

In the
United States Court of Appeals
For the Seventh Circuit

No. 11-2889

KATHLEEN G. SCHULTZ and MARY KELLY,

Plaintiffs-Appellants,

v.

AVIALL, INCORPORATED LONG TERM DISABILITY PLAN,
PERKINS COIE LONG TERM DISABILITY PLAN, and
PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 1:09-cv-02387—**Ruben Castillo**, *Judge*.

ARGUED JANUARY 17, 2012—DECIDED MARCH 2, 2012

Before EASTERBROOK, *Chief Judge*, and CUDAHY and
HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Plaintiffs Kathleen Schultz
and Mary Kelly brought this putative class action under
the Employee Retirement Income Security Act of 1974
("ERISA"), 29 U.S.C. § 1001 *et seq.* They seek to recover

benefits under the long-term disability benefit plans maintained by their former employers (Aviall, Inc. and Perkins Coie, respectively) and issued by the Prudential Insurance Company of America. Like many private disability insurance plans, these plans provide for a reduction of private disability benefits if the disabled employee also receives federal disability benefits under the Social Security Act, as both of these plaintiffs do. The plaintiffs agree that some reduction of their private benefits was correct, but they dispute the correct calculation of the reduction.

When calculating the amount of the reduction based on Social Security disability benefits, both plans counted both the amounts payable to each plaintiff under 42 U.S.C. § 423 (primary disability insurance benefits) and amounts payable on behalf of their dependent children under 42 U.S.C. § 402(d) (child's benefits based on parent's disability). The plaintiffs contend that the plans do not authorize Prudential to include in the offset calculation the benefits paid to their dependent children on account of the plaintiffs' disabilities. Both plans require offsets for "loss of time disability" benefits. The plaintiffs argue that a child's Social Security disability benefit based on a parent's disability is not a "loss of time disability" benefit. In the alternative, the plaintiffs argue that the plan language is ambiguous and should be construed against Prudential. Based on the relevant plan language, the district court held that the children's Social Security benefits based on their parents' total disability counted as "loss of time disability" benefits and dismissed the plaintiffs' case for failure to state a

claim under Rule 12(b)(6). *Schultz v. Aviall, Inc. Long Term Disability Plan*, 790 F. Supp. 2d 697 (N.D. Ill. 2011). We review *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6), see *Ray v. Maher*, 662 F.3d 770, 772 (7th Cir. 2011), and we affirm.¹

The issue is whether children's Social Security disability benefits paid based on a parent's disability are "loss of time disability" benefits under the language of the Aviall and Perkins Coie Long Term Disability Plans, and accordingly, whether Prudential acted properly when it reduced plaintiffs' private disability benefits based on their children's Social Security disability benefits. Under the Aviall Long Term Disability Plan, plaintiff Schultz's gross monthly long-term disability benefit amount was

¹ Because we find that the reductions were proper under the terms of the plans, we do not reach the second issue presented by the plaintiffs in this appeal: whether our precedents, such as *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1490 (7th Cir. 1996), holding that an insurer is not a proper party in an ERISA suit under 29 U.S.C. § 1132(a)(1)(B) should be revisited in light of *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) (holding that 29 U.S.C. § 1132(a)(3) does not limit the universe of defendants able to be sued under its terms), and *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011) (en banc) (extending the Supreme Court's analysis in *Harris* to section 1132(a)(1)(B) claims, and holding that an insurer is a proper defendant). In light of our holding on the merits, we reserve this second question for another case where the answer may make a difference in the outcome.

to be reduced by other “deductible sources of income.” The Aviall Plan listed eight types of deductible sources of income, one of which was “The amount that you, your spouse and children receive or are entitled to receive as loss of time disability payments because of your disability under . . . the United States Social Security Act.” Likewise, under the Perkins Coie Long-Term Disability Plan, plaintiff Kelly’s long-term disability benefits were subject to deductions of certain sources of income. The deductible amount was “equal to the total amount of payments or benefits which for that Calendar Month or part of a Calendar Month are Periodic Benefits . . . payable to you or to your spouse or children based on your work and earnings[.]” There were five categories of deductible “Periodic Benefits” under the Perkins Coie Plan, one of which was “Loss of time disability benefits payable under or by reason of . . . The United States Social Security Act as amended from time to time.” Pursuant to these provisions, Prudential offset from plaintiffs’ monthly long-term disability benefit payments the amount that each plaintiff’s household was awarded in primary and dependent Social Security disability benefits. Consistent with the parties’ arguments, and because the language of the offset provisions in the two plans is substantially similar, we consider the two plans and provisions together.

Before addressing the merits, we address the standard of review. The Supreme Court directs that “a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary

authority to determine eligibility for benefits or to construe the terms of the plan,” in which case a deferential standard of review is appropriate. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If such discretion is granted, court review is under the arbitrary and capricious standard, but a plan’s provision for deferential review must be clear. See *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331-32 (7th Cir. 2000). The Aviall and Perkins Coie Long-Term Disability Plans do not contain language conferring discretion on the plan administrators, although attached to each policy is an “ERISA Statement” that contains discretionary language. Where no discretionary language is contained in the plan itself, discretionary language contained in a summary plan description is not sufficient to alter the standard of review. See *Schwartz v. Prudential Ins. Co. of America*, 450 F.3d 697, 699-700 (7th Cir. 2006). Thus, we review *de novo* the Plans’ interpretation of the offset provisions.²

² In a footnote to their brief, the defendants claim that “discovery would confirm that the Plans are vested with discretionary authority to interpret Plan documents, subject to an arbitrary and capricious standard of review.” During argument, counsel for the defendants claimed that a yet unproduced, broader, “master” plan grants discretionary power, and that the document would control if the plaintiffs’ case survived on the pleadings. Defendants filed their motion to dismiss before discovery, but plaintiffs assert that they requested copies of all plan documents and summary plan descriptions during administrative appeals. In response, the defendants produced only the policies. The defendants do not dispute this, and
(continued...)

Turning now to the merits, the plaintiffs agree that their own, primary Social Security disability benefits under section 423 may be used as offsets as “loss of time disability” benefits. They contend only that their children’s Social Security disability benefits under section 402(d) do not constitute “loss of time disability” benefits, so that Prudential’s use of their children’s Social Security payments to offset plaintiffs’ private disability benefits violated the plans. Essentially, they argue, the purpose of Social Security payments to a dependent child of a disabled parent is not to replace the income that the household has lost as a result of the parent’s inability to work. The purpose is instead to provide additional “support” for the child. The phrase “loss of time” is a term of art, plaintiffs argue, meaning “loss of business time connected with the insured’s occupation,” citing 17 Couch on Insurance § 246.84 (3d ed. 2007). In their attempt to

² (...continued)

do not argue for a deferential standard of review — but claim they do so only because of the Rule 12(b)(6) standard.

Perhaps the defendants believed that the plaintiffs failed to word their requests for relevant plan documents using magic terms that would trigger production at the administrative level. From the defendants’ description of the “master” plan, however, there is little doubt that they believe the document is controlling and thus clearly relevant to the plaintiffs’ case. Yet defendants withheld it in pre-litigation discovery, risking sanctions of up to \$110 per day, which might still be imposed. See 29 U.S.C. § 1132(c); 29 C.F.R. § 2575.502c-1. We are left to wonder why.

distinguish “loss of time” or “disability” payments made to dependents from “support” payments made to dependents, they rely on language in *In re Unisys Corp. v. Long-Term Disability Plan ERISA Litigation*, 97 F.3d 710, 716 (3d Cir. 1996), generally describing children’s Social Security disability payments as “designed to provide the recipient for the loss of support he or she sustains because of the disability of a parent.” The plaintiffs also rely on *Carstens v. U.S. Shoe Corporation’s Long-Term Benefits Disability Plan*, 520 F. Supp. 2d 1165 (N.D. Cal. 2007), in which the district court accepted the same arguments presented here and held that children’s Social Security disability benefits based on a parent’s disability are not “loss of time” benefits.

The interpretation of language in a plan governed by ERISA is controlled by federal common law, which draws on general principles of contract interpretation, at least to the extent that those principles are consistent with ERISA. See *Young v. Verizon’s Bell Atl. Cash Balance Plan*, 615 F.3d 808, 823 (7th Cir. 2010); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 465 (7th Cir. 1998). Plan language is given its plain and ordinary meaning, and the plan must be read as a whole, considering separate provisions in light of one another and in the context of the entire agreement. See *Young*, 615 F.3d at 823. All language of a plan should be given effect without rendering any term superfluous. The plaintiffs also argue that, to the extent we reject their interpretation of the phrase “loss of time disability” benefits, we should find the words ambiguous and construe them against the party that drafted the agreement and in the plaintiffs’ favor.

We do not believe the Aviall or Perkins Coie plan language on the offset is ambiguous, however. The only reasonable interpretation of the applicable language is that when a disabled employee's dependent children receive Social Security payments by reason of the parent-employee's disability, those benefits are disability benefits based on the employee's "loss of time." The offsets were permissible under these plans.

Virtually all courts considering this issue have found that dependent children's Social Security benefits were subject to offset under nearly identical policy language. See *Mayhew v. Hartford Life & Accident Ins. Co.*, 2011 WL 5024648, at *5-7 (N.D. Cal. Oct. 21, 2011) (denying insured's motion to dismiss plan's counterclaim because dependent Social Security disability benefits could be offset against insured's long-term disability benefits pursuant to policy language permitting offset of "loss of income" benefits paid to insured or insured's family under Social Security Act); *Fortune v. Group Long Term Disability Plan for Employees of Keyspan Corp.*, 588 F. Supp. 2d 339, 341-42 (E.D.N.Y. 2008) (denying insured's motion to amend complaint as futile because plan's language offsetting "loss of income" benefits provided to insured or her family because of the insured's disability would permit offset of dependent Social Security disability benefits), *aff'd*, 391 Fed. Appx. 74, 80 (2d Cir. 2010); *Pennell v. Hartford Life & Accident Ins. Co.*, 2010 WL 330259, at *5-7 (N.D. Ohio Jan. 21, 2010) (same, under arbitrary and capricious standard); *Kennedy v. Hartford Ins. Co.*, 2009 WL 3007921, at *4-5 (E.D.N.Y. Sept. 21, 2009) (same, under arbitrary and capricious standard),

aff'd, 402 Fed. Appx. 610 (2d Cir. 2010). We find no meaningful basis on which to distinguish the phrase “loss of income” interpreted in these cases from the phrase “loss of time” used in the plans at issue here. Although the various agreements use slightly different language, the “loss of income” and “loss of time” provisions are intended to have the same consequence — to offset the amount of money the insured employee receives as replacement income pursuant to the employee’s long-term disability benefit by the amount of money that the employee and his or her dependents receive as replacement income under the Social Security Act.

To avoid this result, the plaintiffs rely heavily on language in the Third Circuit’s decision in *In re Unisys Corp. v. Long-Term Disability Plan ERISA Litigation*, 97 F.3d 710, 716 (3d Cir. 1996), but it does not aid their cause. The disability policy in that case said that offsets would apply only to Social Security benefits received by the claimants. It was silent on Social Security disability benefits received by their dependent children. In deciding that the claimants’ benefits could not be offset by amounts their children received, the court commented that dependent children’s Social Security disability benefits “are designed to provide the recipient for loss of support he or she sustains because of the disability of a parent.” *Id.* at 716. The court’s choice of words does not indicate that the court was differentiating between “support” and “income,” and it certainly was not intended to guide a case like this one, where the plans refer specifically to offsets for Social Security benefits paid to children. The court’s language does not support

the plaintiffs' argument that a meaningful distinction should be drawn between the monetary and non-monetary blows a household sustains when a breadwinner is disabled.

The district court's decision in *Carstens* supports plaintiffs' case, but we respectfully disagree with that court's analysis. *Carstens* dealt with an offset provision like those at issue here: it provided that the defendant could offset "periodic benefits, for *loss of time* on account of the Employee's disability, under or by reason of . . . the United States Social Security Act as amended from time to time." See *Carstens*, 520 F. Supp. 2d at 1166 (emphasis added). The plan referred specifically to amounts payable to children. The court accepted *Carstens*' argument, repeated by plaintiffs here, that "loss of time" is a term of art that permits the offset of payments made to compensate for the insured's lost income, but not to compensate for the insured's disability or for support to the insured's children. *Id.* at 1167. The *Carstens* court was also persuaded by the fact that the dependent child continues to receive benefits after a disabled parent dies, and by the fact that the disabled recipient of the child's benefit can spend that benefit only on the child's needs. See 520 F. Supp. 2d at 1169, citing 42 U.S.C. § 402(d)(1)(C)(ii) and SSA Publication No. 05-10076.

We are not persuaded by these arguments. The plaintiffs' assertion that "loss of time" is a term of art does not apply in this context. In the cases cited in *Carstens* and by the plaintiffs here, the issue was whether there was coverage under a disability insurance contract for an

insured's inability to work at his or her specific occupation or whether the contract covered an insured's inability to work in any occupation. See 17 Couch on Insurance § 246.84; *Weum v. Mut. Benefit Health & Accident Ass'n*, 54 N.W.2d 20, 30 (Minn. 1952) (finding that jury was properly instructed that the phrase "total loss of time" in disability policy referred to the loss of business time connected with the insured's specific occupation); *Federal Life Ins. Co. v. Bolinger*, 193 N.E. 681, 682 (Ind. App. 1935) (permitting recovery of benefits for both loss of limb and "loss of time" under disability policy). That distinction simply is not at issue in these plans or in this case.

The offset provisions in these plans refer specifically to Social Security disability benefits paid to children. These benefits are paid under the Act to compensate the household for the loss of income it has suffered as a result of the disability of one of its breadwinners. See *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977) (purpose of the old age, survivors, and disability insurance provisions of the Social Security Act is to "insure covered wage earners and their families against the economic and social impact on the family *normally entailed by loss of the wage earners's income* due to retirement, disability or death, by providing benefits *to replace the lost wages*") (emphases added). The Act makes no distinction between payments for "loss of time" or "loss of income" or "loss of support." Nor does it recognize anything less than total disability. To be awarded benefits under the Act, an applicant for Social Security disability insurance benefits must demonstrate that he suffers from "physical

or mental impairment or impairments [that] are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A). A successful applicant, then, must satisfy the Social Security Administration that he is unable to work at all because of his disability, i.e., that his loss of time from work is total.

As a result of that total loss of time, a Social Security disability benefits recipient is entitled to a certain “package of benefits,” including dependent child benefits. See, e.g., *Hopkins v. Cohen*, 390 U.S. 530, 534 (1968) (holding that attorney fee award of percentage of “past-due benefits to which the claimant is entitled” should include percentage of payments to disabled claimant’s spouse and children based on his disability). Those dependent benefits, then, are paid on account of the primary recipient’s total disability — or, put another way, because of the primary recipient’s total “loss of time” from work. See 42 U.S.C. § 402(d)(1)(B). We are not swayed, as the *Carstens* court was, by the fact that dependents may continue to receive dependent Social Security disability benefits after the primary recipient has died, or the fact that the recipient receives a child’s Social Security disability benefits on behalf of and in trust for the dependent child. The benefits that are subject to offset under these plans are those paid under section 402(d)(1)(B) based on the parent’s disability. If the disabled parent dies, these benefits for children

become survivor benefits and are no longer subject to offset (but the private disability insurance benefits also cease in all likelihood). The overriding purpose of the benefits — to replace income lost due to a disabled parent's inability to work, see *Califano*, 430 U.S. at 213 — is unaltered. Social Security disability benefits, whether primary or dependent, are "loss of time disability" benefits paid because of the primary recipient's disability. Such payments fall squarely within the offset provisions of the plaintiffs' disability plans and accordingly may be used to reduce their long-term disability benefits.

The plaintiffs also rely on the legislative history of the Social Security Act, but the available history does not change our analysis. In 1958, when Congress amended the Act, the responsible committee wrote:

In providing monthly benefits for the dependents of workers entitled to disability insurance benefits, the committee has given recognition to the problems confronting families whose breadwinners have been forced to stop work because of total disability. The benefit amount payable to the disabled worker under the present disability insurance provisions does not provide adequate protection for his family. The needs of the family of a disability insurance beneficiary are as great as, or greater than, the needs of the family of an old-age insurance beneficiary. It is reasonable to assume, also, that in a great many cases the care which the disabled person requires makes it difficult, if not impossible, for his wife to increase the family income by working. In addition, a

person receiving disability insurance benefits frequently has high medical expenses.

S. Rep. No. 85-2388 (1958), reprinted in 1958 U.S.C.C.A.N. 4218, 4228. This passage recognizes that the family of a disabled worker suffers not only from the worker's loss of wages but also from added expenses associated with the disability. But contrary to plaintiffs' assertions, this passage does not suggest that Congress meant to treat primary and children's Social Security disability benefits under the Act as anything other than replacement income for the disabled person and his or her family. The dependent's Social Security benefit therefore is based entirely on the disabled parent's loss of income, which is a measurement of that parent's total "loss of time."

Finally, plaintiffs' arguments simply fail to account for the plan language calling for offsets based on Social Security benefits that dependent children receive. The Aviall plan requires offsets for amounts that "you, your spouse *and children* receive . . . as loss of time disability payments because of your disability under . . . the United States Social Security Act," and the Perkins Coie plan requires offsets for payments "to you or to your spouse *or children* based on your work and earnings." The plans' references to children must mean something with regard to children's Social Security disability benefits. What is plaintiffs' theory? The Social Security Act provides benefits to the dependent child of a deceased, disabled, or retired wage earner under 42 U.S.C. § 402(d)(1)(B). Ordinarily, those benefits are discontinued when the child reaches the age of 18, but they may be extended

under certain circumstances, such as if the child herself is disabled before the age of 22. See 42 U.S.C. § 402(d)(1)(E), (G).

The plaintiffs' theory is that the offset provisions apply to this latter category of benefits — benefits payable to the *disabled child* of a disabled parent — “in that they compensate the recipient [child] for time away from work due to a disability.” By contrast, they argue, Social Security payments made to a non-disabled child of a disabled parent under 42 U.S.C. § 402(d)(1)(B) do not compensate the recipient (child) for time away from work and therefore may not be offset under the plan language. Under the plaintiffs' formulation, then, children's Social Security disability benefits paid to a disabled child may be offset under the “loss of time” language of the plans, while dependent Social Security disability benefits paid to a non-disabled child may not.

In oral argument, we asked about this rather unusual position by asking plaintiffs' counsel a hypothetical question involving two households, each with a disabled parent. Household A has a non-disabled dependent child, while Household B has a disabled dependent child. Under the plaintiff's reading of the plans, Household B's monthly long-term disability benefit could be offset based on dependent Social Security disability payments, while Household A's monthly long-term disability benefit could not. In other words, Household B has suffered not only the disability of a former wage earner but also the disability of a child, yet rather than receiving the greater monthly benefit, it would receive

the lesser. This outcome would be untenable and would verge on the unconscionable. In light of the plaintiffs' argument, we wish to make abundantly clear that the offset language in these plans would not apply to Social Security benefits paid because of the child's disability. The result the plaintiffs seek is not a reasonable interpretation of the plans' use of the phrase "loss of time disability benefits."

The judgment of the district court is AFFIRMED.