The ERISA Common Law and the Limits of Reticulation

"I have to make a confession. We work with these things all the time. I have to say it is a real pain every time we get into ERISA or pension benefits or other problems in the Labor Committee; they are almost impossible to fathom, they are complex, they are boring, they are detailed, they are difficult. And as much as I work with these areas, as much as I work in this area, I do not know what is in this current version."

Senator Orrin Hatch; Congressional Record, S. 13289, September 18, 1990
(Remarks made in connection with the passage of the Older Workers Benefit Protection Act in 1990.)

As Senator Hatch's floor statement points out, ERISA is an uncommon law and Congress tends to deal with it in uncommon ways. It has been called all sorts of names by both friends and foes. The Supreme Court, perhaps sharing the good Senator's assessment of the law, has come up with a more curious, and certainly more circumspect, description of the law. When first confronted by an ERISA case in 1980, the Supreme Court told us that ERISA is "reticulated." (*Nachman Corp. v. PBGC*, 446 U.S. 359.)

We never were sure what to make of this "reticulation" business. Our dictionary tells us that "reticulate" means "to have the appearance of a network." We always thought the Supreme Court was alluding to ERISA's detailed and complex nature. We are beginning to think, however, that the Supreme Court really was focusing on the "appearance" part of the definition. ERISA appears to be comprehensive, but the appearance masks some surprising gaps and conflicting themes.

To casual observers, it probably seems ridiculous to suggest that the law has gaps. Isn't this an area of law that suffers from legislative overkill every couple of years? Yes indeed, but the vast bulk of that legislation deals with the tax law provisions of ERISA. The labor

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provisions of ERISA have been amended to include new benefit provisions such as COBRA and HIPAA, but the original provisions of ERISA have been untouched. Surely, what particular gaps one finds in the labor provisions of ERISA depends on one's political leanings. Many plaintiffs and plenty of commentators have contended that there are serious gaps in the ERISA law of remedies and that things like consequential damages should be allowable. Others find gaps in the basic ERISA protection of welfare plans and argue for the protection of these plans based on estoppel-type theories. Others might agree that the lack of a statute of limitations for benefit claims is a curious gap in the statute, but argue that there are few other gaps in the law.

While technical corrections legislation has become commonplace in the realm of tax laws, the labor provisions of ERISA never have been the subject of a good technical corrections scrubbing. This has not been for want of effort. A serious technical corrections bill was introduced in 1979—the so-called ERISA Improvements Act of 1979—but the effort fell apart rather quickly. Technical corrections bills in the tax area often get a boost by being coupled with other substantive legislation, and substantive ERISA legislation has been rare. The conventional explanation for the infrequency of ERISA legislation—even technical changes—is the difficulty of working with four different congressional Committees. Maybe the explanation is more basic, though. Perhaps Senator Hatch had it right. Maybe ERISA legislation is just too boring for legislators. Nature abhors a vacuum, of course, so congressional inaction has emboldened the federal courts to jump into the fray and fashion ERISA law—the so-called common law of ERISA—to fill some of the statutory gaps.

The ERISA Common Law

By now it is considered hornbook law that Congress delegated broad powers to the federal courts to fashion a federal common law of ERISA. We all know the judicial cues. If the first paragraph of an opinion tells us that ERISA is "comprehensive and reticulated," we know the courts have found the answer in the statute itself. If, in contrast, the opinion mentions ERISA's "interstices," you know the court is about to launch into its ERISA common law-making mode. To date, there seem to be more cases dealing with the ERISA common law than with the actual statutory language. At last look, there are over two thousand federal decisions discussing some aspect of the ERISA common law. With all of this case law, it is easy to forget how weak a statutory base there is for the whole notion of an ERISA common law.

It may surprise many to recall that the statute nowhere mentions the right of the federal courts to develop a common law of ERISA. Nor, for that matter, do the words "ERISA common law" appear in any of the Committee Reports. The first inkling that there is such a thing as an ERISA common law was found in a footnote in the Supreme Court's opinion in the case of *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983). The idea of a federal common law of ERISA was first discussed in some length in Justice Brennan's concurring opinion in *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985), and subsequently alluded to in such cases as *Pilot Life Insurance v. Dedeaux,* 481 U.S. 41 (1987), and *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989).

Re-reading Justice Brennan's opinion in light of more recent judicial assaults on the use of legislative history, it seems odd that the Supreme Court found support for its ERISA common law-making powers in some fairly low-level legislative history. The legislative history the Supreme Court found so convincing consists of two floor statements by the Senate managers of ERISA and a passage in an obscure Senate Labor Committee report dealing with a comparison of ERISA to the Labor Management Relations Act (for the citations, see 473 U.S. 134, at 156 (1985)). For a detailed critique of the Supreme Court's ERISA lawmaking, we recommend an article by Professor Jeffrey A. Brauch in the *Harvard Journal of Law and Public Policy.* ("The Federal Common Law of ERISA," 21 *Harv. J.L. & Pub Policy* 541 (1998).) Professor Brauch criticizes the Supreme Court for its judicial activism in light of the meager legislative history and argues that the Supreme Court has usurped the powers of Congress in endorsing an ERISA common law.

Whether or not the Supreme Court stretched the law to conclude that the federal courts are empowered to fashion our ERISA common law, the fact remains that the federal courts have readily embraced the idea of creating the common law of pensions. Perhaps more interesting than the statutory predicate of the ERISA common law, however, are some of the peculiar formulations of the ERISA common law, especially in view of the ERISA preemption provision.

Uniformity and the ERISA Common Law

ERISA is especially well-known for the scope of its preemption rule, one that the Supreme Court has labeled as "deliberately expansive." (*Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 45-46 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504,

523 (1981).)) ERISA's broad preemption provision was intended to avoid "conflicting employer obligations and variable standards of recovery" under various states' laws. (*Singer v. Black & Decker Corp.*, 964 F.2d 1449, at 1453 4th Cir. 1992). Given a clearly-expressed congressional mandate for uniformity, the notion of an unfettered ERISA common law seems at odds with one of the basic tenets of ERISA. Can it be that the same Congress that adopted such an expansive state preemption provision also intended to empower the federal courts with broad common law-making powers, without any guarantees of judicial uniformity? That appears to be the case.

The developing law in the area of ERISA disclosure offers a glimpse into the problem. A number of the federal circuits seem to agree that the scope of the ERISA disclosure rules is imperfect and that the federal common law should expand the required disclosure requirements to fill the gap. At this point, there is a significant gulf between the various courts as to the scope of the ERISA disclosure requirements. Some courts, in concert with the Supreme Court's decision in *Varity v. Howe,* 516 U.S. 489 (1996), simply have concluded that a plan fiduciary has a duty not to lie. (*Switzer v. Wal-Mart Stores, Inc.*, 52 F.3d 1294, 1299 (5th Cir. 1995).) Other courts have held that a fiduciary has a much broader duty to inform participants of various things that they need to know about even if a participant did not ask for any particular advice. (*Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 991 (9th Cir. 1993).) So, as it now stands, a fiduciary only has to answer questions honestly if he sits in the Fifth Circuit, but he better start talking if he sits in the Ninth Circuit. What is uniform about that?

All hope is not lost with the ERISA disclosure cases. There is some possibility of uniform doctrinal development as the cases go along the appellate trail and move toward Supreme Court resolution. Even without Supreme Court review, these cases offer the possibility of uniformity because they share a common starting point—general principles found in the restatement of trusts and traditional fiduciary law. In other areas, however, the federal courts have adopted a wholly different analysis—one that is guaranteed to ensure a non-uniform ERISA common law.

Missing Statute of Limitations

The prime example of a non-uniform ERISA common law is found in the case law dealing with the ERISA statute of limitations for various participant benefit claims. Despite the finely-tuned timetables that appear in the Labor Department's regulations on claims process-

ing, it is one of ERISA's great peculiarities that the statute does not include a statute of limitations for civil actions other than fiduciary claims (ERISA Section 413) and certain multi-employer plan actions (ERISA Section 4068(d)). How have the federal courts dealt with this incredible gap in the law? By crafting a federal common law statute of limitations, of course. And, what does a court do when there is no clear-cut statute of limitations? Do you apply the limitations period that applies to fiduciary breaches under ERISA? Well, only a handful of cases have done that. (*Meagher v. IAM Pension Plan,* 856 F.2d 1418 (9th Cir. 1988), certiorari denied, 490 U.S. 1039 (1989).) Instead, the vast majority of the courts have decided to adopt the most analogous state law in the area where the case is brought. (*Meade v. Pension Appeals and Review Committee*, 966 F.2d 190 (6th Cir. 1992).) In other words, you adopt a different statute of limitations for a case brought in each different state of the union.

The federalizing of a particular state statute of limitations involves a number of decision-points. First, the courts have had to decide what state law to look at. This involves a conflicts of laws question. Generally, the courts decide to look to the state law of the forum state—the state in which the federal action is brought. (*Harrison v. Digital Health Plan,* 183 F.3d 1235 (11th Cir. 1999).) Other courts employ a different approach; these courts use more traditional conflicts-of-laws rules and look to the statute of limitations of the state that has the most "contacts" to the matters involved. (*Chung v. Pomona Valley Community Hospital,* 667 F.2d 788 (9th Cir. 1992).) The courts also have to decide whether any state law's tolling principle applies. Once the court decides on which particular state's law should apply, the fun really begins. The federal court first must decide which state law applies. For basic ERISA benefit claims, the courts generally look to the state statute of limitations for contract claims. (*Hogan v. Kraft Foods,* 969 F.2d 142 (5th Cir. 1992).) Some states have multiple contract law statutes of limitations, so the court has to decide which to look at. Delaware, for example, has a three-year statute of limitations for general contract actions, but a one-year statute for employment disputes. The Third Circuit recently upheld the use of the one-year statute of limitations for an ERISA benefits claim in *Syed v. Hercules, Inc.*, 214 F.3d 155 (3d Cir. 2000).

Matters are further complicated if a case involves an ERISA Section 510 claim, which involves an assertion of a retaliatory firing of the employee. Some courts have held that the state statute of limitations for wrongful terminations should apply rather than looking to the state contract law limitations period. (*McClure v. Zoecon,*

Inc., 936 F.2d 977 (5th Cir. 1991).) This only serves to complicate the analysis since some wrongful terminations violations implicate state tort law as well as contract law and a state may have a different statute of limitations for tort claims than it has for contract actions. Still other courts look to the state limitations period for employment discrimination claims. (*Held v. Manufacturers Hanover Leasing Corporation,* 912 F.2d 1197 (10th Cir. 1990).)

As goes without saying, the statute of limitations cases are a mess, and this ignores the question whether choice of law provisions in plans apply in the analysis. Choice of law provisions are those boilerplate clauses at the end of most plans saying which state law will be used to help interpret the plan and, in some cases, have been used to determine which state's statute of limitations should apply. All in all, it is difficult to think of a more convoluted way of deciding how long a period a particular participant has to assert his or her rights in court. You can find ERISA benefit claims cases applying a 15-year statute of limitations (*Meade v. Pension Appeals and Review Committee*) and, as noted previously for actions in Delaware, cases supporting a one-year statute. Maybe the plaintiffs' bar likes the idea of an uncertain statute of limitations, but the situation does not make much sense if the goal is uniformity of participant rights.

Plan-Imposed Limits

While the matter of settling a uniform statute of limitations would seem to be a simple thing to correct in future legislation, don't hold your breath waiting. In the meanwhile, there are steps employers can take to protect themselves from an uncertain and extended statute of limitations. There are a number of cases that support the enforceability of a plan provision that sets forth limitations on the timing of a participant suit for benefits under ERISA. (*John Doe v. Blue-Cross & Blue Shield United of Wisconsin,* 112 F.3d 869 (7th Cir. 1997); *Northlake Regional Medical Center v. Waffle House System Employee Benefits Plans,* 160 F.3d 1301 (11th Cir. 1998).) A provision of this sort must be well-crafted, but seems worth the effort given the stakes involved.

Conclusion

Congress never carefully considered the idea of an ERISA common law, and the unchecked development of the ERISA common law invites variable standards of recovery for plan participants in

different jurisdictions. The statute of limitations for benefit claims presents the starkest case. Does it make any sense that an identical benefit claim can be pursued in an Ohio federal court up to 15 years after the benefit is denied, but only one year in Delaware? The irony is evident: while ERISA broadly preempts all sorts of state laws that "relate to" ERISA plans, the ERISA common law has federalized other state laws that do not so relate. It is an uncommon common law that permits such variances. Unless and until Congress steps into the breach, employers should take what steps they can to protect their interests. Adding a specific statute of limitations provision to the employer's plans is something every plan sponsor should consider.

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