Eighth Circuit Struggles to Select Appropriate Statute of Limitations for Erisa Claims: Difficulties with a Straightforward Matter—Johnson v. State Mutual Life Assurance Co. of America

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EIGHTH CIRCUIT STRUGGLES TO SELECT APPROPRIATE STATUTE OF LIMITATIONS FOR ERISA CLAIMS: DIFFICULTIES WITH A STRAIGHTFORWARD MATTER

Johnson v. State Mutual Life Assurance Co. of America

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A cause of action capable of being “brought at any distance of time . . . would be utterly repugnant to the genius of our laws.”¹

I. INTRODUCTION

Jo Ann Johnson sought to recover benefits under a group life insurance policy issued to her late husband through State Mutual Life

Assurance Co. of America.2 In May 1989, Johnson commenced an action under the federal Employee Retirement Income Security Act of 1974 (ERISA).3 The federal district court dismissed Johnson’s complaint, holding that the claim was barred by Missouri’s five-year statute of limitations for contract actions.4

The Eighth Circuit Court of Appeals, sitting en banc in Johnson v. State Mutual Life Assurance Co. of America,5 reversed and remanded, holding that Johnson’s claim for group life insurance benefits under ERISA was governed by Missouri’s ten-year statute of limitations for actions on written contracts to pay money, rather than the five-year statute which governs most contracts.6 In so holding, the court expressly overruled a prior decision, which held that the five-year statute controlled an action to recover ERISA benefits.7

This Case Note examines the Eighth Circuit’s attempt to reconcile the characterization of an ERISA benefits claim for statute of limitations purposes, the underlying policies of ERISA, and the Missouri common law characterization of similar claims. Part II outlines ERISA’s history, policies, and statutory provisions. Part III explores the Eighth Circuit’s decision in Johnson. Part IV argues that the method of selecting the “most analogous” or “appropriate” limitations period under the “state-borrowing doctrine,” demonstrated by the Eighth Circuit’s decision in Johnson, fails to achieve ERISA’s underlying policy of uniformity in the regulation of employee benefit plans and inadequately considers federal interests. Part IV further argues that a uniform limitations period is required to advance ERISA’s policies. This Case Note contends that Congress should amend ERISA’s statute of limitations and proposes a limitations period that would promote ERISA’s policies. Alternatively, in the absence of congressional action to amend ERISA’s statute of limitations, this Case Note proposes that, to best promote ERISA’s policies, the United States Supreme Court should apply a uniform federal limitations period.

3. Id. The life insurance policy in question was issued under an ERISA benefit plan through Johnson’s husband’s employer. As the named beneficiary under the policy, Johnson commenced a beneficiary action under section 502 of ERISA, 29 U.S.C. § 1132 (1988). Id.; see also infra notes 33-38 and accompanying text for discussion of section 502 of ERISA.
4. Johnson, 942 F.2d at 1261; see also infra note 73 for Missouri’s five-year statute of limitations.
5. 942 F.2d 1260 (8th Cir. 1991) (en banc).
6. Id. at 1265; see also infra notes 73-74 for Missouri’s five- and ten-year statutes of limitation for contract claims.
7. Johnson, 942 F.2d at 1266 (overruling Fogerty v. Metropolitan Life Ins. Co., 850 F.2d 430 (8th Cir. 1988)).
II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

A. History

Employee benefit plans are the primary source of retirement income for American workers today. Currently, public and private pension plans have assets in excess of $2.9 trillion, comprising twenty-eight percent of all outstanding equity in the United States economy. \(^8\) This figure represents an increase of nearly 140 percent over the last decade. \(^9\) The dramatic growth in pension funds is due, in part, to the rise in the proportion of Americans over age sixty-five. \(^10\)

In an attempt to curb abuses within the employee benefit system, \(^11\) Congress enacted the Employee Retirement Income Security Act of 1974. \(^12\) Title I of ERISA \(^13\) established minimum standards governing the structure and operation of employee benefit plans. \(^14\) Congress designed ERISA's comprehensive regulatory scheme to protect the benefit rights and the retirement security of plan partici-


\(^9\) See id.; see also Peter F. Drucker, Reckoning with the Pension Fund Revolution, Harv. Bus. Rev., Mar.-Apr. 1991, at 106 (describing the rise of pension funds as "one of the most startling power shifts in economic history").

\(^10\) See Population, Retirement Trends, Plan Design Examined at Conference, 18 Pens. Rep. (BNA) No. 20, at 876 (May 20, 1991). At a symposium sponsored by the Pension Research Council of the University of Pennsylvania's Wharton School, Professor Samuel H. Preston predicted that there will be "a sharp rise in the proportion of the population older than 65" during the next 60 years. Id. Furthermore, Census Bureau projections show that "[i]n 2030, there will be two persons in the United States over 65 for every five aged 20 to 64, almost double the ratio projected for 2010 . . . ."


\(^13\) ERISA consists of four titles. Titles II-IV are beyond the scope of this Case Note.

pants and beneficiaries. The United States Supreme Court has noted that Congress intended to "set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."

ERISA's legislative history evinces Congress' desire to eliminate the possibility that the law protecting employee benefit plans would differ from state to state. During legislative debate, the House and Senate Conference Committee stated, "Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform system of law . . . ." Both the Senate and House Reports on the ERISA legislation recognized that "the operations of employee benefit plans are increasingly interstate" and that the "uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." Senator Javits, one of ERISA's principal sponsors, urged during the floor debate, that "the emergence of comprehensive and pervasive Federal interest and the interests of uniformity [in] interstate plans require[s] . . . the displacement of State action in the field of private employee benefit programs."


15. The preamble to ERISA reads:

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefits plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).


19. 120 CONG. REC. 29,942 (1974). ERISA's House sponsor, Representative
The Supreme Court later reinforced the significance of uniformity in the regulation of employee benefit plans that ERISA sought to achieve, concluding that variations in benefit plan regulation would result in administrative inefficiencies.20

B. Scope of ERISA

ERISA applies to any employee benefit plan established or maintained by a union or by an employer engaged in commerce.21 The phrase “employee benefit plan” is defined to cover both employee welfare benefit plans and employee pension benefit plans.22 An “employee welfare benefit plan” is any benefit plan other than a pension plan, including most employer-provided plans or programs that furnish employees and their beneficiaries with benefits such as medical, death, disability or unemployment insurance, as well as vacation, scholarships, or day care.23 An “employee pension benefit plan” is any employer-established plan or program that provides employees with retirement income or deferred income extending to, or beyond, the termination of employment.24 ERISA specifically excludes coverage of certain employee benefit plans, including governmental plans, church plans, workers’ compensation, and unemployment or disability plans.25

ERISA mandates that all employee benefit plans “shall be established and maintained pursuant to a written instrument.”26 This instrument must provide a “named fiduciary”27 who will control and

John Dent, proclaimed: “I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans.” 120 CONG. REC. 29,197 (1974). As many commentators have noted, ERISA was intended to provide a “uniform national civil enforcement system to regulate pension plans” through the “adoption of a comprehensive scheme of federal laws relating to both benefit claims and fiduciary responsibilities.” Leslie L. Wellman & Shari J. Clark, An Overview of Pension Benefit and Fiduciary Litigation Under ERISA, 26 WILAMETTE L. REV. 665, 666 (1990) (emphasis added).

20. See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987). The Court stated, “The most efficient way [for employers] to meet [administrative] responsibilities is to establish a uniform administrative scheme . . . . Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.” Id.
27. The term “named fiduciary” is defined as a fiduciary named in the plan instrument, or identified as a fiduciary by the employer, an employee organization, or both. ERISA § 402(a)(2), 29 U.S.C. § 1102(a)(2).
maintain the operation and administration of the plan.\textsuperscript{28} ERISA also specifically defines a fiduciary's obligations to benefit plan participants.\textsuperscript{29} Generally, a fiduciary must hold the assets of an employee benefit plan in trust;\textsuperscript{30} however, ERISA provides an exception for assets of a plan that consist of insurance contracts or policies.\textsuperscript{31}

C. \textit{Enforcement and Procedural Aspects}

ERISA's civil enforcement section permits participants and beneficiaries of a plan, within the purview of ERISA, to commence a civil action to redress certain enumerated violations of ERISA or the terms of the plan.\textsuperscript{32} One remedy afforded to beneficiaries and par-

\begin{itemize}
\item \textsuperscript{28} ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).
\item \textsuperscript{29} ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). As defined by these sections, a fiduciary has the following duties:
  \begin{itemize}
  \item \textbf{[A]} fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
    \begin{itemize}
    \item \textbf{(A)} for the exclusive purpose of:
      \begin{itemize}
      \item (i) providing benefits to participants and their beneficiaries; and
      \item (ii) defraying reasonable expenses of administering the plan;
    \end{itemize}
    \item \textbf{(B)} with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
    \item \textbf{(C)} by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
    \item \textbf{(D)} in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter . . . .
  \end{itemize}
\item \textsuperscript{30} ERISA § 403(a), 29 U.S.C. § 1103(a). \textit{See supra} note 29 for fiduciary obligations under ERISA's trust requirements.
\item \textsuperscript{31} ERISA § 403(b), 29 U.S.C. § 1103(b). The exception relevant to this Case Note states that section 1103(a) does not apply "to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State . . . ." ERISA § 403(b)(1), 29 U.S.C. § 1103(b)(2).
\item \textsuperscript{32} ERISA § 502(a), 29 U.S.C. § 1132(a). This section provides that a civil action may be brought by a participant or a beneficiary. ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1).
\end{itemize}
participants of an ERISA plan is the right to bring an action to recover benefits from the plan. In addition to recovering benefits, participants and beneficiaries are also entitled to bring other civil actions under ERISA's civil enforcement section.

Under ERISA's broad venue provisions, an action under ERISA "may be brought in the district court where the plan is administered, where the breach took place, or where a defendant resides or may be found." United States district courts generally have exclusive jurisdiction over all actions brought under Title I of ERISA. The sole exception is for actions brought under ERISA's civil enforcement section. Civil enforcement actions may be filed in either a state court of competent jurisdiction or in federal district court. However, actions filed in state court under ERISA may be removed to federal court.

In actions brought in federal court, process may be served in any...
district where a defendant resides or may be found. This broad provision essentially authorizes nationwide service of process. While federal law governs any court's interpretation of ERISA, federal courts may apply the state legal principles that best promote federal policy. Claims based on state common or statutory laws, however, are subject to ERISA's preemption provision.

D. Preemption of State Law

ERISA generally preempts "any and all State laws" that "relate to any employee benefit plan" covered by ERISA. Although ERISA's preemption clause has broad application, a number of express statutory exemptions are provided. For example, ERISA specifically

district courts have jurisdiction over ERISA actions regardless of the amount in controversy. ERISA § 502(f), 29 U.S.C. § 1132(f).

41. See Wellman & Clark, supra note 19, at 682.
42. See ERISA § 514(a), 29 U.S.C. § 1144(a); see also infra notes 43-47 and accompanying text for discussion of ERISA's preemption clause.
43. ERISA § 514(a), 29 U.S.C. § 1144(a). ERISA's preemption clause states, "Except as provided in subsection (b) of this section" the saving clause, "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan . . . ." Id. (emphasis added). The term "State laws" includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1). The term "State" includes "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2).


"saves" from preemption state laws regulating insurance, banking, or securities. An employee benefit plan may not escape ERISA regulation by characterizing itself as an insurance, banking, or security firm, however. ERISA's deemer clause closes this loophole in the savings clause by deeming such plans to be employee benefit plans subject to ERISA.

The legislative history of ERISA's preemption clause illustrates Congress' concern over the threat of multiple and conflicting state laws enacted to regulate employee benefit plans. It is clear that Congress intended ERISA to have a broad preemptive effect on state laws related to employee benefit plans. Recognizing Congress' uniformity concerns in drafting the preemption clause, later Supreme Court decisions interpreted ERISA's express preemption provision as deliberately expansive and designed to establish employee benefit plan regulation as "exclusively a federal concern."

44. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). ERISA's saving clause states: "Except as provided in subparagraph (B)" the deemer clause, "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." Id.


Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Id.

46. Senator Javits expressed the perceived reasons for an expansive preemption provision. Rejecting the House and Senate versions, and supporting the provisions of the Conference Committee substitute, Senator Javits stated:

[The House and Senate] formulation[s] raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.


47. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981); see also Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) ("A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) ("The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.").
E. Statute of Limitations

1. Express Limitations Period

ERISA's express statute of limitations provision applies only to actions under ERISA's fiduciary obligations section.48 Actions for breach of fiduciary duty under this section must be commenced within the earlier of six years after the last act constituting a breach or after the latest date an omission could have been cured, or three years after the earliest date on which the plaintiff had actual knowledge of the breach.49 In the case of fraud or concealment, the action must be commenced within six years after the plaintiff discovered the breach.50

2. "State-Borrowing Doctrine"

When Congress has failed to provide a statute of limitations for a federal cause of action, it is a well-settled rule of federal law that federal courts look to state law governing the timeliness of claims.51 In looking to state law, the federal court "borrows" or "absorbs" the state statute of limitations most analogous to the case at hand.52 This practice of "borrowing" state limitations periods derived from the Federal Rules of Decision Act.53 Federal courts are to as-

48. See supra note 29 for fiduciary obligations under ERISA.
49. See ERISA § 413, 29 U.S.C. § 1113 (1988). ERISA's Limitations of Actions provision provides:
   (a) No action may be commenced 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, after the earlier of —
      (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
      (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
   except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.
   Id. (emphasis added).
50. ERISA § 413(a), 29 U.S.C. § 1113(a).
sume that, in enacting remedial legislation, Congress ordinarily intends by its silence that state law is to be borrowed to determine the limitations period. Although the rule is not without exception, it is not to be lightly abandoned. On occasion, the United States Supreme Court has concluded that it was not Congress' intention to use state rules in conflict with the purpose or operation of federal substantive law. In these situations, the Court has departed from the "state-borrowing doctrine" and looked to federal law for a suitable limitations period.

Because ERISA does not provide an express statute of limitations for actions other than those under the fiduciary obligations section, federal courts are required to apply the most analogous state statute of limitations that is consistent with ERISA's objectives. In determining the most analogous state statute of limitations, the federal court must consider the federal policies involved and must also be aware of the underlying nature of the federal claim. The choice of the appropriate state statute of limitations often is the subject of sub-

54. See Agency Holding Corp., 483 U.S. at 147.
57. See, e.g., Agency Holding Corp., 483 U.S. at 147-48; DelCostello, 462 U.S. at 161-62.
58. See, e.g., Fogerty v. Metropolitan Life Ins. Co., 850 F.2d 430, 432 (8th Cir. 1988) (holding that action for recovery of benefits under ERISA is most analogous to a state breach of contract claim); see also Wilson v. Garcia, 471 U.S. 261, 268 (1985) (selecting the "most appropriate" or the "most analogous" state statute of limitations under section 1983 claim when Congress had not established a time limitation).

Although the limitations period for federal statutes that do not contain an express statute of limitations is determined by borrowing state limitations, determination of the time when the federal claim accrued is controlled by federal law. See Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 341 (D.C. Cir. 1991). Federal law governs "the time at which the federal claim accrue[s]—the moment at which the limitations period began to run." Id.

The general federal accrual rule is the "discovery rule," which provides that a claim for relief begins to accrue when the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the claim. Id. (citing Northern Cal. Retail Clerks Union & Food Employers Joint Pension Trust Fund v. Jumbo Markets, Inc., 906 F.2d 1371, 1372 (9th Cir. 1990)); see also Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990) (noting that the discovery rule is applied in all federal question cases "in the absence of a contrary directive from Congress"); Alcorn v. Burlington N. R.R., 878 F.2d 1105, 1108 (8th Cir. 1989). The statute generally commences to run for actions to recover ERISA plan benefits at the time the benefits were due. See Fogerty, 850 F.2d at 432.

59. See Wilson, 471 U.S. at 261; see also Jenkins v. Local 705, International Brotherhood of Teamsters Pension Plan, 713 F.2d 247, 251 (7th Cir. 1983).
Courts must focus on the nature of the employee benefits sought in the action to determine the most analogous state statute of limitations. Because the nature of the claims authorized under ERISA differs, courts have characterized the various ERISA claims in a number of ways. Even when a particular claim is characterized uni-

60. See Charles P. Efflandt, An Overview of Civil Litigation Under ERISA, 59 KAN. B. Ass'n July 1990, at 24, 29. ERISA's broad venue provisions afford plaintiffs the opportunity to "shop" forums in search of a statute of limitations that favors their cause of action. Id.; see also supra note 35 and accompanying text for discussion of ERISA's venue provisions.

61. See Lumpkin v. Enviroydne Indus., Inc., 933 F.2d 449, 465 (7th Cir. 1991) ("To determine which statute of limitations properly applies, the nature of the plaintiffs' claims must be examined."); see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991) (5-4 decision). In Lampf, the Court concluded that, when "the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period." Id. at 2780.


Courts have varied in their characterization of a trustee's action to recover unpaid or delinquent contributions under ERISA § 515, 29 U.S.C. § 1145. Generally, however, these claims are characterized as contract actions. See, e.g., Northern Cal. Retail Clerks Union and Food Employees Joint Pension Fund v. Jumbo Mkt., 906 F.2d 1371, 1372 (9th Cir. 1990) (applying California's four year limitations for contract actions); Vernau v. Vic's Mkt., Inc., 896 F.2d 43, 45 (3d Cir. 1990) (applying Pennsylvania's three-year limitations for state wage payment and collection actions); Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc., 872 F.2d 702, 706 (6th Cir. 1988) (applying Michigan's six-year limitations for written contract actions); Wyoming Laborers Health & Welfare Plan v. Morgan & Oswood Constr. Co., 850 F.2d 613 (10th Cir. 1988) (applying Wyoming's ten-year limitations for actions based on written contracts).

Courts have also varied in their characterization of an employee's claim of retaliatory discharge under ERISA § 510, 29 U.S.C. § 1140. Generally, these claims are characterized as tort-type actions. See, e.g., McClure v. Zoecon, Inc., 936 F.2d 777, 778 (5th Cir. 1991) (applying Texas' two-year limitations for wrongful discharge or employment discrimination claims); Held, 912 F.2d at 1205-07 (applying New York's three-year limitations period for employment discrimination-tort actions); Clark v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989) (applying Georgia's two-year limitations for recovery of wages, and twenty-year limitations for enforcement of stat-
formly among the federal circuits, the limitations periods in different
states can widely vary. Thus, for the same ERISA claim, it is pos-

sible that fifty different statutes of limitation may apply.

II. Johnson v. State Mutual Life Assurance Co. of America

A. Facts

Cleveland Johnson died of a gunshot wound in October, 1979. At
that time, he was a policyholder under a group life insurance policy
issued through an employee benefit plan at his place of employ-

ment. His wife and named beneficiary, Jo Ann Johnson, was to re-

ceive $44,000 under the terms of the policy in the case of her
husband’s accidental death. The insurer, however, refused to pay
the amount owing in the case of accidental death on the ground that
Mr. Johnson’s death was not accidental.

In May, 1989, Johnson commenced an action in Missouri state
court to recover the accidental death benefits under the policy. The
insurer removed the action to federal district court because its
group policy was part of an employee benefit plan regulated by
ERISA. Rather than contest federal jurisdiction, Johnson amended

utory rights action); Jaskilka v. Carpenter Technology Corp., 757 F. Supp. 175, 177
setts’ three-year limitations for tort actions).

63. A good example of the disuniformity among state statutes of limitation is
evident in the cases seeking ERISA benefits under § 502. See, e.g., Wright, 925 F.2d at
1291 (applying Oklahoma’s five-year limitations for written contract actions): Held,
912 F.2d at 1205-07 (applying New York’s six year limitations for benefits and dam-
ages claims); Jenkins, 713 F.2d at 254 (applying Illinois’ ten-year limitations for con-
tract actions); Harris-Teeter Super Mkts., Inc., 716 F. Supp. at 1560 (applying North
Carolina’s three-year limitations for contract actions); Dameron, 595 F. Supp. at 1412
(applying Maryland’s three-year limitations for contract actions).

64. 942 F.2d 1260 (8th Cir. 1991) (en banc).

65. Id. at 1261. The policy was issued by State Mutual Life Assurance Co. of
America.

66. Id. The insurance policy provided, “Upon receipt of due proof that an em-
ployee has . . . sustained bodily injury . . . solely through external violent and acci-
dental means . . . the Company agrees to pay . . . FOR LOSS OF . . . Life . . . The
Principal Sum [$44,000].” Id. at 1264.

67. Id. at 1261. The insurer contended that Mr. Johnson’s death was the result of
an altercation that he instigated, which “he should have foreseen would put his life
in danger.” Thus, Mr. Johnson did not die from injuries sustained through “accidental
means.” Id.

68. Id.

69. Id.; see also supra note 39 and accompanying text for discussion of removal
jurisdiction. The insurer removed the action to federal court most likely for the pur-
purpose of “shopping” for the shortest statute of limitations period. The Eighth Circuit
had previously affirmed a five year statute of limitations for an action based upon
ERISA plan benefits. See Fogerty v. Metropolitan Life Ins. Co., 850 F.2d 430 (8th
her complaint to state an ERISA cause of action. 70

B. Procedure

The insurer brought a motion for summary judgment on the ground that Johnson's claim was barred by the applicable statute of limitations. 71 In considering the motion, the district court looked to Missouri law for the most analogous limitations period. 72 However, two Missouri contract statutes of limitations potentially applied to Johnson's ERISA civil enforcement action.

Missouri's general five-year statute of limitations applies to all actions to recover on a contract, whether express or implied. 73 However, a special ten-year statute of limitations is provided for actions on a written contract "for the payment of money or property." 74 Missouri courts have narrowly applied the ten-year statute of limitations and generally require three elements of proof: a promise to pay money; an acknowledgement of indebtedness; and evidence, proved without resort to extrinsic aids, that the money sued for is promised in the written contract. 75

The district court determined that Johnson's ERISA claim was subject to Missouri's five-year statute of limitations for breach of contract. 76 In reaching its conclusion, the court relied upon a recent Eighth Circuit case, Fogerty v. Metropolitan Life Insurance Co., 77 which held that Missouri's five-year statute controlled an employee action to recover benefits under ERISA. 78 The district court granted the

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70. Id. at 1261. Under section 502(e)(1) of ERISA, state and federal courts share concurrent jurisdiction over claims brought by a beneficiary to enforce rights or recover benefits under the terms of a plan. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1988). Thus, Johnson could have challenged removal to federal district court.


72. Id. at 332.

73. Mo. Ann. Stat. § 516.120 (Vernon 1949). Under Missouri's five-year statute of limitations, actions that must be commenced within five years include: "All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record . . . ." Id.; see also infra note 74 for the text of section 516.110.

74. Mo. Ann. Stat. § 516.110 (Vernon 1949). Under section 516.110, actions that must be commenced within ten years include: "An action upon any writing, whether sealed or unsealed, for the payment of money or property . . . ." Id.

75. Johnson, 735 F. Supp. at 332; see also Fogerty v. Metropolitan Life Ins. Co., 850 F.2d 430, 432 (8th Cir. 1988) (citing Martin v. Potashnick, 217 S.W.2d 379 (Mo. 1949) and Superintendent of Ins. v. Livestock Mkt. Ins. Agency, 709 S.W.2d 897 (Mo. Ct. App. 1986)).

76. Johnson, 735 F. Supp. at 333; see also supra note 73.

77. 850 F.2d 430 (8th Cir. 1988).

78. Id. See supra text accompanying notes 85-91.
insurer's motion for summary judgment and held that Johnson's claim was barred because it was brought more than five years after the cause of action accrued.\footnote{Johnson, 735 F. Supp. at 333.}

Johnson appealed. After a panel of the Eighth Circuit Court of Appeals considered the parties' arguments, the court issued an order, sua sponte, resubmitting Johnson's case to the court en banc.\footnote{Johnson v. State Mut. Life Assurance Co., 942 F.2d 1260, 1261 (8th Cir. 1991) (en banc). The Eighth Circuit considered the case en banc because of a perceived need to reconsider its prior decision in Fogerty v. Metropolitan Life Insurance Co., 850 F.2d 430 (8th Cir. 1988). Id.}

C. Court's Analysis

The Eighth Circuit found that ERISA contains no statute of limitations for an action to recover benefits under an ERISA-regulated plan.\footnote{Id. at 1261-62.} The court concluded that the district court properly framed the issue as whether or not Missouri's five-year statute of limitations is "most analogous" to Johnson's ERISA action.\footnote{Id. at 1263.} In considering how Missouri's courts have interpreted the two contract statutes of limitations, the court rejected its prior decision in \textit{Fogerty} and concluded that Missouri's ten-year statute, not the five-year statute, applied to Johnson's action.\footnote{Id. at 1266. The majority observed that numerous Missouri cases decided the circumstances in which the five or ten year statute of limitations applied, and that it was the court's task to decide which of two parallel inconsistent lines of cases the Supreme Court of Missouri would apply to this case. \textit{Id.}} Although Johnson's action was not time-barred, the court remanded the case for consideration of whether laches principles under state law applied to bar the action.\footnote{Id.}

1. Overturning \textit{Fogerty} v. Metropolitan Life Insurance Co.

In \textit{Fogerty}, the Eighth Circuit held that an employee's action to recover benefits under ERISA was subject to Missouri's five-year statute of limitations for breach of contract, rather than the ten-year statute for written contracts to pay money.\footnote{Fogerty v. Metropolitan Life Ins. Co., 850 F.2d 430, 432 (8th Cir. 1988); see also supra notes 73-74 for Missouri's statutes of limitations for contract actions.} Primarily relying upon two Missouri cases,\footnote{See Martin v. Potashnick, 217 S.W.2d 379 (Mo. 1949); Superintendent of Ins. v. Livestock Mkt. Ins. Agency, 709 S.W.2d 897 (Mo. Ct. App. 1986).} the court determined that an employee action to recover benefits under ERISA is based on a contract, the employee benefit plan, and allegations involving breach of that contract.\footnote{Fogerty, 850 F.2d at 432.}
The *Fogerty* court observed that an action upon a written contract for the payment of money must contain an "acknowledgement of indebtedness" under Missouri law.\(^88\) Furthermore, the court noted that the promise for payment of money must be established without the use of extrinsic evidence to prove the promise.\(^89\) The court reasoned that an ERISA benefit plan does not contain a written acknowledgement of indebtedness and that the payment of benefits requires proof by extrinsic evidence.\(^90\) Thus, in *Fogerty*, the Eighth Circuit held that the most analogous state statute of limitations was the five-year statute.\(^91\)

2. Majority Opinion

Judge Loken, writing for the majority in *Johnson*, rejected the court's analysis in *Fogerty* and expressly overruled its rule that the five-year statute governed a claim for benefits under ERISA.\(^92\) The majority reasoned that *Fogerty* did not accurately reflect Missouri law on claims for insurance benefits for two reasons.

First, the court noted that its decision in *Fogerty* did not state whether the benefit plan in question contained a written promise to pay money within the meaning of Missouri's ten-year statute of limitations.\(^93\) The court in *Fogerty* had simply stated that an action upon a written contract for the payment of money is "not similar to an action for the recovery of employee benefits under ERISA."\(^94\) The majority observed that Missouri's ten-year statute applies to an action upon any writing for the payment of money.\(^95\) The majority noted that the Missouri Court of Appeals determined that "this statute is to be broadly construed."\(^96\) Furthermore, the majority explained that the Missouri Supreme Court had rejected a narrow interpretation of the ten-year statute.\(^97\)

Second, the majority found that the district court had failed to consider that an insurance policy "typically contains a written prom-

\(^{88}\) Id. (quoting Martin, 217 S.W.2d at 381).

\(^{89}\) Id. (citing Livestock Mkt., 709 S.W.2d at 902).

\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Johnson v. State Mut. Life Assurance Co., 942 F.2d 1260, 1266 (8th Cir. 1991) (en banc). Judge Loken was joined by Chief Judge Lay and Judges Arnold, Bowman, Wollman and Magill.

\(^{93}\) Id. at 1265.

\(^{94}\) Id. at 1265 (quoting Fogerty v. Metropolitan Life Ins. Co., 850 F.2d 430, 432 (8th Cir. 1988)).

\(^{95}\) Id. at 1263; see also supra note 73 for the text of Missouri's statutes of limitations for contract actions.

\(^{96}\) Johnson, 942 F.2d at 1263 (quoting Home Ins. Co. v. Mercantile Trust Co., 284 S.W. 834, 836 (Mo. Ct. App. 1926)).

\(^{97}\) Id. at 1263 (quoting State ex rel. Enterprise Milling Co. v. Brown, 106 S.W. 630, 631 (1907)).
ise to pay money.” Additionally, the court found that “Missouri courts have consistently applied the ten year statute of limitations to suits upon insurance policies.” Furthermore, Missouri courts had applied the ten-year statute in two suits for group disability insurance benefits.

The majority also noted that, before Fogerty was decided, the Eighth Circuit reversed a district court decision applying the five-year statute under similar circumstances. In Central States Southeast & Southwest Areas Pension Fund v. King Dodge, the Eighth Circuit held that the ten-year Missouri statute of limitations governed a trustee’s claim for unpaid contributions because the promise was “within the four corners of the writing,” even though extrinsic evidence would be required to prove the amount owed.

To “harmonize” Fogerty and King Dodge, the majority devised a two-part test to determine which Missouri contract statute of limitations applies. First, if the contract claim is not based upon a written promise to pay money, so that payment of the money must be established by extrinsic evidence of a breach of contract, then the five-year statute applies. Second, if the claim is based upon a written promise to pay money, then the ten-year statute applies even though extrinsic evidence is required to show that the written obligation to pay money has matured. The majority concluded that construing Johnson’s insurance policy as a written promise to pay money within the ten-year statute best reflected Missouri law as to claims for insurance benefits. In so holding, the majority expressly overruled Fogerty’s application of the five-year statute to an action to recover insurance benefits under ERISA.

98. Id. at 1263-64.
100. Johnson, 942 F.2d at 1264 (citing Crawford v. Metropolitan Life Ins. Co., 167 S.W.2d 915 (Mo. Ct. App. 1943)); Adams v. Metropolitan Life Ins. Co., 139 S.W.2d 1098 (Mo. Ct. App. 1940)).
101. Id. at 1265.
102. 835 F.2d 1238 (8th Cir. 1987).
103. Id. at 1240.
104. Johnson, 942 F.2d at 1265.
105. Id. (quoting Missouri, Kan. & Tex. Ry. v. American Surety Co., 236 S.W. 657, 663 (Mo. 1921) (applying Missouri’s ten-year statute of limitations to action on indemnity bond)).
106. Id.
107. Id. at 1266.
3. Dissenting Opinions

Judge McMillian and Judge Beam each filed a dissenting opinion. Judge McMillian disagreed with the majority’s factual conclusions and interpretation of Missouri precedent. He concluded that Missouri’s five-year statute applied to Johnson’s action. Judge Beam took a different approach and determined that neither of Missouri’s contract statutes of limitation should apply.

Judge McMillian agreed with the majority that a contract statute of limitations was most analogous to Johnson’s claim for insurance benefits. However, he disagreed with the majority’s conclusion that Johnson’s insurance policy constituted a written promise to pay money within the meaning of Missouri’s ten-year statute of limitations. Looking to Missouri precedent, Judge McMillian concluded that the essence of a promise to pay money was the “admission of a debt due and unpaid.” In the present case, there was no absolute or fixed liability on the part of the insurer to pay an accidental death benefit. Also, proof of Johnson’s claim would require extrinsic evidence that accidental death had occurred. Judge McMillian therefore concluded that it was impossible to construe Johnson’s policy as a promise for the payment of money.

Based upon his factual conclusions, Judge McMillian would have held that Missouri’s five-year statute of limitations applied. To support his conclusion, he carefully distinguished the line of cases applying Missouri’s ten-year statute of limitations cited by the majority. Judge McMillian also reconciled the court’s decision in King

108. Id. at 1266-70. Judge McMillian was joined by Judge Gibson, and Judge Beam was joined by Judge Fagg.
109. See id. at 1266 (McMillian, J., dissenting).
110. Id.
111. Id. (citing Martin v. Potashnick, 217 S.W.2d 379 (Mo. 1949)).
112. Id.
113. Id.
114. Id.
115. Id. at 1267. In analyzing the Missouri cases, Judge McMillian noted that the ten-year statute was applied with little analysis by the courts. For example, in Liebing v. Mutual Life Ins. Co., 191 S.W. 250 (Mo. 1916), the court based its decision to apply the ten-year statute on the terms of the insurance policy in question, and not an obligation created by statute. Id. at 252-53. Judge McMillian noted that Liebing and other Missouri cases show that the law is “subject to differing interpretations.” Johnson, 942 F.2d at 1267 (McMillian, J., dissenting).

Additionally, Judge McMillian maintained that State ex rel. Enterprise Milling Co. v. Brown, 106 S.W. 630 (Mo. 1907), and Missouri, Kan. & Tex. Railway v. American Surety Co., 236 S.W. 657 (Mo. 1921), were the “aberrant” line of cases that should not be followed. Johnson, 942 F.2d at 1266-67 (McMillian, J., dissenting). Both Brown and American Surety could be distinguished as cases involving writings for the payment of money on attachment and indemnity bonds, respectively, and not promises for the payment of money. Neither case involved a writing for the payment of money or an acknowledged liability to the bondholder. Id.
Dodge with its later decision in Fogerty and maintained that the facts in Johnson were consistent with Fogerty’s application of the five-year contract limitations period.116

In contrast, Judge Beam found that neither of Missouri’s contract statutes of limitations should apply.117 Rather, the court should apply the Missouri statute most analogous to an action brought by a plan beneficiary seeking ERISA benefits pursuant to ERISA’s civil enforcement provision.118 The judge found that the state statute of limitations most analogous to Johnson’s claim for insurance benefits was Missouri’s five-year statute governing suits against trustees.119 Judge Beam argued that the insurer’s refusal to pay benefits was the equivalent of a trustee’s final account or statement. Therefore, Johnson’s action was barred because it was commenced more than five years after the insurer denied the benefits.120

The majority, however, specifically rejected Judge Beam’s analysis. The majority stated that Missouri’s statute of limitations for actions against trustees was “not a rational choice” because, under ERISA, Congress expressly provided a limitations period for breach of trustee suits.121 Furthermore, Congress specifically excepted insurance policies from the trust provisions of ERISA.122 In response, Judge Beam noted that the Third Circuit has applied ERISA’s limita-

116. Judge McMillian stated that Central States Southeast & Southwest Areas Pension Fund v. King Dodge, Inc., 835 F.2d 1238 (8th Cir. 1987), was not inconsistent with Fogerty. In King Dodge, the employer acknowledged its indebtedness; the only issue involved the amount to be paid. King Dodge, 835 F.2d at 1240. Judge McMillian argued that the use of extrinsic evidence to prove the amount to be paid does not bar application of the ten-year statute of limitations. In contrast, Johnson’s insurance policy contained neither an admission of liability to pay accidental death benefits, nor a promise for the payment of money. Therefore, since extrinsic evidence would be necessary to establish the debt itself, the ten-year statute should not apply. Johnson, 942 F.2d at 1268 (McMillian, J., dissenting).

117. Id. at 1268 (Beam, J., dissenting).

118. See id. For a discussion of ERISA’s civil enforcement provision see supra text accompanying notes 32-34.

119. See Johnson, 942 F.2d at 1268 (Beam, J., dissenting). Missouri’s statute of limitations in suits against trustees states in relevant part:

Unless previously barred by adjudication, consent or limitation, any cause of action against a trustee for breach of trust shall be barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the cause of action is commenced within five years after receipt of the final account or statement by [the beneficiary].


120. Johnson, 942 F.2d at 1270 (Beam, J., dissenting).

121. See supra notes 48-50 and accompanying text for ERISA’s statute of limitations provision.

122. Johnson, 942 F.2d at 1262 (Beam, J., dissenting); see supra note 31 and accompanying text for a discussion of exceptions to trust provisions.
tions provision to claims for benefits by a plan beneficiary.123

IV. FURTHERING ERISA'S GOALS BY PROVIDING A UNIFORM LIMITATIONS PERIOD

The United States Supreme Court has never decided whether a uniform federal limitations period, rather than an existing state statute of limitations, is more appropriate for ERISA claims that are not covered under ERISA's express limitations period.124 The decision in Johnson, which applied a ten-year state statute of limitations for an action under ERISA, ignores ERISA's underlying policy to provide uniformity and prompt claims settlement procedures. Further, considerable federal court time spent analyzing states' statutes of limitations strikes against federal interests in certainty.125

Congress surely did not intend that state courts and legislatures have a conclusive role in defining how long a federal cause of action survives. ERISA's legislative history evinces Congress' desire to supplant completely state common and statutory law relating to employee benefit plans.126

A recognition that state legislatures rarely enact limitations periods with federal interests in mind,127 coupled with the danger of "forum shopping,"128 favors adopting a uniform limitations period.

124. See supra notes 125-126 and accompanying text; see also supra note 49 for ERISA's statute of limitations.
125. See Wilson v. Garcia, 471 U.S. 261, 271-75 (1985). The majority noted, "courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrate that their approach inevitably breeds uncertainty and time-consuming litigation." Id. at 272. The Court further noted:

For this reason the adoption of one [limitations period] rather than another will often be somewhat arbitrary; in such a case, the losing party may "infer that the choice of a limitations period in his case was result oriented, thereby undermining his belief that he has been dealt with fairly."

Id. at 272 n.24 (quoting Garcia v. Wilson, 731 F.2d 640, 650 (10th Cir. 1984) (emphasis added).
126. See supra notes 42-46 and accompanying text for a discussion of congressional intent regarding ERISA preemption of state law.
127. See Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977). "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." Id.

The increasing significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket; in a field so productive
Additionally, federal interests in uniformity, predictability, and judicial economy support the argument that federal claims not within ERISA's statute of limitations be governed by a uniform limitations period. ERISA's underlying purpose of uniformity buttresses the conclusion that a uniform limitations period is appropriate.

A. Congressional Amendment

Congress cannot foresee every possibility when it adopts statutes. In enacting ERISA, Congress left to courts the task of borrowing state limitations periods in actions other than the enforcement of fiduciary obligations under ERISA. The breadth and complexity of ERISA may have caused Congress to misapprehend the difficulties courts have experienced in characterizing ERISA actions and in borrowing state limitations periods. Congress’ explicit direction to the courts through a legislative amendment to ERISA’s limitations provision is the better-reasoned approach to these difficulties. I propose the following amendment, indicated by underlining, to ERISA’s limitations section:

- (a) No action may be commenced under this title with respect to a fiduciary’s breach of any responsibility, duty, or obligation under this part, Part 4 of Title I, or with respect to a violation of this part, or after the earlier of...

- (b) No action may be commenced under this title with respect to any action by a participant or beneficiary under this part, Part 1 of Title I, six years after the date (1) of the action which constituted a denial of benefits under the plan, or (2) on which he or she could reasonably be expected to have obtained knowledge of such denial of benefits under the plan.

This proposed statute of limitations would promote ERISA’s underlying policies by eliminating the application of inconsistent and conflicting state limitations periods to ERISA actions. Such an
amendment would eliminate the disuniformity and uncertainty that currently exists among and within the circuits.

B. Judicial Solution

In the absence of a congressional amendment to ERISA, the Supreme Court should apply a uniform statute of limitations. The Court could reach a solution to support ERISA's policy of uniformity by applying the analysis it used in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* to actions under ERISA.

In *Lampf*, the United States Supreme Court considered the proper limitations period to be applied to an action under section 10(b) of the Securities Exchange Act of 1934, which does not provide an express limitations period. In selecting a limitations period, the Court looked to the limitations periods for express causes of action under the 1934 Act, as well as the Securities Act of 1933. The Court applied a three-step hierarchical inquiry to ascertain the appropriate limitations period for a federal cause of action when Con-

134. Section 10(b) of the Securities Exchange Act of 1934 does not provide for private claims; however, for many years courts have implied a private right of action under that section. *Lampf*, 111 S. Ct. at 2779-80. Other sections of the 1934 Act contain express causes of action, each with an express limitations period. *Id.* at 2780.
135. See *id.* at 2780-81. The *Lampf* court held that, when the claim asserted is one implied under a statute that contains an express cause of action with its own limitations period, the court should first look to the statute from which the implied claim originated. *Id.* at 2780. The Court explained, "the contemporaneously enacted express remedial provisions represent a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake" in the implied cause of action. *Id.* at 2780 (citing DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)). Therefore, "State-borrowing" principles should not be applied when the claim asserted is one implied under a statute that also contains an express cause of action with its own limitations period. *Id.* at 2779-81. The Court explained:

[A] court should look first to the statute of origin to ascertain the proper limitations period. We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections. When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end. Only where no analogous counterpart is available should a court then proceed to apply state-borrowing principles. *Id.* at 2780 (citations omitted).

The Court found that the express causes of action provided under the Securities Exchange Act of 1934 were analogous to the plaintiff's implied claim under section 10(b). Each section of the 1934 Act was intended to facilitate a central goal: "to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges." *Id.* at 2781 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195
gress has not set the time within which such an action must be commenced. 136

The first step of the Lamph inquiry requires the Court to determine whether a uniform statute of limitations is appropriate. If a federal cause of action "encompass[es] numerous and diverse topics and subtopics" so that a single state's statute of limitations period may not be applied consistently within a jurisdiction, then a uniform limitations period is appropriate. 137 Second, if a uniform limitations period is appropriate, then the court must determine whether this period should be adopted from a state or federal source. In making this determination, particular weight must be given to the geographic character of the claim. 138 Finally, when the geographic character of the claim dictates federal borrowing, the court must determine that an analogous federal source better fits the cause of action than does any available state source. 139 Factors such as commonality of purpose and similarity of state and federal elements help make this determination. 140

1. A Uniform Limitations Period Is Appropriate

The first step of the Lamph inquiry is to determine whether a uniform statute of limitations is appropriate. 141 Johnson demonstrates the Eighth Circuit's inability to apply consistently a single state's limitations period and the resulting disuniformity. The characterization of Johnson's claim required the court to decipher a maze of inconsistent holdings by Missouri state courts and federal courts. In attempting to reconcile these cases and to achieve a result "consistent" with Missouri law, the Eighth Circuit issued a deeply divided decision. While stating in its decision that it had "considerable reservations about the wisdom of a ten-year statute of limitations for a claim such as this that appears to turn upon a tragic event that occurred long ago," 142 the court proceeded to overrule its prior decision in (1934)). Like the express causes of action under the 1934 Act, an implied claim under section 10(b) was intended to accomplish a similar goal.

The Court further noted that, when Congress adopted the 1934 Act, it amended the limitations provision of each cause of action under the 1933 Act. After the amendments, the 1933 Act provided limitations periods identical to those provided under the 1934 Act. This finding supported the Court's conclusion in Lamph that the limitations period under the 1934 and 1933 Acts provided a more appropriate statute of limitations for an implied claim under section 10(b) than analogous state-law alternatives. Id. at 2781-82.

136. Id. at 2778-79.
137. Id. at 2779 (quoting Wilson v. Garcia, 471 U.S. 261, 273 (1985)).
138. Id.
139. Id.
140. Id.
141. See supra text accompanying notes 136-137.
142. Johnson v. State Mut. Assurance Co. of America, 942 F.2d 1260, 1266 (8th
Fogerty, applying a five-year statute of limitations under similar circumstances.

The Johnson court’s decision clearly demonstrates that even a single state limitations period may not be consistently applied within a jurisdiction. In addition to the Eighth Circuit’s decision in Johnson, discrepancies both among and within the circuits in borrowing state limitations periods support this conclusion. A uniform limitations period for actions for benefits under ERISA is appropriate.

2. Source of Limitations Period for “State-Borrowing” Purposes

Under the second step of the Lampf inquiry, the geographic character of the claim influences whether the limitations period should be derived from a state or federal source. The multistate nature of ERISA results, in part, from the broad venue provisions afforded to participants or beneficiaries in actions under ERISA. The multiple venues from which the plaintiff may select and the concomitant disparities both among and within states’ limitations periods pose the danger of “forum shopping.”

a. State Source

Uniform characterization of all actions under ERISA by the United States Supreme Court would be a first step toward alleviating the threat of inconsistent or conflicting state limitations periods. For instance, the Court could characterize all benefit actions under ERISA as analogous to contract actions. A uniform characterization of such actions would support ERISA’s policy of uniformity. A uniform characterization of benefit actions for purposes of applying state limitations periods is not an ideal solution, however. The result would be uniform treatment of benefit actions within a single state only. Even in states such as Missouri, which provides for multiple limita-

Cir. 1991) (en banc). The majority noted that the record did not reveal why Johnson waited nearly ten years to commence her action. Furthermore, Johnson admitted that witnesses to the altercation that caused her husband’s death had become unavailable by the time she commenced her benefits action. Id. at 1261 n.1. Recognizing this very problem in Wilson, the Supreme Court stated, “Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost.” Wilson, 471 U.S. at 271.

143. 850 F.2d 430 (8th Cir. 1988).
144. See supra notes 61-63 and accompanying text.
145. See supra text accompanying note 138.
146. See supra text accompanying note 35.
147. See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987). In Agency Holding Corp., the Court explained, “With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping . . . .” Id.
tions periods for contract actions,\textsuperscript{148} the state’s general or residual statute of limitations could be applied to achieve a uniform result.\textsuperscript{149}

Applying a limitations period derived from a state source, however, would not solve the problem of forum shopping due to the disparity among states’ limitations periods. Therefore, geographic considerations counsel federal borrowing of a limitations period.

\paragraph{b. Federal Source}

Under the final step of the \textit{Lampf} inquiry, even where, as here, geographic considerations counsel federal borrowing, a federal source is adopted only when “an analogous federal source truly affords a closer fit with the cause of action” than any available state law source.\textsuperscript{150} The most obvious federal source from which to borrow is ERISA itself; the statute contains a limitations period applicable to actions to enforce fiduciary obligations.\textsuperscript{151} ERISA’s express remedial provisions to enforce participants’ and beneficiaries’ rights, and to enforce fiduciary obligations, are comparable in their related protections. The commonality of purpose in both provisions is the desire to protect “the interests of participants in employee benefit plans and their beneficiaries.”\textsuperscript{152}

The considerations implicit in Congress’ balancing of the policy considerations regarding the express limitations provision for fiduciary obligations apply also to the limitations period for actions, like

\begin{itemize}
    \item \textbf{148.} See supra notes 73-74; see also Jenkins v. Local 705, International Brotherhood of Teamsters Pension Plan, 713 F.2d 247 (7th Cir. 1983) (affirming district court’s application of Illinois’ ten-year limitations for written contract actions over the five-year limitations for oral contract actions).
    \item \textbf{149.} Cf. Owens v. Okure, 488 U.S. 235 (1989). In \textit{Owens}, the Court held, “where state law provides multiple statutes of limitations for personal injury actions [under 42 U.S.C. § 1983], courts considering § 1983 claims should borrow the [state’s] general or residual statute” of limitations \textit{Id.} at 249-50. Thus, “Potential § 1983 plaintiffs and defendants . . . can readily ascertain, with little risk of confusion or unpredictability, the applicable limitations period in advance of filing a § 1983 action.” \textit{Id.} at 248. However, courts should apply the general or residual limitations “only where state law provides multiple statutes of limitations for personal injury actions.” \textit{Id.} at 250 n.12.
    \item \textbf{150.} \textit{Lampf}, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2779 (1991). See also supra text accompanying notes 139-140.
    \item \textbf{151.} See supra note 49 and accompanying text for a discussion of the ERISA limitations period for fiduciary obligations.
    \item \textbf{152.} See supra note 15 discussing the protection of employee benefit plans.
\end{itemize}
Johnson's, which enforce participants' or beneficiaries' rights.\textsuperscript{153} Although the Supreme Court has cautioned that courts should not abandon the "state-borrowing doctrine" lightly,\textsuperscript{154} the danger of forum shopping and the interests of uniformity, predictability, and judicial economy direct that the limitations period be derived from a federal source. Recognizing the \textit{Lampf} consideration, the Supreme Court, were it to address this issue, should conclude that this delicate determination dictates federal borrowing of ERISA's express limitations period. Under the guidance of \textit{Lampf}, the Eighth Circuit should, in the future, select ERISA's express limitations provision to achieve a uniform limitations period in all actions under ERISA.\textsuperscript{155}

\textbf{V. Conclusion}

ERISA will continue to have a far-reaching effect on a growing number of American workers. As aging American workers comprise a greater proportion of the population,\textsuperscript{156} their dependance on ERISA-regulated plans will increase. In turn, benefit and fiduciary actions under ERISA will increase. Advancing ERISA's policy of protecting the retirement security and benefit rights of participants in ERISA benefit plans and their beneficiaries requires that all ERISA actions be governed by a uniform statute of limitations.

ERISA's underlying policies of uniformity and certainty support the application of a uniform limitations period in all non-fiduciary actions under ERISA. The proposed language to amend ERISA's limitations provision would eliminate the confusion and uncertainty courts and litigants currently experience. Congressional adoption of the amendment proposed in this Case Note would provide clear guidance to the courts and help to advance the statute's remedial purpose by providing for uniformity of decisions among courts.

Alternatively, in the absence of a congressional amendment, action by the Supreme Court is necessary. The Supreme Court should apply a federal source of limitations, and the best choice, for the sake of consistency, is the limitations period for fiduciary actions provided in ERISA.

The current patchwork scheme of limitations periods applied by courts has resulted in disuniformity and uncertainty. Furthermore,

\textsuperscript{153} See supra note 15.

\textsuperscript{154} \textit{Lampf}, 111 S. Ct. at 2778.

\textsuperscript{155} A less desirable statutory option would be for the Court to borrow from the new residual, four-year limitations period for all "civil action[s] arising under an Act of Congress" that were created after December 1, 1990. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313(a), 104 Stat. 5089, 5115 (1990) (codified at 28 U.S.C. § 1658). Because ERISA was enacted in 1974, this new "catch-all" statute of limitations does not apply to ERISA actions.

\textsuperscript{156} See supra note 10 for a discussion of pension and retirement trends.
the courts' misguided practice of borrowing state statutes of limitations has resulted in the time-consuming waste of judicial resources. A uniform statute of limitations applied to all non-fiduciary actions under ERISA would mitigate against this added consumption of judicial time and resources, as well as promote Congress' intent to provide for certainty and uniformity in the regulation of employee benefit plans.

Todd M. Worscheck