Post-Erisa Interpretation of Pre-Erisa Pension Plans: Dissention among the Circuits

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POST-ERISA INTERPRETATION OF PRE-ERISA PENSION PLANS: DISSENTION AMONG THE CIRCUITS

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I. INTRODUCTION

The idea that workers who reach retirement age should enjoy certain benefits is not a new one by any stretch of the imagination. One author has stated that industrial pension plans go back as far as 1875.¹ Many private plans have developed since that time, and these new developments have been followed by an extensive amount of legislation. One of the most important pieces of legislation relating to pension plans is the Employee Retirement Income Security Act (ERISA).²

ERISA was passed by Congress in 1974. Its purpose is to protect the interests of participants in employee benefit plans and their beneficiaries by requiring plan fiduciaries to meet certain recording, disclosure, and funding standards and by providing for appropriate remedies through ready access to the federal courts.³ ERISA contains several sections which are all designed to achieve the foregoing purpose,⁴ but the section which is probably most effective in promoting

3. Id.
4. For a comprehensive look at the Employee Retirement Income Security Act, see Snyder, supra note 1.
the goals expressed by Congress is the section known as the pre-emption statute. The preemption statute reads:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under 1003(b) of this title. This section shall take effect on January 1, 1975.

The power of Congress to enact the section 1144(a) preemption statute comes from Article VI of the federal Constitution. The intention of Congress to preempt state law with ERISA is clear from the language of the subsection. However, the intention of Congress under subsection (b)(1) of 29 U.S.C. 1144 is not as clear.

Section 1144(b)(1) states the preemption statute’s effective date, and reads: “This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.” Although the language of the statute is not complex, it has been the subject of much dispute in recent years and has left the circuit courts in a near perfect dichotomy. The situation in which the issue of how to apply section 1144(b) usually arises is when an employee has begun to participate in a private pension plan prior to the January 1, 1975 date, and the employee has later filed an application for benefits and had them denied sometime after the

6. Id. § 1144(a).
7. U.S. Const. art. VI, cl. 2. The supremacy clause states: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.
9. At the present time seven circuits have applied the statute in a retroactive fashion with two of the seven doing so indirectly. Rodriguez v. MEBA Pension Trust, 872 F.2d 69 (4th Cir. 1989); Central States S.E. & S.W. Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986); Tanzillo v. Local Union 617, Int'l Bhd. of Teamsters, 769 F.2d 140 (3rd Cir. 1985); Coward v. Colgate-Palmolive Co., 686 F.2d 1230 (7th Cir. 1982); Peckham v. Bd. of Trustees, 653 F.2d 424 (10th Cir. 1981); Paris v. Profit Sharing Plan, 637 F.2d 357 (5th Cir. 1981); Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307 (8th Cir. 1979). Four circuits have taken the opposite view and have refused to apply the statute retroactively. Lamontagne v. United Wire, Metal & Mach. Pension Fund, 869 F.2d 153 (2nd Cir. 1989); Vaughter v. Eastern Air Lines, Inc., 817 F.2d 685 (11th Cir. 1987); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984); Quinn v. Country Club Soda Co., 639 F.2d 838 (1st Cir. 1981).
January 1, 1975 effective date. In this situation, the federal courts have laid out a two-prong test for determining whether ERISA applies.¹⁰ The first prong tests whether the cause of action arose before January 1, 1975. There has not been much controversy over the first prong of the test. However, there has been a large amount of controversy over the application of the second prong of the test which asks whether any act or omission occurred before January 1, 1975. In applying the second prong, some courts have taken a narrow view¹¹ of the phrase “acts or omissions,” holding that the denial of benefits is the act or omission for purposes of the statute, while other courts have taken a more expansive or “broad” view of the phrase, holding that any act which relates to the cause of action is an act or omission for the purposes of the statute.¹²

This article will present an analysis of the dichotomous views held by the federal circuit courts on the issue of whether the federal judiciary may review pre-ERISA pension plans when the denial of benefits occurs after the enactment of ERISA. More specifically, this article will present and analyze the position the courts have taken in deciding what is an “act or omission” for purposes of section 1144(b)(1). First, it will discuss those decisions which have held that the denial of benefits is the “act or omission” for purposes of section 1144(b)(1). Next, it will examine those decisions which have held that any act or omission relating to the denial of benefits is the “act or omission” for purposes of section 1144(b)(1). Finally, it will attempt to predict the position the United States Supreme

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¹⁰. See, e.g., Rodriguez, 872 F.2d at 71.
¹¹. At this time a clarification of the term “narrow view” is needed. Section 1144(b)(1) contains the phrase “act or omission.” The term “narrow” is used because the courts that take this view hold that the only act or omission that is relevant for purposes of the statute is the formal denial of pension benefits. Therefore, the court is limiting or narrowing the kinds of acts or omissions that can be considered in applying the statute. It is a narrow view of “act or omission.” It should also be noted that § 1144(b)(1) is a limitation on ERISA protection because it limits the application of the act by setting an effective date. Therefore, a court that takes a narrow view of § 1144(b)(1) is actually expanding the protection of the act as a whole. The opposite view which states that any act or omission before 1975 is an “act or omission” for purposes of § 1144 (b)(1) will be referred to as the “broad view” for purposes of this article. The same logic is used in defining the broad view as was used in defining the narrow view above. Thus, the court which employs the broad view of § 1144(b)(1) is actually contracting the scope of the act’s protection.
¹². See supra note 9.
Court will ultimately assume if it should decide to address the issue at hand.

II. THE NARROW VIEW

A slight majority of the federal circuit courts have taken a narrow view of the phrase "act or omission." Under the narrow view, these courts have held that the formal denial of pension benefits is the crucial act which determines whether ERISA applies under section 1144(b)(1).  

The Eighth Circuit Court of Appeals became the first circuit to address this issue in the 1979 case *Winer v. Edison Bros. Stores Pension Plan.* In *Winer,* former employees were denied pension benefits under a provision in their plans known as a "Bad Boy" clause. The employees' alleged misconduct, used by their employers to deny their benefits, involved the receipt of kickbacks from various suppliers in the period prior to the enactment of ERISA. However, the formal denial of the employees' benefits came in July of 1976, one and a half years after the enactment of ERISA. The pension plan argued that the dishonest conduct of the employees occurred before 1975 and that, therefore, ERISA was not applicable to the case at bar. However, the court did not agree. The court held ERISA applicable because no event had occurred at the time of the alleged kickbacks which could have served as a basis for a claim under ERISA. The court reasoned that Congress could not have meant that if any act or omission relevant to the cause of action occurred prior to January 1, 1975, state law would control. The court further stated that such an interpretation would be inimical to the congressional attempt to extend the protection of ERISA to.

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13. The Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits all hold this view. See supra note 9.
14. 593 F.2d 307 (8th Cir. 1979).
15. A "Bad Boy" clause is a clause in a pension contract that disqualifies a member from receiving benefits if he commits certain acts such as being dishonest with respect to the assets of the business or if the person is convicted of a felony while he is an employee.
17. *Id.* at 312.
18. *Id.* at 314.
19. *Id.* at 313.
all employees as soon as practicable.\textsuperscript{20} The Eighth Circuit is not alone in its interpretation of section 1144(b)(1).

In 1981, the United States Court of Appeals for the Fifth Circuit followed the view taken by the Eighth Circuit in \textit{Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.}\textsuperscript{21} That case also involved a situation where the pension plan was started before January 1, 1975, but the denial of benefits came after January 1, 1975.\textsuperscript{22} The court, in concluding that it had federal jurisdiction, held that for purposes of ERISA a cause of action does not accrue until an application has been denied.\textsuperscript{23} In giving the reasons for its decision, the court quoted a 1947 Supreme Court case which stated that claims filed before a pension actually has been denied might be challenged for lack of ripeness.\textsuperscript{24} The Fifth Circuit also reasoned that to hold otherwise would place an almost intolerable burden on employees covered by pension plans.\textsuperscript{25} The court further stated that a contrary ruling would require individuals who are unversed in the law to be constantly vigilant and would also require piecemeal challenges before an actual denial has occurred, resulting in a "great waste of judicial resources."\textsuperscript{26}

More recently the Seventh Circuit has also addressed this issue in \textit{Coward v. Colgate-Palmolive Co.}\textsuperscript{27} The \textit{Coward} case dealt with a factual situation similar to the cases discussed above. The pension plan in \textit{Coward} was a voluntary plan which required contributions from the participating employees and the company.\textsuperscript{28} The initial plan was started in 1943 and was amended in 1971 to retroactively recognize pension benefits of employees who had been continuously employed.\textsuperscript{29} The plaintiffs instituted this action to recover past ben-

\begin{itemize}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} 637 F.2d 357 (5th Cir. 1981).
\item \textsuperscript{22} \textit{Id.} at 359.
\item \textsuperscript{23} \textit{Id.} at 361.
\item \textsuperscript{24} United Public Works v. Mitchell, 330 U.S. 75 (1947).
\item \textsuperscript{25} \textit{Paris}, 637 F.2d at 361.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} 686 F.2d 1230 (7th Cir. 1982).
\item \textsuperscript{28} \textit{Id.} at 1232.
\item \textsuperscript{29} \textit{Id.}
\end{itemize}
benefits. Their application for past benefits was denied in 1976. The pension plan company argued that the claim was not subject to ERISA. The Seventh Circuit held that the critical act for federal jurisdictional purposes of ERISA was the denial of plaintiffs’ applications for pension benefit credits. The court closely followed the reasoning in Paris and Winer.

In Tanzillo v. Local Union 17, Int’l Bhd. of Teamsters, the United States Court of Appeals for the Third Circuit adopted the narrow view by holding that the act or omission giving rise to this action was the post-ERISA denial of an employees pension by the fund in 1981. Although the court acknowledged a contrary view held by the Ninth Circuit in Menhorn v. Firestone Tire & Rubber Co., it chose not to follow the Ninth Circuit’s lead. Instead, the court was more persuaded by the Menhorn dissent which reasoned that while the determination of a claim upon the fund may require the fund trustees to consider events that have taken place before ERISA’s enactment, the act of granting or denying a pension nevertheless involves a contemporaneous construction of the plan’s provisions—an “act or omission” to which ERISA’s fiduciary standards apply, and by extension, over which the district courts are unquestionably given jurisdiction. The Tanzillo court also noted that an identical conclusion had been reached by another panel of the Third Circuit in Jameson v. Bethlehem Steel Corporation, which held that ERISA’s jurisdiction extends to claims based upon events occurring long before ERISA’s effective date, so long as the cause of action arises after ERISA’s effective date.

30. Id. at 1234.
31. Id.
32. Id.
33. Id.
34. 769 F.2d 140 (3rd Cir. 1985).
35. Id. at 144.
36. 738 F.2d 1496 (9th Cir. 1984) (holding that certain acts before the 1975 date constituted “acts or omissions” for the purpose of § 1144(b)(1) even though the denial of benefits did not come until after that date).
37. 738 F.2d at 1508 (Ferguson, J., dissenting).
38. 769 F.2d at 144.
39. 765 F.2d 49 (3rd Cir. 1985).
40. Tanzillo, 769 F.2d at 144.
The Fourth Circuit addressed the issue for the first time in the 1989 case *Rodriguez v. MEBA Pension Trust*. The court in *Rodriguez* acknowledged that there was a conflict among the circuits where a plaintiff's application for pension benefits is made and denied post-ERISA, but at least some acts have occurred pre-ERISA. After examining both views the court adopted the view expressed by the *Tanzillo* court and held that the denial of benefits is the act or omission for purposes of section 1144(b)(1). The court also cited *Winer*. The Fourth Circuit reasoned that a narrow approach has the advantage of certainty over the broad view. Therefore, courts need only look to the date of the trustees' determination in order to decide whether ERISA applies. The court also noted that plan participants cannot be expected to inquire about benefits until retirement.

Although they have not specifically addressed the issue, two other courts have indirectly applied ERISA to similar situations. In *Peckham v. Board Trustees*, the Tenth Circuit Court of Appeals applied ERISA to a claim in which many critical acts had occurred before the January 1, 1975 date, but the formal denial of benefits did not take place until 1976. The court did not specifically address the issue of ERISA jurisdiction, but instead it applied ERISA to the merits of the case without any mention of section 1144(b)(1). In essence, the court presumed jurisdiction from the start. In a similar situation, the United States Court of Appeals for the Sixth Circuit applied ERISA to a claim in which many of the crucial acts had occurred prior to the January 1, 1975 effective date in *Central States S.E. & S.W. Areas v. Kraftco, Inc.* Although the court acknowl-

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41. 872 F.2d 69 (4th Cir. 1989).
42. Id. at 72.
43. Id.
44. Id.
46. Id.
47. Id.
49. 653 F.2d 424 (10th Cir. 1981).
50. Id. at 425.
51. 799 F.2d 1098 (6th Cir. 1986).
edged that section 1144(b)(1) provides a limitation on claims, it simply stated that this section did not provide any further guidelines as to statutes of limitations on claims.\textsuperscript{52} The court then assumed jurisdiction and decided the case without any discussion of whether it had the authority to do so or not. Although the primary reason for the court's failure to discuss the application of section 1144(b)(1) may have been that the parties never brought up the issue, the court nevertheless could have raised the issue itself as it did in the Tanzillo\textsuperscript{53} case, but significantly did not. Although the narrow view taken by the courts in the cases discussed above has merit, there is a contrary view which has also received some attention.

III. THE BROAD VIEW

Some of the circuits have taken a broad view of the phrase "act or omission," holding that any act or omission that relates to the cause of action may bar an employee from the protection of ERISA.\textsuperscript{54}

The United States Court of Appeals for the First Circuit adopted the broad view in Quinn v. County Soda Company.\textsuperscript{55} That case involved a situation where many of the critical acts had occurred prior to 1975. Those acts included such things as oral representations by the company to the employee that he was not included in the plan and that he would not be made a participant in the plan.\textsuperscript{56} The court stated that the trustees, in denying the employee benefits, were simply following through on a position consistently taken and communicated to the plaintiff from the time the plan was established.\textsuperscript{57} Therefore, the court held that the plaintiff's basic quarrel was with a policy and course of conduct instituted, fully delineated, and communicated to him many years prior to 1975, and, therefore, the district court lacked subject matter jurisdiction over this suit.\textsuperscript{58}

\textsuperscript{52} Id. at 1104.
\textsuperscript{53} Tanzillo v. Local Union 617, Int'l Bhd. of Teamsters, 769 F.2d 140, 143 (3rd Cir. 1985).
\textsuperscript{54} The First, Second, Ninth and Eleventh Circuits hold this view.
\textsuperscript{55} 639 F.2d 838 (1st Cir. 1981).
\textsuperscript{56} Id. at 841.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
court reasoned that the clear practical import of the act or omission clause is to prevent past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards of ERISA simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is technically an independent "cause of action." Therefore, the court felt that it would be adverse to congressional intent to apply ERISA in this situation.

Perhaps the landmark case adopting the broad view is *Menhorn v. Firestone Tire & Rubber Co.*, which was decided in 1984 by the United States Court of Appeals for the Ninth Circuit. The *Menhorn* case involved a situation where an employee worked for several years, resigned in 1967, was rehired one month later and worked until he was laid off in 1980. The employee then filed for benefits and was denied them because he had not worked fifteen continuous years; therefore, he had no vested benefits. The employee brought suit under ERISA. The court held that the denial of benefits in 1980 was simply the "inexorable consequence" of the position Firestone had taken years before. The court also held that because all of the relevant conduct on which liability must be based occurred prior to 1975, state law and not ERISA must control. The Ninth Circuit also noted that in cases where a claimant has been formally denied benefits after ERISA's effective date pursuant to an unambiguous and non-discretionary plan provision adopted before the effective date, the denial is not reviewable under ERISA. The court qualified this holding somewhat by stating that "the case at bar must be distinguished from those in which benefits have been denied as a result of a significant act of discretion under an interpretation of the plan which took place after ERISA's effective date."

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59. *Id.*
60. *Id.*
63. *Id.*
64. *Id.* at 1501.
65. *Id.* at 1502.
guage seems to suggest that the Ninth Circuit would hold differently in other factual situations.

The Second Circuit subsequently followed the Menhorn rationale in the 1989 case, Lamantagne v. Pension Plan of the United Wire, Metal and Machine Pension Fund. In Lamantagne, the Second Circuit dealt with a situation where an employee worked from 1954 to 1971. In 1971 the employee injured his back and never returned to work. In 1978 he applied for benefits and was denied on the basis of a "break in employment" clause. The court held that the relevant act for section 1144(b)(1) purposes — the adoption of the break in employment policy—occurred before 1975, and therefore the fiduciary standards section of ERISA does not apply to the employee's claim. Here the court found that the relevant act for the purposes of ERISA was the break in employment. The court also cited Menhorn in stating that the post-1975 denial of his application for a pension was the direct result of the employer's pre-1975 adoption of a "break-in-service" policy and its warnings to him that a break in employment would terminate his previously earned credits.

One other court has also followed this view in a less direct fashion. In Vaughter v. Eastern Airlines, Inc., the United States Court of Appeals for the Eleventh Circuit faced a situation in which pilots were involved with a voluntary contribution pension plan. The plan had begun in 1947. In 1965, Eastern assumed the burden of funding the pension program for its pilots. Under the terms of the program, contributors were entitled to returns of their contributions only in the event of death or termination of employment. In 1979 Eastern entered into an agreement whereby the airline agreed to return vol-

66. 869 F.2d 153 (2nd Cir. 1989).
67. Id. at 154.
68. Id.
69. A "break in employment" clause "is a provision in a pension plan that states that an employee must work a certain number of hours within a certain time period. If the employee fails to achieve the stated number of hours he or she will lose credit for pension benefits." Id. at 154-55.
70. Id. at 156.
71. Id.
72. 817 F.2d 685 (11th Cir. 1987).
untary contributions to non-pilot employees. In 1980 Vaughter, a pilot, filed for his own contributions and was denied. The court stated that the plaintiff's claims had accrued in 1965, that the accrual of his claims constituted the relevant act for purposes of section 1144(b) and that his claims were therefore not cognizable under ERISA. Although the pilots claimed that they could not have known about the return of payments until the 1979 agreement, the court flatly rejected their argument and denied their ERISA claim.

IV. THE VIEW THE UNITED STATES SUPREME COURT WILL LIKELY FOLLOW

Although the above discussion has given an insight into how the circuit courts have dealt with the issue in the past, it has not given any indication of how the conflict is to be resolved.

The conflict among the circuits is likely to lead to a future Supreme Court decision. However, certiorari has been denied four times to date. Currently, the United States Supreme Court has not so much as cited 29 U.S.C. § 1144(b)(1) in any of its opinions. However, it has written about section 1144(a), which is the general pre-emption statute. Although the Court's analysis of section 1144(a) will not answer the question of how it might deal with section 1144(b)(1), it does provide some insight as to how the Court deals with ERISA and retirement issues generally. One of the most helpful cases for understanding the Supreme Court's view on the general issue of ERISA pre-emption is Pilot Life Insurance Co. v. Dedeaux, which was decided in 1987 by a unanimous Court.

The respondent in Dedeaux hurt his back on the job in 1975. At the time, he was working for Entex, and he had acquired a long-

73. Id. at 691.
74. Id. at 692.
77. The Dedeaux Court included all the members of the present Supreme Court except Justice Kennedy. The present members of the Supreme Court are Harry A. Blackmun, William J. Brennan, Anthony M. Kennedy, Thurgood Marshall, Sandra Day O'Connor, William H. Rehnquist, Antonin Scalia, John Paul Stevens, and Byron R. White.
78. Dedeaux, 481 U.S. at 43.
term disability employee benefit from the petitioner-employer. The respondent-employee sought benefits from the plan which were initially granted and then terminated after two years. During the next three years, respondent’s benefits were reinstated and terminated several times. The respondent instituted a diversity action against petitioner on tort and contract claims, but did not assert any ERISA claims. The district court granted summary judgment for petitioner on the grounds that the claims were pre-empted by ERISA. The Court of Appeals for the Fifth Circuit reversed and the Supreme Court granted certiorari. The Supreme Court reversed the court of appeals and held that ERISA pre-empted the state law claims. The Court noted that the pre-emption provisions of ERISA are deliberately expansive and designed to establish pension plan regulation as an exclusively federal concern. The Court also quoted Shaw v. Delta Airlines, Inc. in stating:

The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language and indicated that the section’s pre-emptive scope was as broad as its language.

The Court further quoted from comments made by sponsors of the original bill:

It should be stressed with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to pre-empt the field for federal regulations, thus examining the threat of conflicting or inconsistent state and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law.

79. Id.  
80. Id.  
81. Id.  
82. Id. at 43-44.  
83. Id. at 44.  
84. Id.  
85. Id. at 57.  
86. Id. at 46.  
88. Dedeaux, 481 U.S. at 46 (quoting Shaw, 463 U.S. at 89).  
89. Id. at 46 (quoting 120 Cong. Rec. 29933 (1974) (statement of Sen. Williams)).
In driving the point home, the Court stated that it agreed with the argument made by the Solicitor General:

Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions taken by ERISA-plan participants and beneficiaries . . . and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress.90

Dedeaux makes it clear that the Court believes that ERISA should be applied expansively for the purpose of furthering congressional intent. Likewise, in Metropolitan Life Insurance Co. v. Taylor,91 the Supreme Court followed this same rationale. The Metropolitan case involved a pension plan set up by General Motors Corporation.92 The plan was insured by Metropolitan Life Insurance Company.93 Arthur Taylor was a General Motors employee who hurt his back on the job.94 Taylor filed a supplemental claim for benefits and was sent to an orthopedist.95 General Motors also requested that Taylor be examined by the company’s medical department.96 In both examinations, it was concluded that Taylor was not disabled.97 Taylor refused to return to work and was terminated.98 Taylor filed suit against General Motors and Metropolitan on the grounds of breach of contract and wrongful termination.99 General Motors removed the case to federal court alleging federal question jurisdiction over benefit claims by virtue of ERISA.100 The district court agreed with General Motors but the Court of Appeals reversed.101 The Supreme Court reversed the Court of Appeals and held that common law contract and tort claims are pre-empted by ERISA.102 Both of these

90. Id. at 52.
92. Id. at 60.
93. Id.
94. Id.
95. Id. at 61.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id. at 62.
102. Id.
cases demonstrate a clear intent by the court to expand the provisions of ERISA as far as possible. However, there are cases where the Court has not encouraged jurisdictional expansion of ERISA.

In Metropolitan Life Insurance v. Massachusetts,103 the Supreme Court declined to apply ERISA. That case dealt with a situation where a Massachusetts statute required that minimum mental health care benefits be provided to a Massachusetts resident who was insured under a general health insurance policy or an employee health care plan.104 The appellant insurer contended that the statute, as applied to insurance policies purchased by employers, violated ERISA.105 The Court held that the statute merely regulated insurance and was not pre-empted by ERISA, as it applies to insurance contracts purchased for plans subject to ERISA.106 However, the Court did acknowledge that the scope of ERISA pre-emption is broad.107 The opinion also noted the duty to further congressional intent.108

In the more recent case, Fort Halifax Packing Co. v. Coyne,109 the Court also declined to apply ERISA. In Coyne, handed down in 1987, the appellant-employer closed its plant and laid off most of its employees.110 The Director of the Maine Bureau of Labor Standards filed suit to enforce the provisions of a state statute requiring employers in the event of a plant closing to provide a one-time severance payment to employees not covered by an express contract providing for severance pay.111 The state superior court granted summary judgment for the Director, and the Supreme Court of Maine affirmed, rejecting the argument that the statute was pre-empted by ERISA.112 The Supreme Court of the United States held that “the statute was not pre-empted by ERISA . . . because the statute neither establishes nor requires an employer to maintain an

104. Id. at 727.
105. Id.
106. Id. at 758.
107. Id. at 739.
108. Id. at 738 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).
110. Id. at 4.
111. Id. at 5.
112. Id. at 6.
employee benefit plan under that federal statute." The Court noted that ERISA is not applicable to all employee benefits, but only to benefit plans. The Court also reasoned that "concern only arises . . . with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation."

Although the Court declined to apply ERISA, this case is easily distinguished from those cases in which the Court chose to apply ERISA. Coyne dealt with a statutorily mandated severance payment, rather than a comprehensive employer-originated benefit plan of the type involved in the cases which have interpreted section 1144(b)(1). The latter cases, without doubt, involved an employer-established "benefit plan." That fact alone greatly distinguishes Coyne for our purposes. Even with the factual situation as it was in Coyne, Justices White, Rehnquist, O'Connor, and Scalia strongly dissented. The dissent argued that the Court's "administrative scheme" rationale provides states with a means of circumventing congressional intent clearly expressed in section 1144, to pre-empt all state laws that relate to employer benefit plans. The dissenting Justices would have applied ERISA even in the factual setting of Coyne.

The cases discussed above show the Court's willingness to expand the pre-emption of ERISA. It would also seem logical that the Court would be willing to take the view that the formal denial of benefits constitutes the "acts or omissions" for the purposes of section 1144(b)(1). This view would afford more employees the protection of ERISA and would therefore further the congressional intent of protecting employees who are covered under qualified plans.

It is difficult to see how congressional intent will be upheld if the Court takes a contrary position. For example, if the view is taken that an act or omission may bar ERISA claims, then many

113. Id.
114. Id. at 7.
115. Id. at 11.
116. Coyne, 482 U.S. at 23 (White, J., dissenting) (also joined by Justices Rehnquist, O'Connor, and Scalia).
117. Id. at 26.
employees will not be subject to the protection of ERISA. Any employee who is participating in a plan in which he or she started before 1975 will be in a kind of limbo. If twenty years from the present date the person applies for benefits, the Court could possibly deny the claim as a pre-1975 act. Thus, an employee may incorrectly believe that his or her retirement pension is intact throughout years of employment, and fail to provide for his or her retirement in some other way. Clearly this is not what Congress intended. Although past opinions are important in predicting the outcome of possible future Supreme Court decisions, there are also other factors that should be considered.

One of these considerations is the age of the justices. Six of the justices are over 65 years of age, and three of those six are over age 80.118 This factor alone indicates that several of the justices may be somewhat sympathetic to protecting retirement benefits. The age factor may not have a conscious effect, but it is bound to play a role in the Court’s decision.

Another factor which may play a role in the decision is the inequity that is bound to result if the broad view is taken. If the Court rules with the narrow view, anyone who is denied benefits after January 1, 1975, will be subject to the protection of ERISA. This would create certainty which would not come about under the broad view. However, if the Supreme Court should decide to accept the broad view and allow any act or omission before 1975 to bar claims to ERISA, the only certainty that will be achieved is that every citizen will be subject to the same rule. But the problem is that the broad rule itself creates uncertainty. For example, if the Supreme Court adopts the broad rule, it will be left to the trial courts to decide which acts or omissions shall bar the claim and which ones will not. It would be impossible for the Supreme Court to make a comprehensive list of those that will and those that will not. Therefore, it would then be possible that a worker in one circuit or district would be denied ERISA protection because he was delinquent on a payment to his plan before 1975 and yet a worker

118. Years of birth for the six justices over age 65 are: Brennan 1906, Blackmun 1908, Marshall 1908, White 1911, Stevens 1920, Rehnquist 1924.
from another circuit or district would be granted ERISA protection in the exact same factual situation because the separate courts had differing views as to what would qualify as an act or omission. Thus, inequities are bound to result from adoption of the broad view. Furthermore, such a rule would also increase litigation because employers and employees would not be sure whether the specific event in controversy would qualify as an act or omission for the purpose of ERISA claims. This would only lead to more cases and more appeals.

Although most of the discussion above indicates that the Supreme Court is likely to adopt the narrow view, there is at least one argument to the contrary. An argument that can be made for adoption of the broad view is that the whole purpose of enacting section 1144(b)(1) was to prevent ERISA from being applied retroactively. Although this argument has merit, it also has a flaw. If the narrow view is taken and the benefits are denied after 1975, it would not really be retroactive because the "act or omission" would have taken place after the effective date. Therefore, this argument alone will probably not be strong enough to sway the Court.

V. CONCLUSION

If the Supreme Court decides to resolve the issue, it is likely to follow the narrow view. The purpose of ERISA is to protect the interests of participants in plans by providing ready access to the federal judiciary.119 In light of the discussion above, the narrow view is much more likely to achieve this purpose. It is also more likely to result in equitable treatment of litigants. The broad view places a heavy burden on participants to inquire about benefits long before retirement. Trustees will not act upon a participant’s claim until the claim is made; therefore, the act of denying a claim will invariably involve a post-ERISA interpretation. It makes sense to allow these participants the protection of ERISA.

It may be argued that time eventually will take care of the problem because in a number of years all the plans in effect will be

subject to ERISA. Therefore, the argument might continue, it would be a waste of judicial resources to have a Supreme Court ruling now. However, this argument must fail. Many people are presently being treated unequally. Depending on the circuit the worker lives in, he or she may or may not be subject to the protections of ERISA. These inequities are more likely to continue because there are a substantial number of pre-1975 plan participants still working and participating in plans today. If the conflict is not solved, there is always a chance that a court may go back and find that a person is still not subject to the protections of ERISA. It does not make sense to enact a statute in 1975 which may not afford protection to workers in the 1990’s. Judicial economy is important, but a Supreme Court decision is needed. And the Court should not clear its docket at the expense of justice. A judicial burial of the conflict is long overdue.

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