

## The Uncertainty and Unpredictability of the Limitations Period For Claims For Benefits Under ERISA § 502(a)(1)(B)

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The lack of specificity with respect to the period in which a plaintiff is entitled to file suit for benefits under ERISA § 502(a)(1)(B) causes legal and administrative difficulties.

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), establishes a federal cause of action for an ERISA plan participant to sue for benefits under the plan. ERISA does not set forth a limitations period for these claims. Instead, claims for ERISA plan benefits are subject to the most analogous state statute of limitations. Most federal courts hold that the state law claim most analogous to an ERISA claim for plan benefits is a breach of contract claim and apply the forum state's limitations period for an action on a written contract. However, because the state limitations period for contract actions varies widely among the states (from three years to fifteen years), the limitations periods for claims for benefits brought by two different participants in the same plan can be dramatically different depending on the state in which the action is brought.

The wide variation in limitations periods for ERISA § 502(a)(1)(B) claims has been further complicated by the inconsistent standards employed by courts to determine exactly when the limitations period for a benefit claim begins, i.e., when the claim accrues. The Circuit Courts of Appeal that have addressed the question of when a claim for benefits accrues are divided into two camps:

(1) Those Circuits holding that an ERISA § 502(a)(1)(B) cause of action accrues only when an administrative claim for benefits under the plan has been formally made and formally denied; and

(2) Those Circuits holding that an ERISA § 502(a)(1)(B) claim accrues when a claim for benefits has been clearly repudiated notwithstanding that there has been no formal denial and, in some cases, no claim filed.

In addition, the Circuits differ in reasoning and result as to: (1) what conduct constitutes a denial, (2) what conduct constitutes a clear repudiation, (3) what the effect is when the plan fiduciary fails to strictly comply with ERISA's claims procedure requirements, (4) what circumstances cause the limitations period to be tolled, (5) whether a participant can file a second claim for the benefits and restart the limitations clock, (6) whether a new limitations period begins for each payment in the case of a stream of benefit payments from a plan, and (6) whether plan provisions can dictate the limitations period and the accrual event for a limitations period.

These inconsistencies have created considerable uncertainty and unpredictability with respect to the period in which a plaintiff is entitled to file a suit for

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benefits under ERISA § 502(a)(1)(B), leaving practitioners, plans, and fiduciaries in a quandary. The lack of specificity relating to the limitations period for claims for benefits under ERISA creates considerable administrative and legal difficulties when ERISA § 502(a)(1)(B) suits are filed well after the expiration of a period that would generally be considered to be a "reasonable" limitations period and often long after administrative records, third party administrators, and benefits personnel have ceased to be available to establish the reasons for the challenged claim denial.

This article attempts to wade through the holdings of the Circuits to determine when an ERISA § 502(a)(1)(B) claim accrues in circumstances where a plaintiff has been dilatory in filing a claim for benefits. In addition, the article will present a number of potential practical solutions that a plan sponsor may adopt in an attempt to prevent participants from bringing stale claims for benefits.

#### *Limitations Period For § 502(a)(1)(B) Claims*

##### *Limitations Period Is the Most Analogous State Limitations Period*

ERISA sets forth no limitations period for ERISA § 502(a)(1)(B) claims.<sup>1</sup> Federal case law establishes that the limitations period for an ERISA § 502(a)(1)(B) claim is the most analogous state statute of limitations. Generally the state-borrowed limitations period is adopted from the state in which the court sits.<sup>2</sup> However, if the court considers a state other than the forum state to have a significant connection with the case and application of that non-forum's limitations period is more consistent with ERISA's policies, the limitations period may be borrowed from that non-forum state instead.<sup>3</sup>

Most Circuits have held that a claim for plan benefits under ERISA § 502(a)(1)(B) is most analogous to a state breach of contract action and have applied the limitations period for actions on written contract.<sup>4</sup> Nonetheless, some of the Circuits

have applied a state limitations period for a claim other than breach of contract where the court has deemed the non-contract claim to be more analogous to the ERISA § 502(a)(1)(B) claim at issue in the case.<sup>5</sup>

##### *Non-Uniform Limitations Periods Invite Forum Shopping*

Because the limitations period for an ERISA § 502(a)(1)(B) claim is borrowed from state law, the period varies greatly depending on where the lawsuit is filed. Specifically, the state limitations period for breach of written contract ranges from three years (e.g., Maryland and North Carolina) to fifteen years (e.g., Kentucky and Ohio). This means that the same claim for benefits under an ERISA plan can have a dramatically different limitations period depending on the forum in which the action is filed. *Compare Dameron v Sinai Hospital of Baltimore, Inc.*, 815 F.2d at 981 (applying three-year Maryland statute of limitations for contract action to a claim for benefits) *with Meade v. Pension Appeals & Review Committee*, 966 F.2d at 194-95 (applying a fifteen-year limitations period for breach of contract to a claim for benefits).<sup>6</sup>

Moreover, because ERISA's jurisdictional provision creates an opportunity for a plaintiff to file a claim for benefits in more than one jurisdiction,<sup>7</sup> the availability of numerous and sometimes dramatically different statutes of limitations invites an ERISA plaintiff to choose a forum that accommodates the plaintiff's delay in bringing his claim. The result is that a plan generally cannot predict the limitations period that will apply to claims for benefits under the plan until a suit for benefits is filed.

##### *When A Claim For Benefits Accrues And Starts Limitations Clock*

In addition to the task of predicting what limitations period will apply to an ERISA § 502(a)(1)(B) claim for benefits, plans must also grapple with determining when that limitations period starts to run.

### *Federal Law Determines the Time of Accrual*

Notwithstanding that the limitations period for a claim for benefits under ERISA § 502(a)(1)(B) is borrowed from the applicable state, it is generally accepted that federal law determines when the claim for benefits accrues and starts the clock running on the limitations period.<sup>8</sup>

Under the federal discovery rule, a cause of action accrues when a plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the litigation.<sup>9</sup> However, there is a split among the Circuits as to the application of the discovery rule to actions for benefits under ERISA § 502(a)(1)(B). The Fourth and Fifth Circuits on the one hand hold that there must be an administrative claim made by the participant and a formal denial of that claim in order to trigger the start of the limitations period under the federal rule. The other Circuits that have addressed the issue have concluded that the limitations period is triggered under the discovery rule before there has been a formal denial if there is a clear repudiation of benefits made known to the participant—even, in some cases, if there has been no claim filed by the participant at the time of the repudiation.

#### *Fourth and Fifth Circuits: Claim Accrues Only Upon a Formal Claim and Formal Denial*

One of the two Circuits that does not follow the clear repudiation doctrine, the Fourth Circuit, has consistently—and frequently—held that a claim for benefits under ERISA § 502(a)(1)(B) accrues and starts the limitations period only when there has been a formal claim filed with the plan and that claim has been formally denied.<sup>10</sup> The one departure from the Fourth Circuit's strict adherence to the claim-and-formal-denial trigger was in *Cotter v. Eastern Conference of Teamsters Retirement Plan*,<sup>11</sup> where the Fourth Circuit determined that if there has been no formal claim filed, the limitations period is triggered by an event that alerted the plaintiff to entitlement to benefits that he did not receive, reasoning that it would be anomalous to

conclude that an ERISA claim accrued only when plaintiff filed a lawsuit.

The Fifth Circuit has also maintained a staunch stance that a claim must be made and formally denied in order to start the limitations period running.<sup>12</sup>

The holdings of the Fourth and Fifth Circuits comport with ERISA's "exhaustion requirement," which has been universally recognized by the Circuits and prohibits a claimant from bringing an ERISA § 502(a)(1)(B) action in court until the claimant has exhausted the plan's internal administrative procedures.<sup>13</sup> The rationale of the two Circuits requiring a formal claim and formal denial to start the limitations clock is that, because a formal claim and formal denial must be completed under the exhaustion requirement before a participant may bring an action in court, it is consistent to hold that the limitations period does not begin to run until the participant has completed this administrative process and is eligible to bring a lawsuit.<sup>14</sup> The anomaly of the Fourth and Fifth Circuit decisions, however, is that, because ERISA does not set forth any deadline for a participant to bring a claim for benefits under the plan,<sup>15</sup> this line of cases permits a participant to defer the start (and therefore the end) of the limitations period indefinitely.

#### *Other Circuits: A Claim Accrues Prior to Formal Denial Upon a Clear Repudiation of Benefits*

In contrast, the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have determined that a claim for benefits under ERISA § 502(a)(1)(B) will accrue and start the limitations period prior to a formal denial if there has been a clear repudiation of the benefits that is made known to the participant. Recognizing that, without the clear repudiation rule, a plaintiff could trigger the limitations period at his own discretion, the Third Circuit stated in *Kapp v. Trucking Employees of North Jersey Welfare Fund, Inc.-Pension Fund* that:

[A] *formal* denial is not required if there has already been a repudiation of the benefits by the fiduciary which was *clear* and made known [to] the beneficiary. Implementing the clear repudiation rule in the ERISA context reflects the underlying goals of statutes of limitations . . . [such as] rapid resolutions of disputes, repose for defendants, and avoidance of litigation involving lost or distorted evidence. Otherwise a plaintiff could trigger the statute of limitations at his own discretion, creating an indefinite limitations period.<sup>16</sup>

The Second, Third, Seventh, Eighth, and Ninth Circuits have taken the clear repudiation doctrine one step further, holding that a claim will accrue and start the limitations clock when there has been a clear repudiation of benefits even if the plaintiff has not filed a formal claim for benefits.<sup>17</sup>

The clear repudiation line of cases eliminates the ability of a plaintiff to control the limitations period by delaying a filing of a claim for benefits, eliminates the possibility of an indefinite limitations period, and gives the plan administrator some ability to limit dilatory claims for benefits. By clearly stating that a claimant is not entitled to benefits, whether by letter,<sup>18</sup> or by a definite determination of a participant's amount of benefits,<sup>19</sup> a plan administrator has some control over the limitations clock.<sup>20</sup>

#### *Cases Addressing Whether a Plan Can Specify the Limitations Period and the Accrual Date*

Given the uncertainty under federal case law of the applicable limitations period and the accrual date for an ERISA § 502(a)(1)(B) claim, many plans contain language specifying a limitations period and an accrual event for benefit claims. Courts that have addressed whether a limitations period specified in a plan will supersede the applicable state limitations period have consistently held that a plan-specified limitations period will control, as long as it is a reasonable limitations period. However, the Circuits

have disagreed as to whether a plan can specify an enforceable accrual date for that limitations period.

#### *Plans Can Specify a Contractual Limitations Period*

Courts that have addressed the enforceability of a limitations period specified in a plan have consistently held that the plan's limitations period will control over the applicable state limitations period if the plan-specified period is "reasonable."<sup>21</sup>

#### *Courts Disagree About Whether Plans Can Specify an Accrual Date*

Notwithstanding uniform approval by the Circuits of a reasonable plan-specified limitations period, there is not the same consistency among the Circuits regarding whether a plan can specify the accrual date that will start that limitations period.

Some Circuits have held—directly or effectively—that an accrual date specified in a plan document will control the start of the limitations period. The accrual dates that have been approved by the Circuits are generally dates that spring from a time period after proof of loss is required in order to obtain a plan benefit.<sup>22</sup>

Yet other Circuits have held that a specified accrual date in a plan, even a date measured from a proof of loss date, will not be enforced. These courts hold that a plan-specified accrual date fails to comport with the federal accrual rule that applies in determining the start of the limitations period for an ERISA § 502(a)(1)(B) claim.<sup>23</sup>

Thus, although a plan is authorized to specify a reasonable limitations period for a suit for benefits, the plan-specified event that triggers the start of that limitations period may or may not be enforceable, depending on which Circuit's law applies to the cause of action.

*What Plan Sponsors Can Do To Reduce the Uncertainty of the Limitations Period and Implement a Uniform Limitations Period For Benefit Claims Under the Plan*

The inconsistent decisions regarding the applicable limitations period for an action claiming benefits under the plan and the triggering event that will start the limitations period has caused considerable uncertainty and unpredictability with respect to the period in which a plaintiff is entitled to file a suit for benefits under ERISA § 502(a)(1)(B). Considering what has been sanctioned by the Circuits, along with what is not proscribed by ERISA, it appears that plan sponsors could bring uniformity to the limitations period for suits to recover benefits under the plan and add a degree of certainty to the beginning and the end of the limitations period for those actions through specific plan language appropriate for the particular plan. For example, a plan could, where appropriate:

(1) *Specify a reasonable limitations period in the plan.* The Circuits that have addressed the enforceability of a limitations period specified in the plan have uniformly enforced plan-specified limitations periods—even if the specified period is shorter than the state limitations period that would otherwise be borrowed—as long as the plan-specified limitations period is reasonable. A plan-specified limitations period would provide a uniform limitations period for all claims for benefits under the plan and would greatly reduce the forum shopping by plaintiffs where ERISA § 502(a)(1)(B) claims could be brought in more than one state.

(2) *Provide a reasonable deadline for bringing a claim for plan benefits.* In the Fourth and Fifth Circuits where a formal claim and a formal denial are needed to start the limitations period running, and even in the clear repudiation Circuits that have not specifically held that a clear repudiation will trigger the limitations

period even if there is no claim filed, a claim for benefits is typically needed to start the limitations period running. Yet ERISA does not specify a deadline for filing a claim for benefits,<sup>24</sup> so, absent a plan provision to the contrary, a participant is in control of the time to file his or her claim. The plan should, therefore, specify a deadline for filing claims for benefits under the plan, which would take the discretion of when to start (and therefore end) the limitations period out of the hands of the participant. A plan-specified deadline should be reasonable, give a participant or beneficiary sufficient opportunity to adequately investigate whether he or she wishes to file a claim for benefits, and be fashioned in keeping with ERISA's deadlines for filing an appeal of a denied claim. What is a "reasonable" deadline would appear to vary depending on, among other things, whether the plan is a retirement plan or a welfare plan, the type of benefit (e.g., medical benefit, severance benefit, disability benefit, retirement benefit, etc.), and whether the plan is insured or self-insured. For example, the applicable plan document could provide, if appropriate, that:

(i) A participant or beneficiary in a defined benefit pension plan must make a claim for additional benefits under the plan no later than 180 days after the earlier of: (a) the date the first payment of a benefit is paid to the participant or beneficiary from the plan or (b) the date the participant or beneficiary is informed of, or otherwise learns of, the amount of his or her final retirement benefit or survivor benefit. In the case of any amendment to, or reformation of, the plan that entitles a participant or beneficiary to additional benefits after such participant terminates employment with the employer, such participant or beneficiary must make a claim for additional benefits under the plan no later

than one year after the date of such amendment or reformation.

(ii) A participant in a disability plan must: (a) make a claim for initial benefits under the plan no later than 60 days after incurring the disability, (b) make a claim for increased benefits under the plan no later than 90 days after receiving the first disability payment, and (c) make a claim for continued payments no later than 90 days after his or her disability payments are terminated by the plan.

(iii) A participant in a severance plan must: (a) make a claim for initial benefits under the plan no later than 60 days after his or her termination of employment, (b) make a claim for increased benefits under the plan no later than 90 days after receiving the first (or only) severance payment, and (c) make a claim for continued payments no later than 90 days after his or her severance payments are terminated by the plan.

(iv) A beneficiary must: (a) make an initial claim for a benefit under a life insurance or death benefit plan no later than 180 days after the participant's death and (b) make a claim for increased benefits under the plan no later than 90 days after receiving the first (or only) death benefit payment.

(v) A participant must make a claim for benefits or additional benefits under a 401(k) plan within 180 days after his or her termination of employment with the employer and its controlled group.

(vi) A participant must make a claim for benefits under a medical plan, health FSA, or dependent care plan no later than 12 months after the expense is incurred.

With a plan-imposed deadline for filing a claim, the participant will not be able to

delay filing the claim indefinitely. If the participant does not file the claim before the specified deadline, the participant would not be able to exhaust his or her administrative remedies under the plan (because the participant missed the claim filing deadline specified in the plan's claims procedures) and presumably would not be able to access the courts, irrespective of whether the limitations period had expired, under the exhaustion of administrative remedies requirement embraced by all the Circuits. If the participant does in fact file a claim within the specified deadline and exhausts his or her administrative remedies, the participant would be able to file an action in court as long as he or she does so within the plan-specified limitations period described in (1) above. That limitations period would be triggered, under the federal accrual rule, no later than the final denial by the plan administrator during the administrative review and earlier in the clear repudiation Circuits if and when repudiated.

(3) *Specify a reasonable accrual trigger in the plan.* Because the Circuits are split as to whether a plan-specified accrual date will be enforced, inserting an accrual trigger in the plan may or may not be successful depending on which Circuit's law governs the action. Notwithstanding that a plan accrual date may not be enforceable, however, the accrual date will not be a critical element in curtailing the limitations periods if the plan specifies a claim filing deadline as described in (2) above.

### *Conclusion*

Under the current state of the law, there is virtually no certainty with respect to either the length of the limitations period for an ERISA § 502(a)(1)(B) cause of action or the commencement of that limitations period. Many Circuits have provided some measure of protection against stale actions for plan benefits

through the clear repudiation doctrine. In addition, plan sponsors can increase the certainty of the limitations period applicable to an ERISA § 502(a)(1)(B) action for benefits by including a reasonable limitations period in the plan document and increase the predictability of the start of the limitations period by including a plan provision limiting the timeframe in which a participant or beneficiary is entitled to bring an administrative claim for benefits or additional benefits under the plan.

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<sup>1</sup> ERISA specifies a limitations period for claims for violation of the fiduciary responsibility provisions set forth in Part 4 of ERISA. See 29 U.S.C. § 1113. However, there is no limitations period set forth in ERISA for benefit claims brought under ERISA § 502(a)(1)(B) or other non-fiduciary claims brought under ERISA §§

502(a)(1)(A) or 502(a)(3). 29 U.S.C. §§ 1132(a)(1)(A) or (a)(3).

<sup>2</sup> See, e.g., *Shaw v. McFarland Clinic, P.C.*, 363 F.3d 744, 747 (8th Cir. 2004); *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Insurance Program*, 222 F.3d 643, 648 (9th Cir. 2000) (en banc); *Syed v. Hercules Inc.*, 214 F.3d 155, 161 (3d Cir. 2000); *Lang v. Aetna Life Insurance Co.*, 196 F.3d 1102, 1104 (10th Cir. 1999); *Harrison v. Digital Health Plan*, 183 F.3d 1235, 1239 (11th Cir. 1999); *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir. 1996); *Hogan v. Kraft Foods*, 969 F.2d 142, 145 (5th Cir. 1992); *Meade v. Pension Appeals & Review Committee*, 966 F.2d 190, 194-95 (6th Cir. 1992); *Martone v. Connecticut General Life Insurance Co.*, 983 F.2d 1056 (Table) (4th Cir. 1992); *Miles v. N. Y. Teamsters Conference Pension & Retirement Fund Employee Pension Plan*, 698 F.2d 593, 598 (2d Cir. 1983).

<sup>3</sup> See, e.g., *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808, 816 (7th Cir. 2010) (borrowing a breach of contract limitations period from a non-forum state because the non-forum state had the most significant connection to the dispute, the plan sponsor was headquartered in the non-forum state, and the named plaintiff did not live in the forum state).

<sup>4</sup> See, e.g., *Daill*, 100 F.3d at 65 (holding that the most analogous Illinois statute of limitations for an ERISA § 502(a)(1)(B) claim is the 10-year limitations period for suits on a written contract); see also *Kapp v. Trucking Employees of North Jersey Welfare Fund, Inc. Pension Fund*, No. 10-CV-2777, 2011 BL 118254 at \*6 (3d Cir. May 4, 2011); *Wise v. Verizon Communications Inc.*, 600 F.3d 1180, 1187 n.2, 1191 (9th Cir. 2010); *Burke v. Pricewaterhousecoopers LLP Long Term Disability Plan*, 572 F.3d 76, 78 (2d Cir. 2009); *Abdel v. U.S. Bancorp*, 457 F.3d 877, 880 (8th Cir. 2006); *Chuck v. Hewlett Packard Co.*, 455 F.3d 1026, 1031 (9th Cir. 2006); *Santino v. Provident Life & Accident Insurance Co.*, 276 F.3d 772, 776 (6th Cir. 2001); *Harrison*, 183 F.3d at 1241; *Hogan*, 969 F.2d at 145; *Meade*, 966 F.2d at 195; *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197, 1207 (10th Cir. 1990); *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975, 981 (4th Cir. 1987).

<sup>5</sup> See, e.g., *Redmon v. Sud-Chemie Inc. Retirement Plan for Union Employees*, 547 F.3d 531, 537 (6th Cir. 2008) (applying five-year statutory violation limitations period instead of fifteen-year written contract limitations period where it was more appropriate considering the facts of the underlying claim); *Mirabile v. Life Insurance Co. of North America*, 293 F. App'x 213, 215 (4th Cir. 2008) (applying, for plans whose benefits are provided by

an insurance company, the one-year limitations period for filing suit against an insurer instead of the five-year breach of contract limitations period); *Mead v. Intermec Technologies Corp.*, 271 F.3d 715, 717 (8th Cir. 2001) (applying state two-year limitations period for wage payment suits to ERISA § 502(a)(1)(B) action).

<sup>6</sup> In addition, in cases where a court employs a limitations period other than the period for actions on a written contract, the limitations period may be even less than the three-year contract limitations period creating even more disparity. *See, e.g., Syed*, 214 F.3d at 161 (applying the one-year limitations period for claims arising out of work, labor, or personal services to a claim for benefits under ERISA § 502(a)(1)(B)).

<sup>7</sup> ERISA's jurisdictional provision, § 502(e), states that where a claim for benefits under ERISA is brought in a federal district court, it may be brought in the district either: (1) where the plan is administered, (2) where the breach took place, or (3) where a defendant resides or may be found. 29 U.S.C. § 1132(e)(2). Plaintiffs are, therefore, presented with the opportunity to bring an ERISA § 502(a)(1)(B) claim for benefits in various states, especially where the defendant has a national presence.

<sup>8</sup> *See Miller v. Fortis Benefits Insurance Co.*, 475 F.3d 516, 520 (3d Cir. 2007) ("[T]he accrual date for federal claims is governed by federal law, irrespective of the source of the limitations period."); *see also, e.g., Young*, 615 F.3d at 816; *Wise*, 600 F.3d at 1188; *White v. Sun Life Assurance Co. of Canada*, 488 F.3d 240, 245 (4th Cir. 2007); *Abdel*, 457 F.3d at 880; *Chuck*, 455 F.3d at 1031; *Union Pacific Railroad Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir. 1998); *Dail*, 100 F.3d at 65; *Price v. Provident Life & Accident Insurance Co.*, 2 F.3d 986, 988 (9th Cir. 1993).

<sup>9</sup> *See Union Pacific Railroad Co.*, 138 F.3d at 330.

<sup>10</sup> *See, e.g., Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989) ("An ERISA cause of action does not accrue until a claim of benefits has been made and formally denied. . . . To hold otherwise would require lay participants and beneficiaries to be constantly alert for errors or abuses that might give rise to a claim and start the statute of limitations running.") (citation omitted); *see also Cross v. Bragg*, 329 F. App'x 443, 453 (4th Cir. 2009) (same); *Mirabile*, 293 F. App'x at 215 (same); *White*, 488 F.3d at 246 (same); *Singleton v. Temporary Disability Benefits Plan for Salaried Employees of Champion International Corp. No. 505*, 183 F. App'x 293, 295 n.2 (4th Cir. 2006) (same); *Williams v. Ironworkers Local 16 Pension Fund*, 178 F. App'x 235, 236 (4th Cir. 2006) (same); *Christensen v. Northrop Grumman Corp.*, 125 F.3d 847 (4th Cir. 1997) (same).

<sup>11</sup> 898 F.2d 424, 429 (4th Cir. 1990).

<sup>12</sup> *See, e.g., Hargrave v. Commonwealth General Corporation's Long Term Disability Plan*, No. 10-CV-30720, 2011 BL 127913 at \*9 n.12 (5th Cir. May 13, 2011) (holding that a claim for benefits accrues at the time benefits are denied); *Baptist Memorial Hospital-DeSoto Inc. v. Crain Auto. Inc.*, 392 F. App'x 288, 294 (5th Cir. 2010) (Under ERISA, a cause of action accrues after a claim for benefits has been made and formally denied) (internal quotations and citations omitted); *Harris Methodist Fort Worth v. Sales Support Services Inc. Employee Health Care Plan*, 426 F.3d 330, 337 (5th Cir. 2005) (same); *Hall v. National Gypsum Co.*, 105 F.3d 225, 230 (5th Cir. 1997) (same).

<sup>13</sup> Although not required by ERISA, courts uniformly require a claimant to exhaust the administrative remedies under the plan before filing suit under ERISA § 502(a)(1)(B). *See, e.g., LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 258-59 (2008) (Roberts, J., concurring) ("[A]lmost all the Courts of Appeals, *see Fallick v. Nationwide Mutual Insurance Co.*, 162 F.3d 410, 418, n.4 (6th Cir. 1998) (citing cases), [recognize the requirement] that a participant exhaust the administrative remedies mandated by ERISA § 503, 29 U.S.C. § 1133, before filing suit under § 502(a)(1)(B)"); *White*, 488 F.3d at 247 ("Thus, although ERISA does not explicitly state that claimants must exhaust internal appeals before filing suit, courts have universally found an exhaustion requirement in part because statutory text and structure establish these twin remedies of administrative and judicial review as parts of a single scheme.") (citations omitted).

<sup>14</sup> *See, e.g., White*, 488 F.3d at 247 ("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.").

<sup>15</sup> ERISA, under the Department of Labor regulations, establishes a deadline for a claimant to appeal a denial of a benefits claim, a deadline for a plan to provide a determination of a claim to a claimant, and a deadline for a plan to provide a determination of an appeal to the claimant, but ERISA does not set forth any deadline for a participant to bring a claim for benefits in the first instance. *See* 29 C.F.R. § 2560.503-1.

<sup>16</sup> *Kapp*, 2011 BL 118254 at \*7 (citations omitted); *see also, e.g., Young*, 615 F.3d at 816 (holding that a claim for benefits "accrues upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary" and this did not occur by simply making a lump sum payment of the benefit without a red flag that the plaintiff was

underpaid) (quotations and citation omitted); *Wise*, 600 F.3d at 1188 (holding that an ERISA claim accrues either at the time benefits are denied or when the insured has reason to know that the claim has been denied); *Redmon*, 547 F.3d at 534-35 ("In an ERISA case, a cause of action accrues 'when a fiduciary gives a claimant clear and unequivocal repudiation of benefits.' . . . Under the 'clear repudiation rule,' the fiduciary's repudiation need not be formal.") (citations omitted); *Miller*, 475 F.3d at 517-518 (holding that a repudiation that is clear and made known to the beneficiary—even in the absence of any formal or informal claim—causes a claim for benefits to accrue); *Abdel*, 457 F.3d at 880-81 (stating that "[a] cause of action for plan benefits under ERISA accrues when a plan fiduciary has formally denied an applicant's claim for benefits or when there has been a repudiation by the fiduciary which is clear and made known to the beneficiary" and holding that, if a claim has been filed, the cause of action accrues at the end of the 60-day appeal period if the claimant fails to appeal a denial) (quotations and citation omitted); *Burks v. American Cast Iron Pipe Co.*, 212 F.3d 1333, 1336 (11th Cir. 2000) (stating, for purposes of determining whether claims for benefits accrued under an ERISA plan prior to the enactment of ERISA, that employee benefit claims accrue when participants "became aware of the facts necessary to make their claims" or, if later, when "an application [for benefits] is denied") (quotations omitted); *Carey v. International Brotherhood of Electrical Workers Local 363 Pension Plan*, 201 F.3d 44, 49 (2d Cir. 1999) ("[A] cause of action under ERISA accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff—regardless of whether the plaintiff has filed a formal application for benefits."); see also *Chuck*, 455 F.3d at 1039; *Henglein v. Colt Industries Operating Corp.*, 260 F.3d 201, 214 (3d Cir. 2001); *Wetzel*, 222 F.3d at 649; *I.V. Services of America, Inc. v. Inn Development & Management, Inc.* 182 F.3d 51, 52 n.2 (1st Cir. 1999); *Bennett v. Federated Mutual Insurance Co.*, 141 F.3d 837, 839 (8th Cir. 1998); *Union Pacific Railroad Company*, 138 F.3d at 330-31; *Daill*, 100 F.3d at 65-66; *Mills v. Twentieth Century-Fox Film Corp.*, 57 F.3d 1077 (9th Cir. 1995); *Price*, 2 F.3d at 988; *Held*, 912 F.2d at 1205-06; *Miles*, 698 F.2d at 598.

<sup>17</sup> See *Miller*, 475 F.3d at 517-518, 520-23 (holding that a repudiation that is clear and made known to the beneficiary—even in the absence of any formal or informal claim—causes a claim for benefits to accrue); *Carey*, 201 F.3d at 48-49 ("Whether or not Carey filed a formal application for benefits before his retirement in 1992, the Plan clearly and unequivocally repudiated

Carey's entitlement to benefits in its October 28, 1991 letter"); *Union Pacific Railroad Company*, 138 F.3d at 330-31 ("[T]he general rule in an ERISA action is that a cause of action accrues after a claim for benefits has been made and has been formally denied. . . . Nonetheless, and still consistent with the discovery rule, an ERISA beneficiary's cause of action accrues before a formal denial, and even before a claim for benefits is filed, 'when there has been a repudiation by the fiduciary which is clear and made known to the beneficiar[y]'); *Daill*, 100 F.3d at 66, n.5 (holding that cause of action accrued when the fund denied plaintiff's appeal and unequivocally informed him that he was not entitled to benefits and rejecting plaintiff's argument "that his cause of action did not accrue until he actually filed a formal application for benefits, as opposed to seeking and then challenging a determination" of his benefits); *Martin v. Construction Laborer's Pension Trust for Southern California*, 947 F.2d 1381, 1384-86 (9th Cir. 1991) (holding that a clear repudiation started the limitations period notwithstanding that plaintiff only had requested a determination of his pension credits and had not filed a formal claim for benefits at that time).

The courts are also at odds as to whether a second claim for the same benefits will, if heard by the plan administrator, trigger a new limitations period. The Eighth Circuit declined to apply a new limitations period if the plan administrator reconsidered plaintiff's claim a second time, while the Fourth Circuit held that a new limitations period applied to the second claim if the claim was reconsidered by the plan administrator. Compare *Mason v. Aetna Life Insurance Co.*, 901 F.2d 662, 664 (8th Cir. 1990) (holding that a claim for benefits accrued when it was initially denied by the plan administrator and that a subsequent reevaluation of the claim at the request of the plaintiff several years later did not renew the cause of action for limitations purposes) with *Williams*, 178 F. App'x at 236-37 (holding that, where the plan administrator agreed to consider a claim submitted by plaintiff for the second time, the denial of that second claim triggered a new limitations period).

<sup>18</sup> *Carey*, 201 F.3d at 49.

<sup>19</sup> *Miller*, 475 F.3d at 517-518.

<sup>20</sup> However, plan fiduciaries should be aware that actions that purposefully delay a participant's claim will extend the limitations period. Even when the accrual date of an ERISA benefit claim would otherwise cause the claim to be time-barred, courts have generally recognized the equitable tolling of the limitations period if the plan fiduciary has acted improperly and can be faulted for plaintiff's failure to timely file a claim within

the limitations period. *See, e.g., Veltri v. Building Service 32B-J Pension Fund*, 393 F.3d 318, 325 (2d Cir. 2004) (noting that "[a]s a general matter, a claim for improper denial of benefits accrues 'when there has been a repudiation by the fiduciary which is clear and made known to the beneficiaries'" and holding that failure to notify a claimant of her right to bring an action in court equitably tolls the statute of limitations unless the claimant has actual notice of her right to sue) (citation omitted); *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 875-77 (7th Cir. 1997) (holding that the statute of limitations for a claim for benefits is tolled if defendant's conduct prevents plaintiff from filing suit).

<sup>21</sup> *See, e.g., Harris Methodist Fort Worth*, 426 F.3d at 337 ("Where a plan designates a reasonable, shorter time period, however, that lesser limitations schedule governs."); *see also Baptist Memorial Hospital*, 392 F. App'x at 294; *Salisbury v. Hartford Life & Accident Insurance Co.*, 583 F.3d 1245, 1249 (10th Cir. 2009); *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 908 (9th Cir. 2009); *Rice v. Jefferson Pilot Financial Insurance Co.*, 578 F.3d 450, 455 (6th Cir. 2009); *Abena v. Metropolitan Life Insurance Co.*, 544 F.3d 880, 883 (7th Cir. 2008); *Fetterhoff v. Liberty Life Assurance Co.*, 282 F. App'x 740, 744 (11th Cir. 2008); *White*, 488 F.3d at 250; *Wilkins v. Hartford Life & Accident Insurance Co.*, 299 F.3d 945, 948 (8th Cir. 2002); *Santino*, 276 F.3d at 776; *Northlake Regional Medical Center v. Waffle House System Employee Benefit Plan*, 160 F.3d 1301, 1303-04 (11th Cir. 1998); *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 873-75 (7th Cir. 1997).

<sup>22</sup> *See, e.g., Salisbury*, 583 F.3d at 1249 (enforcing a plan limitations period of three years after proof of loss is required to be furnished and rejecting the argument that accrual may not begin until participant has completely exhausted administrative remedies under the plan); *Rice*, 578 F.3d at 455-56 (stating that a contractual accrual date set forth in a plan will be enforced if it is reasonable in lieu of the clear repudiation rule and holding that "three years of the time written proof of claim was required to be given" was reasonable); *Burke*, 572 F.3d at 79, 81 (enforcing accrual provisions in "Plan's limitations period [that] prohibit[ed] a claimant from bringing legal action more than 'three years after the time written Proof of Loss is required to be furnished'"); *Abena*, 544 F.3d at 883 (upholding plan requirement that required a participant to file suit no later than three years from the time proof of disability was required to be filed); *Harris Methodist Fort Worth*, 426 F.3d at 337 (holding that plan provision creating a limitations period

of "three (3) years from the time written proof of loss is required to be given" was valid); *Santino*, 276 F.3d at 776 (enforcing a limitations period of "three years of [claimant's] written proof of loss" instead of the state six-year breach of contract limitations period); *Clark v. NBD Bank*, 3 F. App'x 500, 503 (6th Cir. 2001) (upholding application of plan limitation provision that stated "[n]o such action [at law or equity] shall be brought after the expiration of three years after the time written proof of loss is required to be furnished"); *Doe*, 112 F.3d at 873-75 (holding that a provision in an ERISA plan that no legal action may be brought more than 3 years from the time proof of loss is required is reasonable and enforceable).

<sup>23</sup> *See, e.g., White*, 488 F.3d at 242, 245-47 (refusing to enforce contractual accrual language that would start the limitations period at the time proof of loss was required rather than at the time claim was denied, because it results in starting the statute of limitations before a participant can file a lawsuit); *Miller*, 475 F.3d at 517-518 (refusing to enforce contractual accrual language that did not comport with federal accrual rule); *Price*, 2 F.3d at 988 (refusing to enforce plan's accrual provision as it could allow the limitations period to expire before a plan participant knew his claim had been denied).

<sup>24</sup> *See supra* n. 15.