

CHAPTER 6A

Litigation Over Contingent Worker Claims for Benefits

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§ 6A.01 Introduction

As the numerous case citations in Chapter 6 attest, there has been a large volume of litigation involving claims by contingent workers seeking entitlement to employee benefits. Much of that litigation is quite recent, and the volume may grow in coming years.

One of the reasons for so much litigation undoubtedly is simply money. A lawsuit seeking the benefits that would have accrued as a result of several years of participation in a 401(k) plan or a defined benefit pension plan, particularly if the claim is made on behalf of hundreds or thousands of individuals in a class action case, obviously is high-stakes litigation. The settlement of the *Microsoft* litigation for just under \$97 million amply demonstrates the point. Claims of that magnitude invite lawsuits and pose risks that companies that use contingent workers must take seriously.

Chapter 6 outlines the substantive law pertaining to claims for benefits by contingent workers. In Chapter 6A the focus is on procedural issues that arise in litigation over those claims. An understanding of those procedural questions should be of value not only to litigators but to those who attempt through prudent planning to reduce or eliminate the risks of litigation.

§ 6A.02 Claims on Behalf of Contingent Workers

Frequently, multiple claims under ERISA¹ are combined in the same complaint with multiple claims under state law for benefits under plans or contractual obligations that are not governed by ERISA.²

[1]—ERISA Claims

As outlined more fully in Chapter 6, claims to benefits under ERISA plans may be asserted under multiple theories. These include claims that:

- (1) ERISA creates a statutory right to participate in the benefits plan,
- (2) the terms of the plans, properly interpreted and applied to the facts of the plaintiffs, entitle the plaintiffs to benefits,
- (3) company officials committed a breach of fiduciary duty by not treating the plaintiffs as participants in the plan or by excluding them from the plan, and
- (4) the company in denying benefits to the plaintiffs intentionally discriminated against them in violation of Section 510 of ERISA.³

It now appears to be settled law that mere status as a common law employee does not in itself give an individual any right under ERISA to participate in a benefit plan.⁴ Claims based on plan interpretation,

¹ The Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 832 (Sept. 2, 1974), as amended; 29 U.S.C. §§ 1001 *et seq.*

² A fairly typical example is *Montesano v. Xerox Corporation Retirement Income Guarantee Plan*, 117 F. Supp.2d 147 (D. Conn. 2000), *aff'd in part and vacated in part* 256 F.3d 86 (2d Cir. 2001). In that case, the plaintiffs who had worked as leased employees at Xerox facilities in Rochester asserted claims under ERISA for the right to participate in and receive benefits from the company's medical, insurance, pension, savings, and employee stock ownership benefits plans governed by ERISA under multiple theories, as well as claims under New York State law for various other benefits, such as entitlement to paid vacations.

³ See §§ 6.04, 6.06 *supra*. *Schultz v. Texaco, Inc.*, 127 F. Supp.2d 443 (S.D.N.Y. 2001), provides a fairly typical example. In that case, plaintiffs asserted claims for (1) benefits under ERISA Section 502(a)(1)(B), (2) breach of fiduciary duty under Sections 502(a)(3) and 502(c), and (3) violation of Section 510.

⁴ See, e.g.:

Second Circuit: *Montesano v. Xerox Corporation Retirement Income Guarantee Plan*, 256 F.3d 86 (2d Cir. 2001), *affirming per curiam in relevant part* 117 F. Supp.2d 147 (D. Conn. 2000).

and on the application of the terms of the plan to the particular facts, however, certainly may be viable and may therefore be successful.

The viability of claims for breach of fiduciary duty for alleged misclassification of workers appears doubtful at best when a claim for wrongful denial of benefits is available.⁵ In *Varity Corp. v. Howe*⁶ the Supreme Court, in recognizing a breach of fiduciary duty cause of action for participants who were fraudulently induced to go to work for a newly created employer with underfunded benefit plans, the Court described ERISA Section 502(a)(3) as creating remedies for situations wherein Congress had not otherwise provided a remedy. *Varity* goes on to state that if another remedy was available, equitable relief under Section 502(a)(3) would not be appropriate. Based on this language, most Circuit Courts have concluded in cases not involving contingent workers that a claim for breach of fiduciary duty under Section 502(a)(3) cannot be pursued when that claim is essentially one for wrongful denial of benefits under Section 502(a)(1)(B).⁷ The Second

Fourth Circuit: Clark v. E. I. DuPont de Nemours & Co., 105 F.3d 646 (noted), No. 95-2845, 1997 WL 6958 (4th Cir.), cert. denied 520 U.S. 1259 (1997).

Fifth Circuit: Abraham v. Exxon Corp., 85 F.3d 1126 (5th Cir. 1996).

Seventh Circuit: Trombetta v. Cragin Federal Bank for Savings Employee Stock Ownership Plan, 102 F.3d 1435 (7th Cir. 1996).

Ninth Circuit: Hensley v. Northwest Permanente P.C. Retirement Plan & Trust, 258 F.3d 986 (9th Cir. 2001), cert. denied ___ U.S. ___, 122 S.Ct. 815 (2002).

Tenth Circuit: Bronk v. Mountain States Telephone and Telegraph, Inc., 140 F.3d 1335 (10th Cir. 1998).

Eleventh Circuit: Wolf v. Coca-Cola Co., 200 F.3d 1337 (11th Cir. 2000).

See generally:

Supreme Court: Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (*dictum*).

Fifth Circuit: McGann v. H&H Music Co., 946 F.2d 401, 406-407 (5th Cir. 1991) (citing early cases).

⁵ Plan design, as distinct from plan administration, is a settlor function that is not subject to any fiduciary obligations. For example, see *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999), and *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). Thus, a challenge to the terms of the plan under the breach of fiduciary duty rubric would not be appropriate.

⁶ *Varity Corp. v. Howe*, 516 U.S. 489, 515, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996).

⁷ See, e.g.:

First Circuit: Larcocca v. Borden, Inc., 276 F.3d 22, 28-29 (1st Cir. 2002).

Fifth Circuit: Tolson v. Avondale Industries, Inc., 141 F.3d 604, 610 (5th Cir. 1998).

Sixth Circuit: Wilkins v. Baptist Healthcare Systems, Inc., 150 F.3d 609, 615-616 (6th Cir. 1998). A recent district court decision declined to apply *Wilkins* at the

Circuit, without discussing any of the contrary precedents, has reached the opposite conclusion, holding that a plaintiff employee could simultaneously pursue a claim for benefits under Section 502(a)(1)(B) and a claim for breach of fiduciary duty under Section 502(a)(3).⁸ Prior to this decision, three separate decisions by district courts located in the Second Circuit reached disparate results on this question in cases involving contingent workers.⁹

As we discussed in Chapter 6, ERISA Section 510 has generated a great deal of litigation regarding contingent workers.¹⁰ Here, too, the results are not easily reconcilable. At present, it is likely that further Section 510 claims on behalf of contingent workers will be asserted in the future, at least in cases in which employees who are eligible for benefits are reclassified as contingent workers in order to deprive them of benefits.¹¹

pleading stage because of uncertainty whether plaintiff had a viable claim under Section 502(a)(1)(B); the court left the door open, however, to revisiting the issue at the summary judgment stage. *Gieger v. UNUM Life Insurance Co.*, 213 F. Supp.2d 813, 817-818 (N.D. Ohio 2002). In so ruling, the district court cited and expressed disagreement with the decision of another district court in the Sixth Circuit which granted a motion to dismiss. *Kennedy v. United Healthcare of Ohio, Inc.*, 186 F.R.D. 364, 368 (S.D. Ohio 1999).

Eighth Circuit: *Wald v. Southwestern Bell Corp.*, 83 F.3d 1002, 1006 (8th Cir. 1996).

Ninth Circuit: *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir.), *cert. denied* 522 U.S. 996 (1997).

Eleventh Circuit: *Katz v. Comprehensive Plan of Group Insurance*, 197 F.3d 1084, 1088-1089 (11th Cir. 1999).

⁸ *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 89-90 (2d Cir. 2001).

⁹ Compare *Montesano*, N. 2 *supra*, with *Herman v. Time-Warner, Inc.*, 56 F. Supp.2d 411 (S.D.N.Y. 1999), and *Schultz*, N. 3 *supra*. *Montesano* holds that, in a private civil action, a claim for breach of fiduciary duty cannot be maintained where the plaintiffs are seeking nothing more than they have sought or could seek under a denial of benefits theory. 117 F. Supp.2d at 165-166. The *Herman* court, in contrast, refused to dismiss a government suit for breach of fiduciary duty where the defendant argued that the Department of Labor was relying on the breach of fiduciary duty theory to evade the statutory restriction on government suits asserting wrongful denial of claims for benefits. In *Schultz*, the court declined to dismiss the breach of fiduciary duty claim at an early stage in the litigation before the facts were fully developed. 127 F. Supp.2d at 450-451.

¹⁰ See §§ 6.04[2], 6.04[3], and 6.04[4] *supra*.

¹¹ In *Montesano*, N. 2 *supra*, the plaintiffs alleged that the company violated Section 510 when it classified the plaintiffs as leased employees rather than common law employees. The District Court held that since the plaintiffs had failed to establish that they would have been entitled to benefits under the terms of the plans if they had been classified as common law employees, their Section 510 claims must fail because

When plaintiffs are asserting claims for benefits under ERISA Section 502(a)(1)(B), important procedural issues arise:

- (1) Are the plaintiffs required to exhaust their remedies under the plan before they can assert their claims in court, and
- (2) What deference, if any, should a court pay to a plan administrator or fiduciary's denial of the claim for benefits?

These two issues are discussed below.¹² Breach of fiduciary duty claims and claims under Section 510 generally do not give rise to these issues. Thus, it is important at the outset to determine precisely what claims are being asserted.

[2]—State Law Claims

If a plan or claimed contractual obligation is not governed by ERISA, a wealth of state law theories may be asserted to enforce that plan or contract.¹³ Probably the most common of these theories is a claim for breach of contract. Descriptions of employee benefits, if they are viewed as unilateral contract offers, can be described as binding obligations when an employee performs in accordance with an offer. For example, an employer that states orally or in writing that employees will be entitled to paid vacations once they are employed for six months, arguably becomes contractually bound to provide that benefit when the employee completes six months of service. Using this model, contingent workers may assert both that they are “employees” for purposes of the benefit description—because they meet the common law definition of an “employee”—and that they have performed the requisite amount of service to earn the benefit.

Claims for overtime pay, pursuant to either federal or state law, may also be asserted on the theory that plaintiffs are “employees” within the meaning of those statutes rather than independent contractors, and the workers are therefore entitled to the substantive

the alleged misclassification did not deprive them of benefits. 117 F. Supp. 164-165. The Court of Appeals found no error in this conclusion. See 256 F.3d at 88.

¹² See § 6A.05 *infra*.

¹³ See Canan and Mitchell, *Employee Fringe and Welfare Benefits Plans*, § 3.6 at 150-151 & n.4 (West Publishing Co. 1999) (citing cases asserting state common law and statutory claims). State law claims that are asserted with respect to plans governed by ERISA are generally dismissed as precluded by ERISA's broad preemption provision. ERISA § 514(a); 29 U.S.C. § 1144(a). For a recent case discussing ERISA preemption principles, see *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001).

protection provided by those statutes. Generally, such statutes use a broad economic realities test to determine who is entitled to overtime pay and minimum wages.¹⁴

State law claims may also be based on many state statutes that require employers promptly to pay wages earned by their employees, and that often impose liquidated damages or other penalties for failing to comply. In *Montesano*, for example, the leased employee plaintiffs asserted they were entitled to paid vacations and to an additional award of liquidated damages pursuant to a New York State law requiring the prompt payment of compensation owed to employees.¹⁵ The court held both that the statute did not require prompt payment or impose liquidated damages penalties unless the employer had a clear contractual obligation to make the payments, and that the defendant's employee handbook did not create a contractual right to paid vacations for leased employees.¹⁶ Had the company's employment manual promised that all common law employees would receive paid vacations after a specified period of service, and if it did not disclaim an intent to create a contractual obligation, perhaps the outcome would have been different. However, if the leasing agency promised to provide vacation benefits to the leased employees, the defendant company could certainly argue that the leased employees had no reasonable basis for believing they were entitled, in addition, to the vacation benefits the defendant undertook to provide to its employees.

[3]—Claims Against Government-Sponsored Benefit Plans

Employee benefit plans sponsored by state and local governments are exempt from regulation under ERISA.¹⁷ But a variety of state and local laws can give rise to claims against the plans by contingent workers. For example, the Metropolitan Water District of Southern California, a state agency, was found by an intermediate appellate court to be required under California law to enroll in the state's pension plan employees leased from third-party providers because those employees came within the common law definition of "employees" of the District.¹⁸

¹⁴ See §§ 2.04[1] and 4.03 *supra*.

¹⁵ *Montesano*, N. 2 *supra*, 117 F. Supp.2d at 167.

¹⁶ *Id.*

¹⁷ 29 U.S.C. § 1003(b)(1).

¹⁸ *Metropolitan Water District of Southern California v. Superior Court of Los Angeles County*, 112 Cal. Rptr.2d 513, 527-534 (Cal. App. 2001), *review granted* 38

Similarly, a class action lawsuit was recently filed against the City of Seattle, Washington, on behalf of individuals employed as “temporary employees” based, among other things, on various city charter and code provisions and a state statute prohibiting public employers from incorrectly classifying an employee as a temporary if that designation “does not objectively describe the employee’s actual work circumstances.”¹⁹ The suit also seeks to establish the plaintiffs’ entitlement to full civil service benefits.²⁰ An earlier lawsuit on behalf of temporary contract employees providing services to King County, Washington, resulted in an \$18.6 million settlement.²¹ A similar lawsuit against the City of Bellevue, Washington, was settled for \$750,000.²² At least two other lawsuits on behalf of contingent workers providing services to Los Angeles County, California, are pending.²³

P.3d 1080, 115 Cal. Rptr.2d 852 (Jan. 23, 2002).

¹⁹ Glaser v. Seattle, Wash. Super. Ct. No. 02-2-291651-1 SEA (complaint dated Sept. 20, 2002). See 2 Pension & Benefits Daily, No. 200 (BNA) (Oct. 16, 2002).

²⁰ *Id.*

²¹ Clark v. King County (No. 95-2-29890 SEA, Super. Ct. King County), described in 113 Daily Labor Rep. (BNA) A-3 (June 12, 2000).

²² Jordan v. City of Bellevue (No. 98-2-21515-1 SEA, Super. Ct. King County), described in Pension and Benefits Daily No. 155 (BNA) (Aug. 10, 2000).

²³ Holmgren v. Los Angeles County (No. BC 240954, Super. Ct. Los Angeles County); Shiell v. Los Angeles County (No. BC 208582, Super. Ct. Los Angeles County). These and other cases are described on the Web site of the Seattle law firm of Bendich, Strobaugh & Strong, P.C., <http://216.13.224.31>. The Bendich firm represents plaintiffs in all of these lawsuits, and represented the plaintiff class in the *Vizcaino* litigation. See, e.g., *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir.), *cert. denied* 71 USLW 3154 (U.S. No. 02-252, Nov. 12, 2002).

§ 6A.03 Standing to Sue Under ERISA

To assert a claim for benefits under ERISA, a plaintiff must be either a participant or a beneficiary of an ERISA plan.¹ Because ERISA participants must be, or must have been, employees, many persons in alternative work arrangements will lack standing to sue under ERISA,² although they may in some cases be able to sue as plan beneficiaries.³ Moreover, mere status as an employee is insufficient to establish ERISA standing. An ERISA claimant must also establish eligibility to receive a benefit under a plan “according to the language of the plan itself.”⁴ Although courts have accorded standing to those who have a “colorable claim” to participant status,⁵ claims by contingent workers have been dismissed for lack of standing or otherwise summarily disposed of in cases in which the terms of the plan ex-

¹ The statute provides in relevant part:

“A civil action may be brought—

“(1) by a participant or beneficiary—

“(A) for the relief provided for in subsection (c) of this section, or

“(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

“(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under § 409 [29 U.S.C. § 1109];

“(3) by a participant, beneficiary, or fiduciary—

“(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

“(B) to obtain other appropriate equitable relief

“(i) to redress such violations or

“(ii) to enforce any provisions of this title or the terms of the plan;

“(4) by the Secretary or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C. § 1025(c)]; . . .”

29 U.S.C. § 1132(a).

² E.g., *Waxman v. Luna*, 881 F.2d 237, 240-241 (6th Cir. 1989) (plaintiff lacked standing under ERISA since he was an independent contractor, not an employee).

³ See § 6.03[3] *supra*.

⁴ *Wolf v. Coca-Cola Co.*, 200 F.3d 1337 (11th Cir. 2000); see also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) (requiring a “reasonable expectation” of “covered employment”).

⁵ *I.V. Services of America, Inc. v. Inn Development & Management, Inc.*, 182 F.3d 51, 54 n.3 (1st Cir. 1999); see also, e.g., *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1129 (5th Cir. 1996) (“Although we ultimately reject *Renda*, . . . we believe Abraham’s reliance on *Renda* in this instance gave him a colorable claim that he would prevail in this lawsuit. That is enough for ERISA standing.”).

pressly exclude “leased employees” or “independent contractors.”⁶

The Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*⁷ explained:

“[T]he term ‘participant’ is naturally read to mean either employees in, or reasonably expected to be in, currently covered employment, or former employees who have a reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits. In order to establish that he or she may become eligible for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future.”⁸

For these purposes, “[a] claim is colorable if it is arguable and non-frivolous, whether or not it would succeed on the merits.”⁹ As the Fifth Circuit in *Abraham* recognized, “*Firestone* does not distinguish between a plaintiff who claims he has been wrongly excluded under the terms of the plan as written and a plaintiff who claims the plan was improperly written to exclude him.”¹⁰ *Firestone* involved plaintiffs who claimed they were wrongly denied benefits to which they were entitled under the terms of the plan as written, whereas *Abraham* and many other lawsuits brought by contingent workers involve claims that the plan as written wrongfully excludes them. The “colorable claim” test established by *Firestone* applies to both types of claims. Recent decisions involving contingent workers asserting claims of the latter type have effectively determined that a claim is not colorable if the terms of a plan expressly exclude “leased employees” or “independent contractors,” regardless of whether individuals so classified are, in reality, common law employees.¹¹

The *Firestone* definition of “participant” excludes a former em-

⁶ See, e.g., *Wolf*, N. 4 *supra* (granting summary judgment for defendant ERISA plan); *Montesano v. Xerox Corporation Retirement Income Guarantee Plan*, 117 F. Supp.2d 147 (D. Conn. 2000) (judgment on the pleadings for defendant but granting plaintiff leave to amend), *aff’d in part and vacated and remanded on other grounds* 256 F.3d 86 (2d Cir. 2001).

⁷ *Firestone*, N. 4 *supra*.

⁸ *Id.*, 489 U.S. at 117-118 (internal ellipses, quotations and citations omitted).

⁹ *Davis v. Featherstone*, 97 F.3d 734, 737-738 (4th Cir. 1996) (citing *Kennedy v. Connecticut General Life Insurance Co.*, 924 F.2d 698, 700-701 (7th Cir. 1991)).

¹⁰ *Abraham*, N. 5 *supra*, 85 F.3d at 1129 n.3.

¹¹ See N. 6 *supra*.

employee with no reasonable expectation of returning to covered employment, or who terminates employment prior to vesting of some portion of his or her plan benefit, since that person will not “become eligible to receive a benefit” as required by ERISA Section 502.¹² Essentially, “employees cease to be ‘participants’ in a plan when they effectively terminate all their rights under the plan.”¹³ However,

“[the] majority of circuits . . . have developed an exception to the general rule [regarding former employees] if the employer’s breach of fiduciary duty causes the employee to either give up his right to benefits or to fail to participate in a plan[;] then the employee has standing to challenge that fiduciary breach.”¹⁴

Otherwise, a fiduciary could defeat a person’s standing to bring an ERISA action by simply excluding him or her from participating in a plan.¹⁵ The minority approach, which does not recognize the exception, is based on the following language from *Firestone*:

“The Court of Appeals [for the Third Circuit] reasoned that [ERISA Section 502(a)(1)] should be read to mean that a civil action may be brought by someone who claims to be a participant or beneficiary. . . . [However], to say that a ‘participant’ is any person who

¹² *Chambers v. Kaleidoscope, Inc., Profit Sharing Plan and Trust*, 650 F. Supp. 359, 366 (N.D. Ga. 1986) (citing *Nugent v. Jesuit High School*, 625 F.2d 1285 (5th Cir. 1980)).

¹³ *Swinney v. General Motors Corp.*, 46 F.3d 512, 518 (6th Cir. 1995).

¹⁴ *Id.*, 46 F.3d at 518-519 (citing *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 668 (2d Cir. 1994)).

And see:

First Circuit: *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994).

Fifth Circuit: *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992).

Sixth Circuit: *Astor v. IBM Corp.*, 7 F.3d 533, 539 (6th Cir. 1993); *Drennan v. General Motors Corp.*, 977 F.2d 246, 250 (6th Cir. 1992).

Eighth Circuit: *Adamson v. Armco, Inc.*, 44 F.3d 650, 655 (8th Cir. 1995) (exception limited to Section 502(a)(2) or Section 502(a)(3) claimants whose loss of participant status was caused by breach of fiduciary duty, not by claimants’ own actions).

¹⁵ *Swinney*, N. 13 *supra*, 46 F.3d at 518-519 (so long as a former employee would have been in a class eligible to become a member of the plan but for the fiduciary’s alleged breach of duty, he “may become eligible” for benefits under the plan, and is therefore a “participant” under Section 1002(7) for the purposes of standing; rejecting the “but for” approach to ERISA standing). But see *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1536 (10th Cir. 1994); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986).

claims to be one begs the question. . . . [A] former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits simply does not fit within the [phrase] ‘may become eligible’ [used in the statutory definition of “participant”].”¹⁶

This approach focuses on whether vested benefits exist. If they do not, then the minority approach holds that there can be no colorable claim. For example, in *Pierchalski v. Dr. Samuel P. Cimino, D.D.S. Associates, Inc.*¹⁷ the court held that a former worker who had no reasonable expectation of returning to covered employment and who had never been a member of the defendant’s pension plan could not have a colorable claim to vested benefits. Rather than determining whether the plaintiff, a dentist, was an “employee” entitled to participate in the defendant’s benefit plan, the district court found that she had no standing because she had no vested benefit in the plan, and therefore could not assert a colorable claim to vested benefits. The *Pierchalski* decision relied on the Tenth Circuit’s reasoning in *Boren v. Southwestern Bell Telephone Co.*¹⁸ that *Firestone* foreclosed any claim that an individual *should* have been enrolled in a plan as a common law employee or pursuant to certain contractual provisions. Under this approach, an employer benefits from any error that it may have made in classifying a worker.

Determining whether an individual has standing as a “participant” can be a complex issue, particularly where the court must decide if a plaintiff qualifies as an employee, because such a determination depends upon the fact-intensive common law test approved in *Darden*.¹⁹ Such highly fact-specific inquiries may require prolonged litigation when many workers are involved, and different outcomes among quite similarly situated individuals can result. Moreover, in cases involving independent contractors and other alternative work force arrangements, the critical issue is whether the plaintiffs are employees who qualify for benefits under the applicable plan, rather than independent

¹⁶ *Firestone*, N. 4 *supra*, 489 U.S. at 117-119 (internal citations and quotations omitted); see, e.g., *Pierchalski v. Dr. Samuel P. Cimino, D.D.S. Associates, Inc.*, No. 92-6373, 1993 WL 281064, *1-*2 (E.D. Pa. July 26, 1993) (citing similar excerpts from *Firestone*), *aff’d without opinion* 30 F.3d 1487 (3d Cir. 1994).

¹⁷ *Id.*

¹⁸ *Boren v. Southwestern Bell Telephone Co.*, 933 F.2d 891 (10th Cir. 1991).

¹⁹ *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

contractors who do not. Thus, as one court stated, a contention that plaintiffs lack standing “begs the question . . . that forms the basis of their action—whether or not they have a claim to vested benefits.”²⁰

The courts have generally resolved this dilemma by adjudicating the merits of a lawsuit rather than dismissing it for lack of standing. In *Capital Cities/ABC, Inc. v. Ratcliff*²¹ the district court avoided the standing issue altogether, finding that:

“The determination of whether the [workers] have standing to bring the [suit for benefits] depends on a resolution of the question which they contend is the crux of their action—whether or not they have a colorable claim to vested benefits as employees. . . .”²²

In the interests of judicial economy, the court sidestepped the standing conundrum. Rather than “commencing a highly factual inquiry into the question of whether the [workers were] employees under the common law test articulated in *Darden*,” the court decided it could resolve the issues presented by deciding a declaratory judgment action the sponsor of the benefit plans had brought.²³ The court explained that although “ERISA does not specifically permit fiduciaries such as the Plan [administrator] to file a declaratory judgment action seeking interpretation of their plans,” the court did have jurisdiction under the Declaratory Judgment Act.²⁴

After stating that a contention that the plaintiff lacks standing “begs the question,” the *Trombetta* district court concluded that, “We cannot decide [the standing issue] without deciding the [substantive issues]. . . . Thus, we proceed to the merits of the defendants’ motion.”²⁵ Similarly, in *Breedlove v. Tele-Trip Co.*²⁶ the court held that:

²⁰ *Trombetta v. Cragin Federal Bank for Savings Employee Stock Ownership Plan*, No. 94 C 2010, 1995 WL 787973, at *2 (N.D. Ill. Jan. 18, 1995), *aff’d on other grounds* 102 F.3d 1435 (7th Cir. 1996); see also *Burditt v. Kerr-McGee Chemical Corp.*, 982 F. Supp. 404, 407 (N.D. Miss. 1997) (“the standing question and the merits of an employee’s claim are unavoidably intertwined to some degree”).

²¹ *Capital Cities/ABC Inc. v. Ratcliff*, 953 F. Supp. 1228 (D. Kan. 1997), *aff’d* 141 F.3d 1405 (10th Cir.), *cert. denied* 525 U.S. 873 (1998).

²² *Id.*, 953 F. Supp. at 1232.

²³ *Id.*

²⁴ *Id.*

²⁵ *Trombetta*, N. 20 *supra*, 1995 WL 787973, at *2.

²⁶ *Breedlove v. Tele-Trip Co.*, No. 91 C 5702, 1993 WL 284327 (N.D. Ill. July 27, 1993).

“at this stage of the litigation, plaintiffs need not convince the court that they are participants. . . . Rather, the Seventh Circuit has stated that satisfaction of [the standing requirement] as articulated in *Firestone* ‘depends on an arguable claim, not on success.’”²⁷

The central issue in *Breedlove* was whether the plaintiffs had always been employees despite being considered independent contractors. Because the plaintiffs advanced an arguable claim for vested benefits based on the language of the plan, the court declined to dismiss the case for lack of standing.²⁸

²⁷ *Id.* at *13 (citation omitted).

²⁸ *Id.* at *14. See also *Burditt*, N. 20 *supra*, 982 F. Supp. at 407 (summary judgment based on lack of standing was inappropriate because plaintiff’s status was the salient issue). The Tenth Circuit has even vacated a lower court’s determination as to subject matter jurisdiction, saying that such determination as to whether the plaintiff was a participant “cannot be made properly until after the trier of fact has found whether [the plaintiff] was an employee or an independent contractor.” Although the court of appeals appears to have conflated the subject matter jurisdiction and standing issues, it is striking that it held that the merits of the case should be resolved prior to determining whether the trial court had subject matter jurisdiction. *Herr v. Heiman*, 75 F.3d 1509, 1513-1514 (10th Cir. 1996).

§ 6A.04 Class Certification Issues

Before an ERISA case can proceed as a class action in federal court, the district court must determine whether a class should be certified and, if so, how the class should be defined. Class certification determinations are to be made by federal district courts as “soon as practical after the commencement of an action brought as a class action. . . .”¹ The substantive rules governing certification are found in Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) imposes four prerequisites that must be satisfied if there is to be any class certification pursuant. The rule reads:

“(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”

The first prerequisite, commonly referred to as the “numerosity” requirement, does not present any issues unique to contingent worker litigation.² Similarly, the fourth prerequisite is not likely to be affected by the fact that the claims are being asserted on behalf of contingent workers. However, the second and third prerequisites, often referred to, respectively, as “commonality” and “typicality,” may present unique problems when the proposed class consists of contingent workers.³

For example, consider a proposed class consisting of all individuals who provided services to the defendant corporation during a given time period but who were treated or characterized as something other

¹ Fed. R. Civ. Pr. 23(c)(1).

² As few as 100 persons has been held to be sufficient to satisfy the numerosity requirement. *Kromnick v. State Farm Insurance Co.*, 112 F.R.D. 124, 126 (E.D. Pa. 1986).

³ In addition to satisfying all four prerequisites in Rule 23(a), parties seeking class certification must show that one or more of the criteria in Rule 23(b) are also satisfied. Since these requirements do not seem to have given rise to any unique issues involving claims by contingent workers, the Rule 23(b) requirements will not be considered further here.

than employees of the corporation.⁴ Such a class would present commonality problems because it would include those who are unquestionably independent contractors, such as outside attorneys, independent accounting firms, advertising agencies, and many others, as well as workers who were performing services very similar to those performed by corporate employees but were classified as independent contractors or as leased employees.

Even when the proposed class is limited to a specific category of service providers or contingent workers, questions with respect to the commonality and typicality prerequisites could still arise, at least in theory. The determination whether an individual is a common law employee typically requires a thirteen-factor, intensive inquiry of the individual circumstances of that person.⁵ Is he or she closely supervised by the corporate defendant and does the corporate defendant truly control how the individual performs his or her services?

For the most part, when the categories of contingent workers are clearly defined, these potential issues have not defeated class certification. One line of cases reasons that the commonality requirement is satisfied so long as one or more issues are common to the proposed class members, and hence differences in potential individual issues about status as common law employees do not present an impediment to class certification.⁶ Similarly, the typicality issue often is resolved by determining whether, despite their individual circumstances, the members of the proposed class are relying on a single legal theory that is applicable to all of them.⁷

One exception to this general approach is presented by *Rumpke v. Rumpke Container Service, Inc.*,⁸ in which a waste disposal company was sued by a former route supervisor who claimed that he and a class of thirty-five other current and former route supervisors, and approxi-

⁴ Cf. *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 390 (E.D. Pa. 2001) (the court noted that a “hopelessly vague” definition of the proposed class, consisting of all persons who worked at the company and were denied benefits, was voluntarily dropped by the representative plaintiffs in favor of a class consisting of all persons who received a specific letter regarding benefits after they were reclassified as employees of the company).

⁵ E.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). For a discussion of those factors, see generally § 4.02 *supra*.

⁶ See *Thomas v. SmithKline Beecham Corp.*, N. 4 *supra*, 201 F.R.D. at 391-394 (relying on *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)).

⁷ *Thomas v. SmithKline Beecham Corp.*, *id.* at 393-395.

⁸ *Rumpke v. Rumpke Container Service, Inc.*, 205 F.R.D. 204 (S.D. Ohio 2001).

mately 800 drivers who worked under the route supervisors, should be treated as employees who were entitled to benefits rather than as independent contractors. The Court found that the plaintiff's claims lacked commonality and typicality not only with respect to the 800 drivers (whose status was likely to depend on the status of the route supervisors), but also because of significant factual differences between the circumstances of the plaintiff and those of the other route supervisors.⁹

Sometimes the parties will have reached a settlement agreement at or prior to the time class certification is requested. In such cases the courts will insist that the parties demonstrate not only that the prerequisites to class certification have been satisfied, but also that the settlement was the product of arms'-length negotiations and otherwise warrants preliminary approval by the court.¹⁰

⁹ *Rumpke, id.*, 205 F.R.D. at 207-211. Citing the *Darden* factors (see N. 5 *supra*), the court noted that, unlike all the other supervisors, only the plaintiff had been prohibited from taking other jobs, did not have complete control over his drivers, and had his route taken away from him due to poor performance. Another important factor was that all or nearly all of the other supervisors executed affidavits indicating that they did not want their status as independent contractors to be changed, which the court viewed as negating plaintiff's claim that he was an adequate representative of their interests. 205 F.R.D. at 210-211.

¹⁰ E.g., *Hamilton v. City of Wilmington*, 2002 U.S. Dist. LEXIS 1683 (D. Del. Feb. 2, 2002) (the court specified matters that the parties will be expected to address in a hearing on class certification in an action brought on behalf of all persons classified by the city as temporary employees).

§ 6A.05 Issues Posed by the *Firestone* Decision

ERISA requires that benefit plans include procedures for a full and fair review of claims for benefits, and obligates plan administrators to acquaint plan participants with those procedures.¹ Thus, in the typical case, plaintiffs seeking recovery on a theory of wrongful denial of ERISA benefits have participated in or could have participated in procedures in which the plan administrator denied the claim. In *Firestone Tire & Rubber Co. v. Bruch*,² the Supreme Court held that the courts must review claims for benefits under ERISA on a “*de novo*” basis, without according any special deference to the benefits decision of the plan administrator who denied the claims, unless the plan gives the plan administrator discretionary authority to interpret and apply the terms of the plan. If such discretionary authority exists, the court’s review of the plan administrator’s decision is then limited to the question of whether that decision constituted an abuse of discretion or was arbitrary and capricious.³

Firestone gives rise to three important procedural issues for purposes of contingent worker ERISA litigation:

- (1) Are the plaintiffs required to exhaust their remedies under the plan before bringing a lawsuit?
- (2) Does the plan give the administrator the requisite authority to interpret its terms and, if so, how is the arbitrary and capricious standard to be applied in particular cases?
- (3) Finally, if the arbitrary and capricious standard is applicable, does the limited scope of judicial review justify restrictions on pre-trial discovery?

[1]—Exhaustion of Remedies

In general, plaintiffs are required to exhaust their remedies under the plan, and when exhaustion has not occurred, the court may dismiss the case without prejudice to its being refiled after exhaustion occurs, or the court may hold the lawsuit in abeyance pending a final decision

¹ ERISA § 503; 29 U.S.C. § 1133.

² *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

³ There appears to be little if any difference in practice between the two standards of review: (1) arbitrary and capricious and (2) abuse of discretion, and the courts often use the two phrases interchangeably. See, e.g., *Jett v. Blue Cross and Blue Shield of Alabama, Inc.*, 890 F.2d 1137 (11th Cir. 1989).

by the plan administrator.⁴ There are important exceptions to this general rule, however. In a class action only the class representatives must exhaust their administrative remedies; other class members need not do so.⁵ Also, exhaustion will not be required if the plaintiffs can show they did not have meaningful access to the review procedures or that requiring review would be futile.⁶ Further, exhaustion will not be required and deferential review will not be accorded where the plan administrator had a clear conflict of interest.⁷

[2]—Scope of Deferential Review

Various circuit courts have defined the scope of review under the arbitrary and capricious and/or abuse of discretion standard in somewhat different, if not conflicting ways.⁸ However it is defined, the

⁴ See, e.g.:

Third Circuit: *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 916 (3d Cir. 1990), *cert. denied* 499 U.S. 920 (1991).

Ninth Circuit: *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (*en banc*), *cert. denied* 522 U.S. 1098 (1998).

District of Columbia Circuit: *Communications Workers of America v. America Telephone & Telegraph Co.*, 40 F.3d 426, 431-432 (D.C. Cir. 1994).

Some courts have also required plaintiffs to exhaust their administrative remedies with respect to claims of violations of ERISA Section 510 (29 U.S.C. § 1140), at least when those claims present issues of plan interpretation. See, for example, *Burds v. Union Pacific Corp.*, 223 F.3d 814, 817-818 (8th Cir. 2000) (noting a split of authority on this issue). See generally 162 A.L.R. Fed. 1 (2000). Compare *Harrow v. Prudential Insurance Co.*, 279 F.3d 244, 253 (3d Cir. 2002) (although exhaustion of plan remedies generally is not required as to statutory claims, “[p]laintiffs cannot circumvent the exhaustion requirement by artfully pleading benefit claims as breach of fiduciary duty claims”).

⁵ E.g., *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 395 (E.D. Pa. 2001).

⁶ *Communications Workers of America*, N. 4 *supra*, 40 F.3d at 432-434 (an initial denial of a claim does not suffice to establish futility); *Edgewater Steel*, N. 4 *supra*, 911 F.2d at 916; *Smith v. Blue Cross & Blue Shield United of Wisconsin*, 959 F.2d 655, 658-659 (7th Cir. 1992).

⁷ See generally *Montesano v. Xerox Corporation Retirement Income Guarantee Plan*, 117 F. Supp.2d 147, 157-158 (D. Conn. 2000), *affirmed in part and vacated and remanded on other grounds* 256 F.3d 86 (2d Cir. 2001) (the fact that a plan administrator is an employee of the company is insufficient, standing alone, to establish a conflict of interest).

⁸ There are even substantial differences among the circuits over the scope of review when the *de novo* standard applies. See, e.g., *Hall v. UNUM Life Insurance Co.*, 300 F.3d 1197, 1201-1204 (10th Cir. 2002) (describing the different approaches taken by the various Circuit Courts on admitting evidence that was not presented to the plan administrator, and opting for a middle course pursuant to which district courts

proper scope of review can be a decisive factor in the final outcome of litigation over the claims of contingent workers that they are entitled to benefits. Often, a key issue in such litigation is whether the plaintiffs are “employees” as that term is used in the defendant’s plans. This is not a purely legal question (to which no deference is accorded a plan administrator’s decision, even under the arbitrary and capricious standard of review) but, rather, the type of plan interpretative issue to which considerable deference is given to the plan administrator’s conclusions so long as the *Firestone* criteria are satisfied.⁹

One particularly noteworthy example of according a plan administrator’s decision deference is *Hensley v. Northwest Permanente PC Retirement Plan and Trust*.¹⁰ In that case, the Ninth Circuit Court of Appeals reversed a district court ruling that the plan administrator abused his discretion by utilizing a W-2 definition of “employee,” rather than the federal common law definition of that term.¹¹ The Court of Appeals reasoned that to require the plans to use a judicially crafted definition of “employee” would deprive the administrators of their discretion to interpret the plan. Hence, the issue was whether language in the plan clearly rendered the plan administrator’s decision unreasonable—not whether the court might opt for a definition of “employee” other than the definition selected by the plan administrator. So long as the plan itself does not foreclose the administrator’s interpretation, and so long as there has been a consistent pattern of interpretation, the plan administrator’s decision will be deemed reasonable.¹²

In contrast to *Hensley*, when differential review under *Firestone* does not apply, many courts employ a rule that ambiguities in contracts (and ERISA plans) are presumptively to be resolved against the interest of the author of the document.¹³ The rationale for this *contra proferentum* rule of construction is simply that the party that drafted

have discretion to admit evidence not considered by the plan administrator when circumstances clearly establish that the additional evidence is necessary to an adequate *de novo* review of the administrator’s decision).

⁹ *Montesano*, N. 7 *supra*, 117 F. Supp.2d at 158-160.

¹⁰ *Hensley v. Northwest Permanente PC Retirement Plan and Trust*, 258 F.3d 986 (9th Cir. 2001), *cert. denied* ___ U.S. ___, 122 S.Ct. 815 (2002).

¹¹ *Id.*, 258 F.3d at 999-1002.

¹² *Id.* at 1002, citing *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1113 (9th Cir. 2001).

¹³ E.g., *I.V. Services of America, Inc. v. Trustees of American Consulting Engineers Council Insurance Trust Fund*, 136 F.3d 114 (2d Cir. 1998).

the document had the opportunity to resolve the ambiguity in its favor, but failed to do so. Had this rule of construction been applied in *Hensley*, or in many of the other cases in which the denial of benefits to contingent workers has been upheld, the final outcome would undoubtedly have been different.¹⁴

[3]—Scope of Discovery

The scope of pretrial discovery also can be affected by the applicable standard of review. Many courts have concluded that, at least when the deferential standard of review applies, the court's interpretation is to be limited to the record that was before the plan administrator at the time of his decision, and that new arguments and facts not presented to the administrator are not to be considered.¹⁵ When the scope of review is limited in this fashion, defendants will have a substantial basis for resisting the wide-ranging pretrial discovery that is the hallmark of modern litigation.¹⁶

Other factors beyond the scope of judicial review will also affect the scope of discovery. Some courts have suggested that the scope of permissible discovery in ERISA cases simply is not as broad as it generally is under the Federal Rules.¹⁷ However, when the issue is whether the plaintiff was a common law employee rather than an independent contractor, there is a reluctance to attempt to resolve this highly fact-specific issue without giving the plaintiff an opportunity to

¹⁴ See, e.g., *Trombetta v. Cragin Federal Bank for Savings Employee Stock Ownership Plan*, 102 F.3d 1435 (7th Cir. 1996).

¹⁵ See, e.g., *Fitts v. Federal National Mortgage Ass'n.*, 204 F.R.D. 1, 3 (D.D.C. 2001) (when review is limited to the record before the plan administrator, discovery seems utterly unjustified"); *Capital Cities/ABC, Inc. v. Ratcliff*, 953 F. Supp. 1228 (D. Kan. 1995) (citing cases holding that a court cannot consider evidence or arguments which were not presented in the administrative proceeding).

¹⁶ *Id.*

Even when differential review is not required, many courts refuse to consider new evidence that was not presented to the plan administrator, at least in the absence of a showing of good cause for the failure to submit the material to the plan administrator. E.g., *Critchlow v. First Union Life Insurance Co.*, 2002 U.S. Dist. LEXIS 6600, *6-9 (W.D.N.Y. Mar. 29, 2002). In this context, the limitation on new evidence may not create an obstacle to discovery because the plaintiff may be able to overcome the good cause hurdle regarding evidence subsequently obtained through discovery by contending that the plan administrator or the company withheld the evidence prior to the plan administrator's decision.

¹⁷ *Fitts v. Federal National Mortgage Ass'n.*, N. 15 *supra*, 204 F.R.D. at 3-4.

conduct discovery.¹⁸

¹⁸ Peden v. Elizabeth Arden Co., 2002 U.S. Dist. LEXIS 7158 (S.D.N.Y. Apr. 23, 2002).

§ 6A.06 The Statute of Limitations Defense

ERISA includes a statute of limitations provision that governs claims for breach of fiduciary duty under Section 502(a)(3).¹ However, the statute does not contain a limitations provision applicable either to claims under Section 510 or to actions for wrongful denial of benefits under Section 501(a)(1)(B). In such cases, the courts “borrow” from the most analogous statute of limitations in the forum state. As a result, the limitations periods applicable to claims for denial of benefits may vary considerably, depending on the state in which the suit is filed.²

Although the length of the limitations period is “borrowed” from state law, the courts have consistently held that the questions as to when the claim accrues—that is, when the limitations period begins to run—are matters that are to be determined in accordance with federal common law.³ A recent series of cases holds that under the federal accrual rule the limitations period begins to run as soon as contingent workers are on notice that the company does not intend to treat them as eligible for benefits. Since such notice may occur very early, even before the plaintiff begins to provide services, many contingent worker claims may be barred on statute of limitations grounds.

The federal common law dictates that, in the absence of a congress-

¹ ERISA § 413; 29 U.S.C. § 1113. This section provides that an action for breach of fiduciary duty may not be commenced after the earlier of (1) six years following either the last date of the action that constituted the breach or, in the case of an omission, the last date on which the fiduciary could have cured the breach, and (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. See, e.g., *In re Unisys Corporation Retiree Medical Benefit “ERISA” Litigation*, 242 F.3d 497 (3d Cir.), *cert. denied* 534 U.S. 1018 (2001) (applying Section 413 in the context of consolidated cases).

² See, e.g.:

First Circuit: *Bolduc v. National Semiconductor Corp.*, 35 F. Supp.2d 106, 118 (D. Me. 1998) (applying a six-year limitations period borrowed from Maine law).

Second Circuit: *Sandberg v. KPMG Peat Marwick*, 111 F.3d 331, 333-337 (2d Cir. 1997) (applying in suits under ERISA Section 510 a two-year limitations period borrowed from New York law).

Fifth Circuit: *Stewart v. Project Consulting Services, Inc.*, 2001 U.S. Dist. LEXIS 13680 (E.D. La. Aug. 29, 2001) (applying a ten-year limitations period borrowed from Louisiana law).

Eighth Circuit: *Adamson v. Armco, Inc.*, 44 F.3d 650, 652-654 (8th Cir.) (applying a two-year period borrowed from Minnesota law), *cert. denied* 516 U.S. 823 (1995).

³ E.g., *Adamson, id.*, 44 F.3d at 653; *Hoodack v. International Business Machines, Inc.*, 202 F. Supp.2d 109, 113-115 (S.D.N.Y. 2002).

sional directive to the contrary, the so-called “discovery rule” applies to determine when the limitations period begins to run.⁴ Under that rule, a cause of action accrues and the limitations period begins to run when the prospective plaintiff discovers or with due diligence should have discovered the injury that is the basis of the litigation.⁵ Typically, in the context of a claim for ERISA benefits, knowledge of injury accrues when the plan administrator denies a claim for benefits. However, several recent cases establish that a cause of action under Section 501(a)(1)(B) may accrue long before there is a formal denial, and even long before a plaintiff first asserts an entitlement to benefits. These cases hold that accrual occurs when there is a repudiation by the fiduciary, or by the employer, of the prospective plaintiff’s entitlement to benefits, and that repudiation is clear and is made known to that beneficiary.⁶

Several district courts have recently applied this accrual rule to dismiss, on statute of limitations grounds, claims for benefits asserted on behalf of contingent workers who were on notice at the time they began providing services to the defendant company that they would not be entitled to receive benefits under that company’s plans.

For example, in *Bolduc v. National Semiconductor Corp.*,⁷ where the plaintiff had been engaged as an independent contractor in 1991 and sued in 1998, the court dismissed his Section 502(a)(1)(B) claim on the ground that the six-year limitations period began to run in 1991 when he was told that he would be treated as an independent contrac-

⁴ E.g., *Bolduc v. National Semiconductor Corp.*, N. 2 *supra*, 35 F. Supp.2d at 118-119.

⁵ *Id.*

⁶ E.g., *Union Pacific Railroad Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir.), *cert. denied* 525 U.S. 817 (1998). In the *Beckham* case, which did not involve contingent workers, employees of a railroad being acquired by Union Pacific were given written notice before the merger was consummated that if they became employees of Union Pacific they would not accrue pension benefits under their then-current employer’s plan after the merger, and they would not be credited for benefit accrual purposes under the Union Pacific plan with their premerger service with the acquired railroad. The counterclaim plaintiffs, all former employees of the acquired railroad, claimed that the terms of the two plans entitled them to accrue benefits under both plans based on the entirety of their service with both employers. These claims were held to be barred by the relevant statute of limitations because the notice given to the counterclaim plaintiffs prior to the merger constituted a clear repudiation of the benefit claims they were making in the pending litigation.

⁷ *Bolduc*, N. 2 *supra*.

tor.⁸ In *Schultz v. Texaco, Inc.*,⁹ the lawsuit was brought in January 2000 by four individuals who, after their initial hire, had been classified as temporary agency employees in 1990 and 1991, and who thereafter received their paychecks from various temporary agencies. Their Section 502(a)(1)(B) claims were held to have accrued in 1990 or 1991 when they were removed from the defendant's payroll, since that removal constituted a repudiation of any entitlement to benefits, and, accordingly, their Section 502(a)(2)(B) claims were barred under the six-year limitations period applicable in New York.¹⁰ In yet another case, *Kryzer v. BMC Profit Sharing Plan*,¹¹ the plaintiff had signed an independent contractor agreement that clearly put him on notice that the company denied any obligation to pay him benefits. Relying on the applicable Eighth Circuit precedent,¹² as well as *Schultz* and *Bolduc*, the *Kryzer* court held that the claim accrued at the time the independent contractor agreement was signed, so that the plaintiff's claim was barred by the applicable statute of limitations.¹³

Ironically, a plaintiff who successfully resists a motion to dismiss for failure to exhaust plan remedies, on the ground that it would be futile to do so, may inadvertently make the case that he had clear notice of repudiation of his claim at an early point, so that the limitations period will be deemed to have run.¹⁴ Conversely, one could argue that a defendant that disputes futility may compromise its ability to contend that there was a clear repudiation of the claim early enough to

⁸ *Id.*, 35 F. Supp.2d at 119 (“*Bolduc* knew, at this point, that he was being hired as an independent contractor and that, by virtue of this status, he would not receive employee benefits.”). See also *McLaughlin v. UNUM Life Insurance Co.*, 2002 U.S. Dist. LEXIS 19290, *9-*11 (D. Me. Oct. 8, 2002) (holding that Maine's six-year limitations period began to run with respect to plaintiff's claim that she was erroneously denied benefits for a long-term physical disability on the day she was informed she would be paid benefits but that her disability would be characterized as a mental illness, which meant benefits would automatically terminate after twenty-four months).

⁹ *Schultz v. Texaco, Inc.*, 127 F. Supp.2d 443 (S.D.N.Y. 2001).

¹⁰ *Id.*, 127 F. Supp.2d at 448, citing *Carey v. Ivey Local 363 Pension Plan*, 201 F.3d 44, 47-50 (2d Cir. 1999).

¹¹ *Kryzer v. BMC Profit Sharing Plan*, 2001 U.S. Dist. LEXIS 18300 (D. Minn. Nov. 1, 2001).

¹² *Beckham*, N. 6 *supra*.

¹³ *Kryzer*, N. 11 *supra*, 2001 U.S. Dist. LEXIS 18300 at *5-*11. See also *Kienle v. Hunter Engineering Co.*, 24 F. Supp.2d 1004, 1006-1007 (E.D. Mo. 1998), *aff'd* 187 F.3d 641 (8th Cir. 1999) (*per curiam*).

¹⁴ See *Beckham*, N. 6 *supra*, 138 F.3d at 331-332.

justify dismissal on limitations grounds.