter, the Plan's designation of "CIBER, INC. Attention: Human Resources" as its agent for service of process, identified the individual heading that department, and therefore, service on the Secretary of Labor was not proper service. Similarly in *Hart*, the 10th Circuit found that, where the summary plan description designated "general counsel" as agent for

service of process, service of process on the Secretary of Labor was not proper. 547 Fed. Appx. 870, 872 (10th Cir. November 15, 2013).

These cases have no application to the instant cases since they do not address service upon the Secretary of Labor where the plan designates the plan administrator, pursuant to 29 U.S.C. § 1132(d)(1), as agent for service of process. Instead, these cases discuss whether the summary plan description designated an "individual," and whether service on the Secretary of Labor is proper in situations where the Plan named general counsel or the human resources division of the employer as agent for service.

Defendant in this case designated the plan administrator as its agent for service, as permitted under section 1022(b). As noted above, service upon an administrator of a plan constitutes service upon the plan. *See* 29 U.S.C. § 1132(d)(1). The ability to designate the plan administrator as the agent for service and the ability to serve the plan administrator would have little or no meaning if a party were permitted to bypass these provisions, which appear to be intended to provide actual notice to the Plan, in favor of serving the Secretary of the Department of Labor, a process which would seem less likely to provide actual notice to the Plan. Here, Defendant did not receive the service of process served on the Secretary of the United States Department of Labor. Accordingly, permitting Plaintiff to disregard the designation of the agent for service of process, to serve the Secretary of the United States Department of Labor instead, and to not actually provide notice of the lawsuit to Defendant frustrates the above set forth service provisions of ERISA, and fails to promote substantial

justice or resolution of the dispute on its merits. *See Craig v. Rider*, 651 P.2d 397, 403-04 (Colo. 1982).

Finally, even if *Bigley* and *Hart* applied here, the Court finds that the "Plan Administrator," could be construed as qualifying as an "individual". The *Bigley* Court rejected the argument that an "individual" must be specified in any particular way for purposes of service of process on a defendant plan. *Bigley*, 2014 WL 2958590, *3; *see also Hart*, 547 Fed. Appx. At 872 ("A title can identify a particular individual as precisely as (often more precisely than) a first and last name. We are aware of no authority, and Hart has pointed to none, requiring any special method of identifying a specific individual to satisfy § 1132 (d)(1)."). The *Bigley* Court also specifically rejected the argument that the term "individual" means a human being. *Bigley*, 2014 WL 2958590, *3. In *Hart*, the 10th Circuit found that, by designating "general counsel" as its agent for service, the defendant had designated an "individual" for purposes of section 1132(d)(1). 547 Fed. Appx. at 872. The *Bigley* Court applied an even more expansive interpretation of the term "individual," finding that an "individual" may be identified by specific job titles or as a general class of professionals. *Bigley*, 2014 WL 2958590, *3. Further, the *Bigley* Court determined that by designating "CIBER, INC. Attention: Human Resources" as its agent for service of process, the defendant in that case had identified the individual heading that department as its agent for service of process, thereby making service on the Secretary of Labor improper. *Id.* Upon applying this expansive interpretation of "individual" to this case, the Court finds that, by designating the "Plan Administrator" as the agent for process, and by

establishing in the summary plan description that that the plan administrator is Public Service Employee Credit Union, Defendant designated an "individual" as agent for service of legal process, and therefore, service upon the Secretary of Labor was not proper service.

Conclusion

For the reasons set forth above, the Court denies Plaintiff's Motion to Reconsider the Court's Order re: Defendant's Motion to Set Aside Default, to Vacate Default Judgment, and for Leave to Respond to Complaint Based on New 10th Circuit Court of Appeals Opinion.

BY THE COURT:

/s/ Shelley I. Gilman
District Court Judge

Dated: July 21, 2014

ORDER OF THE DISTRICT COURT GRANTING DEFENDANT'S MOTION (NOVEMBER 4, 2013)

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

BRENDA OLIVAR,

Plaintiff(s),

v.

PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN,

Defendant(s).

Case No: 06CV11967
Court Room: 269

Before: Ann. B. FRICK, District Judge

This matter is before the Court on Defendant's Motion to Set Aside Default Judgment, to Vacate Default Judgment, and for Leave to Respond to Complaint (Defendant's "Motion"). The Court has reviewed the Motion, Response, and Reply, and having been fully advised, issues the following order:

Defendant's Motion is GRANTED.

This matter arises out of an issue regarding Plaintiff Brenda Oliver's attempt to effect service of process in the winter of 2006-07. In March 2007,

Judge Stern entered default judgment against Defendant Public Service Employee Credit Union Long Term Disability Plan (the "Plan").

The Plan requests that the Court set aside default, vacate the default judgment, and allow the Plan leave to respond to Plaintiff's Complaint. The Plan reasons that Plaintiff failed to properly serve the Plan and, thus, that the default judgment is invalid. The Court agrees. Plaintiff contends that her service on the Secretary of the Department of Labor was proper service and, therefore, the default should not be set aside.

The legal issue in dispute is what proper service on the Plan under ERISA is.

I. Background

This is an ERISA case and is thus governed by ERISA's provisions pertaining to service of process. ERISA clearly allows an employee benefits plan to name a "person," which includes a corporation or other non-natural entity, as agent for service of process. *See* 29 U.S.C. § 1022(b) (referring to "the person designated as agent for service of process"); § 1002(9) (defining "person" to include a corporation). Accordingly, the Plan properly named Public Service Credit Union (the "Credit Union") as its agent for service of process.

Plaintiff served the Department of Labor rather than the Credit Union, the designated agent for service. In so doing, Plaintiff relied on a suspect interpretation of an ERISA provision relating to service, 11 U.S.C. § 1132(d)(1). That provision provides that if an employee benefits plan fails to designate an individual as

agent for service of process, a plaintiff may serve the Secretary of the Department of Labor.

II. Standard

Courts favor the resolution of disputes on their merits. *Craig v. Rider*, 651 P.2d 397, 402-03 (Colo.1982). Therefore, a default judgment is a serious and drastic resolution. *First Nat'l Bank v. Fleisher*, 2 P.3d 706, 713 (Colo. 2000). For these reasons, the "requirements for [vacating] a default judgment should be liberally construed in favor of the movant, especially where the motion has promptly made." *Craig*, 651 P.2d at 402.

The underlying goal "is to promote substantial justice." *Id.* at 401. The trial court has broad discretion when determining whether substantial justice would be served by setting aside a default judgment. *Plaza del Lago Townhomes Ass'n, Inc. v. Highwood Builders, LLC*, 148 P.3d 367, 374 (Colo. Ct. App. 2006).

III. Discussion

Plaintiff asserts that service on the Secretary was proper because the Plan designated a non-natural entity, the Credit Union, rather than an individual as agent for service of process. Plaintiff argues further that the Plan's Motion is precluded by the doctrine of res judicata, or claim preclusion. Plaintiff argues that the Plan is raising the same issues regarding service that the Credit Union raised in an August 2011 hearing. That hearing addressed a contempt citation against the Credit Union, which was subject to a writ of garnishment based on the default judgment levied against the Plan in 2007. At the August 2011 hearing, the Court stated that Plain-

tiff's method of service was permissible and held the Credit Union in contempt.

The Court rejects both of Plaintiffs arguments. First, res judicata does not apply. Res judicata prevents the relitigation of claims, not of individual issues. The relitigation of issues is governed by the doctrine of collateral estoppel, or issue preclusion. In any case in which collateral estoppel is invoked, the proponent of the doctrine must show that (1) the issue sought to be precluded is identical to an issue actually and necessarily determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Vanderpool v. Loftness*, 300 P.3d 953, 957-58 (Colo. App. 2013).

Here, the Plan did not appear, nor did it have an opportunity to appear, at the August 2011 contempt hearing because it was not named in the contempt citation. Thus, the Plan did not have "a full and fair opportunity to litigate the issue in the prior proceeding." Accordingly, Plaintiff has failed to establish the fourth requirement for collateral estoppel.

Moreover, even assuming the Plan did have an opportunity to litigate the issue by virtue of its affiliation with the Credit Union, the Court will not apply collateral estoppel. Again, "collateral estoppel is an equitable doctrine and need not be applied in every case." *W. Grp. Nurseries, Inc. v. Pomeranz*, 867 P.2d 12, 15 (Colo. Ct. App. 1993). Here, the Court will not apply collateral estoppel to protect Plaintiff's

counsel's suspect method of service. The Court is especially reluctant to apply the doctrine given Plaintiff's counsel's failure to disclose at the August 2011 hearing, the rejection of his service method by my brethren here at the Denver District Court in cases in which Plaintiff's counsel was asserting the same position on service as he asserts here.

Having rejected Plaintiff's equitable argument, the Court rejects Plaintiff's legal argument that service was proper. Though the Court originally found that service was proper under the statute, again, the Court was not fully informed of the legal authority from other Denver District Court judges regarding Plaintiff's counsel's service tactics. In the 2.5 years leading up to the August 2011 hearing, there were three cases from the Denver District Court in which the court set aside defaults that had previously been entered in favor of parties also represented by this Plaintiff's Counsel and where the Secretary of Labor had received the service. *See Cave v. Group Long Term Disability [sic] of Convergys Corp.*, Case No. 07-CV-6981 (Stern, J.) (Order dated March 12, 2009, attached to Def's Mtn. as Exhibit J); *Hart v. CapGemini US LLC Welfare Benefit Plan*, Case No. 07-CV-6765 (Mansfield, J.) (Order dated October 2, 2009, attached to Def's Mtn. as Exhibit K); *Cobler v. The American General Long-Term Disability Plan for Employees*, Case No. 07-CV-12520 (Stern, J.) (Order dated October 25, 2010, attached to Def's Mtn. as Exhibit L). Two of these set asides were ordered by Judge Stern, the judge who originally issued default judgment in the instant action. This Court is persuaded by this local authority against Plaintiff's Counsel's method of service.

This Court is also persuaded by a more recent oral order from Judge Martinez dated April 23, 2013 in *Burton v. Colorado Access Benefit Plan*, No. 07CV4421. (Attached as Ex. M to Def's Mtn.) Therein, Judge Martinez stated that it is "far-fetched" to interpret the ERISA provision as allowing for service on the Secretary of the Department of Labor as an alternative agent for service whenever an employee benefits plan names a corporation or other non-natural entity as the agent for service. Judge Martinez found Plaintiff's counsel's interpretation particularly unpersuasive because he provided no cases supporting his distinction between "individuals" and "non-natural entities" as agents for service of process in the ERISA context. As Judge Martinez explained, the lack of supporting case authority is especially concerning given that ERISA is the subject of much litigation and there is a wealth of case law interpreting provisions.

Ultimately, Judge Martinez concluded that this ERISA provision, which provides for alternative service on the Secretary of Labor, is really intended to prohibit an employee benefits plan from insulating itself from claims by neglecting to designate agent for service. The Court agrees with Judge Martinez's assessment and finds that Plaintiff's service in the instant action was improper.

IV. Conclusion

Accordingly, the Court hereby SETS ASIDE default, VACATES default judgment, and GRANTS LEAVE to the Plan to respond to Plaintiff's Complaint. Defendant shall an answer within 21 days of the date of this order or will be in default.

SO ORDERED this 4th day of November, 2013.

BY THE COURT:

/s/ Ann. B. Frick
District Judge

JUDGMENT OF THE DISTRICT COURT (MAY 11, 2007)

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

BRENDA OLIVAR,

Plaintiff,

v.

PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN,

Defendant.

Case No: 2006-CV-11967
Division: 2

Before: Herbert L. STERN III, District Court Judge

Having come before the Court on Plaintiff's Motion For Default Judgment For Amount certain and the Court being fully informed,

Finds as follows:

Judgement is granted in favor of Plaintiff Brenda Oliver and against Defendant Public Service Employee Credit Union Long Term Disability Plan. The Court has considered venue and determined that it is proper.

Plaintiff is hereby awarded and Defendant is ordered to pay the following:

- $68,153.65 in back benefits:
- $9,923.62 in interest as of May 2, 2007; and
- $17,000 in attorney fees.

Plaintiff is directed to file a cost bond within 10 days of this Order.

In addition, the Court finds that Plaintiff is entitled to receive a monthly long term disability benefit payment in the amount of $1,464.62 from May 2, 2007 until Plaintiff reaches the age of 65 years, Defendant is Ordered to pay Plaintiff $1,464.62 each calendar month from May 2, 2007 until Plaintiff reaches the age of 65 years.

So Ordered, this 11th day of May, 2007.

/s/ Herbert L. Stern III
District Court Judge

ENTRY OF DEFAULT
(MARCH 27, 2007)

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

BRENDA OLIVAR,

Plaintiff,

v.

PUBLIC SERVICE EMPLOYEE CREDIT UNION LONG TERM DISABILITY PLAN,

Defendant.

Case No: 2006-CV-11967
Division: 2

The Clerk of the Court, upon Motion For Entry of Default by Plaintiff and examination of the Court's file, finds that Defendant has failed to answer or otherwise respond to within 20 days of service.

Accordingly, Default is hereby entered against Defendant.

Done this 27 day of March, 2007.

/s/ John N. McMullen
Judge

OPINION OF THE COLORADO COURT OF APPEALS (AUGUST 13, 2015)

COLORADO COURT OF APPEALS

CAROLINE BURTON,

Plaintiff-Appellant,

v.

COLORADO ACCESS, A/K/A COLORADO ACCESS LONG TERM DISABILITY PLAN,

Defendant-Appellee.

No: 2015-COA-111

Court of Appeals No. 14-CA-0728
City and County of Denver District Court
No. 07CV4421 Honorable Morris B. Hoffman, Judge

Before: Judge J. JONES,
BERNARD and ROTHENBERG*, JJ, concur.

Plaintiff, Caroline Burton, appeals the district court's order setting aside her default judgment against defendant, Colorado Access Long Term Disability Plan (the plan), and the district court's subsequent summary

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2014.

judgment in the plan's favor on her ERISA benefits claim. We affirm the order and the judgment.

I. Background

Ms. Burton was formerly employed by a company known as Colorado Access. Colorado Access sponsored the plan, which was a long-term disability insurance policy issued and administered by Unum Life Insurance Company of America (Unum). Ms. Burton sought benefits from Unum under the insurance policy and Unum paid her benefits for about two years before terminating them.

On May 3, 2007, Ms. Burton filed a complaint against the plan claiming entitlement to additional benefits under section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA). *See* 29 U.S.C. § 1132(a)(1)(B) (2012). But she did not serve or attempt to serve the plan with the complaint. Instead, on May 11, 2007, she served the complaint on the Secretary of the United States Department of Labor under section 1132(d)(1). The Secretary did not forward the complaint to the plan. Consequently, the plan did not answer the complaint. Ms. Burton sought a default judgment against the plan, which the district court entered on May 16, 2008.[1]

On December 11, 2012, the plan filed a motion to set aside the default judgment under C.R.C.P. 60(b)(3). It argued that Ms. Burton had never properly served it with the complaint; therefore, the district court

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[1] The default judgment ordered the plan to pay Ms. Burton $27,859.80 (plus interest) in "back benefits" and $601.30 per month from May 27, 2007, until Ms. Burton reaches age 65, and awarded her attorney fees.

lacked personal jurisdiction over it when the default judgment was entered, and, accordingly, the default judgment was void. The district court agreed with the plan and set aside the default judgment.

The plan later moved for summary judgment. It argued that because only Unum made eligibility determinations under the plan, and only Unum was obligated to pay benefits under the plan, only Unum could be subject to liability under section 1132(a)(1)(B). In support of its motion, the plan submitted an affidavit from Colorado Access's Vice President of Administrative Services and Corporate Compliance Officer, Rene Gallegos. Therein, Ms. Gallegos stated as follows:

- Colorado Access sponsored the plan, which made long-term disability insurance available to eligible Colorado Access employees.
- The plan was created by Colorado Access's purchase of an insurance policy from Unum.
- The plan's only governing document was the Unum insurance policy.
- Only Unum approved payment of benefits and only Unum paid benefits.
- The plan did not make benefits determinations or pay benefits.
- "The Plan was merely a technical legal entity that existed for the sole purpose of providing insurance under the [Unum insurance policy] to eligible Colorado Access employees. The Plan had no operations, no activities, no employees, no assets, and no means of paying any insurance benefits under the [Unum insurance policy]."

- The plan never played any role in processing Ms. Burton's claim, and did not receive the application for benefits or any correspondence concerning the claim.

The plan also submitted the Unum insurance policy with its motion. That policy, which included a summary plan description, included the following relevant information:

- Eligible employees were required to send all claims and information relating to claims to Unum.
- Unum would make all benefits payments.
- Colorado Access was not an agent of Unum.
- Unum determined eligibility for benefits.
- The plan administrator was Colorado Access. Unum administered benefits.
- The plan was funded as an insurance policy.

The district court granted the motion for summary judgment, agreeing with the plan that it cannot be sued under section 1132(a)(1)(B) because the undisputed facts show that it is not obligated to provide benefits.

Ms. Burton's appeal requires us to answer two questions. First, given that Colorado Access was the plan administrator, and the plan designated Colorado Access as its agent for service of process, could Ms. Burton serve process on the plan by serving the Secretary of Labor under section 1132(d)(1)? We answer that question "no," and therefore affirm the district court's order setting aside the default judgment. Second, given that Unum is the only entity which made

eligibility and payment decisions under the plan, and is the only entity that was obligated to pay benefits, can Ms. Burton nevertheless sue the plan? We answer that question "no" as well, and therefore affirm the district court's summary judgment.

II. Default Judgment—Service on the Secretary of Labor

A. Applicable Law and Standard of Review

C.R.C.P. 60(b)(3) provides that a court may set aside a judgment that is "void." Indeed, if a judgment is void, the court must set it aside. *First Nat'l Bank of Telluride v. Fleisher*, 2 P.3d 706, 714 (Colo. 2000); *In re Petition of C.L.S.*, 252 P.3d 556, 561 (Colo. App. 2011). And this is so regardless of when the party seeking to set aside the judgment moves to set it aside: no time limit applies to a motion under C.R.C.P. 60(b)(3). *Davidson Chevrolet, Inc. v. City & Cnty. of Denver*, 138 Colo. 171, 175, 330 P.2d 1116, 1118-19 (1958); *In re Petition of C.L.S.*, 252 P.3d at 560; *Don J. Best Trust v. Cherry Creek Nat'l Bank*, 792 P.2d 302, 304 (Colo. App. 1990).

A judgment is void if the court that entered it lacked subject matter jurisdiction or personal jurisdiction over the defendant. *See Davidson Chevrolet*, 138 Colo. at 175, 330 P.2d at 118. If a plaintiff fails to properly serve the defendant with a complaint, there is no personal jurisdiction over the defendant. *See Weaver Constr. Co. v. Dist. Court*, 190 Colo. 227, 232, 545 P.2d 1042, 1045 (1976); *Carlson v. Dist. Court*, 116 Colo. 330, 341-42, 180 P.2d 525, 531 (1947); *Rea v. Corr. Corp. of Am.*, 2012 COA 11, ¶ 12 (citing *Cambridge Holdings Grp., Inc. v. Fed. Ins. Co.*, 489

F.3d 1356, 1361 (D.C. Cir. 2007)); *United Bank of Boulder, N.A. v. Buchanan*, 836 P.2d 473, 476-77 (Colo. App. 1992); *see also Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

Likewise, a default judgment entered against a defendant without proper notice may violate a defendant's due process rights and be void for that reason as well. *See First Nat'l Bank*, 2 P.3d at 714; *In re Petition of C.L.S.*, 252 P.3d at 561; *Don J. Best Trust*, 792 P.2d at 305.

We review de novo a district court's decision on a motion to set aside a default judgment under C.R.C.P. 60(b)(3). *First Nat'l Bank*, 2 P.3d at 714; *In re Petition of C.L.S.*, 252 P.3d at 561.

B. Analysis

Determining whether Ms. Burton properly served process on the plan requires us to construe various provisions of ERISA. In so doing, we apply federal rules of statutory interpretation. *Copeland v. MBNA Am. Bank, N.A.*, 907 P.2d 87, 90 (Colo. 1995); *People in Interest of A.R.*, 2012 COA 195M, ¶ 17. We must consider "'whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. ___, ___, 132 S. Ct. 1350, 1356 (2012) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). This requires us to "look first to [the statute's] language, giving the words used their ordinary meaning." *Id.* (internal quotation marks omitted). Further, we must not construe the statute "in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the

overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). It is also a fundamental canon of statutory construction that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). Along the same lines, we must avoid "interpretations of a statute which would produce absurd results . . . if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

Section 1132(d)(1) of ERISA provides that "[s]ervice of summons, subp[o]ena, or other legal process of a court upon . . . an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan." "The term 'administrator' means the person specifically so designated by the terms of the instrument under which the plan is operated . . . ." 29 U.S.C. § 1002(16)(A)(i) (2012). A corporation is a "person" for purposes of ERISA. § 1002(9). So, ERISA is clear that service of process on a plan administrator is service on the plan, and that the administrator may be a corporation.

But ERISA also allows a plan to designate a person other than the plan administrator as its agent for service of process. 29 U.S.C. § 1022(b) (2012) (the summary plan description must contain "the name and address of the person designated as agent for the service of process, if such person is not the administrator"). And "[i]n a case where a plan has not designated in the summary plan description of the

plan an individual as agent for the service of legal process, service upon the Secretary [of Labor] shall constitute such service." 29 U.S.C. § 1132(d)(1).

Reading these provisions together, we conclude that a party intending to sue a plan must serve the plan administrator where it is designated as the agent for service of process, or, if the summary plan description designates a person other than the plan administrator as agent for service of process, the party must serve that other person. It is only where the summary plan description designates neither the plan administrator nor some other person as agent for service of process that service on the Secretary of Labor is allowed.

It is undisputed that Colorado Access was the plan administrator, and that the plan designated Colorado Access as its agent for service of process. Therefore, Ms. Burton was required to serve Colorado Access with her complaint. She did not do so, nor did she serve Colorado Access with her motions for entry of default or entry of default judgment. It is also undisputed that neither Colorado Access nor the plan learned of the proceedings until years after the court had entered the default judgment. We therefore conclude that the district court lacked personal jurisdiction over the plan, the district court's entry of default judgment against the plan violated the plan's right to due process, the default judgment was void, and the district court correctly set it aside pursuant to C.R.C.P. 60(b)(3). *See Rainsberger v. Klein*, 5 P.3d 351, 353 (Colo. App. 1999); *Mason-Jares, Ltd. v. Peterson*, 939 P.2d 522, 524 (Colo. App. 1997); *United Bank of Boulder*, 836 P.2d at 477-78.

In arguing to the contrary, Ms. Burton relies on that portion of section 1132(d)(1) previously quoted which says that "[i]n a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary [of Labor] shall constitute such service." She argues that an "individual" can only be a natural person, and that because a corporation such as Colorado Access is not a natural person, serving the Secretary of Labor was sufficient. We are not persuaded.

The portion of section 1132(d)(1) on which Ms. Burton relies plainly is intended to set forth a means of substituted service—that is, service when service through ordinary means is not possible because a summary plan description fails to identify an agent for service of process. It would make no sense for Congress to expressly allow for designation of a corporation (whether the plan administrator or not) as an agent for service of process and at the same time provide that such a designation can be ignored.

Further, though Ms. Burton asserts that the word "individual" is commonly understood as being limited to natural persons, that is not necessarily so. "Individual" has been defined as "a single or particular being or thing or group of beings or things." Webster's Third New International Dictionary 1152 (2002) (emphasis added); *see also* Black's Law Dictionary 843 (9th ed. 2009) ("[o]f or relating to a single person or thing") (emphasis added). And courts construing other federal statutes have concluded that statutory context may make clear that the word "individual" includes entities other than natural persons. *See*, *e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 428-

29 (1998); *United States v. Middleton*, 231 F.3d 1207, 1210-13 (9th Cir. 2000); *La Barge v. Mariposa Cnty.*, 798 F.2d 364, 366-67 (9th Cir. 1986); *see also Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 346-49 (2d Cir. 2002) (a corporation is an "individual" that may not be singled out for punishment under the Bill of Attainder Clause of the United States Constitution).

Therefore, considering the language of section 1132(d)(1) in the context of ERISA as a whole, we conclude that an "individual" as used therein includes a corporation.

In sum, the district court did not err in determining that Ms. Burton failed to properly serve the plan. As it is undisputed that the plan did not otherwise have actual notice of the action and the default proceedings, the district court correctly set aside the default judgment as void. *Rainsberger*, 5 P.3d at 353; *Mason-Jares*, 939 P.2d at 524; *United Bank*, 836 P.2d at 477-78.

III. Summary Judgment—Proper Party Defendant

A. Standard of Review

We review an order granting summary judgment de novo. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1256 (Colo. 1995); *Barnhart v. Am. Furniture Warehouse Co.*, 2013 COA 158, ¶ 8. Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987).

B. Analysis

ERISA allows a plan participant or beneficiary to bring a civil action to recover plan benefits. Specifically, section 1132(a)(1)(B) provides: "A civil action may be brought . . . by a participant or beneficiary . . . 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 . . . ."

As has been noted by other courts, while section 1132(a) plainly says who may bring a claim thereunder, it does not say, expressly, who may be sued. Nonetheless, "[b]y necessary implication, . . . a cause of action for 'benefits due' must be brought against the party having the obligation to pay. In other words, the *obligor* is the proper defendant on an ERISA claim to recover plan benefits." *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913 (7th Cir. 2013) (emphasis in original).

> Typically the plan owes the benefits and is the right defendant. . . . But not always. Health plans are often structured around third-party payors. When an employee-benefits plan is implemented by insurance and the insurance company decides contractual eligibility and benefits questions and pays the claims, an action against the insurer for benefits due "is precisely the civil action authorized by § 1132(a)(1)(B)."

Id. (quoting in part *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (en banc)). The only proper defendants in such an action are those entities which make eligibility or payment decisions or are obligated to pay benefits. *See Layes*

v. Mead Corp., 132 F.3d 1246, 1249-50 (8th Cir. 1998); *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir. 1988); *Milton v. Life Ins. Co. of N. Am.*, No. CV-12-BE-864-E, 2012 WL 2357800, at *1-4 (N.D. Ala. June 20, 2012); *Portz v. Hartford Life & Accident Ins. Co.*, No. 8:07CV478, 2008 WL 2986272, at *2-3 (D. Neb. July 31, 2008); *Fye v. Unisys Corp.*, No. 8:05-cv-2012-T-26TGW, 2007 WL 788362, at *10 (M.D. Fla. Mar. 14, 2007); *Sawyer v. Potash Corp. of Sask.*, 417 F.Supp.2d 730, 737 (E.D.N.C. 2006), aff'd, 223 F. App'x 217 (4th Cir. 2007); *Henderson v. Transamerica Occidental Life Ins. Co.*, 120 F.Supp.2d 1278, 1281-82 (M.D. Ala. 2000), *aff'd*, 263 F.3d 171 (11th Cir. 2001) (unpublished opinion).

In this case, it is undisputed that under the plan (which was really no more than the insurance policy), Unum—the insurer—made all decisions regarding eligibility for and payment of benefits, and made all such decisions with respect to Ms. Burton. It is also undisputed that only Unum was obligated to pay any benefits owed to Ms. Burton under the plan. It follows that the plan is not a proper defendant as to Ms. Burton's ERISA benefits claim. *See*, *e.g.*, *Echague v. Metro. Life Ins. Co.*, 43 F.Supp.3d 994, 1000 & n.1, 1006-08 (N.D. Cal. 2014) (granting summary judgment in favor of the plan entity on the plaintiff's section 1132(a)(1)(B) claim because the insurer "was the sole entity responsible for denying [the] plaintiff's claim"); *Cox v. Allin Corp. Plan*, No. C 12-5880 SBA, 2013 WL 1832647, at *1, *4 (N.D. Cal. May 1, 2013) (granting plan entity's motion to dismiss the plaintiff's section 1132(a)(1)(B) claim because it had no responsibility to resolve benefits claims or pay them); *Milton*, 2012 WL 2357800, at *1-4 (same as *Cox*); *Sawyer*, 417

F.Supp.2d at 733, 737 (same as *Echague*); *Sanderson v. Cont'l Cas. Co.*, 279 F.Supp.2d 466, 469, 478 (D. Del. 2003) (same as *Echague*).

We are not persuaded to the contrary by the decisions on which Ms. Burton relies.

Of those decisions, only two are arguably on point: *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506 (2d Cir. 2002), and *Meyer v. Unum Life Ins. Co. of Am.*, No. CIV. A. 12-1134-KHV, 2013 WL 1411776 (D. Kan. Apr. 8, 2013) (unpublished order), which relied on *Chapman*. *See also OSF Healthcare Sys. v. Insperity Grp. Health Plan*, ___ F.Supp.3d ___, 2015 WL 1117776 (C.D. Ill. Mar. 10, 2015); *Spears v. Liberty Life Assurance Co.*, 885 F.Supp.2d 546 (D. Conn. 2012) (following *Chapman*).

In *Chapman*, the court rejected a plan's argument that only the insurance company—which had made all eligibility determinations—could be held liable on a section 1132(a)(1)(B) claim. In doing so, the court relied heavily on section 1132(d). *Chapman*, 288 F.3d at 509. That section says, in relevant part, that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity," 29 U.S.C. § 1132(d)(1), and that "[a]ny money judgment . . . against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter," § 1132(d)(2). But as the *Larson* court observed, "[t]he main point of § 1132(d) is to adjust certain common-law liability rules; it's one example of the way in which ERISA departs from the common law of trusts." *Larson*, 723 F.3d at 914. Section 1132(d)(1) does this by treating ERISA plan liability

different from trust liability: "[a]t common law a trust cannot sue or be sued because it is not a juristic person." *Id.* (internal quotation marks omitted). And section 1132(d)(2) also does this by "limiting the personal liability of plan administrators," thereby "overrid[ing] the common law of trusts . . . ." *Id.*

Considered in light of these purposes, section 1132(d) does not create a rule that a plan is always subject to liability under section 1132(a)(1)(B).

The *Chapman* court also relied on cases holding plan administrators and plans liable under section 1132(a)(1)(B). *See Chapman*, 288 F.3d at 509-10. But those cases involved situations in which plan administrators made eligibility decisions or self funded plans paid benefits. Ms. Burton also relies on such cases. *See*, *e.g.*, *Geddes v. United Staffing Alliance Emp. Med. Plan*, 469 F.3d 919 (10th Cir. 2006). Those cases are inapposite, however, because the facts in this case are that only a third-party insurer—Unum—made eligibility decisions and paid benefits under the plan. We agree with the Seventh Circuit that, in cases such as this, because a section 1132(a)(1)(b) claim is "'essentially a contract remedy under the terms of the plan,'" and "rests on contract obligations running directly from the insurers to the [plan participants or beneficiaries]," "the *obligor* is the proper party defendant on an ERISA claim to recover plan benefits." *Larson*, 723 F.3d at 911, 913 (quoting in part *Ponsetti v. GE Pension Plan*, 614 F.3d 684, 695 (7th Cir. 2010)) (emphasis in original). In this case, the only obligor was Unum.

We recognize that in *OSF*, ___ F.Supp.3d ___, 2015 WL 1117776, the district court recently read *Larson* not to preclude a claim against a plan where

an insurer makes all benefits decisions and has the obligation to pay benefits, but merely to allow a claim against the insurer in addition to the plan in such circumstances. The court based its conclusion on the premise that a contractual relationship always exists between plans and beneficiaries. *Id.* at ___, 2015 WL 1117776, at *2 ("[A]n ERISA beneficiary makes his contract with a plan."); *id.* at ___, 2015 WL 1117776, at *3 ("Beneficiaries contract with plans to receive benefits."). Therefore, the court reasoned that the plan, as promisee, "remain[s] liable to the beneficiaries," even if an insurer is liable.

But in *Larson*, the court said that where insurers make benefits decisions and are obligated to pay benefits, "the § 1132(a)(1)(B) claim rests on contract obligations running directly from the insurers to the [beneficiaries]." 723 F.3d at 913 (emphasis added). It thereby rejected the *OSF*s court's view of the insurer's obligations as merely indirect. Instead, the *Larson* court viewed the insurer as taking the plan's place as the contracting party. Further, as discussed above, the *Larson* court made clear that only the obligor may be liable. It also made clear that although "[t]ypically the plan owes the benefits and is the right defendant," that is not always the case, and is not the case where "an employee-benefits plan is implemented by insurance and the insurance company decides contractual eligibility and benefits questions and pays the claims . . . ." *Id.* We read that language as saying that in such circumstances, the only obligor is the insurer. We therefore respectfully disagree with the district court's analysis in *OSF*.

We reject Ms. Burton's contention that the affidavit she submitted with her opposition to the plan's sum-

mary judgment motion established a genuine issue of material fact as to whether the plan is an obligor. In that affidavit, she asserted that she was entitled to benefits "[u]nder the terms of the plan." But the plan document and Ms. Gallegos's affidavit make it clear that only Unum was the obligor under the plan. Ms. Burton's conclusory affidavit did not create a genuine issue of fact as to the identity of the obligor. *See Fritz v. Regents of Univ. of Colo.*, 196 Colo. 335, 339, 586 P.2d 23, 26 (1978) ("A litigant cannot avoid summary judgment by merely asserting a legal conclusion without evidence to support it."); *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 858 (Colo. App. 2007) ("[W]hen a response to a motion for summary judgment or an accompanying affidavit states conclusions on ultimate issues without including facts that tend to prove or disprove the allegations made in the motion for summary judgment, it is insufficient to give rise to genuine issues of fact.").

We therefore conclude that the district court did not err in granting summary judgment for the plan on Ms. Burton's ERISA benefits claim.

IV. Conclusion

The order and judgment are affirmed.

JUDGE BERNARD and JUDGE ROTHENBERG concur.

ORDER OF THE DISTRICT COURT OF COLORADO (FEBRUARY 27, 2014)

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

CAROLINE BURTON,

Plaintiff,

v.

COLORADO ACCESS, A/K/A COLORADO ACCESS LONG TERM DISABILITY PLAN,

Defendant.

Case No: 07CV4421
Court Room: 209

Before: Morris B. HOFFMAN, District Court Judge

For the reasons articulated below, Defendant's "Motion for Summary Judgment," filed December 24, 2013, is GRANTED, this case is DISMISSED WITH PREJUDICE, and the March 31, 2014 trial is VACATED.

Of course, summary judgment is a drastic remedy, and may be granted only when it is clear there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. *E.g.*, *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). Moreover, the initial burden is on the movant to show

a lack of facts supporting the claim; only when that initial burden is met must the claimant respond with counter-affidavits or products of discovery demonstrating a material issue of fact. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987). Mere arguments are insufficient to meet a shifted summary judgment burden; the responding party must produce evidence. C.R.C.P. 56(e); *Schultz v. Wells*, 13 P.3d 846, 848 (Colo. App. 2000).

Plaintiff is apparently a former or current employee of Colorado Access, and claims that she was a beneficiary of the Defendant Plan, the Colorado Access Long Term Disability Plan ("the Plan"). She asserts a single claim for relief seeking long term disability benefits under the Plan.

In its supported motion for summary judgment, the Plan has attached affidavits establishing the following facts. The Plan is a qualified "employee welfare benefit plan" under § 1002(1)(A) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* ERISA permits such plans to be self-funded, in which case benefits are paid with Plan assets, or to be insurance funded, in which case benefits are paid under the terms of an insurance policy. *Id.* The Plan here was insurance funded; in particular, the disability benefits were provided through a disability insurance policy issued by Unum Life Insurance Company of America ("Unim"). A copy of that Policy, entitled "Long Term Disability Insurance Policy No. 511316," is attached as Exhibit B to the Motion ("the Policy"). Because the Plan is insurance funded, there is no governing Plan document other than the Policy. Affidavit of Rene Gallegos ¶ 4, attached as Exhibit A to the Motion. The Plan itself had no

role in eligibility or benefits decisions; all of those decisions were made by Unum. *Id.* at ¶ 6.

The Plan therefore argues that because any benefits owed to Plaintiff are owed under the Policy by Unum Life Insurance Company, and not by the Plan itself, and because the Plan had no role in making any eligibility or benefits decisions, it is not liable as a matter of law. I agree.

The cases in this area are clear that insurance-funded plans, whose only role is to provide insurance coverage, are not themselves liable for benefits under that insurance. *See*, *e.g.*, *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 915-16 (7th Cir. 2012); *Peters v. Hartford Life & Acc. Inc. Co.*, 367 F. Appx. 69, 71 (11th Cir. 2010). For example, in the recent case of *Milton v. Life Ins. Co. of N. Am.*, 2012 WL 2357800, at *2 (N.D. Ala., June 2012), the federal trial court dismissed a plaintiff's claims against an insurance funded plan, concluding that "the proper party in such cases is the entity that controls administration of the plan." Here, because it is uncontroverted that the Plan is an insurance plan, that there is no plan document imposing on the Plan itself any benefits obligation, and that the Plan undertook no duties to administer the Policy or to make eligibility or benefits decisions under it, the Plan is not liable for any benefits Unum decided not to pay.

Plaintiff attempts to avoid this result by making several arguments, none of which alter the dispositive undisputed fact that the Plan has no legal obligation to pay these benefits.

First, Plaintiff quite correctly points out that under ERISA qualified plans may sue and be sued. 29

U.S.C. § 1132(d)(1). But this misperceives the Plan's argument. The Plan does not assert that it is not a suable entity. It admits it can be sued, but only for obligations the law imposes. The fact that ERISA allows plans to be sued says nothing about what they can be sued for. As the Plan cogently put it in its reply, corporations can also be sued, but not for failing to perform acts they have no legal duty to perform.

Plaintiff also cites a host of cases denying dispositive motions brought by plans, but every one of them involved either self-funded plans or plans that administered policies by making eligibility or benefits decisions. *E.g., Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506, 509-10 (2nd Cir. 2002); *Hall v. Lhaco, Inc.*, 140 F.3d 1190 (8th Cir. 1998). In fact, Plaintiff rather disingenuously quotes from *Hall* ("[b]enefits under the terms of Hall's Plan . . . can only be obtained against the Plan itself") without mentioning, first, that the plan in *Hall* was self-funded, or, second, that the terms of that self-funding plan specifically provided that the plan was obligated to pay benefits out of plan assets. *Id.* at 1192.

Plaintiff's contention that the Plan does, in fact, have assets fails for several reasons. First, Plaintiff fails to submit any affidavits or products of discovery on this point to contradict the affidavit in the motion stating that the Plan has no assets. Moreover, the only asset Plaintiff even argues is owned by the Plan is the Policy itself, which of course only reinforces the fact that Unum is obligated to provide these insurance benefits, not the Plan. But most importantly, the question of assets is a straw man. The Plan could have millions of dollars and that would not change

the fact that under the undisputed facts in this record it has no obligation to provide any benefits.

Finally, Plaintiff argues that the Plan and the plan administrator are one and the same, and therefore that the Plan has arguably taken on some administrative duties sufficient to render it liable for the benefits Unum has refused to pay. This argument ignores the plain language of Plaintiff's own document submitted on this point. The Plan Summary, attached as Exhibit 2 to Plaintiff's Response, unambiguously states that the plan administrator is the employer, Colorado Access. That is a very different entity than the Plan itself.[1]

DONE THIS 27th DAY OF FEBRUARY, 2014.

BY THE COURT:

/s/ Morris B. Hoffman
District Court Judge

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[1] I note that Plaintiff's caption is potentially confusing on this point. She names the defendant as "Colorado Access, a/k/a Colorado Access Long Term Disability Plan." But the body of the complaint makes it clear, and Plaintiff does not dispute in her response brief, that she intended to sue, and is suing, the Plan and not the employer.

JUDGMENT OF THE DISTRICT COURT (MAY 16, 2008)

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

CAROLINE BURTON,

Plaintiff,

v.

COLORADO ACCESS, A/K/A COLORADO ACCESS LONG TERM DISABILITY PLAN,

Defendant.

Case No: 2007 CV 4421
Division: 1

Before: Christina M. HABAS, District Court Judge

Having come before the Court on Plaintiff's Motion For Default Judgment For Amount certain and the Court being fully informed,

Finds as follows:

Examination of the Court's file, demonstrates that Defendant has failed to answer or otherwise respond to within 20 days of service. The Court has considered venue and determined that it is proper. Accordingly, Default is hereby entered against Defendant.

Plaintiff has made the proper showings via affidavit and Judgement is granted in favor of Plaintiff

Caroline Burton and against Defendant Colorado Access, a/k/a Colorado Access Long Term Disability Plan. Plaintiff is hereby awarded and Defendant is ordered to pay the following:

- $27,859.80 in back benefits as of April 27, 2008;
- Interest at the rate of 8% per annum compounded annually; and
- Ms. Burton's reasonable attorney fees and costs which will be determined based on a future motion by Plaintiff to be filed within 30 days of this order.

In addition, the Court finds that Plaintiff is permanently disabled under the terms of the Plan and will remain so until she reaches the age of 65 years. Therefore, Plaintiff is entitled to receive a monthly long term disability benefit payment in the amount of $601.30 from May 27, 2007 until Plaintiff reaches the age of 65 years. Defendant is Ordered to pay Plaintiff $601.30 each calendar month beginning on May 27, 2008 and terminating when Plaintiff reaches the age of 65 years.

Plaintiff is directed to file a cost bond within 30 days of this Order.

So Ordered, this 16th day of May, 2008.

/s/ Christina M Habas
District Court Judge

RENEWED MOTION FOR DEFAULT JUDGMENT FOR AMOUNT CERTAIN (APRIL 24, 2008)

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

CAROLINE BURTON,

Plaintiff,

v.

COLORADO ACCESS, A/K/A COLORADO ACCESS LONG TERM DISABILITY PLAN,

Defendant.

Case No: 2007 CV 4421
Division: 1

Before: Christina M HABAS, District Court Judge

COMES NOW Plaintiff Caroline Burton, by and through her attorney, Brian A. Murphy, and moves this Honorable Court to enter default judgment against Defendant, and in support, states as follows:

1. On April 18, 2008, this Court denied Ms. Burton's motion for default judgment without prejudice because Plaintiff's Response to the Court's previous notice of defects in the Motion only addressed the lack of a promissory note, but not the lack of an affidavit by Ms. Burton as to damages.

2. Plaintiff had previously filed an affidavit by Ms. Burton, but filed it separately from the Motion For Default. Undersigned apologizes for the confusion caused by this fact. This renewed motion, includes Ms. Burton's affidavit and should resolve all of the issues concerning the Court.

3. Defendant was properly served with a Summons and copy of the Complaint and Jury Demand on May 11, 2007 via the Secretary of the US Department of Labor as prescribed by ERISA. 29 U.S.C. § 1132(d)(1).

4. A copy of the Return of Service was filed with the Court and is attached hereto as EXHIBIT 1.

5. Pursuant to Rule 12, Defendant was required to file an Answer or otherwise respond to the Complaint within 20 days of service. C.R.C.P. 12. Therefore, Defendant was required to file an Answer no later than May 31, 2007.

6. Defendant failed to file an Answer or otherwise respond to the Complaint within the time allowed, has not requested an extension to file an Answer, and has not responded to the Complaint in any way.

7. "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default." C.R.C.P. 55(a).

8. Plaintiff has attached the affidavit of Plaintiff Counsel as EXHIBIT 2, which contains the following provisions required by C.R.C.P. 121:

   (b) An affidavit stating facts showing that venue of the action is proper.

   (c) An affidavit or affidavits establishing that the particular defendant is not an infant, an incompetent person, an officer or agency of the State of Colorado, or in the military service.

   (d) An affidavit or affidavits or exhibits establishing the amount of damages and interest, if any, for which judgment is being sought.

   (e) If attorney fees are requested, an affidavit that the defendant agreed to pay attorney fees, or that they are provided by statute; that they have been paid or incurred; and that they are reasonable.

9. Upon entry of judgment in Plaintiff's favor, undersigned will submit a motion for attorney fees and costs providing the detail required to obtain such an award, including an updated calculation of fees and costs incurred.

10. Plaintiff has attached the Affidavit of Caroline Burton showing that Plaintiff is entitled to damages of $601.3 per month from June 27, 2004 to present. EXHIBIT 3.

11. As of April, 27, 2008, the Plan will owe Ms. Burton $27,859.80 in back benefits.

12. In addition, Ms. Burton is entitled to an award of pre-judgment interest and post-judgment interest at the rate of 8% per annum compounded annually. C.R.S. § 5-12-102.

13. In addition to an award of past damages, Ms. Burton is also entitled to an order directing the Plan to make future monthly disability payments.

14. Although ERISA does not contain an acceleration provision which would typically apply to private insurance contracts, it does allow the Court to determine a Plaintiff's right to future benefits and order that those benefits be paid when they become due under the terms of the Plan. 29 U.S.C.A. § 1132(a) (allows a person to bring an action "to clarify his rights to future benefits under the terms of the plan").

15. Ms. Burton's physical disability is chronic and permanent in nature and she will remain disabled under the Plan's definition for the rest of her life. EXHIBIT 3.

16. The Plan provides monthly benefits up to age 65. EXHIBIT 3.

17. Accordingly, Plaintiff is entitled to an award of her back benefits, interest, and attorney fees, as well as an Order directing the Plan to begin making monthly payments to Plaintiff in the amount of $601.30 from now until she reaches ages 65. EXHIBIT 3.

WHEREFORE, Plaintiff Caroline Burton, by and through her attorney, Brian A. Murphy, respect-

fully asks the Clerk of the Court to: award her $27,859.80 for past LTD benefits plus interest at the rate of 8% per annum compounded annually; award her reasonable costs and attorney fees to be determined by proper post-judgment motion; order the Plan to begin making monthly payments in the amount of $601.30 from May 27, 2008 until Ms. Burton reaches the age of 65 years.

Respectfully submitted this 24th day of April, 2008.

By: /s/ Brian A. Murphy
Brian A. Murphy, #30918
Attorney for Plaintiff
Signed Original
Available For Inspection

**TRANSCRIPT OF PROCEEDINGS—
RELEVANT EXCERPTS
(APRIL 23, 2013)**

DISTRICT COURT
DENVER COUNTY COLORADO

CAROLINE BURTON,

Plaintiff,

v.

COLORADO ACCESS BENEFIT PLAN,

Defendants.

Case No. 2007 CV 4421
Division 259

Before: The Hon. Michael MARTINEZ,
Judge of the District Court.

[p. 37]

THE COURT: . . . On my review of the Court's file in this case, I take judicial notice of its contents and the Court's prior orders and the pleadings filed within it. I've also taken the time this morning to go back and review the court file in case 06 CV 11967 involving—it's styled as *Brenda Olivar v. Public Service Employee Credit Union*. Likewise I have gone back and looked at the court record in 07 CV 12520, as that has been prominently referenced in the pleadings and as

they are court records I can and do take judicial notice of those pleadings as well.

Colorado Rule of Civil Procedure 55(c) provides for good cause shown that the Court may set aside an entry of default in a default judgment, and if a judgment's been entered, likewise set that aside in accordance with Rule 60(b). So the rules work in concert together.

Rule 60(b) and the standards attended to it have been articulated in the motions. I think the parties are very well aware of them and familiar with them and there is really not great dispute in terms of the standards that apply.

The Defendant seeks a declaration from this Court, a determination that the judgment entered in this case was void, therefore the Court lacked jurisdiction over the Defendant in entering its subsequent orders of default and default judgment, therefore the orders are void ad ab initio. The parties also articulate additional basis, at least the Defendant does for relieve as provided for under Rule 60(b), including Rule 60(b)(5) which provides that I may grant the relief from judgment or order for any other reason justifying relief from the operation of the judgment.

Interest of note to hear is that in terms of the timing of the motion judgment challenging—or motion challenging the actual judgment itself and a declaration that the matter is void need not be filed within the six-month period that governs paragraphs one and two of Rule 60. To the contrary when there is an allegation of a void judgment that may be brought at any time.

An appropriate basis establishing the relief requested the judgment must be vacated upon request. That's Rule 60(b)(3).

The Court's review of the record here reflects that the Plaintiff filed her complaint and jury demand on May 3, 2007, and served a summons and a copy of the complaint upon the Department of Labor Secretary, in this case Ronald Whiting, the Deputy Solicitor on May 11 of that year. So approximately eight days after filing the action. It is undisputed in this case that the Plaintiff never received—excuse me, the client never received a copy of the summons or the complaint from the Department of Labor Secretary, Mr. Whiting, or anyone else connected with the Department of Labor. And that's from the affidavit of Ms. Gallegos which I've also reviewed and considered.

It is likewise clear from the record that Plaintiff made no effort to serve the Plan itself, but rather endeavored based on its interpretation of the provisions of the Department of Labor regulations as they apply to ERISA plans, opted to serve specifically the Secretary. In so doing and relying on Department of Labor Regulatory Standard 29 U.S.C. § 1132(d)(1), I believe. Yes.

Because the Plan never received a copy of the summons or complaint no responsive pleading was ever filed. Plaintiff filed a motion for summary—for default judgment which was denied without prejudice in April of 2008, so a year after the case was begun. In May of 2008, the Plaintiff renewed the request—actually I think it was April of 2008 it was renewed and the Court granted that

on May 16, 2008. So the relevant judgment at issue here was default generated on—judgement entered on behalf of the Plaintiff and against the Defendant, Colorado Access in the amount of $27,859.80 and back benefits as of April 27, 2008, together with interest at the rate of 8 percent per annum compounded annually, long term benefit—disability benefits payable to the Plaintiff from May 27, 2007, to the age of 65.

The Defendant's position had been articulated in their pleadings and once again here today in open court that the provisions of ERISA specifically provide and anticipate that ERISA will designate in their summary plan description which is served to its participants and Plan Administrator and name the person as an agent for service of process. And they've articulated that 29 U.S.C. § 1002(9) explicitly provides that a corporation or other business is, quote, a person, end quote, for purposes of ERISA.

What the unquestioned evidence before me has shown is that the Defendant, Colorado Access, and the long term disability plan is an employee welfare benefit plan organized pursuant to the ERISA statutes, 29 U.S.C. § 1001 *et seq*. And in accordance with 29 U.S.C. § 1022 the Defendant Plan here identified in their summary plan disposition—description, the Plan Administrator as Colorado Access and the person or agent for service of process once again is Colorado Access.

There is no dispute in this case that the Plaintiff was aware having been served the summary plan description that the Plan Administrator was

Colorado Access and that the designated agent for service of process was Colorado Access.

And I believe it was Exhibit J at page 34, if I can find it, there it is. No. I wanted to quote from it.

MR. BEAVER [Counsel for Defendants]: Your Honor, I probably—I see where it is.

THE COURT: I have it.

MR. BEAVER: Okay.

THE COURT: I printed it off and I made some notes on it but I just left it on my desk, so—

MR. BEAVER: I've got a copy if the Court would like it.

THE COURT: Okay. Thanks. Exhibit J, page 34 clearly identifies that the additional summary plan description information identifies the name of the Plan as Colorado Access, the name an address of the employer Colorado Access then located at Suite 700 501 South Cherry Street in Denver, 80222. Plan identification number, plan number, type of welfare plan, type of administration, specifically identifying that the plan is to be administered by the Plan Administrator and benefits are administered by the insurer and provided in accordance with the insurance policy issued to the plan. Specific identification of the Plan Administrator name, Colorado Access, same address, further articulating that Colorado Access is the Plan Administrator and named fiduciary of the plan, and finally the agent for service of legal process on the Plan once again is Colorado Access, service of legal process may also be made upon Plan Administrator and any Trustee

of the plan. That is consistent with the Department of Labor regulations applying to ERISA plans.

So the setting aside of the judgment here is governed as I noted under 55(c) and Rule 60. I won't reiterate that. Setting aside of a judgment is a decision left to the sound discretion of the trial court in accordance with applicable statutory criteria. As noted the motion needs to be filed within a reasonable time unless the grounds asserted are mistake, inadvertence, excusable neglect or fraud in which case they need to be filed not more than six months after the judgment was entered.

Here as I've describe the Plaintiff—the Defendant's contention is that default judgment entered on May 16, 2008, is void and therefore unenforceable. And because that is the primary position the Defendants have taken today I won't consider, and it's not necessary for me to consider the other criteria under Rule 60.

And applying the logic to the—logic to the position contended by the Defense I find that the motion is timely filed within a reasonable time, particularly here it is of no concern that they were aware of this judgment a year ago or more because as I've stated the standards provide and the case law authorizes explicitly that challenges to void judgments may be brought at any time.

So, having found that the motion was timely filed and appropriately before me I have appropriate jurisdiction to consider it. The undisputed evidence here both in the record and by the arguments

presented today is that the Plaintiffs—the Plaintiff and her counsel were aware of the designation of the Plan Administrator and the agent for service of process for the Colorado Access Plan as being Colorado Access.

Plaintiff's contention that well, we served the Department of Labor because, one, we can as authorized under § 1132(d)(1) but also because we couldn't find the employer, that is entirely inconsistent with the Defendant's own pleadings which indicate—and Exhibit A for today's hearing which indicate that as of July 29, 2002, Colorado Access had relocated to 1065—excuse me, 165 East Harvard Avenue, Suite 600, Denver, Colorado 80231-5963. That was included—the address included in the correspondence to Ms. Burton. It's conspicuous and clear and certainly as of July 29, 2002, long before this action was brought she was aware of the—the address of the Plain and who to serve.

Likewise it's evident from the record that Plaintiff was able when they desired to to [sic] obtain the correct change of address information regarding the switch from the Cherry—the South Cherry Street address to the East Harvard Avenue address for the Plan long before the action was initiated in 2007.

Considering the evidence as a whole and the totality of the records before me both in my case and in the other cases I've cited I am also persuaded that the method of service in this action was not appropriately obtained, one, and two, that it was utilized for purposes of obtaining not a notice to the party and a responsive pleading,

but as an end run to the obligation that Plaintiff would ordinarily have to obtain service upon—proper service upon the Defendant entity.

I think the position regarding—that Plaintiff has taken that they can—that they are within their rights to serve the Secretary of Labor is inaccurate and an incomplete reading of the regulatory scheme that applies to ERISA plans.

I also think that this approach was intentionally taken as an effort in manipulation to accomplish the goal that was obtained, which was a default judgment and subsequent leverage and bargaining material—or bargaining position to obtain some sort of negotiated settlement on the judgment that was entered. Most importantly as applicable here, I think the evidence is clear and the law is likewise clear that service in this circumstance must have been accomplished upon the agent for service of process identified in the SPD and in this case that agent was the Colorado Access Plan and/or the Administrator of the Plan, which also was Colorado Access Plan, or the Trustee of the Plain itself.

Having failed to obtain proper service and having knowledge in advance that proper service should have been served upon the plan, the Court finds that the service was defective and inappropriate and inconsistent with the requirements of Colorado Civil Procedure to provide an adverse party notice of the proceedings and an opportunity to respond. To allow the judgment to stand would be contrary to substantial justice in this case and I find that the judgment was entered based on improper

service, therefore the judgment entered on May 16, 2008, in this case, 07 CV 4421 is void ab initio.

And so—will you get me some water, please? That judgment is now set aside and vacated as if it had not occurred at all. And the Defendant will be given 20 days—21 days, sorry, to file a responsive pleading to the original complaint. This matter will be—will stand as reopened on that basis. Thank you.

So the Defendant's motion to set aside and vacate the default judgment is granted. As I noted, the Defendant will have 21 days to file their answer.

The Defendant also seeks an award of attorney's fees as a sanction in this case for the repeated conduct of Counsel and in this case that's perpetuated by the Plaintiff in initiating actions of this nature and approaching service of process in this manner. And in directing the Court's attention to the impropriety and inappropriateness of this procedure, Defendants have drawn my attention to case 07 CV 6981, 07 CV 6765, 07 CV 12520. I reviewed in particular the order—the court records in those proceedings but also the particular order entered by Judge Stern in the *Culva* case, 07 CV 12520.

The only mechanism by which the Court could properly entertain a request for attorney's fees in this case would be that found at C.R.S. § 13-17-102. § 13-17-102(4) provides that an attorney, a party who brought or defended an action or any part thereof that lacked . . .