I. ERISA LITIGATION

A. Limitation of Actions

1. Claims for Breach of Fiduciary Duty

ERISA Section 413 provides a statute of limitations for fiduciary breaches under ERISA consisting of the earlier of (1) six years after “the date of the last action which constituted a part of the breach or violation,” or “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.” ERISA § 413. The statute further provides 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.”

(a) “Actual Knowledge” Requirement

Toward the end of last year, the Sixth Circuit took a position as to what constitutes “actual knowledge” for purposes of the three-year limitations period of ERISA Section 413. Wright v. Heyne, 349 F.3d 321, 330 (6th Cir. Nov. 14, 2003) (holding that “the relevant knowledge required to trigger the statute of limitations under [ERISA Section 413(2)] is knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the plaintiff also have actual knowledge that the facts establish a cognizable legal claim under ERISA . . .”). The court held that “actual knowledge” is knowledge of “the facts or transaction” constituting the alleged violation.

Wright involved claims by profit sharing plan trustees against investment advisors to the plan for breach of fiduciary duty under ERISA in connection with investment decisions. The district court found the claims barred by the three-year statute of limitations. The Sixth Circuit affirmed. Id. at 322.

The appellate court noted that the district court accurately had stated that the Sixth Circuit had not articulated a broad definition of “actual knowledge” under ERISA Section 413. Id. at 327. The Wright court further noted that, in contrast, several other circuits have taken positions on the issue. The court explained that the Third and Fifth Circuits define the phrase as requiring actual knowledge of the events that occurred which constitute the breach or violation and that those events supported a claim for breach of fiduciary duty or violation under ERISA. Id. (citing Gluck v. Unisys Corp., 960 F.2d 1168 (3d Cir. 1992); Int’l. Union v. Murata Erie North America, Inc., 980 F.2d 1034, 1057 (5th Cir. 1995); Maher v. Strachan Shipping Co., 809 F.2d 753, 755 (5th Cir. 1987); Scott v. Evins, 802 F. Supp. 411, 416 (N.D. Ala. 1992), aff’d, 998 F.2d 1022 (11th Cir. 1993)). The Sixth Circuit characterized the Second Circuit’s position on the issue as “a ‘hybrid’ view,” requiring knowledge of “all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act,” which does not require “knowledge of the relevant law,” but requires knowledge of “all facts necessary to
constitute a claim.”” Id. (quoting Caputo v. Pfizer, Inc., 267 F.3d 181, 193 (2d Cir. 2001), in turn citing Maher, Gluck, and Blanton).

The Wright court also took note of the many Sixth Circuit decisions dealing with a determination of when litigants had “actual knowledge,” in the absence of a broad definition of the phrase. Id. at 329-30 (citing Tassinare v. Am. Nat’l Ins. Co., 32 F.3d 220, 222-24 (6th Cir. 1994); Farrell v. Automobile Club, 870 F.2d 1129, 1131 (6th Cir. 1989); Ternes v. Tern-Fam, Inc., 904 F.2d 708 (6th Cir. 1990); Rogers v. Millan, 920 F.2d 34 (6th Cir. 1990)).

Taking into account its prior decisions and the decisions in other circuits, the Sixth Circuit concluded that the view reflected in the decisions of the Seventh, Ninth and Eleventh Circuits was the better view. The court thus “join[ed] those Circuits in concluding that the relevant knowledge required to trigger the statute of limitations under [ERISA Section 413(2)] is knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the plaintiff also have actual knowledge that the facts establish a cognizable legal claim under ERISA in order to trigger the running of the statute.” Id. at 330.

Applying this standard to the facts of the case before the court, the Sixth Circuit stated that, “[a]lthough the actions complained of in this case may not themselves ‘communicate the existence of an underlying breach,’ the extrinsic facts of which the Plaintiffs had actual knowledge demonstrate that Plaintiffs must have known that they had been wronged long before they consulted with an attorney.” Id. at 331. The court thus rejected that plaintiffs’ argument that the three-year limitations period is tolled until the plaintiff consults with an attorney and learns from the attorney that he has a claim for breach of ERISA fiduciary duties, emphasizing that not even the Third Circuit has required tolling until an attorney informs the plaintiff that he or she has a claim. Id. (citing Gluck, 960 F.2d at 1177).

The court then found that “it is beyond serious question that Plaintiffs had ‘actual knowledge’ of the material facts upon which their claims for breach of ERISA fiduciary duties are based more than three years before they filed this action . . . .” Id. The court explained that the plaintiffs had obtained actual knowledge that, inter alia, the defendants allegedly invested plan assets in “high-risk investments,” made “imprudent” investment decisions such as “annuitizing an annuity” and purchasing both “A” and “B” shares of the same investment fund, and had invested the funds in a manner the plaintiffs had specifically instructed against. Id. The court found that the plaintiffs had obtained such knowledge from their own dealings with the defendants and from consultations with four investment professionals, each of whom clearly informed the plaintiffs of the “harmful consequences” of the defendants’ improper acts. Id. The court emphasized that the plaintiffs, based on such actual knowledge, had fully terminated their relationships with the defendants by September 11, 1995, yet did not file the action until October 30, 1998, more than three years later. The court thus held that their claims were time-barred. Id. at 332.

The Third Circuit applied the “actual knowledge” requirement in Tinley v. Gannett Co., 2003 WL 68076 (3d Cir. Jan. 9, 2003) (unpublished) (plaintiffs, who alleged that their employer’s classifying them as independent contractors and, thus, not crediting them with service for purposes of defendant’s ERISA plan was a fiduciary breach, had “actual knowledge” of the breach when they were unequivocally informed that they would be treated as independent contractors for pension purposes). The plaintiffs were current and former newspaper haulers for the defendant newspaper publisher who alleged that the defendant breached its fiduciary duty by classifying them as independent contractors (rather than common law employees) and, as a consequence, not crediting them with service in the defendant’s ERISA plan. Id. at *1. The district court held that the plaintiffs’ claims were time-barred, and the Third Circuit affirmed. Id.
The appellate court agreed with the lower court that the plaintiffs had actual knowledge of the breach when, eleven years prior to filing suit, they were informed, in response to their request to be treated as employees and given the same benefits as other employees, that the company would continue to treat them as the company had in the past. *Id.* at *2-3. The Third Circuit rejected the plaintiffs’ argument that the three-year statute of limitations was tolled because the violation was ongoing. The court explained that, in cases involving multiple breaches, the limitations period begins when the plaintiff learns of any breach. *Id.* at *3-4. Further, the court stated that the statute of limitations begins to run upon an outright repudiation of the plaintiffs’ rights. *Id.* at *4.

**b) The “Last Action Which Constituted a Part of the Breach”**

A recent New York district court case addressed the application of the six-year limitations period triggered by the last action constituting a part of the fiduciary breach. *Bona v. Barasch*, 2003 WL 1395932 (S.D.N.Y. Mar. 20, 2003) (fiduciary duty to review plan investments was violated each time defendants renewed imprudent contracts with plan administrators; thus, plaintiffs could sue defendants for renewing service contracts within six years of the date the complaint was filed). The plaintiffs in *Bona*, current or former ERISA plan participants sued numerous individuals and entities for fiduciary breaches related to the defendants’ alleged manipulation of investment services contracts with the plans for the purpose of obtaining inflated fees. *Id.* at *1.

The defendants sought dismissal on various grounds, including that some of claims were time-barred. *Id.* Having found that the three-year statute of limitations had not expired at the time the complaint was filed, *Id.* at *14-16, the court considered the application of the six-year period running from the date of the last action constituting part of the breach.

The plaintiffs, arguing that their claims were timely, relied on *Martin v. Consultants & Adm’rs, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992), in which the Seventh Circuit permitted a suit to proceed to the extent it was based on the renewal of a service contract, as opposed to the initial contract, due to the continuing nature of a trustee’s duty under ERISA to review plan investments and eliminate imprudent ones. Because all of the agreements at issue in *Bona* had been renewed within six years of the filing of the complaint, the plaintiffs contended their claims were timely. *Bona*, 2003 WL 1395932 at *17. The defendants, arguing that the claims were time-barred, relied on *Miele v. Pension Plan of N.Y. State Teamsters Conf. Pension & Retirement Fund*, 72 F. Supp. 2d 88 (E.D.N.Y. 1999). *Miele* involved claims against plan trustees for miscalculation of benefits. In that case, the court rejected the “continuing violation” theory -- that a new statute of limitations began to run upon each monthly payment of a miscalculated benefit. *Bona*, 2003 WL 1395932 at *17-18. The *Bona* court, however, distinguished *Miele* on the grounds that it involved miscalculations of benefits, which the *Miele* court found fiduciaries have no obligation to reassess on a monthly basis. *Id.* at *18. In contrast, according to the *Bona* court, “the renewal of a contract clearly implicates a trustee’s duty to review plan investments and eliminate imprudent ones.” *Id.* Echoing *Martin*, the *Bona* court suggested that *Bona* involved a repeated, rather than a continued, violation each time the defendants renewed imprudent contracts. *Id.* The court thus held that the plaintiffs could sue the defendants for renewing service contracts within six years of the date the complaint was filed, although not for entering into those contracts in the first place. *Id.*

**c) Limitations Period in Cases of “Fraud or Concealment”**

Three other New York district court cases addressed the application of the six-year limitations period for fiduciary breaches under ERISA in cases involving “fraud or concealment.” *Burke v. Bodewes*, 250 F. Supp. 2d 262 (W.D.N.Y. Feb. 28, 2003) (finding plaintiffs had alleged
sufficient facts to benefit from limitations period applicable in cases involving “fraud or
concealment”), involved claims that multi-employer pension fund trustees breached their
fiduciary duties by regularly approving increases in pension benefits for retired employees
despite continuous funding deficiencies and other indications that the fund was in serious
financial trouble. The defendants moved for summary judgment on statute of limitations
grounds. Seeking application of the statute of limitations applicable in cases involving fraud or
concealment, the plaintiffs claimed that the trustees knowingly concealed the true status of the
fund from participants and that the plaintiffs did not discover the trustees’ breach until a new
person became head of the fund’s Board of Trustees. Id. at 264, 266. The district court
determined that the plaintiffs plead sufficient facts to benefit from the six-year “discovery”
statute of limitations. Id. at 267-68. Relying on Caputo v. Pfizer, Inc., 267 F.3d 181 (2d Cir.
2001) (holding that the “fraud or concealment” six-year limitations period should be applied
when a fiduciary breached its duty by knowingly misrepresenting or omitting a material fact to
induce an employee to act to his detriment or engaged in acts to hinder the discovery of a breach
of fiduciary duty), the court found that the plaintiffs had put forth sufficient evidence to establish
a genuine issue of material fact as to whether the defendants had knowledge of the poor financial
condition of the fund, yet failed to disclose such information to participants and “instead took
action indicating that the Fund was financially healthy.” Burke, 250 F. Supp. 2d at 268. The
court emphasized that its determination that the claims in the case were subject to the six-year
“fraud or concealment” limitations period was not dispositive of the summary judgment motion,
since the plaintiffs still had to plead the fraud or concealment with the required particularity. Id.
at 268. The court thus granted the plaintiffs leave to amend their complaint to satisfy this
requirement. Id. at 268, 271.
In Oechsner v. Connell Limited Partnership, 283 F. Supp. 2d 926, 933-34 (S.D.N.Y. Sept. 16,
2003) (fraud or concealment exception did not apply), and Institute of Applied Human
the court determined that the plaintiffs had not plead fraud or concealment with the requisite
particularity and thus found the claims at issue time-barred by the three-year limitations period.

(d) Claims Based on Alleged Disclosure Failures

In an unusual decision, the district court in Kilpatrick v. Intertrade Holdings, Inc., 2003 WL
21938912 (E.D. Tenn. July 7, 2003) (applying Tennessee’s six-year statute of limitations on
contract actions to claim under ERISA Section 502(a)(3) for breach of fiduciary duty in failing to
inform of plan changes), applied Tennessee’s six-year statute of limitations on contract actions to
the plaintiff’s claim under ERISA Section 502(a)(3) that the defendant had breached its fiduciary
duty by failing to inform the plaintiff that his coverage under accidental death and
dismemberment policies lacked the total disability benefit that appeared in the policy description
that he initially received. In so holding, the court stated that ERISA Section 502(a)(3) “does not
contain a statute of limitations.” Id. at *3. The court then stated that, in the absence of an
applicable statute of limitations, the court looks to the most analogous state law statute of
limitations. Id. In a footnote, the court referenced ERISA Section 413’s statute of limitations
and rejected its application, while recognizing that “a claim under § [502](a)(3) can be described
as a claim for breach of fiduciary duty.” Id. at *3 n.2. Citing the Tenth Circuit’s decision in
Wright v. Southwestern Bell Telephone Co., 925 F.2d 1288, 1290-01 (10th Cir. 1991), the court
stated that the limitations of Section 413 “have been held to apply only to the breaches described
in §§ [401-412]” -- the “Fiduciary Responsibility” provisions. Id.
2. **Claims Other Than for Breach of Fiduciary Duty**

   (a) **Statutory Limitations Periods**

   (i) **Which Period of Limitations Applies**

   The statute of limitations set forth in ERISA Section 413 applies only to claims for breach of fiduciary duty. ERISA does not contain statutes of limitations for any other claims which are permissible under ERISA Section 502. Courts generally have held that, where ERISA does not specify a statute of limitations for an ERISA claim, the forum state’s statute of limitations for the most closely analogous action should be applied. See, e.g., *Administrative Committee of the Wal-Mart Stores, Inc. v. Soles*, 336 F.3d 780, 785 (8th Cir. July 21, 2003) (dismissing plan’s reimbursement claim on statute of limitations grounds). The characterization of the essential nature of the ERISA action, however, is a matter of federal law. See, e.g., *Arena v. ABB Power T & D Co. Inc.*, 2003 WL 21766560, *4 (S.D. Ind. July 21, 2003) (holding that Indiana’s ten-year statute of limitations for actions on written contracts, not Indiana’s two-year statute of limitations governing actions relating to employment disputes not based on written contracts, applied to action under ERISA Section 502(a)(1)(B) for alleged anti-cutback violations arising in Indiana).

   The statute of limitations for the most closely analogous action often differs from state to state. Compare, e.g., *Shaw v. McFarland Clinic*, 2002 U.S. Dist. LEXIS 19832, *25-26 (S.D. Iowa Oct. 11, 2002) (Iowa’s ten-year statute of limitations for breach of written contract applicable to claim under ERISA Section 502(a)(1)(B) challenging a plan administrator’s decision to deny pre-authorization); with *Brennan v. Metropolitan Life Ins. Co.*, 275 F. Supp. 2d 406 (S.D.N.Y. May 9, 2003) (the six-year limitations of section 213 of the New York Civil Practice law and rules applies to a claim under ERISA Section 502(a)(1)(B)).

   Due to the range of statutes of limitation for the same basic causes of action, counsel representing plaintiffs seeking to file actions under ERISA stating claims other than for breach of fiduciary duty should consider the applicable statutes of limitations in the various states in which jurisdiction would be proper before deciding where to file suit. Choosing a jurisdiction in which an action is time-barred when the applicable statute of limitations has not run in another viable jurisdiction may raise issues of professional responsibility. Counsel representing defendants in non-fiduciary ERISA actions also should be quick to determine the applicable statutes of limitations for the claims at issue, since the limitations periods are quite short. See, e.g., *Harvey v. Mingo Logal Coal Co.*, 274 F. Supp. 2d 791, 795 (S.D. W. Va. Aug. 5, 2003) (claim for failure to satisfy COBRA notification requirements governed by West Virginia’s one-year statute of limitations applicable to unfair insurance related practices); *Leemis v. Medical Services Research Group, Inc.*, 2003 WL 22220527, *2 (6th Cir. Sept. 24, 2003) (unpublished) (noting that neither party disputed on appeal the district court’s conclusion that the plaintiff’s claim for violation of ERISA Section 510 was most analogous to a claim of wrongful or retaliatory discharge and thus governed by a one-year statute of limitations); *Hatteberg v. Red Adair Co. Inc. Employees’ Profit Sharing Plan*, 2003 WL 22510848 (5th Cir. Nov. 6, 2003) (unpublished) (Texas’ two-year tort statute of limitations for claims of breach of fiduciary duty applied to claim for failure to provide requested information under ERISA Section 502(c)(1)).
When the Statute of Limitations Begins to Run


a. Claims for Benefits

Generally, a claim for benefits under ERISA Section 502(a)(1)(B) accrues “when a benefits claim has been made and formally denied.” Davis v. Bowman Apple Products Co., 2002 WL 535068, *5 (W.D. Va. Mar. 29, 2002), aff’d, 2002 WL 31510236 (4th Cir. Nov. 13, 2002). In cases in which a formal denial is lacking, courts tend to look to when the plaintiffs should have known that they were not receiving benefits to which they believed they were entitled. See, id. (with respect to a claim for full vesting of profit-sharing plan benefits, holding that the statute of limitations began to run when the plaintiff received a payout of only thirty percent of his benefits, since that event should have alerted the plaintiff to his allegedly missing benefits).

Courts have also held that claims for benefits may accrue even before a plaintiff has filed a claim for benefits. See, e.g., Brennan v. Metropolitan Life Ins. Co., 275 F. Supp. 2d 406, 409-10 (S.D.N.Y. May 9, 2003) (a cause of action under ERISA Section 502(a)(1)(B) accrues upon the plan’s clear repudiation that is, or should be, known to the plaintiff, whether or not the plaintiff has filed a formal application for benefits; holding that the signing of an independent contractor agreement (stating that the individuals would be paid as independent contractors and would be ineligible to participate in employee benefit plans) qualified as a repudiation by the fiduciary sufficient to trigger the statute of limitations).

The district court in Veltri v. Building Service 32B-J Pension Fund, 2003 WL 22705124 (S.D.N.Y. Nov. 17, 2003) (requiring a “more formal” repudiation of benefits than a letter informing that plaintiff that his years of service prior to his break in service would not be counted in calculating his pension benefits), however, refused to hold that the statute of limitations for the plaintiff’s claim for pension benefits began running upon his receipt of a letter informing the plaintiff that his service prior to 1970 was excluded in calculating his pension due to a break in service. In March of 1992, a few months prior to his expected retirement, the plaintiff submitted an application for a retirement pension seeking benefits for his service from 1957-1969 and from 1980-1992. The fund provided him with written notice of his monthly pension benefit amount, and he and his wife countersigned the notice, as required. Id. at *1. About a year after the commencement of his pension, the plaintiff wrote to the fund to inquire why he was not receiving greater benefits and why he was not credited with his pre-1970 years of service. He received a letter in reply, dated May 25, 1993, informing him that his pre-1970 service was not credited due to the fund’s break-in-service rule. A copy of the Pension Fund booklet was enclosed with the letter. The letter also invited the plaintiff to call with any questions. Id. The plaintiff thereafter accepted the monthly payments in the amount specified by the fund, although he claimed to have called the fund on several occasions without receiving any response. Id. After inquiring again in early 2001 about the pension amount and again being informed that the pre-1970 service was excluded due to the break in service, the plaintiff, through a newly retained attorney, requested the fund’s record of his service. After receiving the information, the attorney informed the fund that its service records were incorrect. After