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The Potential Advantage of Incorporating a Contractual Limitations Period into Welfare Benefit Plans

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The Employee Retirement Income Security Act of 1974 (ERISA)[1] provides for "appropriate remedies, sanctions, and ready access to federal courts"[2] through various statutorily created civil actions such as the benefits-due lawsuit, the breach of fiduciary duty lawsuit, the information penalty lawsuit, the equitable remedy lawsuit, and the employer contribution lawsuit.[3] However, it does not include a statute of limitations for ERISA actions other than an action for breach of fiduciary duty. Without a clear directive from either Congress or the Supreme Court, the circuit courts have turned to state law to determine the most appropriate limitations periods in all other actions that arise under ERISA.

This article provides an overview of circuit court decisions in the benefits-due suit, narrowed in scope to suits brought by "plan participants" or "beneficiaries" of welfare benefit plans. We examine the general rule adopted by the circuits that in the benefits-due lawsuit courts will borrow the most analogous state statute of limitations, which is usually—but not always—an action based on a written

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contract. We then review how some plans and plan administrators have successfully avoided litigation under the most analogous state statute of limitations through a contractual limitations period incorporated into the plan. Finally, we analyze cases where limitations period provisions were not enforced by the court, and offer guidance as to how to incorporate an enforceable contractual limitations period into plan documents.

THE GENERAL RULE: APPLYING THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS PERIOD

The ERISA benefits-due lawsuit arises under ERISA Section 1132, which provides that a plan "participant or beneficiary" has standing to bring a civil action "to recover benefits due to him under the terms of his [employee benefit] 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."[4]

How one acquires "participant or beneficiary" status is statutorily defined. ERISA defines participant as "any employee or former employee of an employer…who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer…or whose beneficiaries may be eligible to receive any such benefit."[5] "Beneficiary" is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."[6] The Supreme Court has held that, "[i]n order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."[7]

ERISA does not provide a statute of limitations period for the benefits-due suit.[8] Thus, all the circuits borrow the most closely analogous state limitations period. In practice "[t]his…has spawned much litigation…[because] for each state, the circuit courts need to resolve the issue of the most analogous state statute of limitations."[9] All states have a multiplicity of potentially applicable limitations periods; thus, "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."[10]

Most courts considering a benefits-due lawsuit adopt the breach of written contract action as the most analogous limitations period.[11] However, this practice has not provided any uniform limitations rule.[12] The statute of limitations period for an action on a written contract varies from jurisdiction to jurisdiction, and some states provide for different limitations periods depending on the type of contract involved.

Other federal courts have analogized the benefits-due lawsuit to various other state causes of action. For example, the Third Circuit

applying Delaware law viewed a benefits-due action under ERISA as an action to recover wages.[13] The Fourth Circuit applying Virginia law viewed the benefits-due action as an action on an insurance policy.[14] And a district court in the First Circuit (applying New Hampshire law) and the Fifth Circuit (applying Louisiana law) viewed the benefits-due action as a personal action for which the limitations periods were three years and ten years, respectively.[15]

Figure 1 is a 50-state survey of the most analogous state statutes of limitations in each jurisdiction. The states are organized by circuit; next to each state the most analogous state statutory limitations period is listed along with the court case that decided the issue. The scope of the survey is narrow. It only considers cases that dealt with ERISA welfare benefit plans, in which a plan participant challenged a denial of benefits. Those courts that have considered the most analogous state statute of limitations in the ERISA benefits-due lawsuit have incorporated many case-specific facts into their analyses (*e.g.*, the manner in which an ERISA plan is funded); new facts may change the outcome in otherwise similar cases.

Figure 1. Fifty-State Survey—Most Analogous State Statutes of Limitations

Jurisdiction	Analogous Statute	Time to File Suit	Citation
1st Circuit			
Maine	General Civil Action, 14 Me. Rev. Stat. Ann. tit. 14, § 752	6 years	*McLaughlin v. Unum Life Ins. Co. of Am.,* 224 F. Supp. 2d 283, 287 (D. Me. 2002)
Massachusetts	Action on a Contract, Express or Implied, Mass. Gen. Laws ch. 260, § 2	6 years	*Alcorn v. Raytheon Co.,* 175 F. Supp. 2d 117, 121 (D. Mass. 2001)
New Hampshire	Personal Action (Catch-All Statute), N.H. Rev. Stat. Ann. § 508:4(I)	3 years	No case directly on point. *But see Lund v. Citizens Fin. Group, Inc.,* 1999 WL 814341, *5 (D.N.H. 1999) ("The most analogous New Hampshire statute of limitations [for actions to recover benefits or clarify rights to future benefits] is that governing personal actions, including breach of contract.")
Rhode Island	General Civil Action, R.I. Gen. Laws § 9-1-13(a)	10 years	No authority found. However, in Rhode Island, the statute of limitations for a civil action, which governs an action on a written contract, is ten years.

Jurisdiction	Analogous Statute	Time to File Suit	Citation
2d Circuit			
Connecticut	Action on a Contract, Written, Express or Implied, Conn. Gen. Stat. § 52-576(a)	6 years	*Kraynak v. Fin. Accounting Found. Long Term Disability Plan,* 2006 WL 3462575, *1 (D. Conn. 2006)
New York	Action on a Contract, Written or Implied, [N.Y. Civil Prac. Law & Rules] § 213(2) (McKinney)	6 years	*Lowry v. Aetna Life Ins. Co.,* 1996 WL 529211, *2 (S.D.N.Y. 1996)
Vermont	General Civil Action (Catch-All Statute), Vt. Stat. Ann tit. 12 § 511	6 years	*Borowski v. Inter'l Bus. Mach. Corp.,* 928 F. Supp. 424, 427 (D. Vt. 1996)
3d Circuit			
Delaware	Action to Recover for Work, Labor, or Personal Services, Del. Code Ann. tit. 10, § 8111	1 year	*Syed v. Hercules, Inc.,* 214 F.3d 155, 159–161 (3d Cir. 2000)
New Jersey	Civil Action (Catch-All Provision Governing Actions on a Contract, Express or Implied), N.J. Stat. Ann. § 2A:14-1 (West)	6 years	*Sturgis v. Mattel, Inc.,* 2007 WL 4225277, *5 (D.N.J. 2007)
Pennsylvania	Action on a Written Contract, 42 Pa. Cons. Stat. Ann. § 5525(a)(8) (West)	4 years	*Koert v. GE Group Life Assur. Co.,* 2007 WL 595028, *1 (3d Cir. 2007)
4th Circuit			
District of Columbia	Action on a Simple Contract, Express or Implied, D.C. Code § 12-301	3 years	No authority found. However, in the District of Columbia, the statute of limitations for an action on a simple contract, express or implied, is three years.
Maryland	General Civil Action, Md. Code Ann., [Cts. & Jud. Proc.] § 5-101 (LexisNexis)	3 years	*Martone v. Conn. Gen. Life Ins. Co.,* 1992 WL 385245, *2 n.4 (4th Cir. 1992)
North Carolina	Action on a Contract, Express or Implied, N.C. Gen. Stat. Ann. § 1-52(1) (West)	3 years	*White v. Sun Life Assur. Co. of Canada,* 488 F.3d 240, 251 n.4 (4th Cir. 2007); *Woody v. Walters,* 54 F. Supp. 2d 574, 578–579 (W.D.N.C. 1999)
South Carolina	Action on a Contract, Express or Implied, S.C. Code Ann. § 15-3-530(1)	3 years	No authority found. However, in South Carolina, the statute of limitations for an action on a contract, express or implied, is three years.

Jurisdiction	Analogous Statute	Time to File Suit	Citation
Virginia	Action on an Insurance Policy, Va. Code. Ann. § 38.2-314	The general Virginia statute of limitations for an action based in contract is five years; however, at least two courts applying Virginia law have held that the statute pertaining to insurance contracts is also applicable. That statute provides that no provision in an insurance policy shall be valid if it limits the time within which an action may be brought to *less than one year* after the loss occurs or the cause of action accrues.	*See Payne v. Blue Cross & Blue Shield of Va.,* 1992 WL 235537, *2 (4th Cir. 1992); *see also Mirabile v. Life Ins. Co. of N. Am.,* 2007 WL 1726444, *2 (E.D. Va. 2007)
West Virginia	Action on a Written Contract, W. Va. Code § 55-2-6	5 or 10 years	No authority found. However, in West Virginia, the statute of limitations for an action on a written contract when "signed by the party to be charged thereby" is ten years. The statute of limitations for other contracts, express or implied, is five years.
5th Circuit			
Louisiana	Personal Action (Catch-all Statute), La. Code Civ. Proc. Ann. art. 3499	10 years	*Hall v. National Gypsum Co.,* 105 F.3d 225, 230 (5th Cir. 1997).
Mississippi	Actions Without Prescribed Period of Limitation, Miss. Code Ann. § 15-1-49(1)	3 years	*Jones v. Wal-Mart Stores, Inc.,* 2007 WL 2782880, *2 (N.D. Miss. 2007)
Texas	Action on a Written Contract, Tex. [Civ. Prac. & Rem.] Code Ann. § 16.004(a) (Vernon)	4 years	*Dye v. Assocs. First Capital Corp. Cafeteria Plan,* 2006 WL 2612743, *2 (E.D. Tex. 2006)
6th Circuit			
Kentucky	Potentially Applicable Statute: Action for the Profits of or Damages	5 years	No case directly on point. *But see Salyers v. Allied Corp.,* 642 F. Supp. 442, 444 (E.D. Ky. 1986) (in action

Jurisdiction	Analogous Statute	Time to File Suit	Citation
	for Withholding Real or Personal Property, Ky. Rev. Stat. Ann. § 413.120(5) (West); Action for an Injury by a Trustee to the Rights of a Beneficiary of a Trust, Ky. Rev. Stat. Ann. § 413.120(6) (West)		for recovery of pension benefits under ERISA plan, applying five years statute of limitations in analogy to actions sounding in breach of fiduciary duty).
Michigan	Action on a Contract, Mich. Comp. Laws § 600.5807(8)	6 years	*Santino v. Provident Life and Acc. Ins. Co.,* 276 F.3d 772, 776 (6th Cir. 2001)
Ohio	Action on a Written Contract, Ohio Rev. Code. Ann. § 2305.06 (LexisNexis)	15 years	*Meade v. Pension Appeals & Review Comm.,* 966 F.2d 190, 195 (6th Cir. 1992)
Tennessee	Action on a Contract, Tenn. Code Ann. § 28-3-109(a)(3)	6 years	*Shiverdecker v. Life Ins. Co. of N. Am.,* 2007 WL 4124478, *3 (E.D. Tenn. 2007)
7th Circuit			
Illinois	Potentially Applicable Statute: Action on a Written Contract (Brought Under the Wage Payment and Collection Act), 735 Ill. Comp. Stat. Ann. 5/13-206	10 years	No case found directly on point. *But see Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan,* 713 F.2d 247, 252–253 (7th Cir. 1983) (in action to recover pension benefits, holding that when an ERISA plan participant raises a Section 501(a)(1)(B) claim, such claims are essentially creatures of contract law). Seventh Circuit case law concerning how Illinois and Indiana insurance provisions might impact the determination of ERISA statute of limitations questions in benefits-due cases is unclear. *See, e.g., Ingram v. Travelers Ins. Co.,* 1996 WL 23400, *2 (7th Cir. 1996) (group insurance policies must include a three-year statute of limitations provision). *But see Doe v. Blue Cross & Blue Shield United of Wis.,* 112 F.3d 869, 873 (7th Cir. 1997) (holding: (1) the plaintiff's assertion

Jurisdiction	Analogous Statute	Time to File Suit	Citation
			that Wisconsin insurance law prohibited shortening the statute of limitations in an ERISA welfare benefit plan was "particularly dubious because [the employee benefit plan] was self-funded; Blue Cross, though an insurer, was merely acting as the plan administrator"; and (2) the Court need not decide whether state insurance laws applied because such laws were not binding in an ERISA suit).
Indiana	Action on a Written Contract, Ind. Code § 34-11-2-11	10 years	*Favre v. Prudential Ins. Co. of America,* 2006 WL 449204, *5 (N.D. Ind. 2006)
Wisconsin	Action on Contract, Express or Implied, Wis. Stat. Ann. § 893.43 (West)	6 years	No controlling authority. *But see Chilcote v. Blue Cross & Blue Shield United,* 841 F. Supp. 877, 880 (E.D. Wis. 1993) (without deciding what statute of limitations is most analogous to an ERISA benefits-due suit, stating that "[i]t is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations…."); *Doe v. Blue Cross & Blue Shield United of Wisconsin,* 112 F.3d 869, 873 (7th Cir. 1997) ("We may assume without having to decide… that the six-year statute of limitations [for an action on a written contract] is the right one to borrow.")
8th Circuit			
Arkansas	Action on a Written Contract, Ark. Code Ann. § 16-56-111(a)	5 years	*Wilkins v. Hartford Life and Acc. Ins. Co.,* 299 F.3d 945, 948 (8th Cir. 2002)
Iowa	Action on a Written Contract, § Iowa Code Ann. 614.1(5) (West)	10 years	*Shaw v. McFarland Clinic, P.C.,* 363 F.3d 744, 750 (8th Cir. 2004)

Jurisdiction	Analogous Statute	Time to File Suit	Citation
Minnesota	Potentially Applicable Statutes: Actions Based in Accident & Health Insurance, Minn. Stat. Ann. § 62A.04, subd. 2(11) (West); Action to Recover Wages, Overtime or Damages, Minn. Stat. Ann. § 541.07(5) (West)	3 years (Accident/ Health Insurance); 2 years or 3 years if willful (Wages Due)	*See Blaske v. Unum Life Ins. Co. of Am.,* 131 F.3d 763, 764 (8th Cir. 1997) (in action for long-term disability benefits, applying Minnesota's statute of limitations for an action under an accident/health insurance plan). *But see Fairview Health Servs. v. Ellerbe Becket Co. Employee Med. Plan,* 2007 WL 978089, *3 (D. Minn. 2007) ("The Eighth Circuit has held that Minnesota's statute of limitations for claims for recovery of wages applies to an employee's claim for benefits due under 29 U.S.C. § 1132(a)(1)(B).") (internal citations omitted).
Missouri	Action Upon Any Writing, Mo. Rev. Stat. § 516.110(1)	10 years	*Harris v. Epoch Group, L.C.,* 357 F.3d 822, 825–826 (8th Cir. 2004)
Nebraska	Potentially Applicable Statute: Group Sickness & Accident Insurance Policy, Neb. Rev. Stat. s. 44-710.03(11), Neb. Rev. Stat. § 44-767	3 years or period not less favorable to the insured (Group Sickness/Accident)	*Duchek v. Blue Cross & Blue Shield of Dist. of Neb.,* 153 F.3d 648, 650 (8th Cir. 1998)
North Dakota	Action on a Contract, Express or Implied, N.D. Cent. Code § 28-01-16(1)	6 years	No authority found. However, in North Dakota, the statute of limitations for an action on a contract, express or implied, is six years.
South Dakota	Action on a Contract, Express or Implied, S.D. Codified Laws § 15-2-13(1) (West)	6 years	*Broughton v. UNUM Life Ins. Co. of Am.,* 2007 WL 39432, *9 (D.S.D. 2007)
9th Circuit			
Alaska	Action on a Contract, Express or Implied, Alaska Stat. § 09.10.053	3 years	No authority found. However, in Alaska, the statute of limitations for an action on a contract, express or implied, is three years.
Arizona	Potentially Applicable Statute: Action on a Written Contract for Debt, Ariz. Rev. Stat. Ann. § 12-548	6 years	*McElwaine v. US West, Inc.,* 176 F.3d 1167, 1170 n.4 (9th Cir. 1999) ("The statute of limitations for an ERISA benefits action is based on

Jurisdiction	Analogous Statute	Time to File Suit	Citation
			the *applicable* statute of limitations for a contract claim in the forum state.") (emphasis added)
California	Action on a Written Contract, Cal [Civ. Proc.] Code § 337(l) (West)	4 years	*Mogck v. Unum Life Ins. Co.* of Am., 292 F.3d 1026, 1028 (9th Cir. 2002)
Hawaii	Action for Recovery of Debt Founded on Contract, Haw. Rev. Stat. § 657-1(1)	6 years	No authority found. However, in Hawaii, the statute of limitations for an action to recover debt founded on a contract is six years.
Idaho	Action on a Written Contract, Idaho Code Ann. § 5-216	5 years	No authority found. However, in Idaho, the statute of limitations for an action on a written contract is five years.
Montana	Action on a Written Contract, Mont. Code Ann. § 27-2-202(1)	8 years	No authority found. However, in Montana, the statute of limitations for an action on a written contract is eight years.
Nevada	Action on a Written Contract, Nev. Rev. Stat. § 11.190(1)(b)	6 years	No authority found. However, in Nevada, the statute of limitations for an action on a written contract is six years.
Oregon	Action on a Health Insurance Policy, Or. Rev. Stat. § 743.441	3 years	*Marshall v. Welltech, Inc.,* 2000 WL 122422, *2–*3 (D. Or. 2000)
Washington	Action on a Written Contract, Wash. Rev. Code Ann. § 4.16.040(1) (West)	6 years	*Warner v. Standard Ins. Co.,* 2007 WL 174099, *3 (W.D. Wash. 2007)
10th Circuit			
Colorado	Potentially Applicable Statute: Action on a Written Contract, Colo. Rev. Stat. Ann. § 13-80-103.5(1)(a) (West)	6 years	*Lee v. Rocky Mountain UFCW Unions & Employers Health Plan,* 1993 WL 482951, *2 n.2 (10th Cir. 1993) (in action to recover pension benefits, using string citation to support proposition that ERISA actions are most analogous to contract actions to recover money damages)
Kansas	Action on a Written Contract, Kan. Stat. Ann. § 60-511(1)	5 years	*Caldwell v. Life Ins. Co. of N. Am.,* 959 F. Supp. 1361, 1367 (D. Kan. 1997)

Jurisdiction	Analogous Statute	Time to File Suit	Citation
New Mexico	Action on a Written Contract, N.M. Stat. § 37-1-3(A)	6 years	No authority found. However, in New Mexico, the statute of limitations for an action on a written contract is six years.
Oklahoma	Action on a Written Contract, Okla. Stat. Ann. tit. 12, § 95(A)(1)	5 years	*Wright v. Southwestern Bell Tel. Co.,* 925 F.2d 1288, 1291 (10th Cir. 1991)
Utah	Action on a Written Policy or Contract of First Party Insurance, Utah Code Ann. § 31A-21-313(1) (West)	3 years	*Lang v. Aetna Life Ins. Co.,* 196 F.3d 1102,1104–1105 (10th Cir. 1999)
Wyoming	Action on a Contract, Express or Implied, Wyo. Stat. Ann. § 1-3-105(a)(i)	10 years	No authority found. However, in Wyoming, the statute of limitations for an action on a written contract is ten years.
11th Circuit			
Alabama	Potentially Applicable Statute: Action on a Written Contract, Ala. Code § 6-2-34(9)	6 years	*Hollingshead v. Burford Equip. Co.,* 747 F. Supp. 1421, 1431 (M.D. Ala. 1990) (characterizing an action to recover pension benefits under a retirement plan as a contract claim).
Florida	Potentially Applicable Statute: Action on a Written Contract, Fla. Stat. Ann. 95.11(2)(b) (West)	5 years	*Hoover v. Bank of Am. Corp.,* 286 F. Supp. 2d 1326, 1333 (M.D. Fla. 2003) (in action to recover pension benefits, holding that "[f] ederal courts have almost uniformly held that a suit for ERISA benefits pursuant to section 502(a)(1)(B) is most closely analogous to breach of contract claims for statute of limitations purposes.")
Georgia	Action on a Written Contract, Ga. Code. Ann. § 9-3-24	6 years	*Harrison v. Digital Health Plan,* 183 F.3d 1235, 1240–1241 (11th Cir. 1999)

Note: The following were omitted: Federal Circuit, Guam, Puerto Rico, and the Virgin Islands.

The survey cites persuasive authority in those jurisdictions that have not expressly decided what state statute of limitations is most analogous to the ERISA welfare benefits-due lawsuit. Because the majority of jurisdictions consider the ERISA benefits-due lawsuit to be an action on a written contract, the applicable statutes of limitations for such actions are listed in all jurisdictions where no other authority illuminates what particular statutes are most analogous.

Although the benefits-due lawsuit also encompasses actions to recover pension benefits, such cases are not included in the survey. Even with the narrowness of the inquiry, the variance among jurisdictions as to the statute chosen and the length of the limitations period applied is stark.

INCORPORATING A CONTRACTUAL LIMITATIONS PERIOD INTO THE PLAN

Some welfare plans have successfully avoided litigation under the most analogous state statute of limitations period by specifying a limitations period within the plan itself.[16] This approach is particularly useful for interstate employee benefit plans, which may otherwise have to contend with multiple limitations periods depending on where the action arises.

All of the circuits uphold contractual limitations periods in welfare plans, provided that such limitations periods are reasonable.[17] This rule can be traced to *Doe v. Blue Cross & Blue Shield United of Wisconsin,* in which the Seventh Circuit noted that "[t]he dominant view in contract law is that contractual limitations periods shorter than the statute of limitations are permissible, provided they are reasonable."[18] Indeed, the court suggested that contractual limitations periods are preferable to the most-closely analogous state statute of limitations, stating that "there is no presumption that [a borrowed limitations period will] fit the special needs of [benefit] plans as well as would a contractual limitation tailored to the particular plan."[19]

However, individual state laws can be relevant to this analysis. Some circuit courts have adopted the rule that contractual limitations periods are enforceable regardless of state statutes that prohibit shortening limitations periods. For example, in *Doe* the court considered a contractual limitations period in a self-funded employee health care plan. A plan participant argued that Wisconsin insurance law prohibited contractual limitations periods in insurance policies. The court rejected the participant's claim, stating that "[t]he question of what limitations *principles* shall govern the borrowed limitations *period* is in the first instance one of federal law, to be decided in accordance with the policies discernible in or imputable to the federal statute for which the state limitations period has been borrowed."[20]

Likewise, in *Northlake Regional Medical Center v. Waffle House System Employee Benefit Plan,* the Eleventh Circuit upheld, with even more express language, a contractual limitations period, stating that "contractual limitations periods on ERISA actions are enforceable, regardless of state law, provided they are reasonable. An ERISA plan is nothing more than a contract, in which parties as a general rule

are free to include whatever limitations they desire."[21] These holdings suggest that no matter what limitations period is applied by analogy to state statute, the right to shorten the period contractually inheres in federal law.

Conversely, language from some circuits—most notably the Eighth Circuit—suggests that these jurisdictions will enforce contractual limitations periods only if authorized by the applicable law of the forum state. Such deference to state law has not been dispositive, however, because in cases that considered it, the applicable statute either allowed contractual limitations periods, or the contractual limitations period mirrored the limitations period provided for in statute. For example, in *Wilkins v. Hartford Life and Accident Insurance Company*, the court determined that the most analogous state statute of limitations applicable to an ERISA benefits-due lawsuit was Arkansas's limitations period for an action on a written contract.[22] Because Arkansas contract law allows parties to contract for a shorter limitations period, the court expressly declined to decide whether federal common law under ERISA should be applied if such a plan provision was unenforceable under state law.[23]

IS A PARTICULAR CONTRACTUAL LIMITATIONS PERIOD "REASONABLE"?

Although the circuits unanimously agree that ERISA plans may contractually limit the time period in which a plan participant may challenge a denial of benefits,[24] such limitations periods must be reasonable to be enforceable.

Because benefits-due lawsuits are viewed as review proceedings, not evidentiary proceedings, a limitations period may be extremely short and still be considered reasonable.[25] For example, in *Davidson Associates Health and Welfare Plan*, the court enforced a 45-day contractual limitations period, stating that a benefits-due lawsuit "is like an appeal, which in the federal courts must be filed within 10, 30, or 60 days of the judgment appealed from,…depending on the nature of the litigation, rather than like an original lawsuit."[26]

In effect, the reasonableness inquiry is simply a question of whether or not the contractual limitations period was enacted in good faith. In *Northlake*, the court upheld a 90-day contractual limitations period as reasonable.[27] In making its determination, the court was primarily persuaded by three factors:

1. The record did not indicate that the limitations period was adopted as a "subterfuge to prevent lawsuits";

2. The limitations period was commensurate with other plan provisions intended to expedite the claims process (*i.e.*,

60 days for plan trustees to review their decisions after a claimant submits written request for review); and

3. The abbreviated statute of limitations period began to run after the completion of the ERISA-required internal appeals process.[28]

Thus, the claimant had the entirety of the administrative review process, plus an additional 90 days thereafter, in which to perfect a claim against the plan and its administrator. Since that case, a number of courts have considered similar factors as determinative on the question of a contractual limitations period's reasonableness.[29]

The most important factor articulated in *Northlake* is the date on which the limitations period begins to run. A limitations period that begins to run after a "final decision" by plan administrators is generally reasonable.[30] It is important to note, however, that in 2007, the Fourth Circuit removed the question of when a limitations period begins to run from the reasonableness inquiry entirely.[31] The court limited the reasonableness inquiry established in *Northlake* to the actual length of a limitations period, but articulated a bright line rule that the accrual provision of a plan's limitations period must provide that the period will commence on or after the day that an ERISA benefits claim is formally denied.[32]

Conversely, the Seventh Circuit has held that a limitations period that begins to run earlier in the administrative review process *can* be reasonable if it preserves *some* opportunity to file suit after "final decision" from the plan administrator.[33] Likewise, in *Hansen v. Aetna Health and Life Insurance Company*, the court held that a contractual limitations period is *unreasonable* if fashioned in such a way that the administrative review process can potentially consume the entirety of the complainant's time to file suit.[34] In that case, a two-year contractual limitations period was deemed unreasonable when the limitations period was measured from the date of disputed care, and the plan administrator's internal review consumed the entirety of that time period.[35]

NOTICE TO PLAN PARTICIPANTS WITH RESPECT TO CONTRACTUAL LIMITATIONS PERIODS

Some courts have considered whether, under the reasonableness inquiry, a plan must specify an abbreviated limitations period in a summary plan description (SPD) or notify a claimant of this period in writing upon an adverse benefits determination.[36] No uniform rule exists on this point.

A requirement for notification of contractual limitations periods may inhere in the ERISA regulations concerning plan administrators' "full and fair review" of claims. The ERISA regulations provide that "[e]very employee benefit plan shall establish and maintain a

procedure by which a claimant shall have a reasonable opportunity to appeal an adverse benefit determination…and under which there will be a full and fair review of the claim and the adverse benefit determination."[37] To constitute a "*full and fair review,*" plan participants who receive adverse benefit determinations must have a specified number of days in which to appeal such decisions and must have access to documents, written notices, and other information relevant to their claims.[38] The regulations also specify that upon an adverse benefit determination, a claimant must receive a "description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action… "[39] In *White,* the Fourth Circuit cited the aforementioned regulation in asserting that "[t]he civil action is treated as an integral part of this [full and fair] review."[40]

In general, the courts have not required that plan administrators notify claimants of an abbreviated limitations period at the time they deny claims for benefits. For example, in *Dye* the court held that failure to provide written notice will not *per se* render an otherwise reasonable limitations provision unreasonable.[41] Likewise, in *Ferguson v. William Wrigley Junior Company*, the court held that a written denial of benefits that did not specify an abbreviated limitations period did not constitute a concerted effort by the plan administrator to cause claimants to miss a filing deadline.[42] Other courts, however, have expressed a preference that plan administrators notify claimants of such periods at the time an adverse benefits determination is made. For example, in *Northlake*, the Eleventh Circuit enforced a contractual limitations period included in the plan and the SPD, but stated in a footnote that "it would have been preferable for the Plan Trustees to have given…written notice of the 90-day limitations period when they denied the claim for benefits."[43]

A related question is whether plan administrators must specify abbreviated limitations periods in an SPD in order for courts to enforce such periods. Under ERISA, the SPD is considered "the primary vehicle for informing plan participants and beneficiaries of their rights under [a] plan."[44] ERISA requires that administrators of employee benefit plans furnish to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan an SPD "written in a manner calculated to be understood by the average plan participant and…sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."[45]

The circuits have not adopted a uniform rule on this question. For example, in *Clark v. NBD Bank*, the court enforced a contractual limitations period where the claimant was not notified of the abbreviated period in writing and the abbreviated period was not specified in

the SPD.[46] The court stated, "[w]e believe [claimant] had *constructive notice* of the filing deadlines because her SPD provides that she can obtain copies of her plan at any time."[47] Conversely, in *Manginaro v. Welfare Fund of Local 771, I.A.T.S.E.*, the court held that the plan participants were likely prejudiced by the SPD's failure to disclose the contractual limitations period in the plan.[48] It reasoned that plan participants are entitled to rely on statutory default limitations periods until they know, or have reason to know (as where such a period is clearly set forth in the SPD), of a contractual limitations period.[49]

Despite these inconsistent holdings, one clear trend by the courts is a tendency to rely more heavily on SPDs than plan provisions in determining the scope of participant rights under a plan. In *Degrooth v. General Dynamics Corporation*, the court held that an SPD could be considered in a motion to dismiss on the basis that "[w]hen participants file a lawsuit to determine the scope of [their] rights, the SPD is surely integral to that determination…"[50] Moreover, courts have held as a general rule that when a conflict exists between a plan document and an SPD, the provision of the SPD controls.[51] For example, in *Fallo v. Piccadilly Cafeterias, Incorporated*, the court held that because the SPD most nearly represents the true intention of the parties, a conflict between language in the SPD and language in the plan document will be resolved to give the SPD effect.[52] Although some courts have held that an omission from the SPD does not, by negative implication, alter the terms of the plan itself, they have usually based this holding on the simple maxim that a summary cannot, by definition, contain every detail of the plan document.[53] A contractual limitations period represents a significant curtailment of a plan participant's legal rights under the plan, and plan administrators may not be able to excuse omission of such a provision from an SPD on the basis that an SPD, by definition, cannot reflect every detail of the actual plan document.

Given that ERISA regulations make notice to plan participants of administrative and legal remedies integral to the "full and fair review of claims" requirement[54]—and the fact that most courts allow SPDs and related documents to override provisions in the actual plan document—plan administrators are advised to elucidate a contractual limitations period for the benefits-due lawsuit in both the SPD and the claim/appeal denial form.

CONCLUSION

Incorporation in plan documents of a contractual limitations period for the benefits-due lawsuit is a good option for plan sponsors and administrators who seek to avoid litigation under the most analogous state statute of limitations. The default statutory limitations periods

often allow participants to file suit five or ten years after a denial of benefits.

The circuit courts generally uphold contractual limitations periods provided that they are reasonable. However, whether a plan participant has notice of the abbreviated limitations periods may determine its enforceability. To increase the likelihood that a court will enforce a contractual limitations period—particularly those periods that are considerably shorter than the statutory default limitations period—plan sponsors and administrators are well-advised to include contractual limitations periods in both SPDs and written notifications of claim appeals/denials.

NOTES

1. Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

2. 29 U.S.C. § 1001(b).

3. *See* ERISA §§ 502(a)(1)(B), 409, 502(a)(2), 502(a)(1)(A), 502(a)(3), and 515. For an excellent discussion on this topic, *see also* George Lee Flint, Jr., "ERISA: Fumbling the Limitations Period," 84 *Neb. L. Rev.* 313, 316–317 (2005).

4. 29 U.S.C. § 1132(a)(1)(B).

5. *Id.* § 1002(7).

6. *Id.* § 1002(8).

7. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117–118 (1989). Cases in which an employee challenges a plan's denial of coverage under the plan are outside the scope of this article.

8. *See* Alcorn v. Raytheon Co., 175 F. Supp. 2d 117, 120 (D. Mass. 2001).

9. Flint, *supra* n.3, at 319.

10. *Id.*

11. *See* Koert v. GE Group Life Assur. Co., 2007 WL 595028, *1 (3d Cir. 2007).

12. Flint, *supra* n.3, at 320.

13. Syed v. Hercules, Inc., 214 F.3d 155, 159–161 (3d Cir. 2000), *see also* Flint, *supra* n.3, at 322.

14. *See* Payne v. Blue Cross & Blue Shield of Va., 1992 WL 235537, *2 (4th Cir. 1992); *see also* Mirabile v. Life Ins. Co. of N. Am., Slip Copy, 2007 WL 1726444, *2 (E.D. Va. 2007).

15. Lund v. Citizens Financial Group, Inc., 1999 WL 814341, *5 (D.N.H. 1999) (The most analogous New Hampshire statute of limitations [for actions to recover benefits or clarify rights to future benefits] is that governing personal actions, including breach of contract."); Hall v. National Gypsum Co., 105 F.3d 225, 230 (5th Cir. 1997).

16. For an excellent overview of this subject, *see* Flint, *supra* n.3, at 328.

17. *See id* at 327 n.114 (citing I.V. Servs. of Am., Inc. v. Inn Dev. & Mgmt., Inc., 182 F.3d 51, 53 (1st Cir. 1999) (health plan) (adopting without discussion lower court's

enforcement of a three-year contractual limitations period); Fontana v. Diversified Group Admin., Inc., 2003 WL 21224040, *2 n.1 (3d Cir. 2003) (health plan); Santino v. Provident Life & Accident Ins. Co., 276 F.3d 772, 776 (6th Cir. 2001) (disability plan); Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d at 869, 874–875 (7th Cir. 1997) (health plan); Wilkins v. Hartford Life & Accident Ins. Co., 299 F.3d 945, 948-949 (8th Cir. 2002) (disability plan); Moore v. Berg Enters., Inc., 1999 WL 1063823, *2 (10th Cir. 1999) (unpublished table decision) (disability plan); Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301, 1303–1304 (11th Cir. 1998) (health plan) (holding that "[a]n ERISA plan is nothing more than a contract, in which parties as a general rule are free to include whatever limitations they desire"); *see also* Kraynak v. Fin. Accounting Found. Long Term Disability Plan, Slip Copy, 2006 WL 3462575, *1 (D. Conn. 2006) (disability plan); White v. Sun Life Assur. Co. of Can., 488 F.3d 240, 251 n.4 (4th Cir. 2007) (disability plan) (holding that contractual limitations period was unenforceable because the accrual of the period did not comport with federal rules, but suggesting that absent the accrual period problem a contractual limitations period would be enforceable); Dye v. Assocs. First Capital Corp. Long-Term Disability Plan 504, 2007 WL 1725528, *2 (5th Cir. 2007) (disability plan); Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643, 650–651 (9th Cir. 2000) (disability plan) (remanding case for lower court determination as to whether contractual limitations period barred plaintiff's claims, thus indicating that the contractual limitations period was enforceable).

18. 112 F.3d 869, 874 (7th Cir. 1997).

19. *Id*.

20. *Id*. at 873 (emphasis in original). The court expressed considerable doubt as to whether a self-funded employee health plan constitutes an insurance policy, since Blue Cross, though an insurer, was merely administering a self-funded employee benefit plan. *Id*. It never decided the issue, because characterization of the policy was not dispositive on its final holding. Whether plans constitute insurance policies may matter in circuits that *do* defer to state statutes that prohibit shortening a limitations period. *See supra* note 14, *infra* ns.22–23, and accompanying text. A question not answered in this article is whether the "deemer clause" of ERISA, which provides that no ERISA plan shall be deemed an insurance company for purposes of state regulation, would preempt such a state law or regulation. *See* 29 U.S.C. 1144(b)(2)(B); Chilcote v. Blue Cross & Blue Shield United of Wis., 841 F. Supp. 877, 880 (E.D. Wis. 1993).

21. 160 F.3d 1301, 1303 (11th Cir. 1998) (citing *Doe*, 112 F.3d at 875).

22. 299 F.3d 945, 948 (8th Cir. 2002).

23. *Id*. *See also* Duchek v. Blue Cross & Blue Shield of Dist. of Neb., 153 F.3d 648, 650 (8th Cir. 1998) (declining to decide whether state law controls in ERISA suits where the most analogous state statute of limitations period contains a provision that prohibits shortening such period, because the contractual limitation period in question and the applicable state statute of limitations period were the same); Davidson v. Wal-Mart Assoc. Health & Welfare Plan, 305 F. Supp. 2d 1059, 1069 (S.D. Iowa 2004) (holding that although the Eighth Circuit only enforces contractual limitations provisions in ERISA cases if authorized by the law of the forum state, Iowa—the applicable forum state—allowed contractual limitations periods in insurance policies); Santino v. Provident Life & Accident Ins. Co., 276 F.3d 772, 776 (6th Cir. 2001) ("[T]his Court has noted that [benefit] claims are governed by the most analogous state statute of limitations, which is that for breach of contract….But, Michigan courts have held that insurance contracts may contain shorter statutes of limitations.") (internal citations omitted).

24. *See supra* n.17 and accompanying text.

25. Davidson v. Wal-Mart Assoc. Health & Welfare Plan, 305 F. Supp. 2d 1059, 1071 (S.D. Iowa 2004).

26. *Id.*

27. Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301, 1302 (11th Cir. 1998).

28. *Id.* at 1304.

29. *See*, *e.g.*, *Davidson*, 305 F. Supp. 2d at 1071–1072; Dye v. Assocs. First Capital Corp. Cafeteria Plan, 2006 WL 2612743, *4 (E.D. Tex. 2006); Alcorn v. Raytheon Co., 175 F. Supp. 2d 117, 121–122 (D. Mass. 2001).

30. *See, e.g.*, *Northlake*, 160 F.3d at 1302 (90-day limitations period upheld); *Davidson*, 305 F. Supp. 2d at 1072 (45-day limitations period upheld); Dye v. Assocs. First Capital Corp. Long-Term Disability Plan 504, 2007 WL 1725528, *2 (5th Cir. 2007) (120-day contractual limitations period upheld).

31. White v. Sun Life Assur. Co. of Can., 488 F.3d 240, 246 (4th Cir. 2007).

32. *Id.* at 247 ("[A]lthough ERISA does not explicitly state that claimants must exhaust internal appeals before filing suit, courts have universally found an exhaustion requirement…This interlocking remedial structure does not permit an ERISA plan to start the clock ticking on civil claims while the plan is still considering internal appeals.").

33. *See Doe,* 112 F.3d at 875.

34. 1999 WL 1074078, *4 (D. Or. 1999).

35. The court stated, "Enforcement of a two-year suit limitation in this case, after plaintiff has diligently pursued her appeals rights in a protracted internal review process, would render that provision unreasonable in practical terms." *Id.* The court's use of language such as "in this case" and "would render that provision unreasonable in practical terms," suggests that the accrual provision was not per se unreasonable, but only unreasonable as applied to the facts of that case.

36. *See* Dye v. Assocs. First Capital Corp. Cafeteria Plan, 2006 WL 2612743, *4 (E.D. Tex. 2006).

37. 29 C.F.R. § 2560.503-1(h)(1).

38. *Id.* § 2560.503-1(h)(2)-(4).

39. *Id.* § 2560.503-1(g)(1)(iv).

40. White v. Sun Life Assur. Co. of Can., 488 F.3d 240, 247 n.2 (4th Cir. 2007).

41. Dye v. Assocs. First Capital Corp. Cafeteria Plan, 2006 WL 2612743, *4 (E.D. Tex. 2006) (citing Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301, 1304 n.3 (11th Cir. 1998).

42. 2001 WL 931586 *2 (7th Cir. 2001).

43. Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301, 1304 n.3 (11th Cir. 1998).

44. Degrooth v. Gen. Dynamics Corp., 837 F. Supp. 485, 487 (D. Conn. 1993).

45. 29 U.S.C. § 1022(a).

46. 2001 WL 180971, *4 (6th Cir. 2001).

47. *Id.* (emphasis added).

48. 21 F. Supp. 2d 284, 296 (S.D.N.Y. 1998).

49. *Id.*

50. 837 F. Supp. 485, 487 (D. Conn. 1993).

51. Brush Wellman, Inc. v. Montes, 295 F. Supp. 2d 785, 794 (N.D. Ohio 2003) (citing Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134, 136 (6th Cir. 1988).

52. 141 F.3d 580, 583–584 (5th Cir. 1998).

53. Bolone v. TRW Sterling Plant Pension Plan, 2005 WL 1027569, *3 (6th Cir. 2005); Nickel v. Unum Life Ins. Co. of Am., 2007 WL 2300649, *4 (E.D. Mich. 2007).

54. *See* supra notes 37–40 and accompanying text.