

# Defeating an ERISA Lien with the Statute of Limitations

By Prof. Roger M. Baron and Anthony P. Lamb

*Consider this question: "An ERISA plan paid \$50,000 worth of medical bills for our client. We secured a tort recovery and set aside \$50,000 in our trust fund to deal with a possible ERISA lien assertion. It has been 5 years. The plan has not filed anything. When can we safely disburse the money?"*

In our work dealing with ERISA lien assertions, we frequently receive inquiries of this nature. We intend this article to provide guidance for these situations.

It is important to stress that "waiting for the statute of limitations to expire" is not a recommended strategy for dealing with lien assertions. The preferred approach is to address the lien assertion early on. In particular, the earlier one addresses the lien issue, the greater the likelihood for a favorable result. This is especially true if the lien issue is resolved prior to releasing the tortfeasor and taking receipt of funds.<sup>1</sup>

Nonetheless, many plaintiffs secure tort recoveries prior to the resolution of a potential ERISA lien assertion. Thus, the statute of limitations inquiry becomes relevant. The question is simple: "What is the statute of limitations for an ERISA reimbursement claim?" We rarely find the answer, however, to be simple. The proper analysis required to determine the answer is a bit complicated. And, that analysis tends to produce results that lie in the gray areas as opposed to providing "black and white" determinations.

## ERISA and Statutes of Limitations (In General)

The general topic of statutes of limitations as they arise in the context of ERISA litigation is broad, encompassing many scenarios.<sup>2</sup> For example, the "limitations issue" may arise in connection with the following situations: 1) action for penalties; 2) claim for benefits due under the ERISA plan; 3) equitable action to enforce plan provisions; 4) retaliation actions; and 5) claims against employers for delinquent contributions.<sup>3</sup>

Note that ERISA does contain at least one limitations provision in connection actions for breach of a fiduciary duty.<sup>4</sup> The courts have never seriously considered this provision as applicable to reimbursement or subrogation claims.<sup>5</sup>

The focus of this article is restricted solely to the matter of ERISA reimbursement or subrogation claims. In that regard, it should be noted that there is no federal statute of limitations in ERISA or otherwise which applies to actions for reimbursement or subrogation.

## Limited Case Law

We have found only three reported opinions from the federal courts of appeal dealing specifically with this issue. These opinions are from the Eighth, Ninth and Eleventh Circuits. This very limited body of law will be the primary guide to our analysis. Of the three opinions, only one produces a result favorable for the ERISA participant or beneficiary. The other two opinions address the same question but produce a result favorable to the ERISA plan. First, we will provide a brief summary of each of these three cases.

### *Administrative Committee of the Wal-Mart Stores, Inc. v. Soles ex rel. Estate of Hollander*<sup>6</sup>

The ERISA Plan, asserting a lien of \$48,837.99, received notice of a \$100,000 tort recovery on January 16, 1997. It agreed to accept a partial payment of \$10,000 on its lien at that time. Subsequently, the plan became aware of an additional tort recovery on April 8, 2000. Although offered payment of an additional \$10,000 to resolve the lien, the Plan rejected the offer and insisted on payment in full. The plan participant lived in South Carolina and the tort occurred in South Carolina. Litigation over the lien began on March 2, 2002, in U.S. District Court in Arkansas, where the plan was administered. The ERISA Plan brought its § 502(a)(3)(B)<sup>7</sup> claim for reimbursement.

Since there is no federal statute of limitations for reimbursement claims, the Eighth Circuit followed the

standard approach, which is to “borrow the most analogous state statute of limitations.”<sup>8</sup> In the context of this litigation, there were two possible provisions that could have been applicable: the Arkansas three-year statute of limitations for actions “founded on any contract or liability, express or implied liability” or the Arkansas five-year statute of limitations for the “enforcement of written obligations.”<sup>9</sup> The trial court applied the three-year statute of limitations and granted summary judgment for the defendant.<sup>10</sup>

On appeal, the ERISA Plan argued that the claim accrued on April 8, 2000, when it received notice of the second tort recovery and that it timely filed the action within two years of when the cause of action accrued. The Eighth Circuit Court of Appeals rejected this argument, holding that the claim accrued on January 16, 1997 when the ERISA Plan received notice of the first tort recovery and that, “under either the three- or five- year statute of limitations, the claim is barred because more than five years have passed since this cause of action accrued.”<sup>11</sup>

As to the determination of when a claim accrues, this opinion invokes the “discovery rule” stating, “Generally, this court applies the discovery rule to determine when a claim accrues. The discovery rule provides that ‘a plaintiff’s cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation.’”<sup>12</sup>

In summary, the Eighth Circuit *Soles* decision borrowed the forum’s (Arkansas’) statutes of limitations relating to contract actions, holding that the ERISA Plan’s claim for reimbursement was time-barred.

*Blue Cross & Blue Shield of Alabama v. Sanders*<sup>13</sup>

The ERISA plan paid \$12,678.69 for medical bills related to an automobile

accident in March 1991. The plaintiff filed the tort action in November 1991, and the court entered a default judgment for \$200,000 against the tort-feasors. The tortfeasor paid (satisfied) the judgment in October 1992. The ERISA Plan brought its § 502(a)(3)(B)<sup>14</sup> claim for reimbursement in U.S. District Court for Alabama in April 1996 - some 3½ years later. The trial court granted summary judgment for the ERISA Plan.<sup>15</sup>

On appeal, the ERISA participants argued, inter alia, that Alabama’s two-year statute of limitations relating to “claims for wages and claims for discharge in retaliation for seeking worker’s compensation”<sup>16</sup> barred the suit. The court’s discussion of the statute of limitations issue is relatively brief, with the court stating,

ERISA does not specify a limitations period for a fiduciary’s suit against a participant under 29 U.S.C. § 1132(a)(3) to enforce a reimbursement provision of a plan. In an ERISA action with no congressionally mandated limitations period, the district court “must define the essential nature of the ERISA action and apply the forum state’s statute of limitations for the most closely analogous action.”<sup>17</sup>

In seeking the “most closely analogous” cause of action and adopting the corresponding statute of limitations, the Court said,

We therefore look to Alabama law for the relevant limitations period. As a matter of first impression for this court, we hold that a fiduciary’s action to enforce a reimbursement provision pursuant to 29 U.S.C. § 1132(a)(3) is most closely analogous to a simple contract action brought under Alabama law. Accordingly, we apply Alabama’s six-year statute of limitations for simple contract actions, *see* Ala. Code § 6-2-34(9),

and reject the [appellants’] proposed two-year limitations period.<sup>18</sup>

In summary, the Eleventh Circuit’s *Sanders* decision borrowed the forum’s (Alabama’s) statute of limitations for simple contract actions, holding that the ERISA Plan’s was not time-barred.

*Wang Laboratories, Inc. v. Kagan*<sup>19</sup>

This ERISA plan was headquartered in Massachusetts. The ERISA participant resided in California and suffered injuries in an automobile accident in California on July 1, 1984. The ERISA plan paid about \$20,000 for medical bills related to the accident and requested reimbursement from the tort recovery of \$50,000. The ERISA Plan filed suit in U.S. District Court for the Central District of California on January 13, 1989.

The Massachusetts statute of limitations for “breach of contract” was six years. The California statute of limitations for “breach of contract” was four years. The ERISA participant urged the application of the California four-year statute of limitations, asserting that the claim was thereby barred. The ERISA plan relied, however, on a provision in its plan document that provided that,

[T]he rights and obligations of the parties were to be “governed by the law of Massachusetts, and all questions pertaining to the validity and construction of such rights and obligations shall be determined in accordance with such law.”<sup>20</sup>

The trial court granted summary judgment for the ERISA Plan. On appeal, the Ninth Circuit Court of Appeals held that federal law controlled the resolution of which state statute of limitations was applicable.<sup>21</sup> In furtherance of its analysis, the court stated,

The parties’ choice of limitations period in an insurance contract is

generally enforced under federal law unless it is “unreasonable or fundamentally unfair.” *Dempsey v. Norwegian Cruise Line*, 972 F.2d 998, 999 (9th Cir. 1992). In an ERISA case, we ordinarily borrow the forum state’s statute of limitations so long as application of the state statute’s time period would not impede effectuation of federal policy. *Pierce County Hotel Employees et al. v. Elks Lodge*, 1450, 827 F.2d 1324, 1328 (9th Cir. 1987). In *Pierce County*, no contractual choice of law provision was at issue. Where a choice of law is made by an ERISA contract, it should be followed, if not unreasonable or fundamentally unfair.<sup>22</sup>

and

The parties’ contractual choice of law requires that Massachusetts’ six-year statute of limitations applies. Since it was not unreasonable or fundamentally unfair, the court is bound by it. Under the Massachusetts statute, [the ERISA Plan’s] claims were timely.<sup>23</sup>

In summary, the Ninth Circuit’s *Kagan* decision would have borrowed the forum’s (California’s) statute of limitations but, due to a choice of law provision in the ERISA plan document, it applied the Massachusetts statute of limitations for breach of written contract actions,<sup>24</sup> holding that the ERISA Plan’s claim for reimbursement was not time-barred.

### Guiding Principles that Emerge

From a study of these cases, we can set forth guiding principles. First, reimbursement claims are not without some kind of time limitation. No court has suggested that they are not. Indeed, statutes of limitations govern reimbursement claims. But, determining the applicable statute is a worthy task.

It appears to be a universal consensus that courts should look to the “most analogous”<sup>25</sup> or “most closely

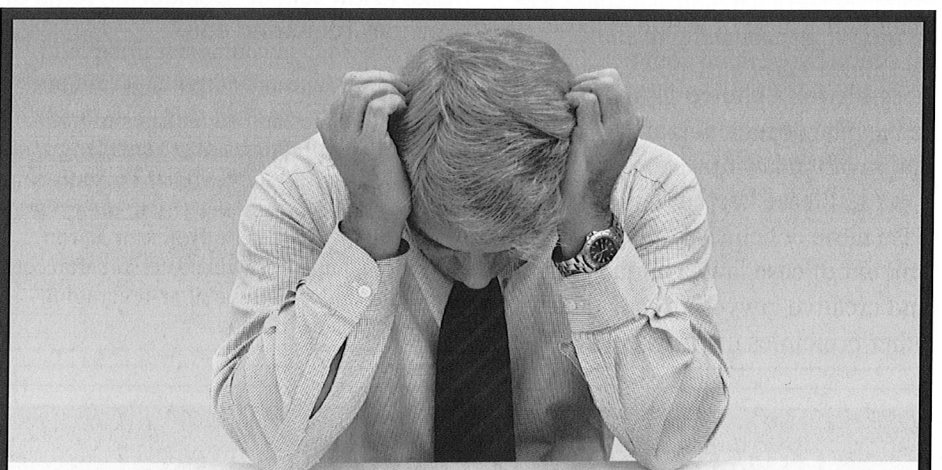
analogous”<sup>26</sup> state law cause of action and borrow the corresponding state statute of limitations. This is likely to be the state’s statute of limitations relating to breach of contract.<sup>27</sup>

Similarly, as set forth in the existing case law, the federal courts have uniformly recognized that presumptively they will borrow the forum’s statute of limitations.<sup>28</sup> An ERISA plan, however, can provide otherwise with a choice of law provision in its plan document and

courts will uphold that choice so long as it is not unreasonable or fundamentally unfair.<sup>29</sup>

### Conclusion

One should keep in mind that conventional wisdom suggests that the parties should address a potential ERISA lien early on and resolve it prior to releasing the tortfeasor(s) and receiving settlement funds.<sup>30</sup> If one is contemplating avoidance of a lien



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through a statute of limitations defense, the vagaries associated with such a defense tend to undermine its usefulness.<sup>31</sup>

Nonetheless, it is possible to defeat an ERISA lien assertion with a statute of limitations defense. Such claims are not without time constraints. Determining the applicable statute of limitations can be problematic. From the limited case law available, it appears that a federal court will look to the forum's statute of limitations for the most analogous cause of action. And, the most analogous cause of action is likely to be an action based upon contract.<sup>32</sup> It is also possible for a choice of law provision in the plan document to trigger the application of the law of a state that is not the forum. Please keep in mind that we base these conclusions upon a minimal amount of case law. Unique situations and creative lawyering may develop other principles or rules. ▲▲▲

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#### Endnotes

<sup>1</sup> The strategies and advantages of this approach is addressed at some length in Professor Baron's Webinar Presentation, Roger M. Baron, *Leveraging the Pressure Points*, ERISA with Professor Baron (2010), <http://erisawithprofessorbaron.com/audio-and-video/webinar-leveraging-the-pressure-points/>.

<sup>2</sup> See e.g., George Lee Flint, Jr., *ERISA: Fumbling the Limitations Period*, 84 NEB. L. REV. 313, (2005), spanning 55 pages with 310 footnotes.

<sup>3</sup> *Id.* at 316-17.

<sup>4</sup> ERISA 29 U.S.C. § 1113.

<sup>5</sup> This was discussed in *Blue Cross & Blue Shield of Ala. v. Sanders*, 913 F.2d 1544, 1356 n.8 (11th Cir. 1990) as follows,

No relevant limitations period is found in 29 U.S.C. § 1132, see *Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1551 n.12 (11th Cir.1990) (stating that 29 U.S.C. § 1132 does not specify a limitations period), or in any other ERISA provision, *cf.* 29 U.S.C. § 1113 (providing limitations periods for suits brought "under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part"); *Trustees of Wyo. Laborers Health and Welfare Plan v. Morgen & Oswood Constr. Co., Inc. of Wyo.*, 850 F.2d 613, 618 n.8 (10th Cir.1988) ("The statute of limitations contained in 29 U.S.C. § 1113 applies only to actions brought to redress a fiduciary's breach of its obligations to enforce the provisions of ERISA.").

See also *Wang Laboratories, Inc. v. Kagan*, 992 F.2d 1126, 1128 n.2 (9th Cir. 2002).

<sup>6</sup> *Admin. Comm. of Wal-Mart Stores, Inc. v. Soles ex rel. Est. of Hollander*, 336 F.3d 780, 781 (8th Cir. 2003).

<sup>7</sup> Codified at 29 U.S.C. § 1132 (a)(3)(B).

<sup>8</sup> "Because ERISA does not contain a statute of limitations, the court 'borrow[s] the most analogous state statute of limitations.'" *Soles*, 336 F.3d at 785.

<sup>9</sup> *Id.* at 785 n.8-9.

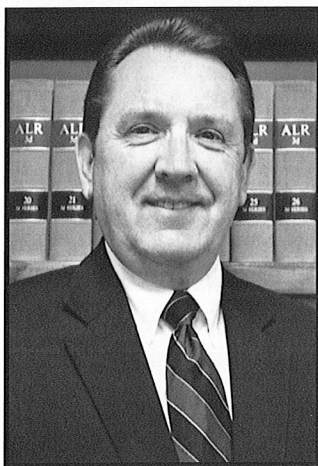
<sup>10</sup> The trial court also granted summary judgment on the alternative basis that the ERISA plan's claims were meritless. *Id.* at 781.

<sup>11</sup> *Id.* at 786.

<sup>12</sup> *Id.*

<sup>13</sup> *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347 (11th Cir. 1998).

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<sup>14</sup> Codified at 29 U.S.C. § 1132 (a)(3)(B).

<sup>15</sup> *Sanders*, 138 F. 3d at 1351.

<sup>16</sup> *Id.* at 1351, n.10.

<sup>17</sup> *Id.* at 1356-57 citing

*Byrd v. MacPapers*, 961 F.2d 157, 159 (11th Cir. 1992); *see also Wilson v. Garcia*, 471 U.S. 261, 266-67, 105 S.Ct. 1938, 1942, 85 L.Ed.2d 254

(1985) (stating that when Congress has not established a time limitation for a federal cause of action, courts should adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so).

<sup>18</sup> *Id.* at 1357.

<sup>19</sup> *Wang Laboratories, Inc. v. Kagan*, 992 F.2d 1126 (9th Cir. 2002).

<sup>20</sup> *Id.* at 1128.

<sup>21</sup> "We decide as a matter of federal law which state statute of limitations is appropriate." *Id.*

<sup>22</sup> *Id.* at 1128-29.

<sup>23</sup> *Id.* at 1129.

<sup>24</sup> "The limitations period applicable to ERISA claims is the one for breach of written contract." *Id.* at 1128.

<sup>25</sup> *Admin. Comm. of Wal-Mart Stores, Inc. v. Soles ex rel. Est. of Hollander*, 336 F.3d 780, 785 (8th Cir. 2003).

<sup>26</sup> *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347 at 1356-57 (11th Cir. 1998).

<sup>27</sup> The result in each of the three cases we analyzed supports this statement. In the *Soles* case, the Eighth Circuit held the action untimely under either the Arkansas three-year statute of limitations for actions "founded on any contract or liability, express or implied liability" or the Arkansas five-year statute of limitations for the "enforcement of written obligations." In the *Sanders* case, the Eleventh Circuit applied the Alabama six-year statute of limitations for a simple contract action. In the *Kagan* case, the Ninth Circuit applied the Massachusetts six-year statute of limitations for breach of contract claims.

<sup>28</sup> "In an ERISA case, we ordinarily borrow the forum state's statute of limitations so long as application of the

state statute's time period would not impede effectuation of federal policy." *Kagan*, 992 F.2d at 1128. The *Kagan* decision ultimately applied the Massachusetts' statute of limitations, not the forum's (California's) statute of limitations as a result of the *choice of law* provision in the ERISA plan document.

The Alabama federal court in *Sanders* applied Alabama's six-year statute of limitations for a simple contract action.

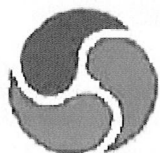
The Arkansas federal court in *Soles* was applying the Arkansas statutes of limitations.

<sup>29</sup> "The parties' contractual choice of law requires that Massachusetts' six-year statute of limitations applies. Since it was not unreasonable or fundamentally unfair, the court is bound by it." *Kagan*, 992 F.2d at 1129.

<sup>30</sup> See note 3, *supra*, and accompanying text.

<sup>31</sup> We find vagaries in the following: 1) pinning down the applicable statute of limitations (the forum state's statute or another state's statute); 2) the possibility of forum shopping by the ERISA Plan which may opt to select a forum with a longer statute from alternative available venues; 3) determining the most analogous state law cause of action; and 4) in dealing with related issues such as when did the reimbursement claim accrue?

<sup>32</sup> Keep in mind that in the *Soles* case, there were differing provisions relating to a contract action: the Arkansas three-year statute of limitations for actions "founded on any contract or liability, express or implied liability" or the Arkansas five-year statute of limitations for the "enforcement of written obligations." *Soles*, 336 F.3d at 785 nn.8-9.



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