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ERISA: Fumbling the Limitations Period

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I. INTRODUCTION

Current scholarly writings concerning the Employee Retirement Security Act of 1974 ("ERISA")[1] have noted recent problems arising in the development of the proper statute of limitations period for an ERISA action.[2] While the Supreme Court could reduce the amount of this ERISA litigation by declaring a simple uniform federal rule, it has not done so, leaving the federal circuit courts to develop their own ERISA jurisprudence.[3] These courts, no longer guided by such legal greats as Byron "Whizzer" White,[4] have fumbled the opportunity in favor of a litigious multiplicity rule, thus spawning much of the ERISA litigation.[5]

The decisions of the federal circuit courts, at times, seem amazing in their ability to evade the purposes of ERISA. For instance, Congress intended ERISA to elevate the behavior of the plan officials by imposing fiduciary duties.[6] Pre-ERISA benefit law used contract the-

1. Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).
2. *See, e.g.*, Ronald Dean & Nancy Ross, *Litigating ERISA Claims, in* ERISA LITIGATION, ALI-ABA COURSE OF STUDY MATERIALS 307, 356–64 (2004) (containing lengthy section on limitations cases).
3. *See, e.g.*, Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004) (accepting ERISA case only to resolve a difference of opinion among the federal circuit courts); *see also* 28 U.S.C § 1254(1) (2000) (discretionary writ of certiorari for cases in the federal circuit courts).
4. Besides serving as a Supreme Court Justice, Byron "Whizzer" White was one of the greatest college football players at the University of Colorado as a half-back and played for the Pittsburg Pirates (now Steelers) and Detroit Lions in the National Football League. *See* Paul Tagliabue, *A Tribute to Byron White*, 112 YALE L.J. 999, 999 (2003). For Justice White's handling of the limitations period issue involved for a welfare plan, albeit for a pre-ERISA case, see *infra* notes 195–204 and accompanying text.
5. An in-law of the author, Judge Fidencio Garza, Federal Magistrate in Brownsville, Texas, once complained to the author and his recently wed spouse that forty percent of his docket consisted of ERISA matters.
6. *See infra* note 185 and accompanying text.

ories,[7] which ordinarily provide for a low standard of behavior to determine employee benefits.[8] On this body of existing law, the ERISA statute imposed the higher altruistic standard of fiduciary behavior on the parties to the employee benefit program, namely the sponsor, the trustees, and the plan administrator.[9] The federal circuit courts, however, initially tried to blunt this innovation[10] by reviewing the plan fiduciary decisions under the arbitrary and capricious rule. This rule was highly favorable to plan fiduciaries,[11] as opposed to the standard fiduciary behavior required by ERISA.[12] ERISA recognized the employer's promise of benefits, supported by the consideration of the employee's deferred compensation, as a contractual relationship.[13] Yet, the circuit courts determined that an ERISA lawsuit involved a matter of trust, and consequently denied jury trials.[14]

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7. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112–13 (1989) (benefit denial situation).
8. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829–32 (1983) (explaining that contract law does not go beyond morals of the marketplace, while fiduciary law is altruistic).
9. *See* Employee Retirement Income Security Act (ERISA) of 1974 § 404, 29 U.S.C. § 1104(a) (2000); H.R. REP. NO. 93-533, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (ERISA "codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts"); S. REP. No. 93-127, at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865.
10. *See* S. REP. NO. 93-127, at 36, *reprinted in* 1974 U.S.C.A.N. 4838, 4872 ("[T]he Committee has concluded that safeguards are required to preclude this type of abuse [employer retaliatory discrimination] from being carried out and in order to completely secure the rights and expectations brought into being by this *landmark reform legislation*.") (emphasis added).
11. *See, e.g.*, STEPHEN R. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 309–13 (1993) (commenting on the inappropriateness of the arbitrary and capricious rule); George Lee Flint, Jr., *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. U. L. REV. 133, 139–43 (1990) (providing early circuit court opinions on the deference to the plan administrator's decision). This rule now survives as part of the abuse of discretion rule. *Compare Bruch*, 489 U.S. at 115 (adopting the abuse of discretion rule), *with* Flint, *supra*, at 168–72 (explaining the arbitrary and capricious rule as part of the abuse of discretion rule); *see also* Jordan v. Northrup Grumman Corp. Welfare Benefit Plan, 370 F.3d 869, 875–76 (9th Cir. 2004) (explaining that the review rule for the ERISA benefits due decision remains the abuse of discretion rule).
12. *See* Employee Retirement Income Security Act § 404(a).
13. *See, e.g.*, George Lee Flint, Jr., *ERISA: Reformulating the Federal Common Law for Plan Interpretation*, 32 SAN DIEGO L. REV. 955, 986–88 (1995) (providing the legislative history from both Houses of Congress recognizing the contractual deferred compensation theory in ERISA); *see also* Phillips v. Ala. Hotel Employees Pension Fund, 944 F.2d 509 (9th Cir. 1991) (recognizing the adoption by Congress of the deferred compensation theory for the pension promise); Demisay v. Local 144 Nursing Home Pension Fund, 935 F.2d 528 (2d Cir. 1991); Knauss v. Gorman, 583 F.2d 82 (3d Cir. 1978).
14. *See, e.g.*, George Lee Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Actions*, 25 LOY. L.A. L. REV. 361, 383–93 (1992) (reviewing federal decisions on the issue of jury trial); *see also* Muller v. First Unum Life Ins. Co., 341 F.3d 119,

ERISA also contains a broad preemption provision obliterating state law as it relates to employee benefit matters.[15] Nevertheless, the circuit courts used state law to determine whether the federal spendthrift provision[16] protected pension benefits under bankruptcy law,[17] until that practice was corrected by the Supreme Court.[18]

The federal circuit courts have created a similar situation for the statute of limitations for employee benefit plan lawsuits. ERISA contains a statute of limitations for lawsuits concerning a breach of fiduciary duty.[19] However, ERISA limits the applicability of that statute of limitations to the fiduciary duty provisions contained in sections 401 to 414.[20] Participant–beneficiary lawsuits to enforce these provisions normally arise under sections 502(a)(1)(B) and 502(a)(3), providing legal and equitable remedies for ERISA violations.[21] But ERISA also provides a separate cause of action for plan recoveries of damages arising from fiduciary duty breaches.[22] Therefore, the circuit courts generally have refused to apply the ERISA statute of limitations to any ERISA action that arises under a provision other than the fiduciary duty section for plan recoveries.[23] These other ERISA causes of

124 (2d Cir. 2003) (explaining that an ERISA benefits due lawsuit remains a bench trial before the judge, without a jury); Thomas v. Or. Fruit Prods. Co., 228 F.3d 991, 995–96 (9th Cir. 2000) (explaining that an ERISA employer retaliatory discrimination lawsuit entails no right to a jury trial).

15. *See* Employee Retirement Income Security Act § 514(a). For the application of ERISA's preemption provision to the limitations issue, see *infra* notes 160–84 and accompanying text.
16. *See* Employee Retirement Income Security Act § 206(d)(1).
17. *See, e.g.*, George Lee Flint, Jr., *ERISA: Anti-Alienation Superiority in Bankruptcy*, 94 W. VA. L. REV. 411, 463–79 (1991–1992) (reviewing federal decisions on the issue of the ERISA spend-thrift trust).
18. *See* Patterson v. Shumate, 504 U.S. 753, 759–60 (1992).
19. *See* Employee Retirement Income Security Act § 413. For the application of ERISA's statute of limitations to the limitations issue, see *infra* notes 240–74 and accompanying text. ERISA also contains other statutes of limitations for various actions by the PBGC. *See* Employee Retirement Income Security Act §§ 4003(e)(6), (f)(5), 4068(d)(2), 4070(f), 4301(f) and the multiemployer plan amendments to ERISA.
20. Employee Retirement Income Security Act §§ 401–414.
21. *See infra* notes 68, 264–68 and accompanying text.
22. *See* Employee Retirement Income Security Act §§ 409, 502(a)(2). For the application of ERISA's plan recovery provision, see *infra* note 33 and accompanying text.
23. *See infra* notes 25–28 and accompanying text. The Third and Ninth Circuits early did apply the ERISA statute of limitations to both a benefits due lawsuit, *see* Meagher v. Int'l Assoc. of Machinists Pension Plan, 856 F.2d 1418, 1422–23 (9th Cir. 1988); Edwards v. Wilkes-Barre Publ'g Co. Pension Trust, 757 F.2d 52, 55 (3d Cir. 1985), and to a delinquent employer contribution lawsuit, *see* Adams v. Gould Inc., 739 F.2d 858, 867 (3d Cir. 1984), but since have recanted. For the benefits due lawsuit, see *infra* notes 54–56, 63–64 and accompanying text. For the delinquent employer contribution lawsuit, see *infra* and note 110 and accompanying text.

action are most notably the informational penalty lawsuit,[24] the benefits due lawsuit,[25] the equitable remedy lawsuit to enforce various plan provisions,[26] the employer retaliatory discrimination lawsuit,[27] and the employer delinquent contribution lawsuit.[28] In these five situations, the circuit courts have opted to use other law to determine the limitations period.[29] Surprisingly, the circuit courts, rather than developing a uniform federal common law rule applicable to all persons similarly situated, have instead chosen to use the very same state law that ERISA supposedly preempted.[30] Even more shocking is that the state law generally chosen is the same contract law rejected for determining whether the court should conduct the ERISA lawsuit by jury trial.[31]

This article aims to show that this approach utilized by the circuit courts is incorrect. Part II performs a cursory investigation of the circuit courts' decisions narrowed in scope to their limitations period for the informational penalty lawsuit, the benefits due lawsuit, the equi-

24. Employee Retirement Income Security Act § 502(a)(1)(A).

25. *Id.* § 502(a)(1)(B). Circuit courts have refused to apply the ERISA statute of limitation to the benefits due lawsuit. *See* Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643 (9th Cir. 2000) (stating that it only applies to breaches of fiduciary duty, not claims against plan for benefits); Nikaido v. Centennial Life Ins. Co., 42 F.3d 557, 559 n.1 (9th Cir. 1994); Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust, 3 F.3d 1246, 1252 (9th Cir. 1993); Kennedy v. Electricians Pension Plan, IBEW No. 995, 954 F.2d 1116, 1120 (5th Cir. 1992); Johnson v. State Mut. Life Assurance Co., 942 F.2d 1260 (8th Cir. 1991) (stating that it only applies to enforcement of fiduciary duties); Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288, 1290 (10th Cir. 1991) (stating that it only applies to violations of the fiduciary sections).

26. Employee Retirement Income Security Act § 502(a)(3). Circuit courts have refused to apply the ERISA statue of limitations to an equitable remedy lawsuit to enforce plan provisions. *See* Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347, 1356 n.8 (11th Cir. 1998) (stating the ERISA statute of limitations is irrelevant to an ERISA action for restitution from beneficiaries under plan subrogation provision).

27. Employee Retirement Income Security Act §§ 502(a)(3), 510. Circuit courts have refused to apply the ERISA statute of limitations to the employer retaliatory discrimination lawsuit. *See* Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197, 1200–02 (10th Cir. 1990) (stating that it only applies to violations of the fiduciary sections).

28. Employee Retirement Income Security Act §§ 502(a)(3), 515. Circuit courts have refused to apply the ERISA statute of limitations to the employer delinquent contribution lawsuit. *See* Felton v. Unisource Corp., 940 F.2d 503, 510–11 (9th Cir. 1991) (stating it does not apply to a delinquent employer contribution case); Trs. of the Wyo. Laborers Health & Welfare Plan v. Morgen & Osgood Constr. Co., 850 F.2d 613, 618 n.8 (10th Cir. 1988) (stating that it only applies to actions to redress a fiduciary's breach).

29. For decisions creating a multiplicity of statutes of limitations for other ERISA actions, see *infra* notes 35–110 and accompanying text.

30. *See infra* notes 169–84 and accompanying text.

31. *See infra* notes 185–89 and accompanying text.

table remedy lawsuit to enforce plan provisions, the employer retaliatory discrimination lawsuit, and the delinquent employer contribution lawsuit. Then, Part III outlines the anomaly of using state statutes of limitations for ERISA lawsuits. Finally, Part IV demonstrates the reasoning that the circuit courts should have used to determine a uniform federal common law for the limitations period for all ERISA causes of action.

II. CIRCUIT COURT DECISIONS

When confronted with a statute of limitations defense in an ERISA lawsuit, a circuit court will first determine whether the cause of action involves a plan recovery of damages arising from a breach of fiduciary duty, for which the ERISA statute of limitations applies. That statute of limitations bars breach of fiduciary duty claims after the earlier of six years from the breach or three years from the date the plaintiff acquires actual knowledge of the breach.[32] Currently, the circuit courts only recognize two ERISA causes of action involving a breach of fiduciary duty to which the ERISA statute of limitations applies: (1) the action for plan recovery of damages from breaches of fiduciary duty[33] and (2) equitable relief for violation of the ERISA fiduciary provisions.[34] If the ERISA action does not involve one of these two

32. For the ERISA statute of limitations, see *infra* note 245 and accompanying text. The major ERISA fiduciary duties are the exclusive benefit duty, prudent person duty, diversification duty, and the duty to follow the plan documents. *See* Employee Retirement Income Security Act § 404(a)(1)(A)–(D). ERISA also applies a co-fiduciary liability and liability for engaging in prohibited transactions. *See id.* §§ 405, 406.
33. Employee Retirement Income Security Act §§ 409, 502(a)(2). *See* Wright v. Heyne, 349 F.3d 321 (6th Cir. 2003) (receipt of commission constituted a prohibited transaction; brought by trustee); Brown v. Am. Life Holdings, Inc., 190 F.3d 856 (8th Cir. 1999) (improper investments violates diversification rule; brought by participant); Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994) (failure to comply with plan provisions; brought by participant); Rogers v. Millan, 902 F.2d 34 (6th Cir. 1990) (failure to oversee co-fiduciary; brought by participant); Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487 (8th Cir. 1988) (failure to disclose violates exclusive benefit duty; brought by trustee); Brock v. Nellis, 809 F.2d 753 (11th Cir. 1987) (advise to trustee to buy grossly above FMV violates prudent person rule; brought by Department of Labor).
34. Employee Retirement Income Security Act § 502(a)(3). The circuit courts did not recognize this action until its confirmation by the Supreme Court in 1996. *See* Varity Corp. v. Howe, 516 U.S. 489 (1996). This ERISA cause of action also provides for equitable remedies in two other situations: (1) violation of plan provisions; and (2) violation of ERISA provisions other than the fiduciary duty sections. *See* Million v. Trs. of the Cent. States, Southeast & Southwest Areas Pension Fund, 50 Fed. Appx. 196, 199 (6th Cir. 2002) (making amendments); Spangler v. Altec Int'l Ltd. P'ship, 172 F.3d 53 (7th Cir. 1999) (intentional misrepresentations); Radford v. Gen. Dynamics Corp., 151 F.3d 396 (5th Cir. 1998) (negligent misrepresentations).

claims, the circuit court deems itself free to fashion a limitations period on its own.

A. The Rule of State Statute of Limitations

For ERISA causes of action other than plan recovery of damages arising from a breach of fiduciary duty, the circuit courts have settled on a rule of using the most analogous state statute of limitations. This practice has spawned much litigation, especially for the benefits due lawsuit, the employer retaliatory discrimination lawsuit, and the delinquent employer contribution lawsuit. Use of state law first requires the circuit court to determine which state's law applies. Then, for each state, the circuit courts need to resolve the issue of the most analogous state statute of limitations. Since states have a multiplicity of statutes of limitations, the circuit courts have a wide selection. As a result, the most analogous statute of limitations varies from state to state in subject matter, even for the same ERISA cause of action, and in length, even for the same type of state statute.

Besides the cost of litigating the choice of law and most analogous state cause of action issues, the problem worsens for interstate plans. Similarly situated employees in different states will have different rights with respect to bringing a lawsuit depending on which state's law applies.[35] Other litigants will have the opportunity to forum shop to locate a state that will not foreclose their lawsuit, or that will supply them with the limitations defense.[36]

1. *The Informational Penalty Lawsuit*

For the informational penalty lawsuit,[37] the circuit courts have yet to settle on a single type of most analogous state statute of limitations. The circuit courts have used the Texas two-year limitations period for a fiduciary duty breach[38] and the California three-year limitations pe-

35. *See infra* notes 298–305 and accompanying text.
36. *See infra* notes 298–305 and accompanying text.
37. *See* Employee Retirement Income Security Act § 502(a)(1)(A), (c)(1). ERISA section 502(a)(1)(A) provides "[a] civil action may be brought (1) by a participant or beneficiary (A) for the relief provided for in subsection (c) of this section." *Id.* § 502(a)(1)(A). Section 502(c)(1) provides:

> Any administrator . . . (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary . . . by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal . . . .

Id. § 502(c)(1).
38. *See* Hatteberg v. Red Adair Co., Inc. Employees' Profit Sharing Plan, 79 Fed. Appx. 709 (5th Cir. 2003).

riod for statutory liability other than a penalty or forfeiture.[39] For Utah, the Tenth Circuit did not decide whether to apply the three-year limitations period for insurance contracts or the four-year catch-all limitations period.[40]

2. *The Benefits Due Lawsuit*

For the benefits due lawsuit,[41] most circuit courts have settled on the statute of limitations for written contracts as the most analogous statute of limitations. This rule does not provide any sort of uniform ERISA rule. Not only do many states have statutes of limitations with widely different periods, some states have multiple statutes of limitations, each corresponding to a different type of contract.

For example, the Second Circuit, applying New York law, used a six-year limitations period.[42] The Fourth Circuit used a three-year limitations period in applying Maryland law,[43] while using a one-year limitations period for insurance contracts under Virginia law.[44] The Fifth Circuit used a four-year limitations period under Texas law.[45] The Sixth Circuit applied a fifteen-year limitations period under Ohio law.[46] The Seventh Circuit used a ten-year limitations period under Illinois law.[47] The Eighth Circuit used a ten-year limitations period

39. *See* Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995); Cal. Civ. Proc. Code § 338(a) (West 1991 & Supp. 2005).
40. *See* Moore v. Berg Enter., Inc., 201 F.3d 448 (10th Cir. 1999); Utah Code Ann. §§ 31A-21-313(1) (insurance), 78-12-25(3) (2003) (catch-all).
41. ERISA section 502(a)(1)(B) provides "[a] civil action may be brought (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Employee Retirement Income Security Act § 502(a)(1)(B).
42. *See* Larson v. NMU Pension Trust of NMU Pension, 902 F.2d 1069 (2d Cir. 1990); Lamontagne v. Pension Plan of the United Wire, Metal & Mach. Pension Fund, 869 F.2d 153 (2d Cir. 1989); Miles v. N.Y. State Teamsters Pension & Ret. Fund Employee Benefit Plan, 698 F.2d 593 (2d Cir. 1983); N.Y. C.P.L.R. 213 (McKinney 2003).
43. *See* Martone v. Conn. Gen. Life Ins. Co., 983 F.2d 1056 (4th Cir. 1992); Cotter v. E. Conference of Teamsters Ret. Plan, 898 F.2d 424 (4th Cir. 1990); Rodriguez v. MEBA Pension Trust, 872 F.2d 69 (4th Cir. 1989); Dameron v. Sinai Hosp. of Baltimore, Inc., 815 F.2d 975 (4th Cir. 1987); Md. Code Ann., Cts. & Jud. Proc. § 5-101 (2002).
44. *See* Payne v. Blue Cross & Blue Shield of Va., 976 F.2d 727 (4th Cir. 1992) (unpublished table decision); Va. Code Ann. § 38.2-314 (2002).
45. *See* Hogan v. Kraft Foods, 969 F.2d 142 (5th Cir. 1992); Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 2002).
46. *See* Meade v. Pension Appeals & Review Comm., 966 F.2d 190 (6th Cir. 1992); Ohio Rev. Code Ann. § 2305.06 (Anderson 2001).
47. *See* Daill v. Sheet Metal Workers' Local 73 Pension Fund, 100 F.3d 62 (7th Cir. 1996); Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449 (7th Cir. 1991); Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan, 713 F.2d 247 (7th Cir. 1983); 735 Ill Comp. Stat. Ann. 5/13-206 (West 2003).

under Iowa[48] and Missouri law for written contracts[49] (overruling prior cases approving a five-year limitations period for unwritten contracts),[50] an eight-year limitations period under South Dakota law,[51] and a five-year limitations period under Arkansas[52] and Nebraska law.[53] The Ninth Circuit used a six-year limitations period under Arizona[54] and Washington law,[55] and a four-year limitations period under California law[56] (overruling the prior approval of the three-year limitations period applicable to insurance contracts).[57] The Tenth Circuit applied a six-year limitations period under Utah[58] and Colorado law,[59] and five-year limitations period under Oklahoma law.[60]

48. *See* Shaw v. McFarland Clinic, P.C., 363 F.3d 744 (8th Cir. 2004); IOWA CODE ANN. § 614.1(5) (West 1999 & Supp. 2004).
49. *See* Harris v. Epoch Group, L.C., 357 F.3d 822 (8th Cir. 2004); Johnson v. State Mut. Life Assurance Co. of Am., 942 F.2d 1260 (8th Cir. 1991); MO. ANN. STAT. § 516.110(1) (West 2002); *see also* Todd M. Worscheck, *Eighth Circuit Struggles to Select Appropriate State of Limitations for ERISA Claims: Difficulties with a Straight Forward Matter:* Johnson v. State Mutual Life Assurance Co. of America, 18 WM. MITCHELL L. REV. 861 (1992).
50. *See* Mason v. Aetna Life Ins. Co., 901 F.2d 662 (8th Cir. 1990); Fogerty v. Metro. Life Ins. Co., 850 F.2d 430 (8th Cir. 1988), *overruled by Johnson*, 942 F.2d at 1266; MO. ANN. STAT. § 516.120(1) (West 2002).
51. *See* Anderson v. John Mortell & Co., 830 F.2d 872 (8th Cir. 1987); S.D. CODIFIED LAW § 15-2-13 (Michie 2004).
52. *See* Bennett v. Federated Mut. Ins. Co., 141 F.3d 837 (8th Cir. 1998); ARK. CODE ANN. § 16-56-111 (Michie Supp. 2003).
53. *See* Union Pac. R.R. Co. v. Beckham, 138 F.3d 325 (8th Cir. 1998); Schroeder v. Philips Petroleum Co., 970 F.2d 419 (8th Cir. 1992); NEB. REV. STAT. § 25-205(1) (Reissue 1995 & Cum. Supp. 2004).
54. *See* McElwaine v. US West, Inc., 176 F.3d 1167 (9th Cir. 1999); ARIZ. REV. STAT. ANN. § 12-548 (West 2003).
55. *See* Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust, 3 F.3d 1246 (9th Cir. 1993); WASH. REV. CODE ANN. § 4.16.040 (West Supp. 2004–2005).
56. *See* Mogck v. Unum Life Ins. Co. of Am., 292 F.3d 1025 (9th Cir. 2002); Giles v. Reliance Standard Life Ins. Co., 242 F.3d 381 (9th Cir. 2000) (unpublished table decision); Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 189 F.3d 1160 (9th Cir. 1999); Pisciotta v. Teledyne Indus., Inc., 92 F.3d 1326 (9th Cir. 1996); CAL. CIV. PROC. CODE § 337 (West 1982).
57. *See* Sommer v. Unum Life Ins. Co., 173 F.3d 861 (9th Cir. 1999) (three-year statute of limitation); Williams v. Unum Life Ins. Co., 113 F.3d 1108 (9th Cir. 1997) (three-year statute of limitation), *overruled by* Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643 (9th Cir. 2000); Nikaido v. Centennial Life Ins. Co., 42 F.3d 557 (9th Cir. 1994) (three-year statute of limitation), *overruled by* Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643 (9th Cir. 2000); CAL. INS. CODE § 103.50.11 (West 1982).
58. *See* Lang v. Aetna Life Ins. Co., 196 F.3d 1102 (10th Cir. 1999); UTAH CODE ANN. § 31A-21-313(1) (2003).
59. *See* Lee v. Rocky Mountain UFCW Unions & Employers Trust Pension Plan, 13 F.3d 405 (10th Cir. 1993) (unpublished table decision); COLO. REV. STAT. ANN. § 13-80-103.5 (West 2004).
60. *See* Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288 (10th Cir. 1991); OKLA. STAT. tit. 12, § 95 (Supp. 2005).

The Eleventh Circuit used a six-year limitations period under Georgia[61] and Alabama law.[62]

In contrast, these and other circuits, under different circumstances, have determined that the most analogous state statute of limitations for the benefits due lawsuit is not one based on written contract. For example, the Third Circuit sees the benefits due action as one for wages, as does the Sixth Circuit for Minnesota. However, the Sixth Circuit views the benefits due action as one for short-term disability in Iowa. This choice provides a one-year limitations period for Delaware[63] and a three-year limitations period for Pennsylvania.[64] For Minnesota's[65] and Iowa's short-term disability,[66] a two-year limitations period applies. For the nation's one civil jurisdiction, Louisiana, the Fifth Circuit has determined the benefits due lawsuit is not one for wages, but a personal action for which the limitations period is ten-years.[67]

3. *The Equitable Remedy Lawsuit to Enforce Plan Provisions*

Only one type of equitable remedy lawsuit to enforce plan provisions under ERISA has dealt with the limitations period.[68] That type was the subsequently partially disallowed enforcement of plan reimbursement contracts for wrongfully paid benefits as authorized by the

61. *See* Harrison v. Digital Health Plan, 183 F.3d 1235 (11th Cir. 1999); GA. CODE ANN. § 9-3-28 (Supp. 2004).
62. *See* Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347 (11th Cir. 1998); ALA. CODE § 6-2-34(9) (1993).
63. *See* Stafford v. E.I. Dupont De Nemours, 27 Fed. Appx. 137 (3d Cir. 2002); Syed v. Hercules Inc., 214 F.3d 155 (3d Cir. 2000); DEL. CODE ANN. tit. 10, § 8111 (1999).
64. *See* Connors v. Consolidation Coal Co., 866 F.2d 599 (3d Cir. 1989); PA. STAT. ANN. tit. 43 §§ 260.2a (defining wages to include ERISA plan moneys), 260.9a(g) (West 1992). *But see* Heinglein v. Colt Indus. Operating Corp., 260 F.3d 201 (3d Cir. 2001) (binding parties who neglected to appeal companion lawsuit to a six-year statute of limitations).
65. *See* Adamson v. Armco, Inc., 44 F.3d 650 (8th Cir. 2001); MINN. STAT. ANN. § 541.07(5) (West 2002).
66. *See* Meade v. Intermec Techs. Corp., 271 F.3d 715 (8th Cir. 2001); IOWA CODE ANN. § 614.1(8) (West 1999).
67. *See* Hall v. Nat'l Gypsum Co., 105 F.3d 225 (5th Cir. 1997); Kennedy v. Electricians Pension Plan, IBEW No. 995, 954 F.2d 1116 (5th Cir. 1992); LA. CIV. CODE ANN. art. 3499 (West 1994).
68. ERISA section 502(a)(3) provides:

> A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.

Employee Retirement Income Security Act (ERISA) of 1974 § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2000).

plan.[69] Prior to the Supreme Court's partial disallowance of plan reimbursements for wrongfully paid benefits, the circuit courts used the Massachusetts six-year limitations period for contracts,[70] the Washington six-year limitations period for written contracts,[71] and the Alabama six-year limitations period for contracts.[72] For Arkansas, the Eighth Circuit did not decide whether to apply the three-year limitations period for unwritten contracts or the five-year limitations period for written contracts.[73]

4. *The Employer Retaliatory Discrimination Lawsuit*

For the employer retaliatory discrimination lawsuit,[74] most circuit courts have settled on the statute of limitations for wrongful termination as the most analogous statute of limitations. Again, this rule does not provide any sort of uniform ERISA application. Retaliatory discrimination could fit under several different state lawsuits. Consequently, some circuit courts have selected multiple standards, even for

69. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210–11 (2002) (disallowing under ERISA section 502(a)(3)(B) the equitable relief of enforcement of plan reimbursement provisions when beneficiary is not in possession of funds since founded on contractual obligation to pay). The circuit courts have extended this rule to the situation where the beneficiary has possession of the funds. *See, e.g.*, Qualchoice, Inc. v. Rowland, 367 F.3d 638, 642–49 (6th Cir. 2004) (following *Knudson* for beneficiary possession of the funds after discussion of similar post-*Knudson* law).

70. *See* Wang Labs., Inc. v. Kagan, 990 F.2d 1126 (9th Cir. 1993) (under California choice of law rules); MASS. GEN. LAWS ANN. ch. 260, § 2 (West 2004).

71. *See* Pierce County Hotel Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324 (9th Cir. 1987); WASH. REV. CODE ANN. § 4.16.040 (West 1988 & Supp. 2005).

72. *See* Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347 (11th Cir. 1998); Blue Cross & Blue Shield of Ala. v. Weitz, 913 F.2d 1544 (11th Cir. 1990); ALA. CODE § 6-2-34(9) (1993).

73. *See* Admin. Comm. of Wal-Mart Stores, Inc. v. Soles *ex rel.* Estate of Hollander, 336 F.3d 780 (8th Cir. 2003); ARK. CODE ANN. §§ 16-56-105 (unwritten), 16-56-111 (written) (Michie 1987 & Supp. 2003).

74. *See* Employee Retirement Income Security Act (ERISA) of 1974 § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (2000). ERISA section 510 states:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter . . . .

Id. § 510; *see also* Millsap v. McDonnell Douglas Corp., 368 F.3d 1246 (10th Cir. 2004) (stating an employer retaliatory discrimination lawsuit is brought under ERISA section 502(a)(3)(B)). *See generally* BRUCE, *supra* note 11, at 533–34. The employer retaliatory discrimination action frequently arises in the context of a termination to avoid providing benefits. *See, e.g.*, Anderson v. Consol. Rail Corp., 297 F.3d 242 (3d Cir. 2002).

a single state, while other circuit courts disagree even for the same state.

For the Fifth Circuit, this wrongful termination rule provides a two-year limitations period in Texas.[75] For the Sixth Circuit, this rule provides a four-year limitations period in Ohio.[76] For the Ninth Circuit, this rule provides a two-year limitations period in Arizona.[77] For the Tenth Circuit, this rule provides a two-year limitations period for employment claims in Oklahoma[78] and a two-year limitations period for wrongful termination in Kansas.[79]

Both the Second and Third Circuits have oscillated as to the most analogous state statute of limitations. New York has either a six-year limitations period for a written contract[80] or a two-year limitations period for wrongful termination.[81] (The Tenth Circuit, under the Colorado choice of law rule, decided on a three-year limitations period for employment discrimination in New York.)[82] Pennsylvania has either a six-year limitations period for residual claims[83] or a two-year limitations for wrongful termination.[84] Similarly, the Seventh Circuit is unable to decide for Illinois between a five-year limitations period for retaliatory discharge or a ten-year limitations period for written contracts.[85] The Ninth Circuit cannot decide for California—it is either a three-year limitations period for statutory claims,[86] a two-year limita-

75. *See* Berry v. Allstate Ins. Co., 84 Fed. Appx. 442 (5th Cir. 2004); McClure v. Zoecon, Inc., 936 F.2d 777 (5th Cir. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 2002).

76. *See* Taylor v. Goodyear Tire & Rubber Co., 38 F.3d 1216 (6th Cir. 1994) (unpublished table decision); OHIO REV. CODE ANN. § 2305.09(D) (Anderson 2001).

77. *See* Felton v. Unisource Corp., 940 F.2d 503 (9th Cir. 1991); ARIZ. REV. STAT. ANN. § 12-542 (West 2003).

78. *See* Woods v. Halliburton Co., 49 Fed. Appx. 827 (10th Cir. 2002); OKLA. STAT. ANN. tit. 12, § 95(3) (West 2000 & Supp. 2005).

79. *See* Myers v. Colgate-Palmolive Co., 26 Fed. Appx. 855 (10th Cir. 2002); KAN. STAT. ANN. § 60-513(a)(4) (1994 & Cum. Supp. 2004).

80. *See* Botsas v. United States, 5 Fed. Appx. 69 (2d Cir. 2001); Sadowski v. Technical Career Insts., Inc., 107 F.3d 4 (2d Cir. 1997) (unpublished table decision); N.Y. C.P.L.R. 213(2) (McKinney 2003).

81. *See* Sandberg v. KPMG Peat Marwick, LLP, 111 F.3d 331 (2d Cir. 1997); N.Y. WORKERS' COMP. LAW § 120 (McKinney 1994).

82. *See* Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990); N.Y. C.P.L.R. 214 (McKinney 2003).

83. *See* Monkelis v. Mobay Chem., 827 F.2d 937 (3d Cir. 1987); Gavalik v. Cont'l Can Co., 812 F.2d 834 (3d Cir. 1987); 42 PA. CONS. STAT. ANN. § 5527 (West 2004).

84. *See* Anderson v. Consol. Rail Corp., 297 F.3d 242 (3d Cir. 2002); 42 PA. CONS. STAT. ANN. § 5524(7) (West 2004 & Supp. 2005).

85. *See* Tolle v. Carroll Touch, Inc., 977 F.2d 1129 (7th Cir. 1992); 735 ILL. COMP. STAT. ANN. 5/13-205 (discharge), 13-206 (contract) (West 2003).

86. *See* D'Andrea v. Bank of Am. N.T. & S.A., 951 F.2d 359 (9th Cir. 1991) (unpublished table decision); CAL. CIV. PROC. CODE § 338 (West 1982 & Supp. 2005).

tions period for an oral contract,[87] or a one-year limitations period for wrongful termination,[88] but not a four-year limitations period for written contracts.[89] The Eleventh Circuit uses a different sort of analogous statute for each state. For Alabama, it is a two-year limitations period for retaliatory discharge,[90] for Florida, it is a four-year limitations period for a statutory claim,[91] and for Georgia, it is a two-year limitations period for wages.[92]

The Sixth and Eighth Circuits disagree for Tennessee. The Sixth Circuit decided on a one-year limitations period for wrongful discharge in Tennessee,[93] while the Eighth Circuit, using Missouri's choice of law rule, has settled on a six-year limitations period for written contracts in Tennessee.[94]

In contrast, the First Circuit applies a ten-year limitations period for a tort in Massachusetts.[95] The Third Circuit has decided the limitations period is one-year for wages in Delaware.[96]

5. *The Delinquent Employer Contribution Lawsuit*

For the delinquent employer contribution lawsuit,[97] most circuit courts have settled on the statute of limitations for written contracts as the most analogous statute of limitations. The delinquent employer

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87. *See* Benson v. Hafif, 114 F.3d 1193 (9th Cir. 1997); Hinton v. Pac. Enters., 5 F.3d 391 (9th Cir. 1993); CAL. CIV. PROC. CODE § 339 (West 1982 & Supp. 2005).
88. *See* Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry Co., 210 F.3d 383 (9th Cir. 2000) (unpublished table decision); Burrey v. Pac. Gas & Elec. Co., 159 F.3d 388 (9th Cir. 1998); CAL. CIV. PROC. CODE § 340(3) (West 1982 & Supp. 2005).
89. *See* Kim v. Pac. Bell, 9 Fed. Appx. 768 (9th Cir. 2001); CAL. CIV. PROC. CODE § 337 (West 1982 & Supp. 2005).
90. *See* Musick v. Goodyear Tire & Rubber Co., 81 F.3d 136 (11th Cir. 1996); ALA. CODE § 6-2-38 (1993).
91. *See* Byrd v. MacPapers, Inc., 961 F.2d 157 (11th Cir. 1992); FLA. STAT. ANN. § 95.11(3)(f) (West 2002).
92. *See* Clark v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989); GA. CODE ANN. § 9-3-22 (1982).
93. *See* Leemis v. Med. Servs. Research Group, Inc., 75 Fed. Appx. 986 (6th Cir. 2003); TENN. CODE ANN. § 50-1-307 (1999).
94. *See* Heideman v. PFL, Inc., 904 F.2d 1262 (8th Cir. 1990); TENN. CODE ANN. § 28-3-109 (2000).
95. *See* Muldoon v. C.J. Muldoon & Sons, 278 F.3d 31 (1st Cir. 2002); MASS. GEN. LAWS ANN. ch. 260, § 2A (West 2004).
96. *See* Syed v. Hercules Inc., 214 F.3d 155 (3d Cir. 2000); DEL. CODE ANN. tit. 10, § 8111 (1999).
97. Employee Retirement Income Security Act (ERISA) of 1974 § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (2000). ERISA section 515 states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

contribution lawsuit arises in multiemployer plans for which the employer obligates itself to make contributions in a collective bargaining agreement.[98] This rule merely perpetuates the chaos present for the benefits due lawsuit since states have a myriad of possible statutes, many not uniform with any other state.

The Second Circuit chose to provide a six-year limitations period in New York.[99] For the Sixth Circuit, this rule yields a six-year limitations period for both Michigan[100] and Tennessee.[101] For the Seventh Circuit, this rule yields a ten-year limitations period for Illinois.[102] For the Eighth Circuit, this rule yields a ten-year limitations period for Iowa.[103] For the Ninth Circuit, this rule yields a six-year limitations period for Alaska,[104] Washington,[105] and Hawaii,[106] and a four-year limitations period for California.[107] For the Tenth Circuit, this rule yields a ten-year limitations period for Wyoming.[108] For the District of Columbia Circuit, this rule yields a two-year limitations pe-

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Id. § 515; *see also* Trs. of Wyo. Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co., Inc., 850 F.2d 613 (10th Cir. 1988) (stating an employer delinquent contribution lawsuit is brought under ERISA section 502(a)(3)(B)).

98. *See, e.g.*, Mich. United Food & Commercial Workers Unions v. Muir Co., 992 F.2d 594 (6th Cir. 1993).

99. *See* O'Hare v. Gen. Marine Transp. Corp., 740 F.2d 160 (2d Cir. 1984); N.Y. C.P.L.R. 213 (McKinney 2003).

100. *See Muir*, 992 F.2d at 597; Trs. for Mich. Carpenters' Council Health & Welfare Fund v. Sobie Co., 885 F.2d 871 (6th Cir. 1989) (unpublished table decision); Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc., 872 F.2d 702 (6th Cir. 1988); MICH. COMP. LAWS ANN. § 600.5807(8) (West 2000).

101. *See* Cent. States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986); TENN. CODE ANN. § 28-3-109(a)(3) (2000).

102. *See* Teamsters Welfare Trust v. Gorman Bros. Ready Mix, 283 F.3d 877 (7th Cir. 2002); Cent. States Southeast & Southwest Areas Pension Fund v. Jordan, 873 F.2d 149 (7th Cir. 1989); Trs. of the Operative Plasterers' Local Union Officers & Employees Pension Fund v. Journeyman Plasterers' Protective & Benevolent Soc'y, Local Union No. 5, 794 F.2d 1217 (7th Cir. 1986); 735 ILL. COMP. STAT. ANN. 5/13-206 (West 2003).

103. *See* Robbins v. Iowa Rd. Builders Co., 828 F.2d 1348 (8th Cir. 1987); IOWA CODE ANN. § 614.1(5) (West 1999).

104. *See* Trs. for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987); ALASKA STAT. § 9.10.050 (Michie 2002).

105. *See* Pierce County Hotel Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324 (9th Cir. 1987); WASH. REV. CODE ANN. § 4.16.040 (West 1988 & Supp. 2005).

106. *See* Haw. Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289 (9th Cir. 1987); HAW. REV. STAT. § 657-1(1) (1993).

107. *See* Northwest Adm'rs, Inc. v. Truck-A-Way, 992 F.2d 1219 (9th Cir. 1993); N. Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund v. Jumbo Mkts., Inc., 906 F.2d 1371 (9th Cir. 1990); CAL. CIV. PROC. CODE § 337 (West 1982).

108. *See* Trs. of Wyo. Laborers Health & Welfare Plan v. Morgen & Oswood Const. Co., 850 F.2d 613 (10th Cir. 1988); WYO. STAT. ANN. § 1-3-105(a)(i) (Michie 2003).

riod.[109] But the Third Circuit for Pennsylvania uses the same three-year limitations period for wage collection it uses for the benefits due lawsuit.[110]

B. Avoiding State Statutes of Limitations Contractually

A few welfare plans have escaped the hodge-podge of using state statutes of limitations for the benefits due lawsuit. Some states' insurance laws require insurance policies for health and disability to contain a limitations provision.[111] ERISA pre-emption of state law contains an exception for insurance law.[112] Under this exception, states can mandate ERISA insurance contract provisions.[113] Consequently, many health and disability plans contain a contractual limitations provision. The circuit courts uphold these contractual limitations provided they are reasonable.[114]

109. *See* Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C. Cir. 1991); D.C. CODE ANN. § 12-310(7) (2005).

110. *See* Sheet Metal Workers, Local 19 v. 2300 Group, Inc., 949 F.2d 1274 (3d Cir. 1991); Vernau v. Vic's Mkt., Inc., 896 F.2d 43 (3d Cir. 1990); Teamsters Pension Trust Funds v. John Tinney Delivery Serv., Inc., 732 F.2d 319 (3d Cir. 1984); Byrnes v. DeBolt Transfer, Inc., 741 F.2d 620 (3d Cir. 1984); 43 PA. CONS. STAT. ANN. § 260.9a(g) (West 1992). For the benefits due lawsuit, see *supra* notes 63–64 and accompanying text.

111. *See* Ingram v. Travelers Ins. Co., 78 F.3d 586 (7th Cir. 1996) (referring to uncited laws in Indiana and Illinois); N.M. STAT. ANN. § 59A-22-14 (Michie 2000). *See generally* LEE R. RUSS, COUCH ON INSURANCE §§ 235:9–:17 (3d ed., West Group 2000).

112. Employee Retirement Income Security Act (ERISA) of 1974 § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (2000).

113. *See* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740–47 (1985) (finding that ERISA does not pre-empt law requiring inclusion of certain benefit provisions in health insurance contracts bought by ERISA plans).

114. ERISA plan administrators run plans according to plan terms, unless those terms conflict with ERISA. *See* Employee Retirement Income Security Act § 404(a)(1)(D) (requiring fiduciaries to operate plans in accordance with plan terms to the extent the provisions are consistent with ERISA). Circuit courts have upheld contractual limitations in benefits due lawsuits. *See* Fontana v. Diversified Group Admin., Inc., 67 Fed. Appx. 722 (3d Cir. 2003) (health plan); Wilkins v. Hartford Life & Accident Ins. Co., 299 F.3d 945 (8th Cir. 2002) (disability plan); Santino v. Provident Life & Accident Ins. Co., 276 F.3d 772 (6th Cir. 2001) (disability plan); Clark v. NBD Bank, 3 Fed. Appx. 500 (6th Cir. 2001) (disability plan); Ferguson v. William Wrigley Jr. Co., 17 Fed. Appx. 421 (7th Cir. 2001) (disability plan); Cole v. United Food & Commercial Workers Union-Employer Health & Welfare Fund, 238 F.3d 420 (6th Cir. 2000) (unpublished table decision) (health plan); I.V. Servs. of Am., Inc. v. Inn Dev. & Mgmt., Inc., 182 F.3d 51 (1st Cir. 1999) (health plan); Moore v. Berg Enters., Inc., 201 F.3d 448 (10th Cir. 1999) (unpublished table decision) (disability plan); Duchek v. Blue Cross & Blue Shield of Neb., 153 F.3d 648 (8th Cir. 1998) (health plan); Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301 (11th Cir. 1998) (health plan); Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869 (7th Cir. 1997) (health plan); Blaske v. Unum Life Ins. Co., 131 F.3d 763 (8th Cir. 1997) (disability plan); Ingram v. Travelers Ins. Co., 78 F.3d 586 (7th Cir. 1996)

All of the circuit courts, except the First Circuit, trace this limitations rule to the Seventh Circuit's *Doe v. Blue Cross & Blue Shield United of Wisconsin.*[115] The *Doe* Court faced a plan provision requiring a denied beneficiary to bring a benefits due lawsuit within three-years of filing the claim with the plan administrator.[116] Rather than use the state six-year statute of limitations for written contracts applicable to the benefits due lawsuit in that circuit,[117] *Doe* noted that the Supreme Court, under basic contract law, allowed parties to select limitation periods provided the limitation periods were reasonable.[118] Presumably, the same rule applies for a federal cause of action under ERISA.[119] *Doe* also noted that this decision concurred with the only district court decision on the matter.[120]

The court in *Doe* did not concern itself much with reasonableness. A limitations period loosely paralleling state insurance law[121] and ERISA's breach of fiduciary duty statutory limitations[122] must be reasonable. All of the circuit courts' opinions involving contractual limitations dealt with a three-year limitations period, except one.[123] That circuit court held that a ninety-day limitations period contained in a Summary Plan Description[124] was reasonable. The limitations period was not a subterfuge to avoid a lawsuit, was consistent with the fed-

(disability plan). Circuit courts have upheld contractual limitations in delinquent employer contribution lawsuits. *See* Crews v. Cent. States, Southeast & Southwest Areas Pension Fund, 788 F.2d 332 (6th Cir. 1986).

115. 112 F.3d 869 (7th Cir. 1997) (Posner, J.). For the Third Circuit, see *Fontana*, 67 Fed. Appx. 722, for the Sixth Circuit, see *Clark*, 3 Fed. Appx. 500, for the Eighth Circuit, see *Duchek*, 153 F.3d 648, and for the Eleventh Circuit, see *Northlake*, 160 F.3d 1301. All of these cases cite to *Doe.*
116. *Doe*, 112 F.3d at 872–73.
117. Wis. Stat. Ann. § 893.43 (West 1997). *See* Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan, 713 F.2d 247 (7th Cir. 1983) (applying an Illinois ten-year statute of limitations for written contracts to an employee benefit pension plan action).
118. *Doe*, 112 F.3d at 874 (citing United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947)) (diversity action for a pre-ERISA death benefit).
119. *Cf.* Employee Retirement Income Security Act § 404(a)(1)(D) (fiduciary must discharge duties in accordance with plan documents to the extent they are consistent with ERISA).
120. *Doe*, 112 F.3d at 875 (citing Chilcote v. Blue Cross & Blue Shield United, 841 F. Supp. 877 (E.D. Wis. 1993)).
121. *See supra* note 111 and accompanying text.
122. For the ERISA statutory limitations provision, see *infra* note 245 and accompanying text.
123. *See* Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301 (11th Cir. 1998).
124. *See* Employee Retirement Income Security Act § 102 (each beneficiary shall receive a copy of the summary plan description); *see also generally* Bruce, *supra* note 11, at 397–98 (suggesting that summary plan descriptions can effectively become the plan, either as interpretative of ambiguous provisions or as an estoppel to enforcing contrary plan provisions).

eral policy to resolve the claims process with dispatch,[125] and in any subsequent lawsuit the beneficiary could not could introduce additional evidence.[126]

C. Origins of the State Statute of Limitations Rule

The use of state statues of limitations for ERISA derives from the practice under the Labor Management Relations Act of 1947 ("LMRA").[127] To prevent bribery payments to union officials, the LMRA provides various requirements for the multiemployer plans of unions, including operating them solely for the benefit of participant–beneficiaries.[128] The circuit courts have implied a benefits due lawsuit under LMRA section 302,[129] as well as LMRA section 301,[130] for enforcement of the collective bargaining agreement, both for failure to operate a multiemployer plan for the sole benefit of participant–beneficiaries.

125. *Cf.* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) (citing 29 C.F.R. § 2560.503-1(h)(1)(i) (2003)) (Department of Labor regulation for appeals of denied benefits by the plan administrator).

126. Some circuit courts, for a review of the plan administrator's decision, do not consider evidence not before the plan administrator. *See, e.g.*, Krizek v. Cigna Group Ins., 345 F.3d 91, 97–98 (2d Cir. 2003); Liston v. Unum Corp. Officer Severance Plan, 330 F.3d 19, 23–24 (1st Cir. 2003).

127. Labor Management Relations Act (LMRA) of 1947, ch. 120, 61 Stat. 136 (1948) (codified in scattered sections of 29 U.S.C. (2001)).

128. *See* Labor Management Relations Act § 302(c)(5), 29 U.S.C. § 186(c)(5) (1998).

129. *See, e.g.*, Johnson v. Botica, 537 F.2d 930, 933 (7th Cir. 1976) (former employee sued to challenge denial of disability pension); Lugo v. Employees Ret. Fund of the Illumination Prod. Indus., 529 F.2d 251, 254–56 (2d Cir. 1976) (former employee sued for declaration and injunctive relief for denial of disability pension); Pete v. United Mine Workers Welfare & Ret. Fund, 517 F.2d 1267, 1269–70 (D.C. Cir. 1974) (former employee sued to review pension benefit denial), *reh'g granted*, 517 F.2d 1274 (D.C. Cir. 1974); Kiser v. Huge, 517 F.2d 1237, 1244–45 (D.C. Cir. 1974) (class action brought to review denial of pension benefits), *reh'g granted sub nom.* Kiser v. Boyle, 517 F.2d 1274 (D.C. Cir. 1974); Kosty v. Lewis, 319 F.2d 744, 745 (D.C. Cir. 1963) (union member sued trustees to determine eligibility for pension).

130. *See, e.g.*, Rehmar v. Smith, 555 F.2d 1362, 1366–67 (9th Cir. 1976) (widow sued trustees for survivor's benefits); Smith v. Union Carbide Corp., 350 F.2d 258, 268 (6th Cir. 1965) (former employee sued for denied pension benefit); Rhine v. Union Carbide Corp., 343 F.2d 12, 15–16 (6th Cir. 1965) (former employee sued for denied disability benefit); Int'l Union, UAW v. Textron, Inc., 312 F.2d 688, 691 (6th Cir. 1963) (union action on behalf of employees to determine their rights in terminated plan); *accord* Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176–77 n.17 (1971) (dictum in unfair labor practice case); Beam v. Int'l Org. of Masters, 511 F.2d 975, 978 (2d Cir. 1975) (spouse of deceased union member sought denied accidental death benefits); *see also* Labor Management Relations Act § 301. *See generally* Flint, *supra* note 14, at 365–68 (explaining the structural violation theory and fiduciary breach, benefits due, and delinquent employer contribution lawsuits under both LMRA sections 301 and 302).

The earliest issues involving statutes of limitations under ERISA for the benefits due lawsuit, the employer retaliatory discrimination lawsuit, and the delinquent employer contributions due lawsuit all involved multiemployer plans brought under LMRA section 301. The earliest informational penalty lawsuit and the earliest action for equitable remedy to enforce plan provisions followed these precedents.

1. *The Informational Penalty Lawsuit*

The circuit courts for the informational penalty lawsuit follow the state statute of limitations rule they have adopted for the employer retaliatory discrimination lawsuit.[131]

2. *The Benefits Due Lawsuit*

Of the ten circuit courts to consider a benefits due lawsuit, seven of the circuits' cases of first impression are traced to the Seventh Circuit's *Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan.*[132] *Jenkins* involved a multiemployer pension plan subject to both LMRA and ERISA.[133] Previous courts for the benefits due lawsuit under LMRA section 301 used the state statute of limitations for written contracts.[134] For the benefits due lawsuit, the *Jenkins* court noted that ERISA's legislative history referred to LMRA.[135]

131. *See* Hatteberg v. Red Adair Co. Employees' Profit Sharing Plan, 79 Fed. Appx. 709 (5th Cir. 2003); Moore v. Berg Enter., Inc., 201 F.3d 448 (10th Cir. 1999) (citing the employer retaliatory discrimination case Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990)); Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995) (citing the employer retaliatory discrimination case Felton v. Unisource Corp., 940 F.2d 503 (9th Cir. 1991)).
132. 713 F.2d 247 (7th Cir. 1983). The six other circuits are the Fourth Circuit, *see* Dameron v. Sinai Hosp. of Baltimore, Inc., 815 F.2d 975 (4th Cir. 1987) (citing *Jenkins*, 713 F.2d 247), the Eighth Circuit, *see* Anderson v. John Morrell & Co., 830 F.2d 872 (8th Cir. 1987) (citing *Jenkins*, 713 F.2d 247), the Tenth Circuit, *see* Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288 (10th Cir. 1991) (citing Trs. Of Wyo. Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co., 850 F.2d 613 (10th Cir. 1988) (citing Cent. States, Southeast & Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986) (citing *Jenkins*, 713 F.2d 247)), the Fifth Circuit, *see* Kennedy v. Electricians Pension Plan IBEW No. 995, 954 F.2d 1116 (5th Cir. 1992) (citing *Anderson*, 830 F.2d 872), the Sixth Circuit, *see* Meade v. Pension Appeals & Review Comm., 966 F.2d 190 (6th Cir. 1992) (citing *Dameron*, 815 F.2d 975; *Anderson*, 830 F.2d 872), and the Ninth Circuit, *see* Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust, 3 F.3d 1246 (9th Cir. 1993) (citing *Dameron*, 815 F.2d 975; *Meade*, 966 F.2d 190; *Wright*, 925 F.2d 1288).
133. Two other of the seven cases of first impression derived from *Jenkins* also involved multiemployer plans subject to both ERISA and LMRA. *See Flanagan*, 3 F.3d 1246; *Kennedy*, 954 F.2d 1116.
134. *See, e.g.*, Martin v. Constr. Laborer's Pension Trust for S. Cal., 947 F.2d 1381 (9th Cir. 1991) (citing CAL. CIV. PROC. CODE § 337 (West 1991)).
135. *Jenkins*, 713 F.2d at 250. *See* H.R. CONF. REP. NO. 93-1280, at 76–77 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107 ("All such actions [ERISA section 502]

Without considering whether ERISA changed this LMRA law with respect to the benefits due lawsuit, the *Jenkins* court recognized that the LMRA rule was to use "the most appropriate state statute of limitations."[136] The *Jenkins* court then determined which of a myriad of states' statutes of limitations applied to the ERISA benefits due lawsuit. Since Illinois had the most contacts with the action, the court decided the appropriate state to consider was Illinois.[137]

The choice of law rules only aggravate the amount of litigation needed for the most analogous state statute of limitations rule.[138] The court in *Jenkins* noted that, since the ERISA claims process differed significantly from the arbitration process of Illinois state labor law, the labor law statutes of limitations did not apply.[139] The court decided that the ERISA plan most resembled a written contract,[140] so the most appropriate state statute of limitations was the ten-year statute of limitations for lawsuits on written contracts.[141] The court also noted that this decision agreed with three other district courts' decisions.[142]

One of the other circuit court's case of first impression traced to the same Supreme Court opinion used by the *Jenkins* court.[143] The other

in federal or state court are to be regarded as arising under the laws of the United States in similar fashion as those brought under section 301 of the Labor–Management Relations Act of 1947."); *see also* 29 U.S.C. § 185 (1998).

136. *Jenkins*, 713 F.2d at 250 (citing Int'l Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 705 (1966) (involving recovery of benefits under a vacation pay plan by a union)). The *Jenkins* court also cited *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), which involved an employee suing both the union and employer for wrongful discharge after seventeen months, for the state statute of limitations rule. But, *United Parcel Service* left open the issue of whether the six-month statute of limitations for wrongful discharge-fair representation hybrid cases under section 10 of the NLRA applied rather than some state's law. The Supreme Court later determined in favor of the federal six-month statute of limitations. *See* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983).

137. *Jenkins*, 713 F.2d at 251. The court noted that the plan administration occurred in Illinois, the agent for service of process had its office in Illinois, plan headquarters were in Illinois, and plan investment agents were in Illinois.

138. *See infra* note 203 and accompanying text.

139. *Jenkins*, 713 F.2d at 252. The court noted the ninety-day period to vacate arbitration awards under Illinois law, *see* 710 ILL. COMP. STAT. ANN. 5/12 (West 2005), and the six-month statute of limitations for wrongful discharge-fair representation hybrid cases under section 10 of the NLRA, as mandated by *DelCostello*.

140. *Jenkins*, 713 F.2d at 252.

141. *Id.* at 253 (citing 735 ILL. COMP. STAT. ANN. 5/13-206 (West 2003)).

142. *Id.* (citing Livolsi v. City of New Castle, 50 F. Supp. 1146 (W.D. Pa. 1980); Morgan v. Laborers Pension Trust Fund for N. Cal., 433 F. Supp. 518 (N.D. Cal. 1977)).

143. *See* Gluck v. Unisys Corp., 960 F.2d 1168 (3d Cir. 1992) (citing Teamsters Pension Trust Funds of Philadelphia & Vicinity v. John Tinney Delivery Serv., Inc., 732 F.2d 319 (3d Cir. 1984) (citing Int'l Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966))).

two circuit courts did not even attempt to use federal retirement plan cases to determine the statute of limitations rule. Rather, these circuit courts seized the state statute of limitations rule from other federal statutes, as if this was a universal rule regardless of federal policy.[144]

3. *The Equitable Remedy Lawsuit to Enforce Plan Provisions*

The circuit courts for the now partially disallowed plan recovery to enforce plan provision lawsuits followed the state statute of limitations rule they have adopted for the benefits due lawsuit, the employer delinquent contribution lawsuit, and the employer retaliatory discrimination lawsuit.[145]

4. *The Employer Retaliatory Discrimination Lawsuit*

Of the ten circuit courts to consider an employer retaliatory discrimination lawsuit, eight of the circuit courts' cases of first impression are traced to the same LMRA Supreme Court opinion used by the *Jenkins* Court for the benefits due lawsuit.[146] That LMRA opinion

144. *See* Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347 (11th Cir. 1998) (citing an employer discrimination case under ERISA section 510, *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989), which cites a Civil Rights Act of 1871 case, *Wilson v. Garcia*, 471 U.S. 261 (1985)); Miles v. N.Y. State Teamsters Pension & Ret. Fund Employee Benefit Plan, 698 F.2d 593 (2d Cir 1983) (citing Kosty v. Lewis, 319 F.2d 744, 750 (D.C. Cir. 1962) (assuming the D.C. Code's three-year residual claim statute of limitations applied to a benefits due lawsuit under LMRA)); *see also* 42 U.S.C. § 1983 (2003) (Civil Rights Act of 1871).

145. *See* Admin. Comm. of Wal-Mart Stores, Inc. v. Soles *ex rel.* Estate of Hollander, 336 F.3d 780 (8th Cir. 2003) (citing Johnson v. State Mutual Life Assurance Co. of America, 942 F.2d 1260 (8th Cir. 1991) (benefits case)); *Sanders*, 138 F.3d 1347 (citing *Clark*, 865 F.2d 1237 (employer retaliatory discrimination case)); Wang Labs., Inc. v. Kagan, 990 F.2d 1126 (9th Cir. 1993) (citing Pierce County Hotel Employees & Rest. Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324 (9th Cir. 1987) (employer delinquent contribution case)); Blue Cross & Blue Shield of Alab. v. Weitz, 913 F.2d 1544 (11th Cir. 1990) (citing *Clark*, 865 F.2d 1237 (employer retaliatory discrimination case)).

146. The Supreme Court case was *Int'l Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), which involved a union suing the employer for vacation pay for employees after seven years. The eight circuits are the Eighth Circuit, *see* Heideman v. PFL, Inc., 904 F.2d 1262 (8th Cir. 1990) (citing Johnson v. Ry. Express Agency, 421 U.S. 454 (1975) (citing *Hoosier Cardinal Corp.*, 383 U.S. 696)), the Tenth Circuit, *see* Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990) (citing Trs. for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987) (citing *Hoosier Cardinal Corp.*, 383 U.S. 696)), the Fifth Circuit, *see* McClure v. Zoecon, Inc., 936 F.2d 777 (5th Cir. 1991) (citing *Heideman*, 904 F.2d 1262; *Held*, 912 F.2d 1197), the Ninth Circuit, *see* Felton v. Unisource Corp., 940 F.2d 503 (9th Cir. 1991) (citing *Heideman*, 904 F.2d 1262; *Held*, 912 F.2d 1197), the Seventh Circuit, *see* Tolle v. Carroll Touch, Inc., 977 F.2d 1129 (7th Cir. 1992) (citing *Heideman*, 904 F.2d 1262; *Held*, 912 F.2d 1197; *McClure*, 936 F.2d 777), the Sixth Circuit, *see* Taylor v. Goodyear Tire & Rubber

dealt with benefits due, not employer retaliatory discrimination. Nevertheless, these circuit courts ignored this distinction, or assumed it made no difference. Had these eight circuit courts considered the LMRA practice for employer retaliatory discrimination, they might have used a different statute of limitations rule. The LMRA practice for employer retaliatory discrimination under LMRA section 301 was to use the federal six-month statute of limitations contained in the NLRA.[147]

However, the use of state statutes of limitations was so ingrained in the federal circuit courts that the other two circuit courts, the two earliest to consider the employer retaliatory discrimination lawsuit, avoided the LMRA practice and opted to use the Civil Rights Act of 1871 as the authority for using the state statute of limitations rule.[148] Being a congressional statute passed one hundred years before ERISA, and the first retirement plan,[149] it is highly unlikely to have reflected the federal policy for employee benefit plans required for the statute of limitations consideration mandated by the Supreme Court.[150]

5. *The Delinquent Employer Contribution Lawsuit*

Of the eight circuit courts to consider a delinquent employer contribution lawsuit, all eight circuit courts' cases of first impression are

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Co., 38 F.3d 1216 (6th Cir. 1994) (citing *Held*, 912 F.2d 1197; *McClure*, 936 F.2d 777; *Felton*, 940 F.2d 503; *Tolle*, 977 F.2d 1129), the Second Circuit, *see* Sandberg v. KPMG Peat Marwick, LLP, 111 F.3d 331 (2d Cir. 1997) (citing *Held*, 912 F.2d 1197; *McClure*, 936 F.2d 777), and the First Circuit, *see* Muldoon v. C.J. Muldoon & Sons, 278 F.3d 31 (1st Cir. 2002) (citing *Held*, 912 F.2d 1197; *McClure*, 936 F.2d 777; *Taylor*, 38 F.3d 1216; *Sandberg*, 111 F.3d 331).

147. *See* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983) (wrongful termination against employer for refusing to drive unsafe vehicle in violation of collective bargaining agreement and breach of fair representation duty for mishandling grievance); 29 U.S.C. § 160(b) (1998). Before *DelCostello*, the LMRA practice had lurched in the direction of adopting the state statute of limitations rule. *See* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981) (rejecting the NLRA six-month statute of limitations urged by amicus briefs since the parties did not raise the issue, and accepting the parties' most analogous state statute of limitations rule); Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348 (9th Cir. 1984) (following the *United Parcel Service* rule and using the state statute of limitations rule for an LMRA employer retaliatory discrimination lawsuit).

148. *See Clark*, 865 F.2d 1237 (citing *Wilson*, 471 U.S. 261); Gavalik v. Cont'l Can Co., 812 F.2d 834 (3d Cir. 1987) (citing *Wilson*, 471 U.S. 261); 42 U.S.C. § 1983 (2003) (Civil Rights Act of 1871). The Third Circuit faced lawyers knowledgeable in the LMRA practice, so the Third Circuit went into a lengthy explanation on why they rejected the six-month statute of limitations for LMRA employer retaliatory discrimination lawsuits, none of which involves the federal policy behind ERISA. *See Gavelik*, 812 F.2d at 846–49.

149. The first retirement plan was that of American Express in 1875. *See* WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY 27 (1976).

150. For the mandate, see *infra* notes 215–33 and accompanying text.

traced to the same LMRA opinion used by the *Jenkins* Court for the benefits due lawsuit.[151] That LMRA opinion of course dealt with benefits due, not delinquent employer contributions. But these circuit courts ignored this distinction, or assumed it made no difference. The LMRA practice for delinquent employer contributions under LMRA section 301 was to use the state statute of limitations for written contracts.[152] Again, none of these circuit courts bothered to consider whether ERISA's policy behind the delinquent employer contribution lawsuit impacted the LMRA state statute of limitations rule. Each circuit court concluded that state law provided the limitations period. Then without considering the federal policy behind ERISA's lawsuit for delinquent employer contributions, seven of these circuit courts determined that the state statute of limitations for written contracts applied. The eighth opted for a wage collection statute of limitations.[153]

III. DETERMINATIVE PRINCIPLES

The contention that the adoption of the state statutes of limitations by the federal circuit courts was ill-conceived raises the question of what principle should be used to determine a statute of limitations for ERISA actions not involving plan recovery of damages arising from a fiduciary duty breach. The answer lies in an examination of ERISA's legislative history and the Supreme Court's methodology for determining non-statutory limitations periods.

151. The Supreme Court case was *Int'l Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), which involved a union suing the employer for vacation pay for employees after seven years. The eight circuits are the Second Circuit, *see* O'Hare v. Gen. Marine Transp. Corp., 740 F.2d 160, 167 (2d Cir. 1984), the Third Circuit, *see* Teamsters Pension Trust Funds of Philadelphia & Vicinity v. John Tinney Delivery Serv., Inc., 732 F.2d 319, 322 (3d Cir. 1984), the Sixth Circuit, *see* Cent. States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1105 (6th Cir. 1986), the Seventh Circuit, *see* Trs. of the Operative Plasterers' & Cement Masons' Local Union Officers & Employees Pension Fund v. Journeyman Plasters' Protective & Benevolent Soc'y, Local Union No. 5, 794 F.2d 1217, 1221 (7th Cir. 1986), the Ninth Circuit, *see* Trs. for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell, 812 F.2d 512 (citing *O'Hare*, 740 F.2d 160; *Teamsters Pension Trust Funds of Philadelphia & Vicinity*, 732 F.2d 319), the Eighth Circuit, *see* Robbins v. Iowa Rd. Builders Co., 828 F.2d 1348 (8th Cir. 1987) (citing *Ferrell*, 812 F.2d 512; *O'Hare*, 740 F.2d 160; *Teamsters Pension Trust Funds of Philadelphia & Vicinity*, 732 F.2d 319; *Trs. of the Operative*, 794 F.2d 1217), the Tenth Circuit, *see* Trs. of Wyo. Laborers Health & Welfare Plan v. Morgen & Osgood Constr. Co., Inc. of Wyo., 850 F.2d 613 (10th Cir. 1988) (citing *O'Hare*, 740 F.2d 160; *Ferrell*, 812 F.2d 512; *Kraftco*, 799 F.2d 1098), and the D.C. Circuit, *see* Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C. Cir. 1991) (citing *Ferrell*, 812 F.2d 512).

152. *See, e.g.*, Waggoner v. Dallaire, 649 F.2d 1362 (9th Cir. 1981) (citing CAL. CIV. PROC. CODE § 337 (West 1991)).

153. *See Teamsters Pension Trust Funds of Philadelphia & Vicinity*, 732 F.2d at 322.

A. ERISA's Legislative History

ERISA's legislative history contains two strands that suggest the applicability of state statutes of limitations to non-fiduciary ERISA actions is not correct. An additional strand indicates that the statute of limitations for contract law is not the most analogous state statute of limitations. The Supreme Court has interpreted one strand, seemingly authorizing the use of the LMRA rule, to mean that state rules do not apply to ERISA matters. Another strand favors ERISA uniformity throughout the land, especially for interstate plans. The third strand indicates that trust law—although more confusing than contract law with respect to a state's statute of limitations—is more appropriate than contract law.

1. *The Mandate to Use the LMRA Practice*

ERISA's legislative history demonstrates that lawsuits to enforce benefit rights or to recover benefits, the benefits due lawsuit, arises in the same fashion as previous pension cases under LMRA:

> [S]uits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of [ERISA's] provisions . . . may be brought . . . also in State courts . . . . All such action in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.[154]

At first glance, this language seems to support the approach of the *Jenkins* court, at least for the benefits due lawsuit. But other legislative history indicates that this language means that, since ERISA preempts state law, the courts must develop a uniform federal common law for the action.[155] Consequently, when the Supreme Court

154. H.R. CONF. REP. NO. 93-1280, at 76–77 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107; *see also* 120 CONG. REC. 29,933 (1974), *reprinted in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR & PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4745 (Comm. Print 1976) [hereinafter LEGISLATIVE HISTORY] (statement of Sen. Williams, then chairman of the Senate Committee on Labor and Public Welfare and co-sponsor of the original draft of the ERISA legislation: "It is intended that such [ERISA benefits due] actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under s[ection] 301 of the Labor Management Relations Act."). *See generally* Flint, *supra* note 13, at 973 (discussing the possible meanings of the LMRA reference).

155. *See* 120 CONG. REC. 29,942 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 154, at 4771 (statement of Sen. Javits, ranking Republican on the Senate Committee on Labor and Public Welfare and the other co-sponsor of the original ERISA legislation, after mentioning the ERISA preemption, explained: "It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.").

references the LMRA in ERISA's legislative history, it usually is in connection with preemption.[156]

The one time the Supreme Court faced the issue of blindly incorporating an LMRA rule into an ERISA action using the arbitrary and capricious rule, the Supreme Court rejected the approach.[157] The Supreme Court's reason centered around the differing structures of the statutes. LMRA did not expressly provide for a remedy while ERISA did.[158] The Supreme Court then turned to ERISA's legislative history concerning incorporation of trust law principles to adopt the abuse of discretion standard.[159] Therefore, the federal circuit courts' approach, typified in *Jenkins*, is wrong. Rather than blindly adopting a rule from the LMRA practice for ERISA, the courts should investigate the structure and policy behind ERISA.

2. *The Mandate for Interstate Uniformity*

In particular, one ERISA policy deals with national uniformity of ERISA rules. It was the alleged absence of this policy that doomed the LMRA practice to the most analogous state statute of limitations rule.[160] In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*,[161] the union urged the Court to devise a uniform limitations period for lawsuits under LMRA section 301, which includes collectively bargained employee benefit plans, to fill the gap left by Congress rather than affirm the state statute of limitations applied

156. *See* Aetna Health, Inc. v. Davila, 124 S. Ct. 2488, 2495–96 (2004) (preempting the Texas Health Care Act); Unum Life Ins. Co. v. Ward, 526 U.S. 358, 377 n.7 (2003) (deciding not to preempt California's notice prejudice rule for insurance); Ingersol-Rand Co. v. McClendon, 498 U.S. 133, 144–45 (1990) (preempting the Texas wrongful termination action based on avoidance of pension contribution); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–67 (1987) (finding that an ERISA action for employer retaliatory discrimination disguised as state action removable to federal court); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55–57 (1987) (preempting Mississippi law of bad-faith claims processing).
157. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109–10 (1989). The Company claimed the LMRA rule applied because ERISA codified the strict fiduciary standards in section 302 of LMRA. *Id.* (citing NLRB v. Amax Coal Co., 453 U.S. 322, 332 (1981)).
158. *See Firestone Tire & Rubber Co.*, 489 U.S. at 109–10 (noting that the LMRA action for benefits due was based on a failure to operate the plan for the sole and exclusive benefit of the employees, which was an actionable violation).
159. *See id.* at 110–11. The distinction between the "arbitrary and capricious" rule and the "abuse of discretion" rule may be meaningless. The standard for the first portion of the abuse of discretion rule is the same as for the arbitrary and capricious rule and the remaining portion, for "bad faith", courts frequently appended to the arbitrary and capricious rule. *See* Flint, *supra* note 11, at 148–50, 157 n.106.
160. *See* Int'l Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).
161. *Id.*

by the lower courts.[162] The Court, lead by Justice Stewart, noted for this federal cause of action, principles of federal labor law superseded incompatible state law doctrines if state statutes of limitations applied to LMRA section 301 actions would lack uniformity, and the subject matter of LMRA section 301 actions called for uniform law.[163] But then Justice Stewart claimed that prior Supreme Court cases ruled that the need for uniformity with respect to collective bargaining agreements applied only to the negotiation and administration of the collective bargaining agreements.[164] Federal labor law focused on promoting negotiation of collective bargaining agreements and private settlement of disputes, while limitations periods only applied after the parties had abandoned these two policies.[165] Therefore, Justice Stewart reasoned that adoption of states' statutes of limitations would not violate any federal labor policy.[166]

To bolster this conclusion, Justice Stewart provided two additional observations. First, Congress intentionally left LMRA section 301 actions without a statute of limitations after they had considered use of statutes of limitations for certain NLRA causes of action.[167] Second, failure to incorporate a limitations statute meant the federal courts should follow their practice (used since the 1830s) of adopting state statutes of limitations for federal causes of action.[168]

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162. *Id.* at 701.
163. *Id.*
164. *Id.* at 701–02 (citing Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103–04 (1962)).
165. *Id.* at 702.
166. *Id.*
167. *Id.* at 703. Congress adopted a six-month statute of limitations for unfair labor practice actions brought by the staff of the National Labor Relations Board ("NLRB") before the NLRB. *See supra* note 147 and accompanying text. NLRB allows any party, including employees, to bring the action. *See* 29 C.F.R. § 102.9 (2003) ("made by any person"); *see also* Hotel & Rest. Employees Local 28, 252 N.L.R.B. 1124, 1125 (1980) (charged employer with retaliatory discrimination); King Snoopers, Inc., 222 N.L.R.B. 1011, 1011 (1976). *Compare* 93 CONG. REC. 3323 (1947) (statement of Sen. Wagner claiming the six-month limitations as a tool to destroy labor unions by encouraging unscrupulous employers to conceal their actions for six months), *and* 93 CONG. REC. 4030 (1947) (statement of Sen. Murray decrying the six-month limitations as the shortest statute of limitations known to man again encouraging employers to conceal their commission of unfair labor practices), *with* 93 CONG. REC. 4283 (1947) (statement of Sen. Smith noting that the six-month limitations comes from the practice of the Democrats' own N.R.L.B.).
168. *Hoosier Cardinal Corp.*, 383 U.S. at 703–04 (citing McCluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830)). *See McCluny*, 28 U.S. (3 Pet.) at 277 (stating the rule for failure to register under the 1796 act for sale of land in the Northwest Territory: "[U]nder [the Judiciary Act of 1789], the acts of limitations of the several states, where no special provision has been made by Congress, form a rule of decision in the courts of the United States."). The basis for the rule lay with section 34 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1861) ("[T]hat the laws of the several states, except where the constitution, treaties, or statutes of the United States shall oth-

ERISA, however, has a need for lawsuit uniformity. ERISA contains a preemption provision, the function of which is to create federal uniformity with respect to the administration of employee benefit plans by plan administrators:

> Except as provided in subsection (b) of this section, the provisions of this subchapter [Title I—Protection of Employee Benefit Rights] and subchapter III [Title IV—Plan Termination Insurance] of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit described in section 1003(a) of this title and not exempt under section 1003(b) of this title.[169]

This desire to create uniformity without reference to state law appeared in committee reports and statements of committee members. The report of the Senate Committee on Labor and Public Welfare indicated that Congress intended ERISA preemption to create uniformity in employee benefit law in order to give interstate plan fiduciaries certainty about the legality of their actions without reference to varying state laws:

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erwise provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.") (current version at 28 U.S.C. § 1652 (1994)). Justice Stewart claimed the court had reviewed and readopted the rule in 1895 and had repeatedly followed it. *Hoosier Cardinal Corp.*, 383 U.S. at 704 (citing Campbell v. City of Haverhill, 155 U.S. 610 (1895) (applying state stature of limitations to decide infringement on letters patent under Patent Act as revised in 1874 by the United States, REVISED STATUTES OF THE UNITED STATES, §§ 5596, 5599 (Washington, D.C., Government Printing Office 1878))). *See* McClaire v. Rankin, 197 U.S. 154 (1905) (applying state statute of limitations to the National Bank Act, codified as amended in scattered sections of 12 U.S.C.); Cope v. Anderson, 331 U.S. 461 (1947); O'Sullivan v. Felix, 233 U.S. 318 (1911) (citing Civil Rights Act of 1870, 42 U.S.C. § 1981 (1994)); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) (Sherman Act, 15 U.S.C. §§ 1–7 (1997)). All of these opinions state the rule as state law determines the statute of limitations for federal causes of action where Congress has specified no statute of limitations. *Cf.* Runyan v. McCrary, 427 U.S. 160 (1976) (Civil Rights Act of 1866, 42 U.S.C. § 1982 (1994)). Justice Stewart also noted that when Congress disagreed with the Supreme Court's rule, Congress passed acts overturning the rule by enacting uniform statutes of limitations. *Hoosier Cardinal Corp.*, 383 U.S. at 703; *see* 15 U.S.C. § 15(b) (1997) (creating four-year limitations period for the Clayton Act in 1955); 35 U.S.C. § 286 (2001) (creating six-year limitations period for the Patent Act in 1870); Herget v. Cent. Bank Co., 324 U.S. 4, 7 (1945) (describing the 1938 amendment to the Bankruptcy Act to clarify the federal statute of limitations exclusion of state statutes of limitation). Such has happened to the Civil Rights Act of 1870. Congress passed a residual four-year statute of limitations for all acts enacted after Dec. 1, 1990. *See* 28 U.S.C. § 1658 (1994). Congress amended the Civil Rights Act of 1870 in 1991, *see* Pub. L. No. 102-168, 105 Stat. 1071 (1992), thereby replacing the old state statute of limitation rule with the federal residual statute of limitations. *See* Jones v. R.R. Donnelly & Sons Co., 541 U.S. 368, 379–84 (2004).

169. Employee Retirement Income Security Act (ERISA) of 1974 § 514(a), 29 U.S.C. § 1144(a) (2000).

> Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will *bring a measure of uniformity* in an area where decisions under the same set of facts may differ from state . . . .
>
> Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The *uniformity of decision* which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws . . . .
>
> . . . [S]tate law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a *uniform source of law* in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.[170]

Certainly, varying state limitations periods would violate this directive and muddle an interstate plan administrator's decision with respect to a lawsuit filed for a claim under the plan. The corresponding report of the House Committee on Education and Labor stated that ERISA alone was the uniform source of law for removing state procedural obstacles from enforcement of fiduciary standards and recovery of benefits:

> The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and *to remove jurisdictional and procedural obstacles with in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law* for recovery of benefits due to participants . . . .
>
> Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the committee believes it essential to provide for a *uniform source of law* in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports . . . .[171]

This indicates Congress considered courthouse procedural rules, one of which is the statute of limitations period,[172] and intended that ERISA preempt state law for such determinations. Statements of ER-

170. S. REP. NO. 93-127, at 29, 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865, 4871 (emphasis added).

171. H.R. REP. NO. 93-533, at 12, 17 (1974); *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650, 4655 (emphasis added).

172. *Compare* Sun Oil Co. v. Hartman, 486 U.S. 717 (1988) (stating that states' statutes of limitations are "procedural" for purposes of the Full Faith and Credit Clause), *with* Guarantee Trust Co. v. York, 326 U.S. 99 (1945) (stating that states' statutes of limitations are "substantive" for purposes of diversity actions under *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938)). The federal law applicable to LMRA actions is substantive, *see* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957), and the LMRA substantive rules require uniformity, *see* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962). Yet the Supreme Court declined to determine whether statutes of limitations are procedural or substantive for the LMRA. *See Hoosier Cardinal Corp.*, 383 U.S. at 703 n.4. Since the Supreme Court ruled for a non-uniform LMRA limitations period, the limitations period for LMRA is not substantive.

ISA's congressional sponsors similarly stated that uniformity required the elimination of state law regulating employee benefit plans.[173]

The Supreme Court has interpreted this legislative history for uniformity as not only applying to plan provisions and plan administration, but also to ERISA lawsuits. The Supreme Court early on emphasized that the ERISA preemption provision applies to the remedies available under ERISA and eliminated state causes of action with respect to employee benefit plans.[174] The reason behind this rule is to avoid burdening the plan administrator with conflicting directives from differing states.[175] This desire to provide employee benefit plans uniform causes of actions under ERISA includes court procedural matters. The Supreme Court has even singled out state choice of law

173. *See* 120 CONG. REC. 29,942 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 154, at 4771 (statement of Sen. Javits that "the interests of uniformity . . . required" that the ERISA preemption provision provide for "the displacement of State action in the field of private employee benefit programs"); 120 CONG. REC. 29,933 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 154, at 4745 (statement of Sen. Williams that ERISA preemption is to eliminate "the threat of conflicting or inconsistent state and local regulation of employee benefit plans"); 120 CONG. REC. 29,197 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 154, at 4670 (statement of Rep. Dent that ERISA preemption is to reserve "to Federal authority the sole power to regulate the field of employee benefit plans"). Senator Harrison Williams, Senator Jacob Javits, and Representative John Dent served on ERISA's Conference Committee. *See* Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?*, 74 TUL. L. REV. 950, 908 (2000). Javits was a Senate co-sponsor of the original ERISA draft legislation and senior ranking member on the Senate Committee on Labor and Public Welfare, Williams was the other co-sponsor and Chairman of the Senate Committee on Labor and Public Welfare, and Dent was the House sponsor and second ranking Democrat on the House Committee on Education and Labor. *See* George Lee Flint, Jr., *ERISA: Non-Waivability of Preemption,* 39 U. KAN. L. REV. 297, 340, 345–46 (1991).

174. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) ("The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop . . . would make little sense if the remedies available to ERISA participants and beneficiaries under section 514(a) could be supplemented or supplanted by varying state law."). *Dedeaux* declared state bad faith processing claims under ERISA preempted.

175. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) ("Section 514(a) was intended to insure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among states or between states and the federal government . . . . Allowing state based action like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through 514(a) . . . . It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to employment."). *McClendon* determined that ERISA preempted a state wrongful termination lawsuit based on avoiding compliance with ERISA.

rules, such as are involved in determining a state statute of limitations for interstate employee benefit plans, as one of the lawsuit procedural rules eliminated by ERISA preemption.[176] More recently, the Supreme Court has indicated that ERISA preemption applies to lawsuit remedial orders and awards.[177] Most assuredly, these principles would apply to an interstate plan with similarly situated employees in different states to bar a state's lengthy statute of limitations to enable recovery of a benefit for one employee unavailable to the other employee in a state with a short statute of limitations.

Once before, the federal circuit courts attempted to impose state law on plan administrator decisions. For instance, bankruptcy law excludes from the bankrupt estate assets in a spendthrift trust.[178] The Fifth Circuit,[179] in a widely followed opinion,[180] ruled that to determine whether an ERISA retirement plan, which is required to contain

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176. *See* Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 148–50 (2001). Uniformity is impossible, however, if plans are subject to different legal obligations in different states.

> The Washington statute at issue here poses that threat. Plan administrators cannot make payment simply by identifying the beneficiary specified by the plan documents. Instead they must familiarize themselves with state statutes so they can determine whether the named beneficiary's status has been "revoked" by operation of law. And in this context the burden is exacerbated by the choice-of-law problem that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse in a third.

Id. at 148–49. "Differing state regulation affecting ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the burden that ERISA preemption was to avoid.'" *Id.* at 150 (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10 (1987)). *Eglehoff* decided that ERISA preempted a state law voiding beneficiary designations upon divorce. Nevertheless, for states' statutes of limitations, the federal circuit courts relish reveling in choice of law rules for ERISA. *See supra* notes 82, 94, 137 and accompanying text.

177. *See* Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 379 (2002) ("Any such provision [by state law adding remedies to ERISA] patently violates ERISA's policy of inducing employers to offer benefits by assuring predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred."). *Moran* found an independent review of an HMO decision not preempted by ERISA due to the insurance exception.

178. 11 U.S.C. § 541(c)(2) (1993).

179. *See In re* Goff, 706 F.2d 574 (5th Cir. 1983) (Williams, J.). Justice Williams was the author's professional responsibility professor in law school. Consequently, the author has a suspicion that Justice William's dislike for doctors influenced his erroneous decision, which prevented a doctor from shielding his assets from creditors by contributing them to a retirement plan.

180. *See, e.g.*, *In re* Daniel, 771 F.2d 1352 (9th Cir. 1985) (following *Goff*, 706 F.2d 574); *In re* Lichstrahl, 750 F.2d 1488 (11th Cir. 1985) (following *Goff*, 706 F.2d 574); *In re* Graham, 726 F.2d 1268 (8th Cir. 1984) (following *Goff*, 706 F.2d 574).

an anti-alienation provision,[181] constituted a spendthrift trust, the plan administrator had to use state spendthrift law. State spendthrift trust law varied significantly, especially for self-settled trusts and loans taken from retirement plans.[182] Consequently, under the Fifth Circuit decision, an interstate ERISA plan could be a spendthrift trust in some states, and not a spendthrift trust in other states. The Supreme Court eventually ended this lunacy[183] in 1992.[184]

3. *The Mandate for Trust Law*

Even if one accepted that state statutes of limitations should govern, ERISA's legislative history, as interpreted by the Supreme Court, suggests that, for the benefits due lawsuit and the employer retaliatory discrimination lawsuit, the appropriate body of law comes from trust law, not contract law. Congressional reports indicate that ERISA grafted fiduciary principles onto employee benefit plans that Congress took from traditional trust law.[185] Consequently, when reviewing fiduciary behavior, in particular a plan administrator's interpretation of plan terms when the plan grants interpretative discretion to the plan administrator, the Supreme Court seized the trust law rule, namely the abuse of discretion standard based on uniform federal application and not on each state's interpretation.[186] The federal circuit courts continue to use this trust law abuse of discretion standard to review plan interpretations in connection with the denial of plan benefits under the benefits due lawsuit.[187]

181. *See* Employee Retirement Income Security Act (ERISA) of 1974 § 206(d)(1), 29 U.S.C. § 1056(d)(1) (2000); 26 U.S.C. § 401(a)(13) (2002).
182. *See* Flint, *supra* note 17, at 470–73 (noting that some states don't recognize spendthrift trusts, while others exclude those trusts that permit loans or hardship distributions).
183. The author as in-house legal counsel for Exxon Corporation's interstate retirement plans routinely advised the Exxon plans to refuse to turn over plan assets to bankruptcy trustees, based on the anti-alienation provision being a spendthrift trust provision, before the *Goff* decision.
184. *See* Patterson v. Shumate, 504 U.S. 753 (1992).
185. *See* S. REP. No. 93-127, at 29–30 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865–66 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts . . . . [The act] incorporate[s] the core principles of fiduciary conduct as adopted from existing trust law, but with modifications appropriate for employee benefit plans."); *see also* H.R. REP. No. 93-533, at 12–13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650–51. *See generally* George Lee Flint, Jr. & Philip W. Moore, Jr., *ERISA: A Co-Fiduciary has no Right to Contribution and Indemnity*, 48 S.D. L. REV. 7, 29–33 (2003).
186. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989).
187. *See, e.g.*, Allison v. Unum Life Ins. Co. of Am., 381 F.3d 1015 (10th Cir. 2004) (involving abuse of discretion, labeled arbitrary and capricious, rule for plan interpretation for the benefits due lawsuit); Glista v. Unum Life Ins. Co. of Am., 378 F.3d 112 (1st Cir. 2004) (same); Verden v. Alexander & Alexander Inc., 379

The trust plan interpretation rule is not the only trust law rule adopted by the federal circuit courts for ERISA actions. Similarly, the federal circuit courts have determined that the remedy sought for both the benefits due lawsuit and the employer retaliatory discrimination lawsuit is trust-like, and hence equitable. Consequently, when the participant requests a jury trial for the benefits due lawsuit[188] or the employer retaliatory discrimination lawsuit,[189] the district court denies the request since the action is trust-like.

So according to the federal circuit courts, for plan interpretation and for jury trial, an employee benefit plan is a trust, but for the limitations period, an employee benefit plan is a contract. For consistency, these courts should have used the state trust statute of limitations. But like the contract rule, this rule also does not yield a uniform limitations period. States have varying statutes of limitations for trust matters.[190]

The circuit courts have avoided using state statutes of limitations for trusts, since state statutes seldom contain a specific limitation for trust causes of action. The reason is that the statutes of limitations

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F.3d 222 (5th Cir. 2004) (involving abuse of discretion rule for plan interpretation for the benefits due lawsuit). *See generally* Flint, *supra* note 13, at 1027–46.

188. *See, e.g.*, Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156 (10th Cir. 1998); Bittinger v. Tecumseh Prods. Co., 123 F.3d 877 (6th Cir. 1997); DeFelice v. Am. Int'l Life Assurance Co. of N.Y., 112 F.3d 61 (2d Cir. 1997); *see also* Coburn v. Cont'l Cas. Co., 306 F. Supp. 2d 815 (N.D. Ind. 2003). *See generally* Flint, *supra* note 14, at 361.

189. *See, e.g.*, Spinelli v. Gaughan, 12 F.3d 853, 857 (9th Cir. 1993) (stating ERISA only provides equitable remedy); Cox v. Keystone Carbon Co., 894 F.2d 647, 649 (3d Cir. 1990); Howard v. Parisian, Inc., 807 F.2d 1560, 1566–67 (11th Cir. 1987); *see also* Vargas v. Child Dev. Council of Franklin County, Inc., 269 F. Supp. 2d 954 (S.D. Ohio 2003).

190. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1997) (creating four-year limitations period for action for which there is no express limitation period, except an action to recover realty), *and* Greman v. Forgeron, 101 S.W.2d 885, 888 (Tex. App. 1937) (disregarding four-year limitations period lawsuits involving withholding of real or personal property), *with* KY. REV. STAT. ANN. § 413.120(5) (Banks-Baldwin 2003) (creating five-year limitations period for lawsuits involving withholding of real or personal property), *and* Potter v. Conn. Mut. Life Ins. Co., 361 S.W.2d 515, 516 (Ky. 1962) (applying statutory five-year limitations period to bar recovery under an alleged trust agreement). *Also compare* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (Vernon 1997) (creating four-year limitations period for breach of fiduciary duty), *and* Jones v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 2002 W.L. 595043 (Tex. App. 2002) (applying statutory four-year limitations period to bar recovery for breach of fiduciary duty in a trust dispute), *with* LA. CIV. CODE ANN. art. 3499 (West 2005) (creating a ten-year limitations period for personal actions unless otherwise provided by the legislature), *and* Edwins v. Lilly, 422 So. 2d 1217, 1223 (La. Ct. App. 1982) (applying ten-year limitations period instead of one-year period created for tort actions).

originally covered only legal actions, not equity.[191] Now many jurisdictions apply statutes of limitations to actions to enforce trusts, either through express statutes of limitations[192] or through the state's residual statute of limitations for which there is no express statute of limitations.[193]

B. The Correct Rule

Justice Stewart overstated his case in favor the state statutes of limitations for LMRA actions.[194] In *Hoosier Cardinal Corp.*, Justice White, the former great running back, did not so fumble the issue. In his dissent, Justice White noted that the real issue is what federal policy required.[195] Courts, in fashioning federal common law to fill congressional gaps, may only resort to state law if that state law supplements and fulfills federal policy.[196] In prior LMRA cases, the Su-

191. *See, e.g.*, 21 Jam., c. 16 (1623), *reprinted in* 4 GREAT BRITAIN, STATUTES OF THE REALM 1222–23 (1963). *See generally* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 950, at 611 (rev. 2d ed. 1995).

192. *See, e.g.*, GA. CODE ANN. § 9-3-27 (1982) (creating ten year statute of limitations); MINN. STAT. ANN. § 541.05 (West 2000) (creating six year statute of limitations); MISS. CODE ANN. § 15-1-39 (1999) (creating ten year statute of limitations). *See generally* BOGERT & BOGERT, *supra* note 191, § 950, at 612.

193. *See, e.g.*, Walters v. Lewis, 634 S.W.2d 129 (Ark. 1982) (holding that five-year limit under section 37-213 of the Arkansas Code, current version at ARK. CODE ANN. § 16-56-115 (Michie 1987), had not expired because of fraud in administration of the estate); Nayee v. Nayee, 705 So. 2d 961 (Fla. App. 1998) (refusing to apply four-year statute of limitations under section 95.11 of the Florida Statutes without a factual determination that family trust beneficiaries had knowledge of trustees adverse possession or repudiation of trust assets); *In re* Cmty. Serv. Soc. of N.Y., 686 N.Y.S.2d 46 (N.Y. App. Div. 1999) (applying six-year limitations period under section 213 of the New York Civil Practice Law and Rules to bar action against a trust); Mason v. Taft, 50 A. 648 (R.I. 1901) (discussing whether limitations period under chapter 234, section 3 of the Rhode Island Laws, current version at R.I. GEN. LAWS § 9-1-13(a) (1997), applies in an action against a trust); *In re* S. Int'l Co., 165 B.R. 815 (Bankr. E.D. Va. 1994) (disregarding five-year limitations period for property damage suit under section 8.01-243 of the Virginia Code and instead applying general one-year limitations period under section 8.01-248). *See generally* BOGERT & BOGERT, *supra* note 191, § 950, at 618.

194. *See supra* notes 160–68 and accompanying text.

195. Int'l Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 709 (1966) (White, J., dissenting, joined by Douglas, J. and Brennan, J.).

196. *Id.*; *see also* Ass'n of Westinghouse Salaried Employees v. Westinghouse Corp., 348 U.S. 437, 463 (1955) (Reed, J. concurring) (justifying the use of state law to resolve a discrepancy in the LMRA); Homberg v. Ambrecht, 327 U.S. 392, 394–95 (1946) (using state law to determine the limitations period under section 16 of the Federal Farm Loan Act); Bd. of County Comm'rs v. United States, 308 U.S. 343, 352–53 (1939) (recognizing influence of local law when interpreting the Indian General Allotment Act of 1887, commonly called the Dawes Act).

preme Court had followed this procedure.[197] So the congressional silence did not mean that Congress intended to apply state law.[198] Justice White then supported his conclusion that state law would not work for LMRA limitations periods. He noted that using state statutes of limitations meant that far more than fifty statutes of limitations would be applicable to LMRA section 301 actions, depending on the type of lawsuit under LMRA section 301. He noted further that some states provided multiple statutes of limitations for one particular type of action, for example, contracts, depending on whether they were written.[199] Therefore, for the interstate employee benefit plan, an employee in one state could recover on an action barred for a similarly situated employee in another state.[200] He felt that simple justice mandated that the assertion of federal causes of action by employees in different states should be equally available.[201] Nor should plan administrators have to refer to more than fifty statutes of limitations for similarly situated employees, nor be concerned about claims of employees in one state already barred for other similarly situated employees in another state.[202] The fertile minds of lawyers would find other opportunities for vexatious litigation over choice of law rules, choice of state statute of limitations, and other intricacies that Congress did not intend.[203] A uniform rule would eliminate this litigation.[204]

Subsequent litigation in the Supreme Court over limitations periods for federal causes of action follows Justice White. Since the *Erie Railroad Co. v. Tompkins*[205] opinion reversed the blind use of state law as federal common law, the Supreme Court has not held that the Judicial Act requires state law to fill congressional statute of limitations gaps in federal statutes.[206] In some instances state statutes of limitations are so unsatisfactory that it is inappropriate for a court to assume Congress would adopt state statutes of limitations at odds with the purpose of the federal legislation.[207] In these instances,

197. *Hoosier Cardinal Corp.*, 383 U.S. at 710 (citing Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957) (applying federal common law for enforcement of arbitration of collective bargaining agreement under LMRA)).
198. *Id.*
199. *Id.* at 709.
200. *Id.* at 711–12.
201. *Id.*
202. *Id.* at 712.
203. *Id.*
204. *Id.*
205. 304 U.S. 64 (1938).
206. *See* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983).
207. *See id.* at 161; *see also* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring) (stating that the assumption Congress held was that states' statutes of limitations works best for express actions, not implied ones); Int'l Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966) (stat-

rules drawn for federal law, either express federal statutes of limitations or federal doctrines of laches, serve as sources of law to fill the congressional gaps.[208] So, although many Supreme Court opinions still cite the basic rule that state law determines the statute of limitations for federal causes of action where Congress has specified no statute of limitations,[209] the Supreme Court also has recognized exceptions.[210] One of these exceptions involved the LMRA. The Supreme Court limited the *Hoosier Cardinal Corp.* opinion to a cause of action by the union, not an employee, and only for a breach of contract action for the collective bargaining agreement.[211] Unfortunately, the federal circuit courts have not noticed this reservation for other rules, possibly federal, for a benefits due lawsuit under the LMRA.[212] The one LMRA exception recognized by the Supreme Court uses the six-month federal statute of limitations for unfair labor practices before the NRLB.[213] The three-year New York statute of limitations for legal malpractice actions is inappropriate for an employee action against

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ing that there is no reason to reject state law, unless it is unreasonable or otherwise inconsistent with national labor policy); *id.* at 709 (White, J., dissenting) (stating that states' statutes of limitations are allowed only because they supplement or fulfill federal policy); Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 463 (1955) (Reed, J., concurring) (stating that state law applies to LMRA section 301 actions only because it is not contrary to federal policy but supplements and fulfills it).

208. *See DelCostello,* 462 U.S. at 162.
209. *See supra* note 168 and accompanying text.
210. *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 147–51 (1987) (using four-year limitations period under the Clayton Anti-Trust Act, 15 U.S.C. § 15b (1997), for assessing treble damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1984), because state law provided no analogous source of law); Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 367 (1977) (refusing to use state statute of limitations for the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b)(1) (1994), since they conflict with the delay for EEOC administrative procedures, so not subject to a statute of limitations); McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 224 (1958) (using the three-year statute of limitations of the Jones Act, 46 U.S.C. app. § 688 (Supp. 2004), which uses the Federal Employee's Liability Act limitations, 45 U.S.C. § 56 (1986), not state statutes of limitations, for admiralty unseaworthiness causes of action joined with the Jones Act); Homberg v. Armbrecht, 327 U.S. 392 (1946) (using federal doctrines of laches for equitable remedies, not state statute of limitations by analogy under the Federal Farm Loan Act, 12 U.S.C. § 812 (1989)); Bd. of County Comm'rs v. United States, 308 U.S. 343, 351 (1939) (states' statutes of limitations do not apply to suits by the federal government unless it waived sovereignty).
211. *See Hoosier Cardinal Corp.*, 383 U.S. at 705 n.7.
212. *See supra* notes 41–67 and accompanying text.
213. *See* National Labor Relations Act (NLRA) of 1935, ch. 372, § 10, 49 Stat. 449, 453 (1936), *as amended by* Labor Management Relations Act of 1947 (LMRA), ch. 120, § 101, 61 Stat. 136, 146 (1948); 29 U.S.C. § 160(b) (1998).

the employer for breach of the collective bargaining agreement and the union for breach of the duty of fair representation.[214]

In *Lampf, Pleva, Lipkind & Petigrow v. Gilbertson*,[215] the Supreme Court delineated the process for determining the appropriate limitations period when Congress fails to specify one in the federal statute. Unfortunately for ERISA, no federal circuit court has come close to this procedure. First, the court must determine whether the federal statute demands a uniform limitations period.[216] One such instance is where the federal cause of action envisions so many diverse topics that a single state statute of limitations would not fit all the diverse topics.[217] ERISA contains considerable language in support of uniform administration of plans.[218] Due to this step, the Supreme Court ultimately has used a federal statute of limitations[219] or specified the uniform characterization under state law.[220] Second, if the federal statute requires uniformity, then the court must determine whether it should derive the uniform limitations period from federal or state law. ERISA contains a broad preemption provision.[221] One of the factors for this determination is whether the possibility of multiple state statutes of limitations will present a danger of forum shopping.[222] The Supreme Court has noted a potential for forum shopping under ERISA if the ERISA rules vary from circuit to circuit.[223] Third, if the federal statute requires a federal statute of limitations, then the court must determine whether the federal statute of limitations affords a closer fit with the cause of action than does the available state statute

214. *See* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 168–70 (1983) (stating that a long state statute of limitations for contracts is inappropriate since federal policy demands rapid resolution of disputes and breach of the duty of fair representation is an unfair labor practice according to the NRLB).

215. 501 U.S. 350 (1991). *Lampf* dealt with the limitations period for the implied private cause of action under Securities and Exchange Commission's rule 10b-5, 17 C.F.R. § 240.10b-5 (2003), under the Exchange Act. *See* 15 U.S.C. § 78j(b) (1997). The Court decided in favor of the federal statute of limitations contained within the Exchange Act for the express actions prohibiting misleading statements. *See* 15 U.S.C. § 78r(c) (1997) (no later than one year after discovery, but in no event more than three years). Congress changed this rule to prohibit the retroactive use of *Lampf*. *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1992) (amending 15 U.S.C. § 78aa-1(a) (1994)). Congress also changed the rule to make it a two-year/five-year limitations period. *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 801 (2003) (amending 28 U.S.C. § 1658 (1994)).

216. *See Lampf*, 501 U.S. at 357.

217. *Id.*

218. *See supra* notes 160–84 and accompanying text.

219. *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987).

220. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261 (1985).

221. *See supra* notes 169–84 and accompanying text.

222. *See Lampf*, 501 U.S. at 357.

223. *See* Mason v. Cont'l Group, Inc., 474 U.S. 1087 (1987) (White, J., dissenting).

of limitations.[224] Among the factors to aid this decision are the commonality of purposes and similarity of the elements.[225] The ERISA causes of action reflect the fiduciary duties imposed by Congress on employee benefit plans, while state causes of action generally do not.

The Supreme Court has shed some additional light on this closer analogy requirement. A court uses federal law for interstitial lawmaking when federal policies are at stake and the practicalities of the litigation make that federal rule significantly more appropriate.[226] Justice Scalia believes the "closer analogy" and "significantly more appropriate" tests are unworkable.[227] "Closer analogy," if followed, would not yield a uniform rule, but rather the federal rule in some states and the state rule in others.[228] "Significantly more appropriate" is always satisfied since a uniform national limit for a federal cause of action is always more appropriate than non-uniform state rules.[229] Examination of the Supreme Court's cases resulting in a federal statute of limitations reveals causes of action dealing with hybrid situations, such as collective bargaining agreements with fair representation[230] or seaworthiness with negligence,[231] or a statute patterned after another federal statute.[232] ERISA causes of action resemble the hybrid situation, part contract and part trust, so much so the circuit courts flip-flop between contract law and trust law in their treatment of employee benefit plans.[233]

IV. THE SOLUTION

There are three approaches to determine the correct limitations period for the ERISA lawsuits not involving plan recovery for fiduciary breaches. First, a court could determine that Congress did in fact provide a statute of limitations rather than conclude, as the federal circuit courts have to date, that Congress failed to specify a statute of limitations. Second is to use the Supreme Court's methodology. Third is for the plan to specify a contractual limitations period.

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224. *See Lampf,* 501 U.S. at 357.
225. *See id.* at 358.
226. *See* N. Star Steel Co. v. Thomas, 515 U.S. 29, 35 (1995); Reed v. United Transp. Union, 488 U.S. 319, 324 (1989); DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 161 (1983).
227. *See N. Star Steel Co.*, 515 U.S. at 37 (Scalia, J., concurring) (suggesting use of an infinite limitations period rather than the most analogous state statute of limitations).
228. *Id.*
229. *Id.*
230. *See, e.g., DelCostello*, 462 U.S. 151.
231. *See, e.g.*, McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958).
232. *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143 (1987).
233. *See supra* note 31 and accompanying text.

There are five different types of ERISA lawsuits of interest for which the circuit courts presently use state statutes of limitations.[234] Participant–beneficiaries may sue: (1) for penalties for failure to provide information when requested;[235] (2) for benefits due;[236] (3) for injunctive and other equitable relief for violations or enforcement of plan provisions;[237] (4) for injunctive and other equitable relief for violations or enforcement of ERISA's fiduciary provisions;[238] and (5) for injunctive and other equitable relief for violations or enforcement of ERISA's provisions other than the fiduciary provisions.[239]

A. The Congressional Specification of a Statute of Limitations

The myth that ERISA does not contain a statute of limitations for ERISA lawsuits not involving plan recovery for damages arising from a fiduciary duty breach[240] is based on two assumptions. First, ERISA's statute of limitations for fiduciary duty breaches applies only to ERISA actions under ERISA section 409.[241] Second, lawsuits for fiduciary duty breaches can only be brought under ERISA section 502(a)(2). ERISA section 502(a)(2) provides that "[a] civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section [409] of this title."[242] The reference to ERISA section 409 merely provides the plan with a recovery for fiduciary duty breaches in which the plan sustains a loss:

234. Participant–beneficiaries may additionally sue for relief concerning certain IRS notices and insurance contracts upon termination. *See* Employee Retirement Income Security Act of 1974 § 502(a)(4)–(5), 29 U.S.C. § 1132(a)(4)–(5) (2000). The circuit courts have no decisions concerning statutes of limitations for these lawsuits. Participant–beneficiaries, as well as fiduciaries, may also sue for plan recoveries for breach of fiduciary duty under sections 409 and 502(a)(2), to which the ERISA statute of limitations, section 413, applies. *See* Employee Retirement Income Security Act §§ 409, 413, 502(a)(2).

235. *See id.* §§ 502(a)(1)(A), 502(c).

236. *See id.* § 502(a)(1)(B).

237. *See id.* § 502(a)(3). Fiduciaries may also sue for this remedy, such as the subsequently disallowed recovery for benefits paid.

238. *See id.* Fiduciaries may also sue for this remedy.

239. *See id.* Fiduciaries may also sue for this remedy, such as the lawsuit for employer retaliatory discrimination under ERISA section 510 and for delinquent employer contributions under ERISA section 515.

240. For the informational penalty lawsuit, see *supra* notes 37–40 and accompanying text. For the benefits due lawsuit, see *supra* notes 41–67 and accompanying text. For the equitable remedy for the enforcement of plan provisions lawsuit, see *supra* notes 68–73 and accompanying text. For the employer retaliatory discrimination lawsuit, see *supra* notes 74–96 and accompanying text. For the delinquent employer contribution lawsuit, see *supra* notes 97–110 accompanying text.

241. *See* Employee Retirement Income Security Act § 409.

242. *Id.* § 502(a)(2).

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter [Title I] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary . . . .[243]

The Supreme Court has confirmed that relief under ERISA sections 409 and 502(a)(2) is limited to recovery by the plan.[244]

Unfortunately for the federal circuit courts making these two assumptions, nowhere did Congress limit the ERISA statute of limitations for fiduciary duty breach to actions under ERISA section 502(a)(2). Instead, the ERISA fiduciary duty breach statute of limitations says it applies to all actions under Title I, not just ERISA section 502(a)(2):

> No action may be commenced under this subchapter [Title I—Protection of Employee Benefit Rights] with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part [Part 4—Fiduciary Duty], or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.[245]

To interpret the ERISA statute of limitations as limited to actions under ERISA section 502(a)(2) would violate the Supreme Court's statutory interpretation technique for word surplusage.[246] Moreover, had Congress desired to limit the ERISA statute of limitations to ERISA section 409 actions, it could have used such language.[247] In fact, Congress did face early proposals to limit the ERISA statute of limitations to actions for plan recoveries for fiduciary duty breaches. The bill submitted to the House Education and Labor Committee on January 3, 1973, and the bill submitted to the Senate Finance Committee

243. *Id.* § 409.

244. *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140–44 (1985).

245. Employee Retirement Income Security Act § 413.

246. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (stating that statutory interpretation canons require a court to give effect to each work if possible, unless inadvertently inserted or repugnant to the rest of the statute); *see also* KARL LLEWELEYN, THE COMMON LAW TRADITION: DECIDING APPEALS 525 (1960).

247. *See, e.g.*, Inter-Model Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry., 520 U.S. 510, 515 (1997) ("Had Congress intended to confine § 510's protection to 'vested' rights, it could have easily substituted the term 'pension plan' . . . for 'plan,' or the term 'non-forfeitable' right . . . for 'any right.'").

as of August 21, 1973, both contained such a limit.[248] In contrast, the bill submitted to the Senate Labor and Public Welfare Committee on January 4, 1973, applied the ERISA limitations period to all ERISA actions.[249] The ultimate removal of the language limiting the limitations period to plan recoveries clearly indicates that Congress intended the ERISA statute of limitations to cover more than just the action for plan recovery.[250] Consequently, the ERISA express statute

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248. *See* H.R. 2, 93d Cong. § 111(i) (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 154, at 46 ("No action may be commenced under subsection (d) [which provides for the plan recovery] with respect to a fiduciary's breach of any responsibility, duty, or obligation, or with respect to a violation of section 112 [providing a prohibition against certain persons holding fiduciary offices], after the earlier of (1) six years after the date of the breach or violation, or (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary [of Labor] under this title."); *see also* S. 1179, 93d Cong. § 501(d)(15) (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 154, at 955 ("No action, suit, or proceeding based on a violation of subsection (b) [which provides for the plan recovery] or (c) [providing a prohibition against certain persons holding fiduciary offices] shall be maintained unless it is commenced within 3 years after the filing with the Secretary of a report, statement, or schedule with respect to any matter disclosed by such report, statement, or schedule, or, with respect to any matter not so disclosed, within 3 years after complainant otherwise has knows or has reason to know of such violation, whichever is later, but no such action, suit or proceeding shall be commenced more than 10 years after the violation occurred. In the case of a willfully false or fraudulent statement or representation of a material fact or the willful concealment of, or willful failure to disclose, any material fact required to be disclosed to the Secretary, a proceeding in court may be brought at any time within 10 years after such violation occurs."); S. REP. No. 93-383, at 106, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 154, at 1174 ("If the fiduciary breach is disclosed in a report filed with the Secretary of Labor, civil action may be brought no later than 3 years after the report is filed. In other cases, an action may be brought within 3 years after the plaintiff knows or has reason to know of the violation, but no action may be brought more than 10 years after the transaction occurred. Additionally, where there is a willfully false or fraudulent statement, misrepresentation, concealment or failure to disclose a material fact to the Secretary of Labor, action may be brought within 10 years of the violation."). The House provision contains the essential parts of the enacted legislation. *Compare* H.R. 2, *supra*, § 111(i), *with* Employment Retirement Income Security Act § 413. The ERISA version of subpart (B) of H.R. 2 was deleted from the current version of ERISA in 1987. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330, 1330–71 (1989).

249. *See* S. 4, 93d Cong. § 608 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 154, at 186 ("Any action, suit, or proceeding based upon a violation of this Act or the Welfare and Pension Plans Disclosure Act shall be commenced within five years after the violation occurs. In the case of fraud or concealment, such action, suit or proceeding shall be commenced within five years of the date of discovery of such violation."); *see also* S. REP. No. 93-127, at 47 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4883 ("[Section 608 of t]he bill provides a statute of limitations of five years for actions arising under the act.").

250. *See, e.g.*, Bindczyck v. Finucane, 342 U.S. 76, 83 (1951) (concluding that an amendment to the original bill just before its passage indicated that Congress

of limitations for fiduciary duty breach would apply to the other causes of action under ERISA section 502, provided they seek to remedy a breach of fiduciary duty.

These other causes of action provide recovery, among others, for the employee, participant, and beneficiary. It would be strange indeed for Congress to have claimed to provide these individuals with expanded federal recovery[251] from added fiduciary duties[252] and then leave them out when they are damaged by breaches of those added fiduciary duties. The failure to recognize remedies for fiduciary duty breaches in these other causes of action produced this myth. ERISA states:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and
> (A) for the exclusive purpose of :
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter [ERISA, Title I, for protection of employee benefit rights] and subchapter III [ERISA, Title IV, for plan termination insurance] of this chapter.[253]

1. *The Informational Penalty Lawsuit*

Failure to provide information on request constitutes a breach of fiduciary duty. Traditional trust law has long recognized the fiduciary duty of the trustee to provide information at the beneficiary's re-

intended to change its meaning when it was passed as the Nationality Act of 1940); Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 458 n.2 (1937) ("Amendments to the bill subsequent to its introduction plainly demonstrate careful intention to leave the lien wholly unimpaired."); Fed. Trade Comm'n v. Raladam Co., 283 U.S. 643, 648–49 (1931) (discussing the significance of a change of wording in the original bill to the Federal Trade Commission Act); *see also* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48.18 at 484–85 n.3 (6th ed. 2000).

251. *See* H.R. REP. No. 93-533, at 17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 ("The intent of the committee [in providing the benefits due lawsuit] is to provide the full range of legal and equitable remedies available in both state and federal courts to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due participants."); S. REP. No. 93-127, at 35, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871.
252. *See supra* note 185 and accompanying text.
253. Employee Retirement Income Security Act § 404(a)(1).

quest.[254] ERISA's legislative history indicates that Congress incorporated traditional trust law principles into ERISA, slightly modified to account for differences between employee benefit plans designed for many beneficiaries and testamentary trusts tailored for one or a few beneficiaries.[255] The similarity between the structure of the penalty remedy of ERISA section 502(a)(1)(A) and the trust law rule, requiring a request, suggests the trust law rule as the source of the ERISA provision. Once the Supreme Court determined that ERISA provided an individual participant–beneficiary with a remedy for a breach of fiduciary duty,[256] each circuit court determined[257] that the fiduciary duties of a plan administrator included providing information at the reasonable request of the participant-beneficiary.[258] The failure to provide the requested information, if reasonable, breaches the prudent person rule of ERISA's multitude of fiduciary duties.[259] Al-

254. RESTATEMENT (SECOND) OF TRUSTS § 173 (1959) ("The Trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of trust property, and to permit him . . . to inspect . . . documents relating to the trust.").

255. S. REP. NO. 93-127, at 29–30, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865–66; H.R. REP. NO. 93-533, at 12–13, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650–51; *see also* Flint & Moore, *supra* note 185, at 30–31.

256. *See* Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (permitting recovery under ERISA section 502(a)(3) for "appropriate equitable relief").

257. The Supreme Court had declined to rule on this matter. *See id.* at 506 (declining to determine "whether ERISA fiduciaries have any fiduciary duty to disclose truthful information . . . in response to employee inquiries").

258. *See* Griggs v. E.I. Dupont de Nemours & Co., 237 F.3d 371, 381 (4th Cir. 2001) (breach for failure to correct disclosure of the absence of tax on rollover distribution); Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 589–91 (7th Cir. 2000) (breach for failure to adequately disclose COBRA options); Krohn v. Huron Mem'l Hosp., 173 F.3d 542, 547 (6th Cir. 1999) (breach for failure to provide adequate information to request about entitlement to disability benefits); Estate of Becker v. Eastman Kodak Co., 120 F.3d 5, 8–9 (2d Cir. 1997) (breach for failure to provide complete and correct information on options under retirement plan); Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 172 (3d Cir. 1997) (breach for failure to inform of eligibility for disability benefits even without request); Shea v. Esenstein, 107 F.3d 625, 628–29 (8th Cir. 1997) (breach for failure to disclose HMO's incentive structure with respect to recommendation against specialist); Maez v. Mountain States Tel. & Tel., Inc., 54 F.3d 1488, 1498–1501 (10th Cir. 1995) (breach for failure to disclose information with respect to early retirement); Eddy v. Colonial Life Ins. Co., 919 F.2d 747, 748–49 (D.C. Cir. 1990) (breach for failure to disclose material information about participants status and options upon policy cancellation). *But see* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 428 (5th Cir. 2003) (no breach for failure to disclose contemplated plan changes); Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 114–15 (1st Cir. 2002) (no breach for failure to inform return to part-time status precludes disability benefits); McLeod v. Or. Lithoprint, Inc., 102 F.2d 376, 378 (9th Cir. 1996) (no damage recovery for breach of failing to inform of eligibility for cancer coverage).

259. *See, e.g.*, *Eddy*, 919 F.2d at 750; Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1299 (3d Cir. 1993).

though the fiduciary duty extends beyond the request situation,[260] the penalty remedy[261] of ERISA section 502(a)(1)(A) is limited to the request situation.[262] If the fiduciary is liable under the penalty remedy, it is solely because of a breach of the fiduciary's duty. Consequently, ERISA's breach of fiduciary duty statute of limitations, ERISA section 413, should apply to this breach of fiduciary duty, not a state's most analogous statute of limitations.[263]

2. *The Benefits Due Lawsuit*

For the benefits due lawsuit under ERISA section 502(a)(1)(B), the plan administrator, as fiduciary,[264] has made a decision not to pay benefits to the participant–beneficiary. If the decision is correct, there is no fiduciary duty breach. But if the decision is wrong, the plan administrator has not acted as a prudent person acting in like capacity and familiar with such matters. The circuit courts recognize this principle that the plan administrator's decision constitutes a fiduciary decision.[265] In other words, the decision to grant or not to grant a benefit is a fiduciary decision. The Supreme Court has mandated that a court's review of this decision is governed by fiduciary law, in partic-

260. Current litigation deals with extending the fiduciary duty to disclose beyond the request and correction situations to require disclosure of material information unknown to the participant–beneficiary. *See* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959) ("[The trustee] is under a duty to communicate . . . material facts affecting the interest of the beneficiary which [the trustee] knows the beneficiary does not know and which the beneficiary needs to know for his protection . . . ."). *See generally* Howard Shapiro & Robert Rachal, *The Duty to Inform and Fiduciary Breaches: The "New Frontier" in ERISA Litigation*, 14 LAB. LAW. 503 (2002) (focusing primarily on contemplated plan amendments).

261. The ERISA penalty remedy is to punish the fiduciary, not to enable the participant–beneficiary to recover some damages. *See, e.g.*, Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1223, 1232 (11th Cir. 2002); Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1494 n.11 (11th Cir. 1993).

262. *See, e.g.*, Rego v. Westvaco Corp., 319 F.3d 140, 149 (4th Cir. 2003) (holding there is no liability under ERISA § 502(c) absent a request); Bannistor v. Ullman, 287 F.3d 394, 407 (5th Cir. 2002) (same).

263. *See supra* notes 38–40 and accompanying text.

264. Employee Retirement Income Security Act (ERISA) of 1974 § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2000). A person is a fiduciary if he exercises any discretionary authority or control with respect to the administration or management of the plan or its assets. *Id.*

265. In order to receive a heightened review standard for a benefits due lawsuit under various types of benefit plans, the participant–beneficiary must show (1) serious procedural irregularity, and (2) that such irregularities caused a serious breach of the trustee's fiduciary duty to the plan beneficiary. *See, e.g.*, Neumann v. AT & T Communications, Inc., 376 F.3d 773, 781–82 (8th Cir. 2004) (disability plan); Buttram v. Cent. States, Southeast & Southwest Areas Health & Welfare Fund, 76 F.3d 896, 900–01 (8th Cir. 1996) (medical reimbursement plan); Atwood v. Newmont Gold Co., 45 F.3d 1317, 1322–23 (9th Cir. 1995) (severance pay plan).

ular the abuse of discretion standard.[266] Consequently, a wrong decision with respect to benefits due is a breach of fiduciary duty.[267] The ERISA statute of limitations, ERISA section 413, should govern this breach of fiduciary duty, not a state's most analogous contractual statute of limitations.[268]

3. *The Equitable Remedy Lawsuit to Enforce Plan Provisions*

The equitable remedy under ERISA section 502(a)(3) seeks remedies for violations of: (1) the plan; (2) ERISA's fiduciary provisions; and (3) ERISA's provisions other than the fiduciary provisions. Ordinarily, statutes of limitations deal with legal remedies rather than equitable remedies.[269] Instead, the concept for equity is laches.[270] The Supreme Court, however, does use analogous state statutes of limitations to provide the period for laches.[271]

The circuit courts have concluded that a breach of a plan provision also is a breach of fiduciary duty.[272] Among the multitude of ERISA

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266. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110–11 (1989).

267. *See* Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (finding a remedy for breach of fiduciary duty with respect to plan interpretation and payment of claims outside of ERISA section 409, running to the participant–beneficiary under ERISA section 502(a)(1)(B)); *see also id.* § 510 (rejecting the plan sponsor's claim that ERISA section 409 covers all the liability for a fiduciary breach, and finding recovery for fiduciary breaches running to the participant–beneficiary outside of ERISA section 409 in ERISA section 502(a)(3) for equitable remedies). A few members of the Supreme Court still believe that ERISA sections 409 and 502(a)(2) provide the exclusive remedy for breach of fiduciary duty. *See id.* § 520 (Thomas, J., dissenting, joined by O'Connor, J. and Scalia, J.) (concluding ERISA section 502(a)(1)(B) does not create a cause of action for breach of fiduciary duty, but exclusively for contract rights).

268. *See supra* notes 43–62 and accompanying text.

269. *See, e.g., In re* Mushroom Transp. Co., 382 F.3d 325, 337–38 (3d Cir. 2004) (equitable bankruptcy turnover claim against agents holding assets due to an ERISA plan for breaches of fiduciary duty); Teamsters & Employers Welfare Trust v. Gorman Bros. Ready Mix, 283 F.3d 877, 880 (7th Cir. 2002) (ERISA suit for delinquent employer contributions).

270. *See, e.g.*, Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 134 (3d Cir. 2000) (using Pennsylvania law for breach of fiduciary duty, delay in paying benefits); Wells v. U.S. Steel & Carnegie Pension Fund, Inc., 950 F.2d 1244, 1250 (6th Cir. 1991) (pension plan suit for recoupment); *see also* Costello v. United States, 365 U.S. 265, 281 (1961) (involving the equitable concept of laches in denaturalization proceedings).

271. *See, e.g.*, *Mushroom Transp. Co.,* 382 F.3d at 335–36 (using most analogous state statute of limitations); *Teamsters & Employers Welfare Trust,* 283 F.3d at 880; *Holmes,* 213 F.3d at 134.

272. *See, e.g.*, Delgrasso v. Spang & Co., 769 F.2d 928, 935 (3d Cir. 1988) (holding employer–administrator breached fiduciary duty in adopting a plan with a reversion clause contrary to anti-reversion provision in plan agreement with union); Donovan v. Cunnigham, 716 F.2d 1455, 1468 (5th Cir. 1983). *But see, e.g.*, McNab v. Gen. Motors Corp., 162 F.3d 959, 961–62 (7th Cir. 1998) (finding employer did not violate fiduciary duty by selecting employees for retirement incentive pro-

fiduciary duties is the obligation to follow plan provisions to the extent these provisions are consistent with ERISA.[273] Failing to follow plan provisions, provided they agree with ERISA, constitutes a breach of fiduciary duty. So the ERISA statute of limitations, ERISA section 413, should supply the limitation period for these equitable remedy lawsuits to enforce plan provisions.

For violation of ERISA's fiduciary provisions, a majority of the Supreme Court has concluded that the remedy sought by a participant–beneficiary is to rectify a fiduciary duty breach.[274] Consequently, the ERISA statute of limitations, ERISA section 413, supplies the limitations period for these equitable actions to enforce ERISA's fiduciary provisions.

B. Court Implication of a Limitations Period

The third type of lawsuit under ERISA section 502(a)(3) (violation of an ERISA provision other than the fiduciary provisions) does not so readily resolve into a breach of fiduciary duty. The two lawsuits of this nature involving the limitations period that have reached the circuit courts deal with employers—the first for delinquent employer contributions and the second for employer retaliatory discrimination. Employers may or may not be fiduciaries with respect to these two acts for the employee benefit plan.

1. *The Employer as an ERISA Fiduciary*

Before a court can impose fiduciary liability on an employer,[275] that employer must serve as a fiduciary to the employee benefit plan with respect to the complained act.[276] ERISA defines fiduciaries as

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gram since plan provided early retirement was possible only if employer and employee agreed); Catarino v. Barry, 8 F.3d 878, 883 (1st Cir. 1993) (finding trustees did not violate fiduciary duty by refusing to transfer assets in accordance with no asset transfer rule contained in plan); Berger v. Edgewater Steel Co., 911 F.2d 911, 918–19 (3d Cir. 1990) (finding plan administrator did not violate fiduciary duty by refusing severance benefits in accordance with employers eligibility decision since plan required them to accept the employers determination).

273. *See supra* note 253 and accompanying text.

274. *See* Varity Corp. v. Howe, 516 U.S. 489, 510 (1996) (finding a violation of the statutory fiduciary section where plan administrator breached duty of loyalty to act "solely in the interest of the participants" by deceiving participants in order to reduce employer costs).

275. For ERISA, the term "employer" includes its agents. *See* Employee Retirement Income Security Act (ERISA) of 1974 § 3(5), 29 U.S.C. § 1002(5) (2000) ("The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer in relation to an employee benefit plan . . . .").

276. *See, e.g.*, Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 18 (1st Cir. 1998) (holding that ERISA extends fiduciary liability to functional fiduciaries); 29 C.F.R. § 2509.75-8 at D-4 (2003) (stating that directors are liable to extent they exercise fiduciary functions); *id.* at FR-16 (stating that functional fiduciaries are

those who have discretion over the assets, investments, or administration of the employee benefit plan.[277] ERISA also imposes duties on employers, prohibiting them from engaging in prohibited transactions,[278] using plan assets for their own benefit,[279] engaging in retaliatory discrimination,[280] requiring them to fund the plan,[281] and requiring them to appoint the named fiduciary.[282] However, the Supreme Court has recognized that employers do not serve as fiduciaries to an employee benefit plan when solely engaging in settlor functions, such as establishing, amending, or terminating employee benefit plans.[283] In contrast, employers act as fiduciaries when they appoint

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only liable to extent they perform the fiduciary function). *See generally* Frank P. Vanderploeg, *Role Playing Under ERISA: The Company as "Employer" and "Fiduciary,"* 9 DEPAUL BUS. L.J. 259 (1997) (addressing predominately asset diversions and misrepresentations).

277. *See* Employee Retirement Income Security Act § 3(21)(A) ("[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.").

278. *See id.* §§ 3(14)(C) (including employers in the definition of "party-in-interest"), 406 (stating the prohibited transaction rule).

279. *See id.* § 403(c).

280. *See id.* §§ 510, 511 (criminalizing coercive interference).

281. *See id.* § 302(c)(11); I.R.C. § 412(c)(11) (2002).

282. *See* Employee Retirement Income Security Act § 402(a).

283. *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443–45 (1999) (holding that amending a contributory defined benefit does not trigger ERISA's fiduciary provisions); Lockheed Corp. v. Spink, 517 U.S. 882, 887–91 (1996) (holding that amending a retirement plan does not trigger ERISA's fiduciary provisions); Varity Corp. v. Howe, 516 U.S. 489, 505–06 (1996) (holding that amending or terminating a welfare plan is not an act of plan "management" or "administration," but making misrepresentations about future benefits does violate a fiduciary duty); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) (noting that adopting, amending, or terminating a welfare plan is not a fiduciary function). The circuit courts have followed this rule. *See, e.g.*, Int'l Union, UAW v. Skinner Engine Co., 188 F.3d 130, 148 (3d Cir. 1999); Izzarelli v. Rexene Prods. Co., 24 F.3d 1506 (5th Cir. 1994); Musto v. Am. Gen. Corp., 861 F.2d 897, 912 (6th Cir. 1988); Young v. Standard Oil, 849 F.2d 1039, 1045 (7th Cir. 1988); Anderson v. John Morrel & Co., 830 F.2d 872, 876 (8th Cir. 1987); Curlia v. Ward Foods, Inc., 804 F.2d 1418, 1432–33 (9th Cir. 1986); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986); Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1416–17 (2d Cir. 1985). The circuit courts similarly find no fiduciary duty for trustees in amending multiemployer plans. *See, e.g.*, Walling v. Brady, 125 F.3d 114 (3d Cir. 1997); Fagan v. Nat'l Stabilization Agreement of Sheet Metal Indus. Trust Fund, 60 F.3d 175 (4th Cir. 1985). Nor do the courts find fiduciary duties in designing spin-offs of plans during corporate restructuring. *See, e.g.*, Sengpiel v. B.F. Goodrich Co., 156 F.3d 660 (6th Cir. 1998); Systems Council EM-3 v. AT&T Corp., 159 F.3d 1376 (D.C. Cir. 1998).

fiduciaries,[284] exercise de facto control over fiduciary functions,[285] and communicate plan information to employees.[286]

With respect to employer retaliatory discrimination under ERISA section 510, one circuit court suggested the discriminatory act constitutes a breach of a fiduciary duty.[287] This court, however, did not point to any of ERISA's fiduciary provisions that the discriminatory

284. *See, e.g.*, Leigh v. Engle, 727 F.2d 113, 133–35 (10th Cir. 1984) (finding liability for appointing business associates as administrators); 29 C.F.R. § 2509.75-8 at D-4 (2003) (stating that, in appointing fiduciaries, directors exercise fiduciary duties); *see also* Hickman v. Tosco Corp., 840 F.2d 564, 566–67 (8th Cir. 1988) (holding that an employer is a fiduciary in appointing members of the administrative committee, but not in amending plan). Appointment of fiduciaries entails monitoring the appointees. *See Leigh*, 727 F.2d at 133–35; *see also* Batchelor v. Oak Hills Med. Group, 870 F.2d 1446, 1449 (9th Cir. 1989) (noting that the existence of a fiduciary duty is grounded in the selection and retention of plan administrators); Ed Miniot, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 736 (7th Cir. 1986) (finding a fiduciary duty with the power to select and remove trust administrators); 29 C.F.R. § 2509.75-8 at D-4 (2003) (stating that directors have a fiduciary duty for appointment and retention of fiduciaries). ERISA imposes co-fiduciary liability on fiduciaries if they participate knowingly or knowingly conceal a breach of fiduciary duty, fail with respect to their own fiduciary duties and thereby enable the co-fiduciary's breach of fiduciary duty, or knows that a breach of fiduciary duty has occurred but fail to take steps to rectify the breach. *See* Employee Retirement Income Security Act § 405(a).

285. *See, e.g.*, Bannister v. Ullman, 287 F.3d 394 (5th Cir. 2002) (finding a breach of fiduciary duty when the employer failed to forward to the employee benefit plan the employees' retirement and health insurance contributions made during two months preceding bankruptcy); LoPresti v. Terwilliger, 126 F.3d 34 (2d Cir. 1997) (involving an employer who commingled corporate and retirement funds to pay corporate creditors); Yeseta v. Baima, 837 F.2d 380, 385–86 (9th Cir. 1988) (finding a fiduciary duty based on the exercise of control over plan funds); Sommers Drug Stores Co. Employee Profit-Sharing Trust v. Corrigan Enters., 793 F.2d 1456, 1460 (5th Cir. 1986) (finding that there is liability where an employer has control over the trustee's decision to sell plan stock).

286. *See, e.g.*, *Varity Corp.*, 516 U.S. at 502–03 (holding that trust law requires fiduciaries to exercise powers appropriate to carry out the trust's purposes and, for ERISA, plan administrators must provide information, so employers in providing this information and responding to participant inquiries are exercising fiduciary functions); *see also* Employee Retirement Income Security Act §§ 102 (stating that a summary plan description must be furnished to participants and beneficiaries), 104(b)(1) (requiring administrators to provide a summary plan description within ninety days of entry, summary of material modifications and latest annual report, both within 210 days after plan year-end), 105(a) (requiring that a statement indicating the status of the benefit plan be furnished to participants and beneficiaries upon request).

287. *See* Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir. 1995) ("[A] court should not use section 510 and ERISA's other fiduciary obligations . . . . Section 510 is only one manifestation of the fiduciary-duty side of the equation."). One commentator believes the same. *See* Reginald B. Henderson, *Pre-Dispute Mandatory Arbitration Agreements and ERISA Fiduciary Claims: The Courts Unfortunately Declare Them a Perfect Match*, 26 AM. J. TRIAL ADV. 27, 61 (2002); *see also* Martin v. Fellon, 965 F.2d 660, 666–67 (8th Cir. 1992) (rejecting the argument that a fiduciary duty was breached by a decision affecting the value of stock held by an em-

act violated. Another circuit court indicated the discriminatory act resembled a nineteenth century breach of fiduciary duty.[288] However, most circuit courts have determined that the discriminatory act relates to a management decision, and so is not a fiduciary duty.[289] Although it is conceivable that the discriminatory act relates to a breach of fiduciary duty, the usual discriminatory act most likely will relate to a management decision concerning discipline of employees rather than a decision relating to the administration or investment of an employee benefit plan.

The circuit courts have identified as a trustee's fiduciary duty the obligation to see that contributions are paid, at least for the multiemployer plan.[290] Therefore, the lawsuit for delinquent contributions under ERISA sections 502(a)(3)(B) and 515 involves the enforcement of a fiduciary duty. However, as the ERISA statute of limitations requires, the enforcement is against the plan trustee not of the employer. So, like the employer retaliatory discrimination lawsuit, it is conceivable that the delinquency act relates to a breach of fiduciary duty,[291] as the usual delinquent contribution situation most likely will relate to a management decision concerning allocation of funds rather than a decision relating to the administration or investment of an employee benefit plan.

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ployee stock ownership plan, because the transaction was corporate and did not involve investing or administration of the plan).

288. *See* Spinelli v. Gaughan, 12 F.3d 853, 856 n.2 (9th Cir. 1993) ("[W]e could analogize section 510 to an equitable action for breach of fiduciary duty—since section 510 imposes duties on one person for someone else's benefit (here the employer becomes obligated not to fire employees for an improper reason).").

289. *See, e.g.*, Bodine v. Employers Cas. Co., 352 F.3d 245, 251–52 (5th Cir. 2003) (holding that an employer's decision not to terminate employees precluding their qualifying for early retirement benefits was a business decision, which did not breach a fiduciary duty under section 404 of ERISA); Haberen v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1497–98 (3d Cir. 1994) (holding that an employer's redesignation of employee's salary as a bonus to prevent it from being taken into account in pension formula was a business decision, which did not breach a fiduciary duty under ERISA section 510); *see also Hickman*, 840 F.2d at 566–67 (holding that the employer fiduciary that appointed the plan administrator did not breach a fiduciary duty under section 404 of ERISA by not keeping employees on payroll long enough to qualify for early retirement).

290. *See, e.g.*, Best v. Cyrus, 310 F.3d 932, 935 (6th Cir. 2002); Moriarity v. Svec, 164 F.3d 323, 329 (7th Cir. 1998); Diduck v. Koszycki & Sons Contractors, Inc., 874 F.2d 912, 918 (2d Cir. 1989).

291. *See* Bannister v. Ullman, 287 F.3d 394 (5th Cir. 2002) (holding that an employer's failure to remit participant contributions before the company fails constitutes a breach of a fiduciary duty because it has exercised discretion over assets of the plan).

2. The Implication of a Limitations Period

For these two actions, the court needs to imply a limitations period. Much of what follows would also apply to the other ERISA lawsuits of interest, if a court failed to notice they seek a remedy for breach of fiduciary duty and consequently did not apply the ERISA statute of limitations. The methodology, adopted in *Lampf* after the federal circuit courts first mandated state statutes of limitations for this implication, requires that a court find three circumstances.

First, the court must determine whether the federal statute demands a uniform limitations period. This is the key factor that distinguishes a LMRA case from an ERISA case. The Supreme Court determined in *Hoosier Cardinal Corp.* that the LMRA's requirements for uniformity did not extend beyond the negotiation of the collective bargaining agreement and, most definitely, did not extend to a lawsuit for a subsequent breach of that collective bargaining agreement.[292] The Supreme Court decided this way even when apprised of the inherent unfairness of using state statutes of limitations for two similarly situated plan participants in different states with different statutes of limitations, one barred from recovery, the other not.[293] In contrast, ERISA abounds in an effort to rectify this unfairness and achieve uniformity. ERISA contains a preemption provision and a reticulated remedy provision, the functions of which are to eliminate state causes of action for ERISA maladies.[294] The Supreme Court has recognized that the ERISA uniformity requirement extends to the administration of plans, procedural matters in ERISA lawsuits, and to remedial orders and rewards.[295] Consequently, ERISA's mandate for uniformity extends far beyond negotiating the plan and reaches procedural aspects of the various ERISA lawsuits and their remedies.

Second, since ERISA requires a uniform statute of limitations, the court must determine whether a court should derive the uniform statute of limitations from federal or state law. ERISA contains a broad preemption provision eradicating state law in so far as it affects ERISA plans.[296] With respect to this preemption provision, the Act's sponsors all advocated the courts to develop federal common law for ERISA plans.[297]

Ultimately, the Supreme Court is concerned with forum shopping.[298] The Court, in an earlier case, noted that, for an LMRA plan under the state statute of limitations rule, forum shopping might arise

292. *See supra* note 165 and accompanying text.
293. *See supra* note 200 and accompanying text.
294. *See supra* notes 169–77 and accompanying text.
295. *See supra* notes 174–77 and accompanying text.
296. *See supra* note 169 and accompanying text.
297. *See supra* notes 154–55 and accompanying text.
298. *See supra* note 222 and accompanying text.

for employees seeking benefits.[299] The potential for forum shopping for ERISA causes of action derives from the statute itself. As federal causes of action, the parties may bring the ERISA action in any district court of the United States where the plan is administered, where the breach took place, or where the defendant resides or may be found, with process of service in the district where the defendant resides or may be found.[300] This ERISA rule could easily provide jurisdiction in several different states, especially for fiduciary duty breaches with an interstate employee benefit plan involving several participants living in different states. This is the reason ERISA uniformity extends beyond the LMRA's negotiation and administration to the ERISA remedies and awards.[301]

Justice White once noticed that even differing federal rules in the circuits causes forum shopping.[302] The federal circuit courts have actually experienced parties engaging in forum shopping for ERISA.[303] These experiences have specifically involved the state statute of limitations.[304] Despite the federal policy against forum shopping, the circuit courts have developed a standard for denying a change of venue but giving the plaintiff great deference in selecting the forum.[305] Even if the circuit courts could settle on one state's law as the source of the uniform law, the various statutes of limitations in one state for

299. *See supra* notes 202–03 and accompanying text.

300. Employee Retirement Income Security Act (ERISA) of 1974 § 502(e)(2), (f), 29 U.S.C. § 1132(e)(2), (f) (2000).

301. *See, e.g.*, Snow v. Aetna Ins. Co., 998 F. Supp. 852, 856 (W.D. Tenn. 1998) ("[U]tilization of the federal rate promotes uniformity in cases brought under ERISA and discourages forum shopping.").

302. *See* Mason v. Cont'l Group, Inc., 474 U.S. 1087, 1087 (1986) (White, J., dissenting) (disagreeing with the Court's denial of certiorari in an ERISA case due to potential for forum shopping on the basis of different exhaustion of remedies rules in the circuit courts).

303. *See, e.g.*, NGS Am., Inc. v. Jefferson, 218 F.3d 519, 521–23 (6th Cir. 2000) (noting plan administrator's forum shopping in bringing action in Michigan for declaratory relief to preempt Florida state court action by participant).

304. *See, e.g.*, Gluck v. Unisys Corp., 960 F.2d 1168, 1179 (3d Cir. 1992) (refusing to apply Michigan statute of limitations to an ERISA action by Michigan residents brought in Pennsylvania despite a policy to discourage forum shopping among states with different limitations); *see also In re* Masters Mates & Pilots Pension Plan & IRAP Litig., 957 F.2d 1020, 1027 (2d Cir. 1992) (refusing to use state law for ERISA indemnification as it would lead to forum shopping); Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197, 1202–03 (10th Cir. 1990) (adopting a choice of law rule other than the forum state to select the most analogous state statute of limitations to reduce forum shopping).

305. *See, e.g.*, Jacobson v. Hughes Aircraft Co., 105 F.3d 1288, 1302 (9th Cir. 1997) (listing the factors a court must consider for transferring venue: "(1) the relative convenience of the selected forum and the proposed forum; (2) the possible hardship to the plaintiff if the court grants the motion; (3) the interests of justice; and (4) the deference to be accorded the plaintiffs' [sic] choice of forum"), *rev'd on other grounds*, 525 U.S. 432 (1999) (reversing dismissal for failure to state an ERISA claim after transfer of venue).

even one area of law show no degree of uniformity.[306] Since state law cannot provide a uniform rule, federal law must be the source of the uniform rule.

Congress has also considered this same problem for other federal statutes. Commentators and courts had called upon Congress to eliminate the problems of forum shopping, which consumes judges' time without advancing justice, in connection with the most analogous state statute of limitations rule by enacting a federal limitations period for all federal causes of action.[307] Congress eventually created a Federal Courts Study Committee, which recommended a retroactive uniform federal statute of limitations.[308] Congress acknowledged the problems associated with the most analogous state statute of limitations rule, such as the determination of which state's law applies under various choice of law rules, the incentive for litigants to forum shop caused by varying results among the circuit courts, and the disruption to the development of federal common law.[309] In 1990 Congress followed the Committee's recommendations, except for the retroactive feature.[310] Congress failed to extend the act retroactively, to such statutes as ERISA, believing that law was well-settled for some of these federal statutes.[311] Clearly, such is not yet the case for ERISA.[312]

Third, since ERISA requires a federal statute of limitations, the court must determine whether the chosen federal statute of limitations affords a closer fit with the cause of action than does the available state statutes of limitations. The concern of the Supreme Court's methodology is the commonality of purposes and similarity of the elements of the causes of action, both between the statute missing the limitations period and the chosen federal statute, as opposed to the available state statutes.[313] There exist two obvious applicable federal statutes of limitations, the ERISA statute of limitations for fiduciary

306. *See supra* notes 49–50, 56–57 and accompanying text.

307. *See* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 379–80 (2004); Sentry Corp. v. Harris, 802 F.2d 229, 246 (7th Cir. 1986); Mitchell A. Lowenthal et al., *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations,* 65 CORNELL L. REV. 1011, 1105 (1980).

308. *See Jones,* 541 U.S. at 380.

309. *See* H.R. REP. NO. 101-734, at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870.

310. *See* 28 U.S.C. § 1658 (1994) (providing the statute of limitations for congressional statutes enacted after December 1, 1990); *see also Jones,* 541 U.S. at 380–81 (extending the congressional rule to those statutes with causes of action amended after December 1, 1990).

311. *See* H.R. REP. NO. 101-734, at 24, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870.

312. *See supra* section II.A.

313. *See supra* note 225 and accompanying text.

duty breaches[314] and the federal residual statute of limitations.[315] As to the commonality of purposes, there can be no better statute of limitations than the ERISA statute of limitations. Congress obviously included it in ERISA since its purpose facilitated ERISA's aims.[316] As to any competing analogous state remedy limitations, as far as employee plans are concerned, state law was a hindrance to participant remedies.[317] This was the reason for replacing state law with the reticulated ERISA remedies.[318] No state law has as its purpose the protection of moneys in, and rights derived from, employee benefit plans.[319]

As to the similarity of the elements of the causes of action, the elements of the employer retaliatory discrimination lawsuit and the delinquent employer contribution lawsuit resemble the ERISA fiduciary breach lawsuit. The only difference is that the violated ERISA provision is not the fiduciary duty breach section,[320] but the section prohibiting employer retaliatory discrimination[321] or the section requiring payment of the employer contributions in accordance with multiemployer plans or collective bargaining agreements.[322] The other elements are identical. No competing analogous state cause of action can come close, since, due to ERISA preemption,[323] state law cannot relate to employee benefit plans.[324] The elements of an ERISA cause of ac-

314. Employee Retirement Income Security Act (ERISA) of 1974 § 413, 29 U.S.C. § 1113 (2000).

315. 28 U.S.C. § 1658 (1994).

316. This comports with Justice Scalia's remarks about this test. *See supra* notes 227–29 and accompanying text. The one situation, not present for ERISA, when this test is not so easily met is when the analogous federal statute of limitations comes from another federal statute. *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987) (applying the limitations period of the Clayton Act to a RICO action).

317. *See* George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611, 647–49 (1994) (providing the legislative history for expanded federal remedies over state remedies).

318. *See id.*

319. *See* S. REP. NO. 93-127, at 36 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4872 ("[There is] evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and *in order to completely secure the rights and expectations* brought into being by this landmark reform legislation.") (emphasis added).

320. Employee Retirement Income Security Act (ERISA) of 1974 § 404(a), 29 U.S.C. § 1104(a) (2000).

321. *Id.* § 510.

322. *Id.* § 515.

323. *See id.* § 514(a).

324. *Cf.* Mackey v Lanier Collection Agency & Serv., 486 U.S. 825, 829 (1988) ("[S]tate laws which make 'reference to' ERISA plans are laws that 'relate to' those plans within the meaning of [ERISA] § 514(a).").

tion differ significantly from those of state law,[325] so much so that the circuit courts frequently cannot devolve on a uniform state action.[326] Furthermore, the employer retaliatory discrimination lawsuit comprises many different acts[327] and so relates to several analogous state actions, not one. This explains the wide variety of most analogous state statutes of limitations found by the circuit courts.[328] The Supreme Court once before required the use of a federal statute of limitations when the circuit courts looked to the underlying predicate to the offense under the most analogous state statute of limitations rule.[329] The inability of state law to provide a most analogous statute of limitations for the ERISA employer retaliatory discrimination lawsuit means the federal ERISA statute of limitations clearly is the "significantly more appropriate" statute of limitations.

These same principals apply to the other lawsuits of interest, even in the event a court is unable to the see the fiduciary duty involved. They all involve breaches of ERISA provisions or plan provisions, not as a simple contract but rather as an altruistic instrument with standards above that of the marketplace, and hence parallel the ERISA fiduciary duty breach action. The employee benefit plan is similar to the hybrid situation, a contract with trust-like duties imposed on employers, administrators, and trustees. Consequently, the ERISA statute of limitations should govern virtually all the actions under ERISA section 502.

325. *See, e.g.*, Roark v. Humana, Inc., 307 F.3d 298, 304 (5th Cir. 2002) (requiring the plaintiff to replead case under ERISA section 502(a) instead of common law breach of good faith and fair dealing and contract as originally pled, or case would be dismissed); Denton v. First Nat'l Bank, 765 F.2d 1295, 1297 n.2 (5th Cir. 1985) (noting that two trials were required because the parties were unaware at the first trial that ERISA applied).

326. *See supra* section II.A.

327. *See, e.g.*, Lessard v. Applied Risk Mgmt., 307 F.3d 1020 (9th Cir. 2002) (excluding employees on medical leave from automatic transfer to plan of successor); Hashimoto v. Bank of Haw., 999 F.2d 408 (9th Cir. 1993) (involving termination for whistleblowing); Tavoloni v. Mount Sinai Med. Ctr., 984 F. Supp. 196 (S.D.N.Y. 1997) (involving the use of salary reduction and harassment to reduce retirement benefit), *aff'd*, 198 F.3d 235 (2d Cir. 1999); Burditt v. Kerr-McGee Chem. Corp., 982 F. Supp. 404 (N.D. Miss. 1997) (involving the misclassification of employees as independent contractors and then as leased workers to avoid paying pension benefits); Pickering v. USX Corp., 809 F. Supp. 1501 (D. Utah 1992) (involving the indefinite idling of the plant, disguised as a shutdown, to reduce pension costs); Healy v. Axelrod Const. Co. Defined Benefit Pension Plan & Trust, 787 F. Supp. 838 (N.D. Ill. 1992) (involving fraudulently inducing a retiree to execute a waiver to prevent him from obtaining pension benefits).

328. *See supra* section II.A.

329. *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 148 (1987) (borrowing another federal statute's limitations period for a RICO action).

C. The Plan Specified Period of Limitations

For those plan administrators desiring to avoid the potential for litigation under the most analogous state statute of limitations, both for the choice of law and the determination of the most analogous state cause of action, and who are also impatient for the Supreme Court to provide guidance to the circuit courts after almost thirty years of inaction, there is a third option. That option involves a contractually specified period of limitations. Justice White's dissent in *Hoosier Cardinal Corp.* noted the possibility of providing for contractual limitations periods in the collective bargaining agreement as a method to achieve a uniform limitations period for LMRA actions.[330] The parties to the contract could agree to a limitations period, thereby providing uniformity for that plan.

The Supreme Court enforces contractual limitations periods unless there is some state statute or public policy voiding the provision or the provision is unreasonable.[331] The existence of an otherwise applicable state statute of limitations does not preclude enforcement of the contractual limitations period.[332] The circuit courts have even suggested that the absence of federal statutes of limitations for some federal causes of action shows congressional willingness to accept reasonable contractual limitations periods for those causes of action.[333] The public policy embodied in statutes of limitations is the promptitude of litigation, not the prohibition of the contractual limitations.[334] ERISA

330. *See* Int'l Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 711 & n.2. (1966) (White, J., dissenting) (noting that for uniformity, federal law would have to determine the validity of contractual limitation periods since state law varied with respect to the enforceability of such provisions).

331. *See* Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 608 (1947) (upholding limitations period in constitution of fraternal benefit society over longer South Dakota statute of limitations).

332. *See* Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868) (upholding insurance policy provision over longer state statute of limitations, as the public policy behind statutes of limitation is to encourage prompt filing lawsuits, not to prohibit contractual provisions); *see also* Thompson v. Phenix Ins. Co., 136 U.S. 287, 298 (1890) (holding that state statutes of limitations can also be lengthened by contractual waiver).

333. *See* Cange v. Stotler & Co., 826 F.2d 581, 584 (7th Cir. 1987) ("Congress' silence . . . shows its willingness to accept reasonable limitations periods rather than a strong policy in favor of some particular limitations period. Because Congress did not provide an express statute of limitations [for this] action, allowing parties to contract for shorter limitations periods than that which would be borrowed from state law is not contrary to public policy.").

334. *See* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 180–82 (1964) (holding that Florida's prohibition on statutes of limitations periods shorter than five years voided the contractual limitations period of the Illinois insurer since insurance contract did not specify which law governed the contract); La. & W.R. Co. v. Gardiner, 273 U.S. 280, 282–84 (1927) (holding that a federal act prohibited shorter period than two years from notice voided a contractual limitation of two years from shipment). *But see* Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292

contains no such prohibition. The Supreme Court has determined that unreasonable contractual limitations are those so short as not to allow sufficient time to discover the breach.[335] The circuit courts have followed this rule for various federal statutes.[336]

To accomplish the contractual limitations period, the plan's specification of a limitations period needs to be express; a mere "governed by the law of X state" is insufficient.[337] Consequently, a court should enforce a contractual limitations period contained in the plan or employment contract for the multitude of ERISA causes of action, provided it is sufficiently long enough to permit discovery of the facts underlying the cause of action. Rather than risk that a court would find a particularly short period of limitation unreasonable, the plan could specify a period of limitation loosely paralleling the three-year ERISA statute of limitation.[338]

V. CONCLUSION

The circuit courts have created a quagmire of litigation for the interstate employee benefit plan. That quagmire involves the wasteful-

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U.S. 143, 148–49 (1934) (upholding contractual limitations in face of state statute voiding such provisions, since contract had no relation to forum state); Home Ins. Co. v. Dick, 281 U.S. 397, 408–09 (1930).

335. *See* S. Express Co. v. Caldwell, 88 U.S. (21 Wall.) 264, 269–71 (1874) (holding that a ninety-day limitations period for bills of lading was reasonable as it allowed sufficient time to discover breach); *see also* Mo., Kan. & Tex. Ry. Co. v. Harriman, 227 U.S. 657, 672 (1913) (same). Some state courts add that unreasonable contractual limitations also include those created by undue influence. *See, e.g.*, Fageol Truck & Coach Co. v. Pac. Indem. Co., 117 P.2d 669, 671–72 (Cal. 1941); Kozemko v. Griffith Oil Co., 682 N.Y.S.2d 503, 505 (N.Y. App. Div. 1998); *see also* B.H. Glenn, *Validity of Contractual Time Period, Shorter Than Statute of Limitations, for Bringing Action*, 6 A.L.R.3d 1197, 1207 (1966).

336. *See, e.g.*, Truck Components, Inc. v. Beatrice Co., 143 F.3d 1057, 1060 (7th Cir. 1998) (involving the Comprehensive Environmental Response, Compensation, and Liability Act); *In re* VMS Ltd. P'ship Sec. Litig., 26 F.3d 50, 51 (7th Cir. 1994) (involving an arbitration agreement under the Exchange Act); *Cange*, 826 F.2d at 584 (involving the Commodity Exchange Act); Reichhold Chems., Inc. v. United States, 11 Cl. Ct. 150, 153 (1986) (involving the Interstate Commerce Act limitations period); *see also* Gallegos v. Mount Sinai Med. Ctr., 210 F.3d 803, 809–10 (7th Cir. 2000) (applying doctrine to ERISA exhaustion of remedies). For the application to ERISA cases, *see supra* section II.B.

337. *See, e.g.*, Gluck v. Unisys Corp., 960 F.2d 1168, 1179–80 (3d Cir. 1992); *see also* Federal Deposit Ins. Corp. v. Peterson, 770 F.2d 141, 142 (10th Cir. 1985) (applying the federal six-year limitations period for contracts instead of the Illinois ten-year period in an FDIC action to enforce a guarantee governed by Illinois law); Des Brisay v. Goldfield Corp., 637 F.2d 680, 682 (9th Cir. 1981) (applying the Washington three-year limitations period instead of the British Columbia six-year limitations period in a securities fraud case occurring prior to the decision in *Lampf*).

338. *See supra* note 245 and accompanying text; *see also* Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301 (11th Cir. 1998) (upholding a plan ninety-day period of limitation).

ness of litigating over choice of law rules and the subsequent most analogous state statute of limitations rule. The circuit courts created this quagmire by merely adopting the LMRA's most analogous state statute of limitations rule as the ERISA rule, without considering either congressional intent for ERISA or the Supreme Court's directives with respect to the use of the most analogous state statute of limitations rule.

The Supreme Court designed the LMRA rule, adopted in 1966, based on congressional legislative history suggesting that the LMRA lacked a need for uniformity in litigating employee benefit plan matters. Congress changed this conclusion when it adopted ERISA in 1974. Plan administrator's of interstate plans need to administer employee benefit plans without reference to varying state laws. So Congress preempted state law insofar as it relates to employee benefit plans. The Supreme Court has specifically stated that this need for uniformity extends to the ERISA causes of action and awards under them.

ERISA contains a uniform federal statute of limitations for fiduciary duty breaches. Due to a misunderstanding of the Supreme Court's early pronouncements in 1985 concerning fiduciary duty breaches, the circuit courts concluded that the ERISA statute of limitations did not apply to any lawsuit except one for plan recovery of damages. Consequently, the circuit courts concluded ERISA contained no statute of limitations for the informational penalty lawsuit, the benefits due lawsuit, and the equitable remedy to enforce plan provisions, authorizing the circuit courts to apply the most analogous state statute of limitations to these ERISA lawsuits. The Supreme Court, however, in 1996 confirmed that other ERISA causes of action also seek remedies for fiduciary duty breach. Consequently, the ERISA statute of limitations applies to these three ERISA causes of action, not the most analogous state statute of limitation rule.

Due to another misunderstanding of the pre-1983 Supreme Court's directives, the circuit courts have concluded that, for those ERISA causes of action for which the ERISA statute of limitations does not apply, the court is automatically authorized to apply the most analogous state statute of limitations. Since 1983, the Supreme Court has made it clear that the most analogous state statute of limitations rule is authorized only if consistent with federal policy as delineated by Congress. The Supreme Court has spelled out a three-step process to determine whether to use a uniform federal statute of limitations and avoid the most analogous state statute of limitations: (1) whether the federal cause of action demands a uniform statute of limitations; (2) if so, whether the uniform limitations period should come from federal law; and (3) if so, whether the selected federal statute of limitations constitutes a significantly closer fit to the federal cause of action. Applying this three-step process to the ERISA causes of action results in using the ERISA statute of limitations, not only for the informational penalty lawsuit, the benefits due lawsuit, and the equitable remedy to enforce plan provisions, but also for the employer retaliatory discrimination lawsuit and the delinquent employer contribution lawsuit.

For those sponsors of interstate employee benefit plans not desirous of waiting for the circuit courts eventually to follow the law, the alternative is to provide for a contractual limitations period in the plan, the participant's employment contract, and in the collective bargaining agreement that is not unreasonably short. The circuit courts have upheld these contractual provisions in ERISA cases.

The time has come to end the fumbling of the limitations issue and to conform ERISA litigation practices to Justice Byron "Whizzer" White's directive and congressional desires. Congress has recognized the wastefulness of the most analogous state statute of limitations and eliminated it for federal causes of action enacted after 1991. Congress did not include ERISA causes of action, enacted before 1991, in the favored group under the mistaken belief that the law was well-settled for these older statutes. The recent ERISA litigation, however, belies that belief. Following the law as laid out by the Supreme Court will eliminate the problem.