Statute of Limitations for ERISA Claims

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This practice note addresses the governing statutes of limitation under the Employee Retirement Income Security Act of 1974, as amended (ERISA), for ERISA employee benefit plan participants who challenge benefit denials and for participants and other individuals, or the Department of Labor, who may sue a plan sponsor or fiduciary for breach of fiduciary duties.

This practice note addresses the following topics:

For an additional discussion on ERISA statute of limitations defenses, see The Law of Life and Health Insurance § 1A.04. For a chart setting forth applicable state law statutes of limitation for benefit claims, see ERISA Litigation Analogous State Law Statutes of Limitations Chart. For a discussion regarding the procedural aspects of an ERISA action, see The Law of Life and Health Insurance § 1A.04. For a practice note that discusses statutes of limitation, generally, applying California law, see Statutes of Limitations (CA) in the Lexis Practice Advisor Civil Litigation practice area.

Introduction to ERISA Statute of Limitations Issues

ERISA's civil enforcement section permits actions that include the following violations:

- Plan benefits (i.e., challenging the full or partial denial of benefits)
- The enforcement of rights under a plan (such as a suit for breach of fiduciary duty)
- Failure to provide information (such as plan documents) in a timely manner –and–
- Violations of ERISA § 510's (29 U.S.C. § 1140) anti-retaliatory statute

The suits listed above may be brought by a plan participant, a beneficiary, a co-fiduciary, or the U.S. Secretary of Labor. ERISA § 502 (29 U.S.C. § 1132).

Typically, the individual or entity against whom an ERISA action is brought (which is, typically, the plan sponsor, often as the plan administrator, or against another ERISA fiduciary) may defend the ERISA suit by asserting a lack of standing to sue defense or the participant's failure to exhaust administrative remedies. Another common defense is to assert that the plaintiff has brought the action after the applicable statute of limitations has run. The discussion below focuses on the nature of an ERISA statute of limitations defense, the nature of ERISA's statutory and common law statute of limitations, and how the applicable statute of limitations for breaches of fiduciary duty is evolving regarding its "actual knowledge" element.

Rationale and Relationship to Laches

Statutes of limitation are designed "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until the evidence has been lost, memories have faded, and witnesses have disappeared." Order of R.R. Telegraphers v. Ry. Express Agency, Inc. 321 U.S. 342, 348–49 (1944). There is some degree of overlap between a statute of limitations and the equitable doctrine of laches, and occasionally a court will hold that an action is time-barred not only by a statute of limitations but also by the equitable doctrine of laches. Turner v. Retirement Plan of Marathon Oil Company, 659 F. Supp. 534 (N.D. Ohio 1987). In general, however, the doctrine of laches is unavailable where Congress has provided a statute of limitations. Miller v. Maxwell's International, 991 F.2d 583, 596 (9th Cir 1993); UA Local-343 United Association of Journeymen and Apprentices of Plumbing and Pipefitting Ind. of the US and Canada v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1474, N. 3 (9th Cir. 1994). Similarly, laches (providing only for equitable remedies) may not be invoked to bar damages relief in an action brought within the statute of limitations period. Petrella v. Metro-Goldwyn Mayer Inc., 134 S. Ct. 1962 (2014). Damages are what plaintiffs typically seek in a suit challenging a denial of benefits.

ERISA Statute of Limitations for Benefit Claims

ERISA Section 413 provides a statute of limitations for claims involving a breach of fiduciary duty. ERISA § 413 (29 U.S.C. § 1113). ERISA Section 4301 provides a statute of limitations for multiemployer plans relating to legal or equitable relief, including a failure to satisfy a withdrawal liability payment. ERISA § 4301 (29 U.S.C. § 1451). However, ERISA is silent regarding the applicable statute of limitations for other ERISA claims, like a claim for benefits. See Duchek v. Blue Cross & Blue Shield, 153 F.3d 648 (8th Cir. 1998). Given this failure, the following paragraphs discuss how the courts nonetheless have identified the applicable statute of limitations regarding claims for benefits. Discussion of the ERISA Section 413 statute of limitations for fiduciary breaches appears further below in Statute of Limitations Standard for Breach of Fiduciary Actions.

In the discussion that follows, you'll note that the various statute of limitations issues are relevant primarily in the ERISA litigation context. If there is a choice between which state's statute of limitations applies, the defendant will seek to have the state with the shorter statute of limitations apply, while the plaintiff will seek the state that has the longer statute. If a plaintiff would be barred by either state's statute of limitations, the plaintiff might argue that a very narrow exception applies warranting a federal statute of limitations applying. Once a decision has been made as to the applicable state, the same dynamic will apply to selecting the most analogous state law asking, for example, "is it an action in contract, tort, or for wages?" If there is agreement as to the applicable state and most analogous state statute, defendants will argue for the earliest possible date the claim accrued, and plaintiff will argue for the latest possible date.

Deciding on What State's Statute of Limitations Will Apply (Choice of Law)

Where a statute of limitations is lacking, a court generally will look to and apply (i.e., borrow) the most analogous state statute of limitations. Jenkins v. Local 705 Intl. Brotherhood of Teamsters Pension Plan, 713 F.2d 247 (7th Cir. 1983); Goodman v. Lukens Steel Co., 482 U.S. 656 (1985) (as Section 1981's nondiscrimination statute fails to state a statute of limitations, federal courts should apply the most appropriate or analogous state statute of limitations to claims based on asserted violations of § 1981).

When a statute of limitations is borrowed, the tolling and suspension provisions that are part of that statute must likewise be applied. West v. Conrail, 481 U.S. 35 (1987); Board of Regents v. Tomasio, 446 U.S. 478 (1980). The U.S. Supreme Court recognizes, and the ERISA practitioner should be mindful, of a narrow exception to this general rule. A court "declines to borrow a state statute only when a rule from elsewhere in federal law provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." Reed v. United States Transp. Union, 488 U.S. 319 (1989), quoting DelCostello v. Teamsters, 462 U.S. 151, 172 (1983). However, this rule is to be construed narrowly and state law should remain the lender of first resort. N. Star Steel Co. v. Thomas, 515 U.S. 29, 34 (1995). However, as discussed below, the first step is not to determine a particular state's most analogous statute of limitations, but rather what state's law to apply.

In many situations, courts have concluded that they should apply the most analogous state statute of limitations of the forum state (i.e., the state in which the action has been brought), rather than a statute of limitations appearing in some other section of ERISA. See, e.g., Massengill v. Shenandoah Life Ins. Co., 459 F.Supp.2d 656, 660 (W.D. Tenn. 2006); Gordon v. Deloitte & Touche LLP Group Long Term Disability Plan, 749 F.3d 746, 750 (9th Cir. 2014) (quoting Wetzel v. Lou Ehlers Cadillac Grp. Long Term Disability Ins. Program, 222 F.3d 643 (9th Cir. 2000)) . "We . . . 'look to the most analogous state statute' in the state where the claim for benefits arose."

However, the statute of limitations of the forum state will not always apply. To provide some context, when the underlying claim is a federal claim, a court must determine a federal choice of law rule. Wang Labs, Inc. v. Kagan, 990 F.2d 1126 (9th Cir. 1993). See also Gluck v. Unisys Corp., 960 F.2d 1168 (3d Cir. 1992) and Campion International Corp. v. United Paperworkers International Union, 779 F.2d 328 (6th Cir. 1985). Federal law may look to state law for substantive principles. United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979). However, which state law to select is a question of federal law. O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

Methods of Selecting Choice of Law (and, Likely the Governing State Statute of Limitations)

Not infrequently, all of the relevant conduct will have taken place in one state. For example, if a plan administered in New York provides an employee working and residing in New York with an inaccurate statement of his or her benefits, the governing statute of limitations will be the New York statute of limitations. If the law of either of two states is arguably applicable, and (coincidentally) the governing statute of limitations in both jurisdictions are the same (e.g., a six-year statute for breach of contract for a benefits claim applies in each), the relevant limitations period is obviously six years. In those instances, the discussion that follows will not be relevant, although the parties may disagree as to the date that the cause of action accrued. If the plan participant and the plan sponsor are residents of different states, and there was a question concerning which state's law would apply, and those states had different statutes of limitations, a larger question remains regarding choice of law.

While technically there are a number of different approaches for determining which of two states statute of limitations is to apply, in most instances, the starting point of analysis is the forum state, that is, the state in which the action has been commenced, with slightly different tests describing the circumstances in which the law of the forum state should not be followed. For a discussion on choice of law considerations in civil litigation, see Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 12-III.

ERISA Plan's Choice of Law Provision

ERISA plans (or insurance contracts) may include a choice of law provision. Such provisions are generally understood to incorporate only substantive law, not procedural rules such as statutes of limitations. Therefore, unless the parties to the agreement expressly state their intention to include in the governing law provision of a document a state statute of limitations, a standard choice of law provision will not apply in determining the applicable state statute of limitations law. See FDIC v. Petersen, 770 F.2d 141, 143 (10th Cir. 1985); Gluck v. Unisys Corp., 960 F.2d 1168 (3d Cir. 1992); Des Brisay v. Goldfield Corp., 637 F.2d 680, 682 (9th Cir. 1981). See, however, Wang Laboratories, Inc. v. Kagan, 990 F.2d 1126 (9th Cir. 1993) ("Where a choice of law is made by an ERISA contract, it should be followed if not unreasonable or fundamentally unfair."). Additionally, the Eighth Circuit has held that there is nothing in the federal common law of contracts that prohibits an ERISA plan from contractually incorporating a state statute of limitations. Harris v. The Epoch Group, LLC, 357 F.3d 822 (8th Cir. 2004). In contrast, in federal diversity cases, under ***Erie*** and ***Klaxon***, statutes of limitations are treated as substantive. Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487 (1941).

For a discussion of the ***Erie*** case, see Wagstaffe Prac Guide: Fed Civil Proc Before Trial § 3-IV "Applying Erie Analysis: Substantive Issues Governed by State Law in Federal Court."

Handling Uncertainty (Wide-Angle and Narrow Path Approaches)

Even after the appropriate state has been determined, it may not be clear which law of that state to apply. Where there is uncertainty as to how the highest court in a state would rule in a diversity action which might arise, for example, if a severance arrangement were determined not to be an ERISA employee benefit plan, there are generally two approaches a court might take. One approach, sometimes referred to as the wide-angle approach, is one under which a court will attempt to predict how the state's highest court would rule on an issue. The second approach is a more conservative view of the way state law is to be applied. In Todd v. Society BIC, S.A., 21 F.3d 1402 (7th Cir. 1994) (en banc), the Seventh Circuit held that "when given a choice between interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability," a Federal Court "should choose the narrower and more reasonable path." Similarly, in Home Valu, Inc. v. Pep Boys-Manny, Moe & Jack of Del., Inc., 213 F.3d 960, 965 (7th Cir. 2000), (facing "two equally plausible interpretations of state law" over which there was "considerable disagreement," adopting the approach that is restrictive of liability).

In most if not all circuits, there will be decisions taking both of these approaches. Plaintiff's counsel will generally look to the wide-angle approach on a statute of limitations issue, while defendants will opt for the more conservative approach restricting liability with respect to a statute of limitations issue.

Stating the Forum State in the Plan Document (Venue Selection)

Plan documents often provide a governing forum state in which an action regarding the ERISA plan can be brought. A majority of federal courts have held that these forum selection clauses are not inconsistent with ERISA. Smith v. AEGON Cos. Pension Plan, 769 F.3d 922, 931 (6th Cir. 2014). For the minority view, however, that ERISA precludes forum selection clauses, see, e.g., Coleman v. Supervalu, Inc. Short Term Disability Program, 920 F. Supp. 2d 901, 908 (N.D. Ill. 2013); Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006). Moreover, the enforceability of venue selection clauses in ERISA plans has been called into question as potentially contravening one of the purposes of ERISA—to provide ready access to federal courts to seek appropriate remedies. ERISA § 2(b) (29 U.S.C. § 1001(b)). That is generally the position of the Department of Labor. Brief for the United States as Amicus Curiae; Smith v. Aegon Cos. Pension Plan, 2015 U.S. LEXIS 3638 (6th Cir. 2014) (denying certiorari). For a sample plan venue provision, see Forum Selection Clause (Employee Benefit Plan).

Actions in Contract Prevail as Most Analogous State Law for ERISA § 502(a)(1)(B) Claims

Once the choice of law has been decided, the next step is choosing the applicable statute of limitations for the statute that is the most analogous to the applicable ERISA claim for benefits. In actions by employees seeking to recover benefits, the most analogous state statute of limitations is generally held to be the statute that applies to actions based on written contracts. This conclusion is assembled below, circuit-by-circuit:

- **First Circuit.** Amara v. CIGNA Corp., 534 F. Supp. 2d 288 (D. Conn. 2008)(applying Conn. Gen. Stat. § 52-576, Connecticut's six-year statute of limitations for written contracts).
- **Second Circuit.** Burke v. PricewaterhouseCoopers LLP Long Term Disability Plan, 572 F.3d 76 (2d Cir. 2009) (applying New York's six-year limitations period for contract actions, N.Y. C.P.L.R. 213).
- **Third Circuit.** Lutz v. Philips Electronics North America Corp., 347 Fed. Appx. 773 (3d Cir. 2009)(applying Pa. Cons. Stat. § 5525(a)(8)—four years for breach of contract).
- **Fourth Circuit.** Dameron v. Sinai Hospital of Baltimore, Inc., 815 F.2d 975 (4th Cir. 1987)(applying Md. Courts & Jud. Proc. Code § 5-101—the three-year limitations period for contract actions).
- **Fifth Circuit.** King v. Unum Life Ins. Co. of America, 447 Fed. Appx. 619 (5th Cir. 2011)(applying Tex. Civ. Prac. & Rem. Code § 16.051—four years for breach of contract).
- **Sixth Circuit.** Santino v. Provident Life and Accident Ins. Co., 276 F.3d 772 (6th Cir. 2001)(Mich. Comp. Laws § 600.5807(8)—six years for breach of contract).
- **Seventh Circuit.** Doe v. Blue Cross & Blue Shield United, 112 F.3d 869 (7th Cir. 1997)(applying Wis. Stat. § 893.43, Wisconsin's six years statute of limitations for contracts).
- **Eighth Circuit.** Johnson v. State Mut. Life Assur. Co. of Am., 942 F.2d 1926 (8th Cir. 1191)(holding that Missouri statutes § 516.110(1), apply to actions on written contracts, rather than § 516.120(1) applicable to all other contract actions, governed a suit on an ERISA accident and health policy).
- **Ninth Circuit.** Withrow v. Bache Halsey Stuart Shield, Inc. Salary Protection Plan, 655 F.3d 1032 (9th Cir. 2011)(applying California statute—four years for contract disputes); see also Wise v. Verizon Communs. Inc., 600 F.3d 1180 (9th Cir. 2010), holding that Washington's six-year statute of limitations for written contracts, Wash Rev. Code § 4.16.040, applied to a claim for ERISA benefits under 29 U.S.C. § 1132(a)(1)(B).
- **Tenth Circuit.** Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288 (10th Cir. 1991)(applying Okla. Stat. Ann. tit. 12, § 95—five years); Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990) (applying the New York statute: N.Y.C.P.L.R. § 213(2)—six years).
- **D.C. Circuit.** SEIU Nat'l Indus. Pension Fund v. Hebrew Homes Health Network, Inc., 2019 U.S. Dist. LEXIS 156155 (D.D.C. 2019)(does not contain a statute of limitations for delinquent contribution claims like those at issue in this case).

For a complete list of the analogous state statutes of limitations for ERISA benefit claims, see ERISA Litigation Analogous State Law Statutes of Limitations Chart.

Actions for ERISA § 510 Retaliation Claims, Delinquent Contributions, and Failures to Provide Plan-Related Documents

ERISA Section 510 Claims

Regarding claims under ERISA Section 510, most courts conclude that the claim is most analogous to a claim for wrongful termination and employment discrimination. Muldoon v. C.J. Muldoon, 278 F.3d 31 (1st Cir. 2002); ERISA § 510 (29 U.S.C. § 1140).

ERISA Section 502(b) Claims for Delinquent Contributions

There is less clarity about the most analogous state law to apply for other actions. For example, ERISA Section 502(b), which permits a claim for delinquent contributions, does not contain a statute of limitations that applies to trustee actions to recover such amounts. Robbins v. Iowa Road Builders Co., 428 F.2d 1348 (8th Cir. 1987); ERISA § 502(b) (29 U.S.C. § 1132(b)). There is actually a split of authority as to whether the most analogous state action is one for breach of contract or one for wage collection. Teamsters Pension Trust v. Jones Motor Co., 1987 U.S. Dist. LEXIS 9242 (E.D. Pa. 1987).

ERISA Section 502(c) Claims for Failing to Provide ERISA Documents

Additionally, circuit courts differ in determining the appropriate statute of limitations for violations of ERISA Section 502(c). ERISA § 502(c) (29 U.S.C. § 1132(c)). The Third, Fourth, and Eighth Circuits have held that a claim for statutory penalties under ERISA is penal in nature and have applied Groves v. Modified Retirement Plan, 803 F.2d 109, 117(3d Cir. 1986); Pressley v. Tupperware Long Term Disability Plan, 553 F.3d 334 (4th Cir. 2009); Iverson v. Ingersoll-Rand Co., 125 Fed. Appx. 73 (8th Cir. 2004). In Babin v. Quality Energy Servs., 877 F.3d 621 (5th Cir. 2017), the Court of Appeals for the Fifth Circuit applied Louisiana's one-year period governing delictual matters, and in ***Hatteberg v. Red Adair Co. Inc. Employee Profit Sharing Plan,*** the Court of Appeals for the Fifth Circuit applied Texas's then two-year period for fiduciary breaches. Hatteberg v. Red Adair Co., 79 Fed. Appx. 709 (5th Cir. 2003). However, in Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995), the Court of Appeals for the Ninth Circuit applied California's three-year period for statutory liability other than a penalty or forfeiture.

For a discussion regarding enforcement of ERISA Section 510 anti-retaliatory claims, see Discrimination, Retaliation, and Whistleblower Claims (ERISA § 510).

Applying a Plan's Contractual Approach (Internal Statutes of Limitation)

Notwithstanding the discussion above, an ERISA plan instead may specify the length of the limitations period, and these provisions will generally be enforced (over the analogous state statute of limitations) if reasonable. Santana-Diaz v. Metropolitan Life Ins. Co., 816 F.3d 172, 176 (1st Cir. 2016). "[W]here the employee benefit plan 'itself provides a shorter limitations period, that period will govern as long as it is reasonable'" (quoting Santaliz-Rios v. Metro. Lie Ins. Co. 693 F.3d 57, 59 (1st Cir. 2012) cert. denied, 133 S. Ct. 1726 (2013)). Where a plan sets forth a time limit but calls for application of a state limitations period if the state's limit is longer, the longer state limitations period is to be applied. Mulholland v. Mastercard Worldwide, 618 Fed. Appx. 875 (8th Cir. 2015).

A federal court will only borrow a state limitations period in the absence of a reasonable contractually agreed-upon period. Salisbury v. Hartford Life & Accident Co., 583 F.3d 1245 (10th Cir. 2009) ("choosing which state law to borrow is unnecessary . . . where the parties have agreed upon a limitations period"). The internal statutes of limitations of certain jurisdictions expressly acknowledge this concept. For example, Section 201 of the New York CPLR provides that a shorter limitations period than one set forth in the CPLR will govern where prescribed by a written agreement, and a written agreement includes an ERISA employee welfare benefit plan. Mitchell v. Shearson Lehman Bros., 1997 U.S. Dist. LEXIS 7323 (S.D. N.Y. 1997). An ERISA plan is a contract, and parties are generally free to include in a contract whatever limitations period they desire.

Heimeshoff v. Hartford Life & Accident Ins. Co.

The leading case in this area is Heimeshoff v. Hartford Life & Accident Ins. Co., 134 S. Ct. 604 (2010). In ***Heimeshoff,*** the Supreme Court held that "absent a controlling statute to the contrary a participant in an ERISA plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable." The Supreme Court further indicated that a time period would be unreasonably short if it left the claimant with little chance of bringing a claim that is not time-barred.

The Court in ***Heimeshoff*** also concluded that ERISA was not a controlling statute to the contrary (referencing its language above), because it does not contain a relevant statute of limitations or any language that would preclude the parties from agreeing to a shorter limitations period by contract. Hence, an ERISA plan is free to designate a reasonable limitations period in which claimants can sue for benefits. Note that the Supreme Court in ***Heimeshoff*** specifically distinguished ERISA Section 413 (the breach of fiduciary duty section) from its holding that where a statute creating a cause of action is silent regarding a statute of limitations, a plan can provide a time limit. Hence, the Court recognized that ERISA is silent regarding the applicable statute of limitations for challenges to benefit denials.

Establishing the Limitations Period in the Plan Document

Whether an internal statute of limitations is reasonable is generally fact-specific, but the Eleventh Circuit, in a pre-***Heimeshoff*** case, ***North Lake Regional Medical Center v. Waffle House Sys. Employee Benefit Plan,*** set forth a three-part test to determine the reasonableness of the provision:

- Is the provision a subterfuge to prevent lawsuits?
- Is the provision commensurate with other provisions in the plan designed to process claims with dispatch?
- Has the ERISA-required internal appeals process been completed?

North Lake Regional Medical Center v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301 (11th Cir. 1998). In meeting this three-part test, it's best to set forth the limitations period both:

- In the plan document itself –and–
- In the plan's summary plan description (SPD)

See 29 C.F.R. § 2550.503-1(b)(2) (claim procedures must appear in the SPD). If the SPD and plan document are combined, as is often the case with welfare medical plans, including the contractual statute of limitations in the combined documents should be enforceable. However, in Hughes v. Life Ins. Co. of N. Am., 2016 U.S. Dist. LEXIS 129542 (E.D. La. 2016), a 180-day period for filing an appeal was not enforced because it was only set forth in a benefits termination letter. As discussed in "Best Practice regarding Participant Notice of Internal Statute of Limitations" below, reference any statute of limitations provided within the plan in any claim denial letter provided to the participant or his or her authorized representative, which denial must include a statement of the claimant's right to bring a civil action under ERISA § 502(a) (29 U.S.C. 1132(a)). 29 C.F.R. § 2560.503-1(g)(1)(iv). See Santana-Díaz v. Metro. Life Ins. Co., 816 F.3d 172 (1st Cir. 2016).

Reasonableness Challenges to Enforcement of a Contractual Limitations Period

An internal statute of limitations is not generally deemed to be unreasonable except in those instances in which the limitations period ends before the claim could have accrued, or the appeals process was so protracted that the claimant was unable to file suit within the contractual period. In fact, reasonableness challenges to limitations periods are usually dismissed summarily by courts. On occasion, however, a court may seek to confine its decision. This happened where the Court of Appeals for the Eleventh Circuit approved a 90-day period (following the trustee's decision on review) as reasonable but cautioned that such a provision may not always be reasonable, or that a still shorter period will ever be reasonable. Northlake Regional Medical Center v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301 (11th Cir. 1998).

It may not be necessary for the period within which to file a claim to have completely expired for an internal statute of limitations to be held unreasonable. The Fifth Circuit Court of Appeals implied that a contractual limitations period providing a claimant only 35 days within which to file suit would be unreasonable. There, the plan required a claimant suit for benefits to be made within one year from the time a claim was filed with the plan under ERISA § 503. After applying the exhaustion principle, this left only 35 days after final appeal for the claimant to file suit. Baptist Memorial Hospital, Desoto, Inc. v. Crain Auto, Inc., 392 Fed. Appx. 289, 294 (5th Cir. 2010); ERISA § 503 (29 U.S.C. § 1133).

Possible Exception to Contractual Limitation for Qualified Domestic Relations Orders

Department of Labor regulations implementing the Pension Protection Act of 2006, in clarifying certain issues regarding the timing of domestic relations orders (DROs), may preclude applying an internal statute of limitations for QDRO procedures. See 29 C.F.R. § 2530.206 and Yale-New Haven Hosp. v. Nicholls, 788 F.3d 79, 86 (2d Cir. 2015). For example, a district court considered whether or not a plan properly rejected a benefit request based on a proposed QDRO because she had "more than a sufficient period of time" to do so after her divorce and before her husband's death—but had failed to do so (a period of almost 10 years). However, because the issue was not briefed by the parties, the district court did not decide the issue. Castanon v. UPS/IBT Full-Time Emple. Pension Plan, 2018 U.S. Dist. LEXIS 221514 (N.D. Ga. 2017). See also Marker v. Northrop Grumman Space & Missions Sys. Corp. Salaried Pension Plan, 2006 U.S. Dist. LEXIS 75507, fn. 2 (N.D. Ill. 2006) (assuming, without deciding, that QDRO procedures could establish a deadline for the submission of domestic relations orders).

Best Practices regarding Participant Notice of Internal Statute of Limitations

Although there is a split of authority among the circuits, and in some instances within a circuit, as to whether notice of a contractual limitations period must be included in a denial letter to plan participants under the Department of Labor's claim review procedures, best practice (which is consistent with some circuit rulings) is to clearly indicate the contractual provision in denial letters regarding the claim. See 29 C.F.R. § 2560.503-1(g)(1)(iv) (requiring benefit denials to include 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 ERISA following an adverse benefit determination on review).

The First Circuit, Third Circuit, and Sixth Circuit support this practice, having held that the DOL regulations require denial letters to include the contractual limitations period for filing the ERISA claim. See, e.g., Santana-Díaz v. Metro. Life Ins. Co., 816 F.3d 172 (1st Cir. 2016). The Ninth and Eleventh Circuits have concluded somewhat to the contrary, indicating that only initial denial letters are required to include time limits applying to internal review procedures. Mirza v. Ins. Admin. Of America. Inc., 800 F.3d 129 (3d Cir. 2015); Moyer v. Metropolitan Life Ins. Co., 762 F.3d 503 (6th Cir. 2014); Santana-Díaz v. Metro. Life Ins. Co., 816 F.3d 172 (1st Cir. 2016), with Wilson v. Standard Insurance Co., 613 Fed. Appx. 841 (11th Cir. 2015); Scharff v. Raytheon Co. Short Term Disability Plan, 581 F.3d 8099 (9th Cir. 2009).

Even while not required under DOL regulations, disclose to plan participants (or to the individual's authorized representative) a plan's internal statute of limitations. Do this not only in the initial and final claim denial letter, but also in a plan's summary plan description (SPD) (or in the permitted separate claims document that accompanies the SPD). See 29 C.F.R. § 2520.102-3(s).

Accrual of the Claim

Because ERISA is silent on the matter, federal common law determines when the statute begins to run. Manuel Soto v. Dean Foods Company, 1:17-cv-13821-TLL-PTM (E.D. Mich. 2017).

Federal Common Law

Under federal common law, the clock starts running on a claim when a plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action. Redmon v. Sud-Chime, Inc. Retirement Plan for Union Employees, 547 F.3d 531 (6th Cir. 2008); Miller v. Fortis Benefits Ins. Co., Inc., 475 F.3d 516 (3d Cir. 2007). Courts may differ on the time that the claim accrues such as in the following:

- **Denial of benefits.** Some courts express the test in a different manner, holding that a cause of action to recover ERISA benefits accrues from the time that benefits are actually denied or at the time that the plan beneficiary becomes aware that benefits will be denied under the plan. Henglein v. Colt Indus., 260 F.3d 201 (3d Cir. 2001); Wetzel v. Lou Ehlers Cadillac Group LTD Insurance Program, 222 F.3d 643 (9th Cir. 2000).
- **Repudiation of claim for benefits.** Other courts indicate that a clear and unequivocal repudiation of a claim for benefits causes a claim to accrue for statute of limitations purposes (i.e., a limitations period begins to run when a plaintiff discovers, or should discover, a clear repudiation of benefits). Morrison v. Marsh & McLellan Companies Inc., 439 F.3d 295 (6th Cir. 2006). However, it may not be clear in certain circumstances that the triggering event has occurred.
- **Formal claim denial.** If the triggering event for a statute of limitations is a formal claim denial, it may be unclear whether the triggering event refers to the initial denial of a claim or the denial of a claim under appeal. Sadowski v. Unum Life Inc. Co., 2008 U.S. Dist. LEXIS 61446 (E.D. Pa. 2008).
- **Failure to receive benefits.** In Jammal v. Am. Family Ins. Grp., 2016 U.S. Dist. LEXIS 4876 (N.D. Ohio 2016), the district court held that there could be no clear and unequivocal repudiation of benefits until a plaintiff is entitled to benefits and fails to receive them.
- **Undervalued lump-sum payment.** There is authority for the proposition that the hypothetical clock starts to run when a lump-sum payment is made to a plan participant unless the injury to plaintiff was somehow concealed. Thompson v. Retirement Plan, 651 F.3d 600 (7th Cir. 2011). However, in ***Young v. Verizon's Bell Atlantic Cash Balance Plan,*** the Seventh Circuit rejected the argument that a lump-sum payment served as a red flag that plan participants had been underpaid, where the payment was not "so inconsistent" with a participant's understanding of his or her benefits so as to serve as a clear repudiation. Young v. Verizon's Bell Atlantic Cash Balance Plan, 615 F.3d 808, 816 (7th Cir. 2010). In Novella v. Westchester Cty., 661 F.3d 128 (2d Cir. 2011), the Second Circuit indicated, for an ERISA claim for benefits miscalculation, that the analysis was a "reasonableness approach" rather

than a bright-line test. The Court looked to "when there was enough information available to the pensioner to assure that he or she knows or reasonably should know of the miscalculation." Novella, 661 F.3d at 147. The Second Circuit explained that this standard would not require a participant to "confirm the correctness of his pension award immediately upon the first payment of benefits." However, when the miscalculation is "apparent from the face of a pension check," or "readily discoverable from information furnished to pensioners by the pension plan," a court may conclude that a participant had enough information at the time of the first payment of benefits to assure that he or she reasonably should have known of the miscalculation. Novella at 147, fn. 22.

- **Section 510 claims.** Most courts hold that a claim under ERISA section 510 accrues when the decision to terminate is made, and the employee is informed of the pending termination. Jakimas v. Hoffman LaRoche, Inc., 485 F.3d 770, 780 (3d Cir. 2007); Tolle v. Carol Touch, Inc., 977 F.2d 1129, 1141 (7th Cir. 1992); see ERISA § 510 (29 U.S.C. § 1140).
- **Employee misclassification.** If an employee is misclassified as an independent contractor, the claim accrues at the time of misclassification, not when a claim for benefits is denied. Brennan v. Metropolitan Life Ins. Co., 275 F. Supp. 2d 406, 409 (S.D.N.Y. 2003).

Accrual Where the Plan Establishes the Limitations Period

When the ERISA claim is governed by an internal statute of limitations under a plan, (see discussion above in "Applying a Plan's Contractual Approach (Internal Statutes of Limitation)"), courts will look to the plain language of the plan, which is a contract, to determine when the cause of action accrues. Rice v. Jefferson Pilot Financial, 578 F.3d 450 (6th Cir. 2009).

Resetting a Statute of Limitations, Tolling, Waiver, and Estoppel

Reopening an ERISA claim generally does not revive a closed statute of limitations. Martin v. Construction Laborer's Pension Trust, 947 F.2d 1381 (9th Cir. 1991). While it is permissible for a ***nunc pro tunc*** domestic relations order to be issued on a nunc pro tunc basis to make corrections to the order retroactive to the date that the original order was issued, a ***nunc pro tunc*** order does not reset the statute of limitations. Patterson v. Chrysler Corp., LLC, 845 F.3d 756 (6th Cir. 2017); Crangle v. Kelley, 838 F.3d 763 (6th Cir. 2016). Similarly, the reopening of a claim file does not in and of itself revive a statute of limitations. Martin v. Construction Laborer's Pension Fund, 947 F.2d 1381 (9th Cir. 1991); Gordon v. Deloitte & Touche, LLP Group Long Term Disability Plan, 749 F.3d 746 (9th Cir. 2014).

Section 1404 Transfer

The federal laws of civil procedure permit a change of venue request, the majority of circuits applying the transferor court's choice of law rules. 28 U.S.C. § 1404. See, e.g., Pender v. Bank of Am. Corp., 788 F.3d 354 (4th Cir. 2015); Hooper v. Lockheed Martin Corp., 688 F.3d 1037 (9th Cir. 2001); In re Ford Motor Co., 591 F.3d 406 (5th Cir. 2009); Olcott v. Delaware Flood Co., 76 F.3d 1538 (10th Cir. 1996); Eckstein v. Balcour Film Investors, 8 F.3d 1121 (7th Cir. 1993). However, the minority view is that a transferee court may apply its own choice of law rules when the case involves an interpretation of federal law. See Lanfear v. Home Depot, Inc., 536 F.3d 1217, 1223 (11th Cir. 2008); Merowitz v. Brown, 991 F.2d 36, 41 (2d Cir. 1993).

Tolling

A participant's insanity or lack of legal competence may toll a statute of limitations. Love v. Wyeth, 569 F. Supp. 2d 1228 (N.D. Ala. 2008) (discussing Alabama statute). A statute of limitations is not tolled, though, because a plan administrator refused to respond to an appeal. Fontana v. Diversified Group Administrators, Inc., 67 Fed. Appx 722 (3d Cir. 2003). Nor it is tolled during the administrative claims-review process. Jackson v. Hartford Life Ins., 2013 U.S. Dist. LEXIS 85955 (E.D. Mich. 2013). However, in Baglione v. Clara Maass Med. Ctr., Inc., 2006 U.S. Dist. LEXIS 64251 (D.N. J. 2006), a New Jersey District Court held that an order for administrative termination tolled a statute of limitations until such time as plan appeals were exhausted, at which time the statute would again begin to run. Baglione, 2006 U.S. Dist. LEXIS, at *16.

Equitable tolling of the statute may be appropriate in extraordinary circumstances. In ***Heimeshoff***, for example, the Supreme Court qualified its general holding regarding internal statutes of limitations. It indicated that "to the extent the participant in an ERISA plan has diligently pursued both internal review and judicial review but was prevented from filing suit by extraordinary circumstances, equitable tolling may apply." Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99, 113 (2013). This qualification was inconsistent with the Supreme Court's earlier holding in ***Pace v. DiGuglielmo***, which stated that equitable tolling has two elements:

- That the claimant had been pursuing his or her rights diligently –and–
- Some extraordinary circumstance stood in his or her way

Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). As the Seventh Circuit also stated, equitable tolling is reserved for instances in which a claimant "has made a good faith error (e.g., brought suit in the wrong court) or has been prevented in some extraordinary way from filing [her] complaint on time." Threadgill v. Moore U.S.A., Inc., 269 F.3d 848 (7th Cir. 2001). It is occasionally defined more broadly. For example, in ***Oshiver v. Levin, Fishbein, Sedran & Berman,*** it was defined to apply where a defendant actively misled the plaintiff about his or her cause of action. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994).

Waiver and Estoppel

In addition to ***Heimeshoff's*** equitable tolling qualification language, the Supreme Court stated that "if the administrator's conduct causes a participant to miss the deadline for judicial review, waiver or estoppel may prevent the administrator from invoking the limitations provision as a defense." ***Heimeshoff,*** 571 U.S. 99 at 104. To assert the argument, a person seeking equitable relief from a statute of limitations must establish that the following exist:

- A material misrepresentation
- Reasonable and detrimental reliance upon the misrepresentation –and–
- Extraordinary circumstances

Pell v. E. I. DuPont De Nemours & Co., 539 F.3d 292 (3d Cir. 2008). As a general rule, a defendant will be estopped from setting up a statute of limitations defense when its own prior representations or conduct caused the plaintiff to run afoul of the statute and it is equitable to hold the defendant responsible for that result. Allen v. A.H. Robbins Co., Inc., 752 F.2d 1365 (9th Cir. 1985). Another court expressed the point more succinctly, saying a defendant is estopped from asserting a statute of limitations defense when its conduct diverted or misled the plaintiff from discovering the injury. Bohus v. Beloff, 950 F.2d 919 (3d Cir. 1991). With respect to waiver, courts in the Ninth Circuit have held that it is consistent with ERISA to require detrimental reliance or some misconduct on the part of a plan before finding that it has affirmatively waived a limitations defense. Gordon v. Deloitte & Touche, LLP Group Long Term Disability Plan, 749 F.3d 746 (9th Cir. 2014); Salye v. Metropolitan Life Ins. Co., 871 F.3d 944 (9th Cir. 2017).

Statute of Limitations Standard for Breach of Fiduciary Actions

ERISA authorizes civil actions against fiduciaries and parties in interest to an employee benefit plan for claims of breach of fiduciary duty and prohibited transactions. The statute outlines the scope of the limitations period for breach of fiduciary claims. Section 413 states that no action can commence regarding a fiduciary's breach of any responsibility, duty, or obligation under this part (i.e., ERISA, Part 5), or violation of this part, after the earlier of:

- Six years after:
  - o The date of the last action which constituted a part of the breach or violation –or–
  - o In the case of an omission, the latest date on which the fiduciary could have cured the breach or violation –or–
- Three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation

ERISA § 413 (29 U.S.C. § 1113).

The ERISA Section 413(1) Six-Year Limitations Period

Regarding the first component of the statute, the type of breach of fiduciary claim determines when the six-year limitations period begins to run. For example, for a traditional affirmative breach of fiduciary duty claim, the limitations period runs six years after the last alleged fiduciary breach. Only a "breach or violation," not an original investment, need occur to start the six-year statutory period. Tibble v. Edison Int'l, 843 F.3d 1187, 1193 (9th Cir. 2016). But in this respect, ERISA's statute of limitations requires courts to "first isolate and define the underlying violation upon which [plaintiff's] claim is founded" and begin running the statute of limitations from that date. Meagher v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan, 856 F.2d 1418, 1423 (9th Cir. 1988); accord Tibble v. Edison Int'l (Tibble II), 135 S. Ct. 1823, 1829 (2015) (courts must "consider[ ] the contours of the alleged breach of fiduciary duty" when applying the statutory bar).

Claims for Failure to Monitor Plan Investments

In the context of a breach of fiduciary claim alleging a failure to monitor plan investments, the Supreme Court has instructed that, because the duty to monitor is a continuing duty, the six-year limitations period can begin at any failure to conduct a prudent review of such investments.

According to the ***Tibble*** court, "A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. The Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty." Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828–29 (2015).

The ***Tibble*** rule has been applied and extended in the lower courts. For example, the Eleventh Circuit crystalized the Tibble holding in Stargel v. SunTrust Banks, Inc., 791 F.3d 1309, 1311 (11th Cir. 2015), indicating that the Supreme Court held in ***Tibble*** that a plaintiff can effectively allege that a defendant breached its duty of prudence under ERISA "by failing to properly monitor investments and remove imprudent ones[,] . . . [and] so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." Since then, the ***Tibble*** holding has been applied to find breach of monitor claims to be timely even though the investments were selected six years before the complaint was filed (because of plaintiff's alleged continued failure to monitor and remove imprudent plan investments). Terraza v. Safeway Inc., 241 F. Supp. 3d 1057, 1068 (N.D. Cal. 2017).

Therefore, determining the contours of the six-year statute of limitations is a fact-specific analysis requiring isolation and examination of the underlying breach of fiduciary violation alleged.

The Six-Year Statute of Limitations as Applied to Omissions

The six-year limitations period also applies to allegations involving omissions rather than affirmative acts. In such cases, the limitations period runs from the last date on which the fiduciary defendant could have cured the omissions. In the context of ERISA breach of fiduciary claims, acts considered "omissions" have included:

- **Failing to notify participants of their ability to enroll in a benefits plan** (Healey v. Abadie, 143 F. Supp. 3d 397, 404–05 (E.D. Va. 2015))
- **Failing to inform a class about material facts tending to have an effect on a benefits plan** (Olivo v. Elky, 646 F. Supp. 2d 95, 102 (D.D.C. 2009)) –and–
- **Failing "to monitor and investigate" improper investments** (Wilson Land Corp. v. Smith Barney, Inc., 1999 U.S. Dist. LEXIS 12879, at *4 (E.D.N.C. 1999))

Further, where a plaintiff alleges an omission in the context of a failure to act on material information not known to plaintiff and/or concealment of a fiduciary breach, courts also apply the ERISA Section 413(1), six-year period of statute of limitations. See, e.g., Caputo v. Pfizer, Inc., 267 F.3d 181, 189 (2d Cir. 2001). The six-year statute of limitations is regularly applied to cases in which a fiduciary:

- Breached its duty by making a knowing misrepresentation or omission of a material fact for the purpose of inducing an employee/beneficiary to act to his or her detriment –or–
- Engaged in acts to hinder the discovery of a breach of fiduciary duty

In re Unisys Corp., 242 F.3d 497, 513–16 (3d Cir. 2001).

To be entitled to a six-year limitations period, courts require , in addition to alleging a breach of fiduciary duty (be it fraud or any other act or omission), that plaintiffs also allege that the defendant committed either:

- A "self-concealing act"—an act committed during the course of the original fraud that has the effect of concealing the breach from the plaintiff (its victim) –or–
- An active concealment, referring to acts intended to conceal the original fraud that are distinct from the original fraud

See, e.g., In re Unisys Corp., 242 F.3d 497, 503 (3d Cir.2001).

More recently, courts have applied the six-year statute of limitations omissions standard to allegations where plan fiduciaries did not disclose a "wear-away" period—the freezing of pension benefits during the plan's transition from a traditional defined benefit to a cash balance approach. See, e.g., Osberg v. Foot Locker, Inc., 862 F.3d 198, 211 (2d Cir. 2017), cert. denied, 138 S. Ct. 981 (2018).

Tolling the ERISA Section 413(1) Six-Year Statute of Limitations

ERISA's statute of limitations is a statute of repose, cutting off certain legal rights if they are not acted on by a specified deadline. Allegations of breach of fiduciary duty do not "toll." Rather, the statute acts as an absolute bar to defendant's liability running six years from the date of discovery of the claim. Caputo, 267 F.3d at 189. This is applied on a widespread basis—even to situations where a participant is still pursuing administrative remedies for his or her claim. For example, the Fifth Circuit has held that the ERISA six-year statute of limitations is not tolled during the plan administrative remedy process, stating that a plaintiff must exhaust administrative remedies before complaining of a breach of fiduciary duty ERISA. See Radford v. Gen. Dynamics Corp., 151 F.3d 396, 399 (5th Cir. 1998) (citing Simmons v. Willcox, 911 F.2d 1077, 1081 (5th Cir. 1990)).

Use of Tolling Agreements

While ERISA Section 413(1)'s limitation-of-actions provision is indeed a statute of repose, courts have concluded that it can be expressly waived by the parties through tolling agreements. Sec'y, U.S. Dep't of Labor v. Preston, 873 F.3d 877, 883 (11th Cir. 2017). In Preston, the DOL brought an ERISA action alleging that Robert Preston, owner and CEO of TPP Holdings, Inc. and plan trustee, engaged in prohibited self-dealing when he knowingly caused the plan to purchase his TPP stock at an inflated price. Preston, 873 F.3d at 879.

While the parties negotiated a settlement, they also entered into a series of tolling agreements. In each of the tolling agreements, the DOL offered to delay filing any action until a specified date in exchange for the defendants' pledge not to raise a timeliness defense in the event the DOL later sued. In particular, the defendants broadly stipulated in tolling agreements that, as to any suit filed by the DOL during the range of dates specified in the agreements, they would "not assert in any manner the defense of statute of limitations, the doctrine of waiver, laches, or estoppel, or any other matter constituting an avoidance of the secretary's claims that is based on the time within which the secretary commenced such action." Preston, 873 F.3d at 879.

In deciphering whether the ERISA statute of limitations could be waived through a tolling agreement, the Eleventh Circuit performed a case and statutory analysis. The court concluded that Section 413(1) was non-jurisdictional and therefore, could be subject to express waiver through a tolling agreement. ***Preston,*** 873 F.3d at 882 citing U.S. v. Kwai Fun Wong, 135 S. Ct. 1625, 1633 (2015).

In addition to express waiver of the statute of repose through tolling agreements, other courts have found that Sections 413(1) and 413(2) present different types of durational limitations. Whereas Section 413(1) is a statute of repose, Section 413(2) is a standard statute of limitations, requiring that plaintiffs file suit within a certain period of time after the plaintiff becomes aware of an injury suffered. Arivella v. Lucent Techs., Inc., 623 F. Supp. 2d 164, 173 (D. Mass. 2009). ERISA § 413(2) sets forth the actual knowledge requirement—that the limitations period begins to run three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. Arivella, 623 F. Supp. at 172. Courts coin Section 413(2) as the "exception clause" to the typical statute of repose specifically relating to cases of fraud or concealment, that only accrue with plaintiff's "discovery" of a claim. Dykema Excavators, Inc. v. Blue Cross & Blue Shield Of Michigan, 77 F. Supp. 3d 646, 655 (E.D. Mich. 2015); See also Caputo v. Pfizer, Inc., 267 F.3d 181, 188 (2d Cir.2001) (referring to the ERISA statute of limitations as "[h]eld together by chewing gum and baling wire," and separately analyzing the limitations period under the exception clause).

The ***Dykema*** case is also unique because it applied the principles of ***American Pipe's*** equitable tolling to an ERISA class action. In ***Dykema,*** plaintiffs Dykema Excavators, Inc. and the Dykema Excavators, Inc. Welfare Benefits Plan brought a class action against Blue Cross BlueShield of Michigan. The complaint alleged that Blue Cross illegally billed and retained fees, violating its third-party administrator (TPA) agreements and breaching ERISA duties. Blue Cross contended that the claims were untimely because plaintiffs had actual knowledge of the hidden fees no later than June 1, 2006. Plaintiffs responded that because the claims were filed less than two years after the Sixth Circuit's decision denying class action certification in Pipefitters Local 636 Insurance Fund v. Blue Cross & Blue Shield of Michigan, 654 F.3d 618 (6th Cir.2011), which the Sixth Circuit referred to as involving "the same claims," the plaintiffs' claims were tolled. Dykema Excavators, Inc., 77 F. Supp. 3d at 653.

The Eastern District of Michigan reasoned that the class action claims of plaintiffs were tolled during the pendency of the ***Pipefitters Local 636*** case (above) and applied the Supreme Court's decision in ***American Pipe*** to find that "the limitations period under section 1113 therefore was tolled in full until the Sixth Circuit reversed the trial court's grant of class certification on August 12, 2011." Dykema Excavators, Inc., 77 F. Supp. 3d at 655–57 (E.D. Mich. 2015 quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974)) ("the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action").

However, class action tolling under ***American Pipe*** might be limited by the Supreme Court's recent holding in ***China Agritech v. Resh,*** which held that, upon the denial of class certification, a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, cannot commence a class action anew beyond the time allowed by the applicable statute of limitations.

China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1804, 201 L. Ed. 2d 123 (2018) ("American Pipe does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.").

The ERISA Section 413(2) Three-Year "Actual Knowledge" Limitations Period

The second statute of limitations under ERISA Section 413 is the three-year statute. ERISA § 413(2) (29 U.S.C. § 1113(2)). That limitation to lawsuit applies if such date is earlier than the six-year limitations period. Recent litigation has focused on what facts can constitute "actual knowledge" of an ERISA fiduciary breach which triggers the three-year limitations period. The general rule, as stated above, is that no ERISA action alleging a breach of fiduciary duty can commence six years after "the date of the last action which constituted a part of the breach or violation, or in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." ERISA § 413 (29 U.S.C. § 1113). But if it can be shown that the plaintiff possessed actual knowledge of the breach or violation, the limitations time period collapses to just three years.

Because actual knowledge significantly shortens the limitations period, plaintiffs having had such knowledge more than three years prior to the time the complaint was filed is a common defense when seeking to dismiss an ERISA breach of fiduciary case. Currently, however, the relative success of such an affirmative defense is based on the location of where the case would be decided. This is due to the intense and drastic differences between the appellate circuits when deciding what constitutes actual knowledge regarding an alleged breach of fiduciary duty under ERISA § 404 (29 U.S.C. § 1104).

Sixth Circuit (Constructive Knowledge Is Actual Knowledge)

In an important case that has had ramifications in how courts decide to analyze what facts illustrate actual knowledge, the Sixth Circuit solidified its test for actual knowledge in Brown v. Owens Corning Inv. Review Committee, 622 F.3d 564, 571 (6th Cir. 2010). In ***Brown,*** plan participants of the Owen Corning defined contribution plans alleged that plan fiduciaries failed to protect plan participants by not divesting employer stock held by the plans before the shares became virtually worthless. To combat these claims, defendants alleged that plaintiffs had actual knowledge of the diminution in value when all plan participants were notified through their account statements and a participant letter that the employer stock fund would be closed to new investments. This, they said, permitted participants to immediately transfer all employer stock investment into other investment funds.

While the plaintiffs argued that these disclosures, at best, would show constructive knowledge (e.g., plaintiffs' ability to access such information), the Sixth Circuit stated emphatically that "we see no material distinction between being directly handed plan documents and being given instructions on how to access them. When a plan participant is given specific instructions on how to access plan documents, their failure to read the documents will not shield them from having actual knowledge of the documents' terms." ***Brown,*** 622 F.3d at 571. Actual knowledge occurred at the time the documents were provided, thus equating constructive knowledge with actual knowledge.

Third and Eighth Circuits (Knowledge of the Nature of the Fiduciary Breach)

The Sixth Circuit's application of constructive knowledge as actual knowledge outright rejected the actual knowledge definition developed from Third and Eighth Circuit case law. Those cases had concluded that in order to show actual knowledge, a participant would have to have knowledge of the nature of the alleged fiduciary breach (e.g., why an investment was imprudent or why a transaction was prohibited under ERISA). See, e.g., Brown v. American Life Holdings, Inc., 190 F.3d 856 (8th Cir.1999). In ***Brown,*** the Eighth Circuit used the Third Circuit test in stating that, "[b] ecause the statute requires 'actual knowledge of the breach or violation,' a plaintiff must have 'actual knowledge of all material facts necessary to understand that some claim exists.'" American Life, 190 F.3d at 859 (quoting Gluck v. Unisys Corp., 960 F.2d 1168, 1177 (3d Cir.1992)).

In contrast, the ***Brown*** court set forth the actual knowledge standard as follows: An ERISA plaintiff has actual knowledge when he or she has "knowledge of all the relevant facts, not that the facts establish a cognizable legal claim under ERISA." Brown, 622 F.3d at 570 (citing Wright v. Heyne, 349 F.3d 321, 328 (6th Cir.2003)).

Other Circuits and Their Lower Courts (Shifting Standards)

Other courts have attempted to take a fact sensitive approach that shifts based upon an ERISA claimant's allegations. As a pertinent example, where ERISA plaintiffs have alleged imprudence based upon a deficient selection process or fees that are excessive in comparison to a stated benchmark, courts in multiple jurisdictions have decided plan disclosures are not enough to meet the actual knowledge requirement. See, e.g., Wildman v. Am. Century

Servs., LLC, 237 F. Supp. 3d 902, 911 (W.D. Mo. 2017); Moreno v. Deutsche Bank Ams. Holding Corp., 2016 U.S. Dist. LEXIS 142601 (S.D.N.Y. 2016); Krueger v. Ameriprise Fin., Inc., 2014 U.S. Dist. LEXIS 36435 (D. Minn. 2014).

In comparison, where there are material facts showing that an ERISA fiduciary may have breached his or her duty and that the breach was disclosed to the participant, courts have allowed the statute of limitations defense to foreclose such an action. The Southern District of New York has reasoned that plaintiff's possession of actual knowledge three years' prior to the complaint was sufficient to honor the statute of limitations defense at the motion to dismiss stage (where the quarterly performance summaries set forth in benefit statements clearly disclosed to participants the fees and expenses associated with investment funds, including the fact that some expense ratios were higher than for others). Young v. Gen. Motors Inv. Mgmt. Corp., 550 F. Supp. 2d 416, 420 (S.D.N.Y. 2008), aff'd, 325 F. App'x 31 (2d Cir. 2009).

Intel Corp. Case Expected to Crystalize the Actual Knowledge Test

The idea that claims—merely by relaying informational data of a specific investment to an ERISA claimant can meet the "actual knowledge standard"—is a premise that was recently rejected in the Ninth Circuit. Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069 (9th Cir. 2018). This case is currently before the Supreme Court. Intel Corp. Inv. Policy Comm. v. Sulyma, 2019 U.S. LEXIS 3991 (2019).

The facts of ***Intel*** are similar to other excessive fee and underperformance cases alleging that plan fiduciaries breached their fiduciary duties to participants. The plaintiff in ***Intel*** claimed that the plan offered investment options that were imprudently risky because they were exposed to alternative investments, and resulted in higher fees and poorer performance, when compared with other investments the plan fiduciaries could have selected.

In response, Intel employed the actual knowledge statute of limitations defense, arguing that it expressly disclosed the alternative investments exposure in communications and disclosures to plaintiff before October 29, 2012—three years before the filing of his complaint—specifically by using:

- Fund Fact Sheets
- Qualified Default Investment Alternative Notices
- The plan's SPD –and–
- Intel's website

Intel specifically argued that because these disclosures informed plaintiff of the mix of investments, the costs and benefits of the investments, and the investment strategy, plaintiff possessed the actual knowledge under ERISA required to trigger the statute of limitations.

The Ninth Circuit disagreed, reasoning that a plaintiff must not only have access to, or have received, plan disclosures; plaintiffs must have had knowledge of the "nature" of the alleged fiduciary breach. The court laid out its actual knowledge test as this: Actual knowledge must "mean something between bare knowledge of the underlying transaction, which would trigger the limitations period before a plaintiff was aware he or she had reason to sue, and actual legal knowledge which only a lawyer would normally possess." The court concluded that the defendant must show that plaintiffs were actually aware of the nature of the alleged breach more than three years before filing a complaint. ***Sulyma,*** 909 F.3d at 1075.

Importantly, the Ninth Circuit, in citing the statutory history of ERISA, emphasized that the plaintiff must have actual knowledge, as opposed to constructive knowledge, of the nature of the alleged breach. In applying this test, the Court found it was a dispute of material fact whether plaintiff had the requisite actual knowledge of the alleged breach.

Certiorari Accepted

The defendants petitioned the Supreme Court for certiorari on February 26, 2019. See On Petition for Writ of Certiorari. The petition focuses on the Ninth Circuit's express disagreement with the Sixth Circuit's decision in ***Brown,*** explaining that "the limitations defense would have barred this suit if it had been brought there . . . the conflict between the two decisions is undeniable." Petition at 15. Defendants also argued that under ERISA, plan administrators are compelled to provide disclosure requirements that Congress designed in order to give each participant the requisite knowledge to enforce his or her rights under the plan. As a result, to apply the Ninth Circuit's reading of the actual knowledge standard, no amount of disclosure by plan fiduciaries could possibly ensure that plan participants will possess actual knowledge of the facts disclosed by the plan. Petition at 20.

The Supreme Court accepted the certiorari petition on June 10, 2019. Intel Corp. Inv. Policy Comm. v. Sulyma, 2019 U.S. LEXIS 3991 (2019). The certiorari petition raised important issues that will potentially crystalize and define the scope of the actual knowledge standard laid out in ERISA § 413. Specifically, the petition focused on the Ninth Circuit's express disagreement with the Sixth Circuit explaining that "the limitations defense would have barred this suit if it had been brought there . . . the conflict between the two decisions is undeniable."

Interestingly, defendants petition also emphasized the ***Intel*** decision was "incorrect" for four distinct reasons any of which it hopes the Supreme Court will latch on to:

- Plaintiffs should not be allowed to "sleep" on their rights when they possess knowledge that would allow them to bring their claims.
- Plan administrators are compelled to provide, under ERISA, extensive disclosure requirements that Congress designed to give each participant the requisite knowledge to enforce their own rights.
- Actual knowledge should mean and encompass situations in which a plaintiff has from plan disclosures "all the knowledge he needs to protect himself."
- Under the Ninth Circuit's reading of actual knowledge, no amount of disclosure by plan fiduciaries can ensure that plan participants will possess actual knowledge of the facts disclosed by the plan.

Anticipation among practitioners is that the Court will focus on the split among the circuits to provide clarity. That split extends not only to the conflict between the Ninth and the Sixth Circuit, but to other longstanding circuit splits including the Third Circuit and Fifth Circuit that have held that actual knowledge requires that (i) a plaintiff knows the facts concerning the conduct or transaction that constitutes the breach and (ii) that these facts are actionable under ERISA.

History of ERISA Section 413

The Court may attempt to resolve this circuit split to avoid forum shopping by plaintiffs being directed to jurisdictions that would favor them on any statute of limitations defense. The Court might also seek to reconcile the meaning of actual knowledge and constructive knowledge under ERISA and determine to what extent they can be deemed to be different or one in the same. Constructive knowledge, in fact, was once defined in ERISA § 413. The constructive knowledge provision stated that an action could not be commenced more than three years after the earliest date "on which a report from which [the plaintiff] could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title." 29 U.S.C. § 1113(a)(2)(B). Congress repealed this provision in 1987, leaving only the actual knowledge requirement. Even though it has had the opportunity to do so, the Supreme Court has failed, thus far, to provide clarity on the actual knowledge standard and the interplay with constructive knowledge. The ***Intel*** case obviously presents such an opportunity.

For an additional discussion regarding the "actual knowledge" standard, see "Actual Knowledge" and ERISA Statute of Limitations Issues in Proprietary Funds Litigation. For a Law 360 article on oral argument of the ***Intel*** case, see Justices Weigh 'Actual Knowledge' Practically In ERISA Case (Dec. 10, 2019).

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Barry Salkin concentrates his practice in ERISA and employee benefits law. He has significant expertise drafting, amending and negotiating various ERISA and employee benefit plans, including defined benefit pension plans, profit-sharing plans, 401(k) plans, as well as qualified and non-qualified deferred compensation programs. He also has wide-ranging experience crafting group medical and health plans involving Health Care Reform, HIPAA, and COBRA. In addition, he has represented clients in ERISA litigation and audits.

His clients include multi-national corporations, closely-held companies, high-net-worth individuals, financial institutions, governmental agencies, investment groups, and tax-exempt organizations such as hospitals and physicians' organizations.

Barry also advises clients on all aspects of retirement plan tax-qualification requirements and the application of labor and securities laws and regulations to sponsors of employee benefit plans and executive compensation programs. Moreover, he has extensive experience in establishing, merging and terminating benefit plans and compensation agreements, and counsels clients on fiduciary responsibilities and prohibited transactions.

Jordan D. Mamorsky, Associate, The Wagner Law Group

Jordan is an experienced litigator and has served as counsel in well-publicized cases involving ERISA fiduciary duty and prohibited transaction matters. He has represented institutional clients in high stakes securities class actions and was part of the litigation team that secured a $275 million settlement with Bear Stearns Companies, and a $19.9 million settlement with Deloitte & Touche LLP in In re Bear Stearns Companies, Inc. securities litigation. Amongst Jordan's most recent case outcomes was a $34.5 million recovery for investors in Patel v. L-3 Communications Holdings, Inc., a settlement that was more than eight times higher than the average settlement of cases with comparable investor losses.

Jordan's unique litigation experience also includes public service as a Deputy Attorney General for the State of New Jersey, where he prosecuted white collar crimes, including medicaid fraud, insurance fraud money laundering and racketeering. Jordan completed a Postdoctoral Fellowship in Corporate Governance and Business Ethics at Yale University where he also co-authored the book "End of Ethics and a Way Back: How to Fix a Fundamentally Broken Financial System." Jordan has served as a guest columnist for publications including the Morningstar Advisor.

Jordan received his Juris Doctor from New York Law School and a Bachelor of Science from Vanderbilt University. He is admitted to practice law in New York and New Jersey.