No. 12-729

IN THE

# Supreme Court of the United States

JULIE HEIMESHOFF,

*Petitioner*,

*v.*

HARTFORD LIFE & ACCIDENT INSURANCE CO. AND WAL-MART STORES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a court should enforce a contractual limitations provision in an ERISA disability benefits policy requiring that any suit be brought within three years after the date proof of loss is due, where the claimant had actual knowledge of the limitations period and more than a year to file suit within that period after the final administrative denial of her claim.

2. Whether the court of appeals properly declined to address petitioner's argument that respondent violated regulatory notice requirements, where petitioner had actual notice of the contractual limitations period long before that period expired.

## CORPORATE DISCLOSURE STATEMENT

Hartford Life and Accident Insurance Company is a wholly owned subsidiary of Hartford Life, Inc., which is a wholly owned subsidiary of Hartford Holdings, Inc., which is a wholly owned subsidiary of The Hartford Financial Services Group, Inc. The Hartford Financial Services Group, Inc. is a publicly traded corporation that has no parent corporation, and no publicly held corporation owns 10 percent of more of its stock.

Wal-Mart Stores, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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## BRIEF IN OPPOSITION

Respondents Hartford Life and Accident Insurance Company (Hartford) and Wal-Mart Stores, Inc. (Wal-Mart) submit this brief in opposition to the petition for a writ of certiorari.

## STATEMENT

1. Wal-Mart established a disability benefits plan for its employees under a group disability insurance policy issued and administered by Hartford (the Policy). Under the Policy, Hartford pays benefits to qualifying Wal-Mart employees who become totally disabled. As relevant to petitioner's claim, the Policy defines total disability in part as an employee's inability,

due to sickness, to perform the essential duties of his or her occupation. App. 2a.[1]

Under the Policy, benefits for total disability become payable on the first day after an "Elimination Period." App. 3a-4a. As relevant here, the elimination period ends, and benefits become payable, when the employee has been totally disabled for 90 days or when Wal-Mart stops making salary continuation payments, whichever is later. App. 1a; Pet. App. 9. An employee seeking benefits under the Policy must provide Hartford with written "proof of loss" establishing his or her eligibility for benefits. Proof of loss is due "within 90 days after the start of the period for which The Hartford owes payment" (App. 5a)—that is, within 90 days after the end of the elimination period.[2]

If Hartford denies a claim in whole or in part, Hartford provides the claimant with a written notice giving reasons for the denial, describing any additional information necessary to substantiate the claim, and explaining the administrative review process. App. 6a. The claimant has a right to appeal the decision by submitting a written request for review, along with any additional documents the claimant wishes to offer in support of the appeal. *Id.* The Policy provides that Hartford will make a decision on the appeal within 60

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[1] Relevant provisions of the Policy are reproduced in the Appendix to this brief ("App.").

[2] A claimant's failure to meet the proof-of-loss deadline will not affect the claim for benefits if it was not possible to submit the proof within the required time and proof is given as soon as possible thereafter. App. 5a. After the deadline passes for submitting the written proof of loss, Hartford may require further documentation of the disability. *Id.*

days after receiving the request for review except in special circumstances, such as where a hearing is required, "but in no case more than 120 days after the request for review is received." *Id.*[3]

If Hartford denies the administrative appeal, the claimant may file a civil action challenging the denial of benefits under Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a) (ERISA). The provisions of the Policy at issue here set time limits within which a claimant may bring such a suit. The Policy provides:

> Legal action cannot be taken against The Hartford:
>
> (1) sooner than 60 days after due proof of loss has been furnished; or
>
> (2) after the shortest period allowed by the laws of the state where the policy is delivered. This is 3 years after the time written proof of loss is required to be furnished according to the terms of the policy.

App. 7a. In the vast majority of States, insurance contracts are required by law to include proof-of-loss limitations language similar to this provision. *See Wetzel* v. *Lou Ehlers Cadillac Grp. Long Term Disability Ins. Program*, 222 F.3d 643, 647 n.5 (9th Cir. 2000) (listing statutes).

2. Petitioner Julie Heimeshoff began working for Wal-Mart in April 1986. Pet. App. 6. During her ten-

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[3] These deadlines were later revised in the Summary Plan Description (*see* Pet. App. 66) to reflect amendments to the governing regulations. *See* 65 Fed. Reg. 70,246 (Nov. 21, 2000).

ure, petitioner became eligible to participate in Wal-Mart's long-term disability insurance plan. *Id.* In January 2005, according to the Complaint, petitioner began to exhibit symptoms of fibromyalgia, including chronic pain and fatigue. *Id.* By May 2005, those symptoms had worsened, and petitioner had been diagnosed with several additional conditions. *Id.* On June 8, 2005, petitioner stopped working (*id.*), and on August 22, 2005, she submitted a claim to Hartford for long-term disability benefits (Pet. App. 7).

Because Wal-Mart continued paying petitioner's salary through September 8, 2005, *see* C.A.J.A. 126; Pet. App. 7 (noting 90-day salary continuation period), the elimination period under the Policy ended on that day, and any benefits owed would have become payable the next day, on September 9, 2005. *See supra* p. 2. Petitioner's written proof of loss was due 90 days later (App. 5a), on December 8, 2005.[4] On several occasions in October and November 2005, Hartford requested information from petitioner and her rheumatologist regarding petitioner's functionality in order to determine whether petitioner met the Policy's definition of total disability. Pet. App. 7, 72-74. Neither petitioner nor her rheumatologist responded to these requests. Pet. App. 8, 77-78.

On December 8, 2005, Hartford denied petitioner's claim for "failure to 'provide satisfactory Proof of Loss.'" Pet. App. 8; *see* Pet. App. 75-79. The denial let-

[4] Overlooking the elimination period, petitioner's Complaint alleged that Hartford owed her payments as of June 8, 2005, when she stopped working. Pet. App. 14. As the district court noted, that would have made proof of loss due even earlier, by September 6, 2005. *Id.*

ter explained that Hartford could not determine whether petitioner was disabled within the meaning of the Policy without the information it had requested and stated that if petitioner wished to have that information considered, she must submit it as soon as possible. Pet. App. 77-78. Hartford advised petitioner of her right to appeal the denial by submitting a written request for review within 180 days. Pet. App. 78. Upon receipt of such a request, Hartford would "review the entire claim." *Id.* If Hartford "again den[ied] [the] claim," petitioner would "have the right to bring a civil action under Section 502(a) of ERISA." Pet. App. 79.

In May 2006, petitioner obtained counsel "'to assist her in acquiring the "satisfactory Proof of Loss" the Hartford was requesting.'" Pet. App. 8. On May 18, 2006, petitioner's counsel wrote to Hartford to confirm petitioner's intent to appeal the denial of benefits and to request a copy of the Policy and the administrative record. C.A.J.A. 138-139. On May 31, 2006, Hartford provided the requested materials, including a complete copy of the Policy, which contained the contractual limitations provision. C.A.J.A. 130. In its cover letter, Hartford explained that it would reopen petitioner's claim without any need for a formal appeal if it received the information it had previously requested. *Id.*; Pet. App. 80.

On October 2, 2006, petitioner submitted additional information. Pet. App. 8. Hartford reopened petitioner's claim and retained a rheumatology consultant, who evaluated the materials petitioner had submitted and spoke with petitioner's rheumatologist. Pet. App. 9. On November 29, 2006, after its consultant concluded that petitioner "'was able to perform the activities of her sedentary occupation,'" Hartford determined that petitioner did not meet the Policy's definition of total

disability and therefore did not qualify for benefits. *Id.*; *see* C.A.J.A. 127-129. The denial letter again advised petitioner of her right to pursue an administrative appeal by submitting a request for review within 180 days and of her "right to bring a civil action under Section 502(a) of ERISA" upon denial of that appeal. C.A.J.A. 129.

On May 24, 2007, petitioner sought an extension of time until September 30, 2007, to submit materials in support of an appeal. Pet. App. 14. Hartford agreed to that request and stated that if it received no additional information by that date, it would evaluate petitioner's appeal using the information currently in the file. Pet. App. 14-15. On September 26, 2007, petitioner submitted her administrative appeal. Pet. App. 9. With the assistance of two new doctors to review petitioner's records, Hartford conducted an administrative review of petitioner's claim. *Id.* At the end of that review, on November 26, 2007, Hartford concluded that petitioner was not totally disabled within the meaning of the Policy and issued a final denial of petitioner's claim. *Id.*; *see* Pet. App. 81-89. The denial letter advised petitioner of her right to "bring a civil action under Section 502(a) of [ERISA]." Pet. App. 89.

3. On November 18, 2010—nearly three years after Hartford denied petitioner's administrative appeal and nearly five years after petitioner's proof of loss was due—petitioner filed this action against Hartford and Wal-Mart. Petitioner alleged claims under ERISA challenging Hartford's denial of her claim for disability benefits. Respondents moved to dismiss on the ground that petitioner's complaint was time-barred under the Policy's contractual limitations provision. Pet. App. 5; *supra* p. 3.

The district court granted the motion to dismiss, holding that the Policy "unambiguously disallows legal action more than three years after the time written proof of loss is required to be furnished." Pet. App. 15. Even crediting petitioner's argument that proof of loss was not due until September 30, 2007—the date of the extension Hartford had agreed to for petitioner's administrative appeal (*supra* p. 6)—the district court held that petitioner's suit was untimely under the plain terms of the Policy. Pet. App. 15.[5] The court also rejected petitioner's argument that the contractual limitations period should not apply because Hartford had not provided notice of the limitations period in its denial letters. Pet. App. 15-18. Interpreting regulations implementing ERISA, the court held that "Hartford was not required to inform [petitioner] of the [Policy]'s limitations period for legal action in its benefits determination letter." Pet. App. 17-18.

On appeal, petitioner argued that the limitations period did not begin to run until Hartford denied her administrative appeal in 2007 because her cause of action did not accrue until she had exhausted her administrative remedies. In the alternative, petitioner argued that she was entitled to equitable tolling because Hartford had violated ERISA regulations requiring it

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[5] Contrary to petitioner's arguments below, neither Hartford's requests for additional information nor its agreement to extend the deadline for petitioner's administrative appeal altered the date proof of loss was due. *See* Resp. C.A. Br. 8-11, 29-32. Even if they did, however, the latest date proof of loss could have been due was September 30, 2007. Petitioner's suit was filed more than three years after that date and was therefore untimely under any calculation of the proof-of-loss deadline. Pet. App. 15.

to disclose the time limits for filing a civil action in its denial letters.

The U.S. Court of Appeals for the Second Circuit affirmed in an unpublished summary order. Pet. App. 1-4. With respect to petitioner's argument that her cause of action did not accrue until Hartford denied her appeal, the court relied on circuit precedent holding that an identical contractual limitations period in an ERISA plan could be enforced even where it began to run before the cause of action accrued. Pet. App. 3 (citing *Burke* v. *PriceWaterhouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76 (2d Cir. 2009)). Applying the contractual limitations period, the court held that petitioner's action was time-barred because she filed it "more than three years after her proof of loss was due." *Id.*

As to petitioner's alternative argument, the court found it "need not address th[e] issue" of whether the ERISA regulations required Hartford to disclose the time limits for filing suit in its letters denying benefits. Pet. App. 4. The court noted that

> [Petitioner]'s counsel conceded in the district court and at oral argument that he had received a copy of the plan containing the unambiguous limitations provision long before the three-year period for [petitioner] to bring the claim had expired.

*Id.* In light of petitioner's actual knowledge of her right to sue and the time limits for doing so, petitioner was "not entitled to equitable tolling," regardless of whether Hartford had violated the regulations. *Id.*

## REASONS FOR DENYING THE PETITION

### I. PETITIONER'S ARGUMENTS CONCERNING THE ENFORCEABILITY OF THE CONTRACTUAL LIMITATIONS PROVISION DO NOT WARRANT REVIEW

It is undisputed that petitioner filed her ERISA suit long after the deadline established by the Policy's contractual limitations provision. Petitioner contends that the limitations provision should not be enforced as written because it began to run before her cause of action accrued at the conclusion of her administrative appeal. Contrary to the petition, however, every circuit but one to have considered the question has concluded that nothing in ERISA categorically forbids the enforcement of a contractual limitations period that begins to run before a claimant may bring suit. Only the Fourth Circuit has held otherwise, and its decision is an outlier: Since that court issued its decision, three other circuits have considered and rejected it.

Petitioner's case provides a poor vehicle to resolve the limited disagreement between the Fourth Circuit and other courts. None of the concerns that drove the Fourth Circuit to depart from the majority rule arose in petitioner's case. As the court of appeals noted, petitioner had actual knowledge of the limitations period at least as early as May 2006—more than two years before that period expired. Once petitioner filed her administrative appeal, after the deadline was extended at her own request, Hartford took only two months to complete its final review. And when Hartford issued its final denial letter, petitioner had more than a year remaining in the limitations period in which to file suit. Petitioner does not contend that Hartford unreasonably delayed its review of her appeal, and she does not contend that she had insufficient time to prepare her

suit before the limitations period expired. Enforcement of the contractual limitations provision was thus eminently reasonable in petitioner's case.

Moreover, even if application of a contractual limitations period could in theory be unreasonable in a particular case, that possibility does not warrant a holding that the limitations period is *per se* unenforceable. Courts that have rejected the Fourth Circuit's position, including the Second Circuit below, have recognized that equitable tolling or other relief may be appropriate where the administrative review process takes too long or a claimant lacks adequate notice of the time limits for filing suit. That is not the case here.

### A. Petitioner Mischaracterizes The Nature And Degree Of Conflict Among The Circuits

As the court of appeals explained, ERISA does not contain a statute of limitations for suits challenging a denial of benefits. Pet. App. 2. Courts instead may borrow the limitations period "provided by the 'most nearly analogous state limitations statute.'" Pet. App. 3 (quoting *Burke* v. *PriceWaterhouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 78 (2d Cir. 2009)). Where, however, the benefits plan contains a contractual limitations period, that provision is generally enforceable so long as it is reasonable. *See Order of United Commercial Travelers of Am.* v. *Wolfe*, 331 U.S. 586, 608 (1947).

Petitioner contends (at 2) that the lower courts have "adopted three conflicting approaches" to answer the question of "when … an ERISA plan's statute of limitations begin[s] to run or accrue." As an initial matter, petitioner's focus on "accru[al]" is misleading. "Accrual"—in the sense of when a beneficiary's right to

bring suit under Section 502(a) arises—is a question of federal common law. Although the statute is silent on the matter, courts have generally held that "an ERISA action may not be brought in federal court until administrative remedies are exhausted." *Burke*, 572 F.3d at 79; *see also, e.g.*, *Chappel* v. *Laboratory Corp. of Am.*, 232 F.3d 719, 724 (9th Cir. 2000); *Bourgeois* v. *Pension Plan for Emps. of Santa Fe Int'l Corp.*, 215 F.3d 475, 479 (5th Cir. 2000); *Doe* v. *Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 873 (7th Cir. 1997).

That is not the question the court of appeals decided. Here, the Policy includes a limitations provision that is not tied to the "accrual" of a beneficiary's cause of action. The Policy instead measures the deadline for filing suit from an event—the due date for submitting proof of loss—that precedes the time when a cause of action accrues. App. 7a (tying deadline for filing suit to "the time written proof of loss is required to be furnished according to the terms of the policy" without reference to an accrual). The only question presented in this case is whether that contractual limitations period should be enforced according to its terms.[6]

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[6] Where a policy includes no contractual limitations provision, leaving suits to be governed by a state statute of limitations, courts have adopted different approaches to determine when the limitations period begins to run on an ERISA benefits claim. *See, e.g.*, *Veltri* v. *Building Serv. 32B-J Pension Fund*, 393 F.3d 318, 324-325 (2d Cir. 2004) (discussing competing approaches). As explained in the text, however, that issue is also not presented in this case, which is governed by a contractual limitations provision that specifies the point at which it begins to run. *See, e.g.*, *Rice* v. *Jefferson Pilot Fin. Ins. Co.*, 578 F.3d 450, 455 (6th Cir. 2009) (noting precedent applying the "clear repudiation" rule of accrual to a claim governed by a state statute of limitations, but declining to apply that rule to a claim governed by a contractual limitations

Consistent with *Wolfe*, every circuit but one to have considered that question has held that a contractual limitations period like the one included in Hartford's Policy is enforceable unless its application would be unreasonable in a particular case. Petitioner concedes (at 2) that the Second, Sixth, Seventh, Eighth, and Tenth Circuits have adopted that rule. *See Salisbury* v. *Hartford Life & Accident Co.*, 583 F.3d 1245, 1248 (10th Cir. 2009) (rejecting beneficiary's argument "that the Plan's limitations period is unenforceable because it is triggered by the Proof of Loss due-date, not by the date of exhaustion of the process for administrative review"); *Rice* v. *Jefferson Pilot Fin. Ins. Co.*, 578 F.3d 450, 455-456 (6th Cir. 2009) ("Although there are situations in which a contractual accrual date for ERISA claims could be unreasonable, there is nothing in the language of the contract in this case to suggest that the contractual accrual date is unreasonable." (citation omitted)); *Burke*, 572 F.3d at 81 & n.5 (joining other circuits in "upholding written plan terms including limitations periods which may begin to run before a claimant can bring legal action," and rejecting the Fourth Circuit's contrary rule "[i]n light of a court's authority to determine the reasonableness of a policy-prescribed limitations period" on a case-by-case basis); *Abena* v. *Metropolitan Life Ins. Co.*, 544 F.3d 880, 884 (7th Cir. 2008) (holding that application of a contractual limitations period that began to run before the time for

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provision); *Mogck* v. *UNUM Life Ins. Co. of Am.*, 292 F.3d 1025, 1028 (9th Cir. 2002) (distinguishing state statute of limitations, for which an ERISA cause of action "'accrues either at the time benefits are actually denied, or when the insured has reason to know that the claim has been denied,'" from a contractual limitations period, which began to run at the time specified in the policy).

bringing suit was not unreasonable where beneficiary "still had seven months following the conclusion of the internal appeals process in which to file his suit in the district court"); *Blaske* v. *UNUM Life Ins. Co. of Am.*, 131 F.3d 763 (8th Cir. 1997) (enforcing a contractual limitations period requiring that suit be brought within three years after proof of claim was required). The First Circuit has similarly enforced a contractual limitations period requiring that any action be filed within three years after the due date for proof of disability, upon concluding that the period was reasonable. *See Santaliz-Rios* v. *Metropolitan Life Ins. Co.*, 693 F.3d 57, 60 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3428 (U.S. Nov. 28, 2012) (No. 12-923).[7]

[7] Other courts of appeals have addressed the enforceability of contractual limitations provisions without squarely addressing whether the period may begin to run before the time for bringing suit. The Third Circuit, in an unpublished opinion, has applied a contractual limitations period upon concluding that it was reasonable. *See Fontana* v. *Diversified Grp. Adm'rs, Inc.*, 67 F. App'x 722, 724 n.1 (3d Cir. 2003). Both the Fifth and Eleventh Circuits have similarly held that "contractual limitations periods on ERISA actions are enforceable, regardless of state law, provided they are reasonable," without specifically addressing the reasonableness of a limitations period that begins to run before the time for filing a judicial challenge. *Northlake Reg'l Med. Ctr.* v. *Waffle House Sys. Emp. Benefit Plan*, 160 F.3d 1301, 1303 (11th Cir. 1998); *see Harris Methodist Fort Worth* v. *Sales Support Servs. Inc. Emp. Health Care Plan*, 426 F.3d 330, 337 (5th Cir. 2005) ("Where a plan designates a reasonable, shorter time period, … that lesser limitations schedule governs."); *Baptist Mem'l Hosp.-DeSoto Inc.* v. *Crain Auto. Inc.*, 392 F. App'x 288, 295 n.1 (5th Cir. 2010) ("Although *Harris Methodist* involved a three-year limitations period that began to run with the filing a completed claim, and thus before the claimant's ERISA cause of action accrued, we had no occasion to address this question because the parties did not dispute the reasonableness of the limitations period.").

These courts have recognized that ERISA plans are contracts and that "a court must not rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous." *Burke*, 527 F.3d at 81 (internal quotation marks omitted); *see also, e.g.*, *Rice*, 578 F.3d at 456.

Only one circuit has taken a different view. In *White* v. *Sun Life Assurance Co. of Canada*, 488 F.3d 240 (4th Cir. 2007), a divided panel of the Fourth Circuit held that a contractual limitations provision that begins to run before a judicial challenge can be filed is unenforceable *per se*. The panel majority reasoned that allowing the limitations period to begin running before a claimant had a right to bring legal action could allow the administrative remedy to undercut the remedy of judicial review. In particular, the *White* majority worried that "[b]enefit plans would have the incentive to delay the resolution of their participants' claims" in order to limit the time a claimant would have to seek judicial review. *Id.* at 247-248. Although the plan administrator had argued that any such delay could be addressed on a case-by-case basis, the majority rejected that approach on the ground that it would fail to give fair notice to claimants of when the time for seeking judicial relief would run. *Id.* at 248-251.

Chief Judge Wilkins dissented from that holding, *White*, 488 F.3d at 256-263, and three courts of appeals subsequently considered and rejected it, *see Salisbury*, 583 F.3d at 1248-1249; *Rice*, 578 F.3d at 456; *Burke*, 572 F.3d at 81 n.5. Although Petitioner argues (at 2, 10, 24) that the Ninth Circuit aligns itself with the Fourth Circuit in declining categorically to enforce contractual limitations periods that begin to run before the time for bringing suit, this argument relies on a misreading of *Price* v. *Provident Life & Accident Insurance Co.*,

2 F.3d 986 (9th Cir. 1993). In *Price*, the Ninth Circuit held that because the plan administrator had failed to notify the claimant that his claim had been denied, the limitations period did not begin to run until the claimant "had reason to know about the denial." *Id.* at 988. *Price* did not hold that a contractual limitations period like the one in Hartford's Policy could not be enforced if the beneficiary *was* properly apprised of the status of his claim and of his rights for review.[8]

The circuits that have rejected the Fourth Circuit's approach in favor of the majority rule have not overlooked the concerns raised in *White*. They have simply held that addressing those concerns does not require holding that contractual limitations periods are unenforceable *per se* when they begin to run before the time for bringing suit. Of the circuits in the majority, nearly all (including the Second Circuit) have recognized that a contractual limitations provision might be unenforceable or subject to equitable tolling in a particular case if it does not allow a reasonable amount of time to sue—for example, because the administrative appeal has

[8] Nor has the Ninth Circuit read *Price* to establish such a rule. In *Mogck*, for instance, the court considered a plan that limited the period for filing a judicial challenge to three years from a request for "proof of claim." 292 F.3d at 1028. The court declined to enforce the provision because the plan administrator never made "an adequate request for the proof of claim," and therefore "never took the steps necessary to trigger the running of the contractual time limitation under the policy." *Id.* The court never cited *Price*, however, or otherwise suggested that the limitations period was unenforceable *per se*. The unpublished district court decisions petitioner cites (at 25-27) similarly do not warrant this Court's review. None holds that a contractual limitations provision that begins to run before the time for bringing suit is categorically unenforceable.

taken too long, or because the plan has failed to provide adequate notice to the claimant of her right to judicial review. The Tenth Circuit, for instance, rejected the Fourth Circuit's rule on the ground that "[l]ess drastic remedies" could "take account of both the Plan's right to set a limitations period and the claimant's need to exhaust administrative remedies." *Salisbury*, 583 F.3d at 1249. It identified at least two such remedies: "to allow a claimant at least a reasonable time after exhaustion of administrative remedies or to apply equitable tolling during the pendency of the administrative review process." *Id.* The Second Circuit similarly rejected the Fourth Circuit's rule on the basis of "a court's authority to determine the reasonableness of a policy-prescribed limitations period" and "to toll that period should the facts of a given case require such a result." *Burke*, 572 F.3d at 81 n.5.[9]

As these cases suggest, petitioner is wrong to characterize (at 2-3) the First Circuit's decision in *Ortega Candelaria* v. *Orthobiologics LLC*, 661 F.3d 675 (1st

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[9] *See also Rice*, 578 F.3d at 455-456 ("Although there are situations in which a contractual accrual date for ERISA claims could be unreasonable, there is nothing in the language of the contract in this case to suggest that the contractual accrual date is unreasonable." (citation omitted)); *Abena*, 544 F.3d at 884 ("We can certainly imagine circumstances in which the application of this provision would not be reasonable. … But that is not what happened here."); *Doe*, 112 F.3d at 876 ("[I]f the defendant through representations or otherwise prevents the plaintiff from suing within the limitations period, the plaintiff may add to the remaining limitations period the entire period during which the defendant's action was effective in delaying the suit."); *LaMantia* v. *Voluntary Plan Adm'rs, Inc.*, 401 F.3d 1114, 1119 (9th Cir. 2005) ("Estoppel may apply … against a party asserting a contractual limitations defense based on a specified time period in an ERISA disability plan.").

Cir. 2011), as establishing a "third approach" to the question whether contractual limitations periods should be enforced. *Ortega Candelaria* simply applied the principle that the other circuits in the majority have recognized by equitably tolling a contractual limitations period in a particular case where its application would have been unreasonable. *See id.* at 681 (explaining that the beneficiary "was materially misled" by the plan administrator). As noted, the First Circuit has more recently issued a decision following the majority rule. *See Santaliz-Rios*, 693 F.3d at 60.[10]

### B. This Case Is A Poor Vehicle To Resolve The Limited Disagreement Between The Fourth Circuit And Other Courts

The Fourth Circuit's main concern in rejecting the reasonableness approach adopted by other courts of appeals was that such a rule would "make it impossible for plans to give their participants the notice of subsequent remedies required by law." *White*, 488 F.3d at 249. As the Fourth Circuit majority explained, its "quarrel [wa]s … not with the ability of plans to set lim-

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[10] Petitioner also relies (at 2-3) on the district court's decision in *Novick* v. *Metropolitan Life Insurance Co.*, 764 F. Supp. 2d 653 (S.D.N.Y. 2011). That decision did not adopt a rule different from the Second Circuit's holding in *Burke*. Had it done so, it would of course be neither correct nor controlling. *Novick* simply recognized that a contractual limitations period that begins to run before the time for bringing suit may be unreasonable in particular circumstances, without holding that such periods are always unreasonable. *See id.* at 659-660 (holding that "[a]n ERISA policy's shorter limitations period will govern so long as that period is reasonable," but declining to enforce the limitations period because the plan administrator failed to provide adequate notice of the applicable time limit for filing suit).

its on the time in which claimants may seek review but with the lack of fair notice to claimants" under that framework. *Id.* at 250; *see id.* at 251 ("The case-by-case assessment … lays waste to limitation periods' critical purpose of providing potential plaintiffs with meaningful notice of the timeliness of their actions and providing potential defendants an equally clear sense of when the time on possible claims has run."). Petitioner's argument, too, amounts to a disagreement with the Second Circuit and other courts of appeals as to what rule adequately vindicates the need for notice.

This case does not provide a suitable vehicle for the Court to evaluate the Fourth Circuit's concern for fair notice. The court of appeals found that petitioner had actual notice of the time limits for filing suit to challenge Hartford's benefits determination. Pet. App. 4. As soon as petitioner retained counsel in 2006, that attorney obtained a copy of the Policy, which clearly specified the contractual limitations period for bringing a judicial challenge. *See supra* p. 5. Petitioner's counsel admitted he knew of the limitations provision. Pet. App. 23-24. The court of appeals properly attributed that notice to petitioner herself. Pet. App. 4; *see, e.g.*, *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) (under "our system of representative litigation, … each party … is considered to have 'notice of all facts, notice of which can be charged upon the attorney'" (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1879))).

Indeed, had petitioner lacked notice of the Policy's limitations period, her case might not have come before this Court at all. Petitioner concedes (at 32) that the availability of equitable tolling in cases where notice is not provided "resolves the tension" between ERISA's exhaustion requirement and the possibility that a contractual limitations period might begin to run before

the end of the administrative review. And she concedes (*id.*) that the provision of adequate notice "permits insurers to draft the limitations provisions they desire." *See also* Pet. 3-4 (equitable tolling "satisfies ERISA[]" in cases where notice is lacking and "allows plans to write their own limitations provisions"); Pet. 11 (case-by-case remedy for notice violations is "consistent with" ERISA). In light of these concessions, it is not even clear whether petitioner agrees with the Fourth Circuit that a contractual limitations provision like the one in the Policy should be categorically unenforceable. To the contrary, petitioner contends (at 32) that the case-by-case approach applied in *Novick* and *Ortega Candelaria* is sufficient.

The Second Circuit follows precisely that approach. *See Burke*, 572 F.3d at 81 n.5 (recognizing court's authority to toll a contractual limitations period "should the facts of a given case require such a result"); *Veltri* v. *Building Serv. 32B-J Pension Fund*, 393 F.3d 318, 322-324 (2d Cir. 2004) (holding equitable tolling "appropriate" where defendant pension fund failed to provide notice of judicial review rights). The court of appeals simply held that petitioner was not entitled to equitable tolling because she had actual notice of the contractual limitations period. Pet. App. 4 (citing *Veltri*, 393 F.3d at 326).

This case also does not implicate the Fourth Circuit's concern that enforcing a contractual limitations provision like the one at issue here would give plan administrators an "incentive to delay the resolution of their participants' claims" to limit the claimant's time for filing suit. *White*, 488 F.3d at 247. Petitioner does not contend that Hartford engaged in any such delay tactics, nor could she. As noted, once petitioner filed her administrative appeal, Hartford took only two

months to resolve it. Moreover, when Hartford issued its final denial, petitioner had more than a year remaining in the limitations period within which to file suit. Petitioner does not deny that this was enough time to prepare her suit. As the Seventh Circuit has explained, an ERISA suit challenging a denial of benefits "is the equivalent of a suit to set aside an administrative decision," for which "ordinarily no more than 30 or 60 days is allowed." *Doe*, 112 F.3d at 875. The suit "is a review proceeding, not an evidentiary proceeding" or an "original lawsuit." *Id.* If application of the limitations provision would not have given a diligent claimant a reasonable amount of time to sue, the lower courts could have provided petitioner with relief. As in cases involving lack of notice, the Second Circuit has recognized "a court's authority to determine the reasonableness of a policy-prescribed limitations period" and to "toll that period" where a "plan administrator … use[s] the administrative process to 'undermine[] and potentially eliminate[] the ERISA civil right of action.'" *Burke*, 572 F.3d at 81 n.5.

The concerns on which the Fourth Circuit rested its outlier rule thus are not present here, and this case accordingly provides a poor vehicle in which to evaluate the Fourth Circuit's anomalous approach. To the extent this Court wishes to review the merit of that approach, the issue arises frequently, and the Court should await an opportunity to decide the issue in a case that presents the full range of equities.

### C. There Is No Error In The Second Circuit's Approach

In any event, the majority rule that the court of appeals applied in this case is manifestly correct. It is uncontested that under this Court's decision in *Wolfe*,

the parties to a contract may agree to a shorter limitations period than a statute would otherwise provide for disputes arising out of that contract. Petitioner thus conceded below that "under applicable law, Hartford could provide in its policy that a statute of limitations shorter than the state's period applied to a claimant's right to file a civil action for judicial review, so long as the policy provision is reasonable and unambiguous." Pet. C.A. Br. 17; *see also Wolfe*, 331 U.S. at 608 ("[I]t is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such a contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.").

This Court has also recognized that a cause of action may "accrue[] at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit." *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993). Although the Court in *Reiter* did not "infer [that] odd result" in the absence of a specific indication in the statute at issue, the Policy here unambiguously specifies that the limitations period begins to run at a time different from the time when a claimant may bring a judicial challenge. App. 7a; *see Burke*, 572 F.3d at 79.

Moreover, there is no dispute that the Policy's limitations period complies with applicable state law. Connecticut law permits contracting parties to adopt a limitations period shorter than that provided by statute, as long as an aggrieved party can file suit within "one year from the time when the loss insured against occurs." Conn. Gen. Stat. § 38a-290; *see also Voris* v. *Middlesex Mut. Assurance Co.*, 999 A.2d 741, 746 (Conn. 2010).

Because it began to run from the time proof of loss was required, rather than from the time the loss occurred, the limitations period in the Hartford Policy was more than two years longer than state law required. Indeed, in the insurance context, "the vast majority of states … *require* insurance contracts to include the proof of loss limitations language such as that at issue here." *Burke*, 572 F.3d at 81 (emphasis added); *see Wetzel* v. *Lou Ehlers Cadillac Grp. Long Term Disability Ins. Program*, 222 F.3d 643, 647 n.5 (9th Cir. 2000) (listing statutes).[11] As the dissenting opinion in *White* observed, this is for good reason: "Tying the limitations period to the date on which proof of claim is due serves the important function of ensuring that a civil action is not too remote in time from the events giving rise to the plaintiff's claim." 488 F.3d at 259 (Wilkins, C.J., dissenting).

Petitioner points to nothing in ERISA that precludes a limitations period like this one. Petitioner notes that ERISA provides for an integrated scheme of administrative and judicial review, *see Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), and that it imposes fiduciary duties on plan administrators, *see Metropolitan Life Ins. Co.* v. *Glenn*, 554 U.S. 105 (2008). But she does not explain how a limitations provision like the one here offends these elements of the statutory scheme. Limitations periods are ubiquitous, and enforcing a reasonable limitations period does not "strip beneficiaries of their ability to file suit." Pet. 14. Nor is there any mer-

[11] Connecticut law requires that individual disability insurance policies include a provision stating that no legal action "shall be brought after the expiration of three years after the time written proof of loss is required to be furnished." Conn. Gen. Stat. § 38a-483(a)(11). Connecticut law contains no comparable requirement for group disability insurance.

it in petitioner's argument (at 3) that "lack of uniformity causes unequal access to judicial review." Whether contractual or statutory, limitations periods vary from plan to plan and jurisdiction to jurisdiction. By leaving the limitations period to be determined by state law or the terms of the contract, Congress plainly saw no concern with such variation.

Echoing the Fourth Circuit's decision in *White*, petitioner contends that applying a contractual limitations provision like the one here could undermine ERISA's two-tiered scheme of administrative and judicial review. But the notion that a plan administrator could manipulate the administrative review of a claim in order to deny the claimant an effective opportunity for judicial review is unfounded and does not justify a refusal to enforce the Policy according to its terms. ERISA regulations strictly limit the amount of time a plan administrator has to make an initial benefits determination and decide an administrative appeal. *See* 29 C.F.R. § 2560.503-1(f), (i). These deadlines prevent plan administrators from drawing out the administrative appeal in a manner that could preclude a diligent beneficiary from protecting his rights. As the Second Circuit has explained, the deadlines "requir[e] plan administrators to conclude appeals in a timely manner" and provide "protections … should the plan administrator be dilatory." *Burke*, 572 F.3d at 80. The deadlines accordingly "support enforcing the contractual limitations provision." *Id.*; *see also White*, 488 F.3d at 260 (Wilkins, C.J., dissenting) (explaining that regulatory deadlines for review by the plan administrator leave the beneficiary with ample time in which to file a judicial challenge).

The Fourth Circuit majority concluded that these regulatory deadlines are insufficient to ensure the

availability of judicial review because the limitation period in a particular plan might be short enough that the administrative review could "eat up the entire limitations period." *White*, 488 F.3d at 251. But there is no reason that this possibility cannot be addressed through a case-by-case inquiry into the reasonableness of the limitations period and by application of equitable tolling to ameliorate occasional instances of unfairness. Moreover, as noted, contractual limitations provisions that run from the date proof of loss is due do not represent an effort by plan administrators to deny claimants their rights to judicial review, but instead reflect legal requirements in most States that policies must include such language. *Supra* p. 22.

In addition, contrary to the petition (at 23), ERISA's written-plan requirement supports the enforcement of limitations periods that are clearly specified in the contract. As this Court has explained, ERISA requires that benefit plans be established and maintained pursuant to a written instrument so that beneficiaries may "learn their rights and obligations at any time" by "examining the plan documents." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995) (alteration in original) (emphasis omitted). At the same time, ERISA gives employers "large leeway to design disability and other welfare plans as they see fit," *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 833 (2003), and courts should not alter the terms of a plan to give participants rights that the sponsor did not provide. *See Burke*, 572 F.3d at 80 n.4, 81; *Rice*, 578 F.3d at 456.

The Fourth Circuit held, to the contrary, that consistent disregard of the written terms of a contractual limitations provision would better vindicate these goals of certainty and fairness than would a "sometimes-

enforcing approach to accrual provisions." *White*, 488 F.3d at 249. But it is difficult to see why. What the Fourth Circuit calls a "sometimes-enforcing approach" would better be called a "nearly-always-enforcing approach": as noted above, plan administrators are precluded by regulation from habitually cutting short the time for beneficiaries to bring suit, and in the rare instances when they do or when notice is lacking, courts can apply equitable tolling. To this narrow remedy, which respects as much as possible the written terms of benefit plans, the Fourth Circuit majority preferred a sweeping rule that does maximal violence to those written terms. That outcome is inconsistent with the law of contract generally and with ERISA's written-plan requirement in particular.

## II. PETITIONER'S ARGUMENTS CONCERNING THE REGULATORY NOTICE REQUIREMENTS DO NOT WARRANT REVIEW

In the lower courts, petitioner sought equitable tolling of the contractual limitations period on the theory that Hartford had violated regulations requiring it to provide claimants with "[a] description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review." 29 C.F.R. § 2560.503-1(g)(1)(iv). In petitioner's view, this regulation required Hartford to notify petitioner in its denial letters not only of her right to seek judicial review, but also of the time limits for filing a judicial challenge to the benefit denial.

The court of appeals found it unnecessary to resolve whether this regulation required Hartford to include in its denial letters the date by which a judicial

challenge had to be filed. Pet. App. 4. Because petitioner had actual notice of the limitations provision in the Policy, the court concluded that petitioner was "not entitled to equitable tolling," regardless whether Hartford had violated the regulations. *Id.* (citing *Veltri*, 393 F.3d at 326 ("[A] plaintiff who has actual knowledge of the right to bring a judicial action challenging the denial of her benefits may not rely on equitable tolling notwithstanding inadequate notice from her pension plan.")).

Because the court of appeals did not pass on the question whether the regulation required Hartford's denial letters to include notice to petitioner of the time limits for filing suit, that question is not properly before this Court. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ours is 'a court of final review and not first view.' Ordinarily, 'we do not decide in the first instance issues not decided below.'" (citations omitted)). Nor, as a result, is the question of what remedy is appropriate when a plan administrator violates any regulatory notice requirement.

In any event, petitioner's interpretation of the regulation lacks merit. As the district court recognized, section 2560.503-1(g)(1)(iv) requires two different types of notice: first, "[a] description of the plan's review procedures and the time limits applicable to *such* procedures" (emphasis added); and second, "a statement of the claimant's right to bring a civil action." Pet. App. 16-17; *see also* Pet. App. 54. The administrator need only specify the "time limits" for "the plan's review procedures," not for the filing of a civil action. *See* Pet. App. 17 ("That the regulation requires notification of time limits for plan review procedures but says nothing about time limits with respect to civil actions suggests that the [Department of Labor] did not intend to re-

quire such a time limit notification in the benefit determination.").

This interpretation of section 2560.503-1(g)(1)(iv), which applies to an initial adverse benefit determination, is supported by section 2560.503-1(j), which applies to an adverse benefit determination "on review" (*i.e.*, on administrative appeal). *See* Pet. App. 54. Subsection (j) requires a notice of denial on appeal to include "[a] statement describing any voluntary appeal procedures offered by the plan … and a statement of the claimant's right to bring an action under section 502(a) of [ERISA]." 29 C.F.R. § 2560.503-1(j)(4) (Pet. App. 55). That regulation does not require disclosure of any time limit, and Hartford's final denial letter indisputably complied with the regulation by advising petitioner of her right to bring a civil action. Pet. App. 89. Because there is no requirement to include the litigation deadlines in the subsection (j) notice, which is the notice that actually triggers a claimant's right to seek judicial review, it makes little sense to read subsection (g)—which applies to the earlier determination—to require notice of those deadlines.

Moreover, if, as petitioner contends (at 36), a civil action under ERISA were deemed part of "the plan's review procedures," the requirement in section 2560.503-1(g)(1)(iv) to describe those procedures and their applicable time limits would be utterly unworkable. Litigation procedures vary widely and are not within the plan administrator's control. In this case, for example, in addition to Connecticut, petitioner might have chosen to bring this action in Arkansas, where she worked and resided, or Washington, where she was represented during administrative proceedings by an attorney in Seattle. Hartford could not possibly have listed in its denial letters the "review procedures" that

apply in every possible judicial forum.[12] In any event, as discussed above, the court of appeals found that petitioner knew of the limitations period contained in the Policy and accordingly did not reach the question whether the regulations required notice in the denial letters of the limitations provision and other litigation procedures.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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[12] Petitioner relies (at 36-37) on a footnote in the First Circuit's decision in *Ortega Candelaria*, 661 F.3d at 680 n.7. As petitioner concedes (at 36), however, that footnote was dictum; the court applied equitable tolling in that case because the plan administrator had failed to provide any notice of the claimant's right to sue. 661 F.3d at 680. Moreover, because the plan administrator "made no … argument" about the scope of the regulations, the First Circuit had no occasion to consider the issues addressed above. *Id.* at 680 n.7. Petitioner also cites (at 32-34 & n.22) the district court's decision in *Novick*, 764 F. Supp. 2d 653, and the Ninth Circuit's decision in *Chappel*, 232 F.3d 719. But the district court in this case soundly rejected *Novick*'s reasoning. Pet. App. 15-18. And it correctly found *Chappel* inapposite, as that decision neither construed the regulation on which petitioner relies nor addressed how it would apply to a contractual limitations provision. Pet. App. 17; *see* 232 F.3d at 724-727.

Respectfully submitted.

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MARCH 2013

# APPENDIX

# APPENDIX

## HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY
**Hartford, Connecticut**
(Herein called The Hartford)

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## CERTIFICATE OF INSURANCE
**Under**
**Group Insurance Policies**
**GLT-205215 EFFECTIVE January 1, 1990**
and
**GLT-24554 EFFECTIVE September 1, 1988**
**Issued by**
**The Hartford**
**to**
**WAL-MART STORES, INC.**
(Herein called The Policyholder)

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* * *

## PLAN OF INSURANCE

* * *

**Elimination Period:** With respect to associates in Classes 1-3 the latter of:

(1) the first 90 days of any one period of Total Disability; or
(2) the end of your Employer sponsored salary continuation program.

* * *

The benefits described herein are those in effect as of January 1, 2000.

**Total Disability or Totally Disabled**[*] means that:

(1) during the Elimination Period; and
(2) for the next 12 months, you are prevented by:

(a) accidental bodily injury;
(b) sickness;
(c) Mental Illness;
(d) substance abuse; or
(e) pregnancy,

from performing the essential duties of your occupation, and are under the continuous care of a Physician and as a result you are earning less than 20% of your Pre-disability Earnings, unless engaged in a program of Rehabilitative Employment approved by us.

After that, you must be so prevented from performing the essential duties of any occupation for which you are qualified by education, training or experience.

"Your occupation" includes similar job positions with the Employer which may be offered to you, with a rate of pay 60% or greater of your Indexed Pre-disability Earnings.

**Partially Disabled** means that you are prevented by Disability from doing all the material and substantial duties of your own or any occupation on a full-time basis, except that:

(1) you are performing at least one of the material duties of your own occupation on either a full-time or part-time basis;

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[*] [The Policy's definition of Total Disability was amended by an endorsement effective January 1, 2005. The changes were minor and irrelevant to this petition.]

(2) you are under the continuous care of a Physician; and
(3) you are currently earning 20% to 80% less per month than your Indexed Pre-disability Earnings due to the same injury or sickness that caused the disability.

* * *

## DEFINITIONS

* * *

**Disability** means any:

(1) accidental bodily injury;
(2) sickness; or
(3) pregnancy.

* * *

**Elimination Period** means the period of time you must be Totally Disabled before benefits become payable. See the Plan of Insurance for the Elimination Period.

* * *

## BENEFITS

### Article 1. Benefit Payment Due to Disability

You will be paid benefits if, while insured under the group policy, you:

(1) become Totally Disabled;
(2) remain Totally Disabled throughout the Elimination Period;
(3) remain Disabled beyond the Elimination Period; and
(4) submit proof of loss satisfactory to The Hartford.

Benefits accrue as of the first day after the Elimination Period and are paid monthly. No benefit will be paid for any day on which you are not under the care of a legally qualified Physician.

The Hartford will pay benefits until the first to occur of:

(1) the date you are no longer Disabled;
(2) the date you fail to furnish proof that you are continuously Disabled;
(3) the date you refuse to be examined, if The Hartford requires an examination;
(4) the date you die; or
(5) the date determined from the table below.

* * *

## CLAIMS

### Notice of Claim

You must give The Hartford written notice of claim within 30 days after the loss happens or starts. If notice cannot be given with that time, it must be given as soon as possible. Such notice must include your name, your address and the policy number.

### Claim Forms

When The Hartford receives a notice of claim, you will be sent forms for providing The Hartford with proof of loss. The Hartford will send these forms within 15 days after receiving a notice of claim.

If The Hartford does not send the forms within 15 days, you may submit any other written proof which fully describes the nature and extent of your claim.

**Proof of Loss**

Written proof of loss must be sent to The Hartford within 90 days after the start of the period for which The Hartford owes payment. After that, The Hartford may require further written proof that you are still Disabled. If proof is not given by the time it is due, it will not affect the claim if:

(1) it was not possible to give proof within the required time; and
(2) proof is given as soon as possible; but
(3) not later than 1 year after it is due, unless you are not legally competent.

The Hartford has the right to require, as part of proof of loss:

(1) your signed statement identifying all Other Income Benefits; and
(2) proof satisfactory to The Hartford that you and your dependents have duly applied for all Other Income Benefits which are available.

After submitting proof of loss, you will be required to apply for Social Security disability benefits. If the Social Security Administration denies your eligibility for any such benefits, you will be required to follow the process established by the Social Security Administration to reconsider denial and, if denied again, to request a hearing before an Administration Law Judge of the Office of Hearing and Appeals.

The Hartford reserves the right to determine if proof of loss is satisfactory.

You will not be required to claim any retirement benefits which you may only get on a reduced basis.

* * *

## Appeal of Claims Denied

If a claim for benefits is wholly or partly denied, you will be furnished with written notification of the decision. This written decision will:

(1) give the specific reason(s) for the denial;
(2) make specific reference to the policy provisions on which the denial is based;
(3) provide a description of any additional information necessary to prepare a claim and an explanation of why it is necessary; and
(4) provide an explanation of the review procedure.

On any denied claim, you or your representative may appeal to The Hartford for a full and fair review.

You may:

(1) request a review upon written application within 60 days of the claim denial;
(2) review pertinent documents; and
(3) submit issues and documents in writing.

A decision will be made by The Hartford no more than 60 days after the receipt of the request, except in special circumstances (such as the need to hold a hearing), but in no case more than 120 days after the request for review is received.

The written decision will include specific reference to the policy provisions on which the decision is based.

## Legal Actions

Legal action cannot be taken against The Hartford:

(1) sooner than 60 days after due proof of loss has been furnished; or
(2) after the shortest period allowed by the laws of the state where the policy is delivered. This is 3 years after the time written proof of loss is required to be furnished according to the terms of the policy.

* * *