The Effect of Choice of Law on Federal Jurisdiction Under ERISA: Defining the Scope of the Act or Omission Preemption Exception

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INTRODUCTION

The primary objective of the Employee Retirement Income Security Act of 1974 ("ERISA")1 is to protect the interests of employees in pension and welfare plans.2 Regulation of such plans by piecemeal state and federal legislation had failed to ensure that employees received their promised benefits.3 ERISA was designed to cure these deficiencies by establishing minimum vesting and funding standards, defining fiduciary duties, furnishing effective remedies for violations, and providing ready access to the federal courts.4 ERISA was intended to be a nationally uniform scheme that would displace state regulation in the field.5 Accordingly, Congress directed that ERISA "supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."6 The preemptive effect of this provision, however, is limited: "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."7 This exception prevents the retroactive application of ERISA standards.8 The circumstances under which the exception applies, however, are far from certain.

A claim is clearly actionable under ERISA when all of the acts giving rise to it occurred after January 1, 1975.9 Similarly, when all acts took place prior to that date, pre-ERISA state law governs.10 Determining

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8. See Rodriguez, 872 F.2d at 71; Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 (9th Cir. 1984); Freeman v. Jacques Orthopaedic & Joint Surgery Medical Group, Inc., 721 F.2d 654, 656 (9th Cir. 1983).
10. See Menhorn, 738 F.2d at 1500.
the applicable law becomes troublesome, however, when acts relating to the claim occur both before and after ERISA's effective date. The choice of law then turns on determining which event is the relevant act or omission.

Several circuits consider the denial of benefits by plan trustees to be the pertinent act or omission in a case, and will apply ERISA to any post-ERISA denial, regardless of when other events relating to the claim took place. Under this approach, federal law will apply in nearly every case, since the denial usually occurs after 1975. According to this view, a narrow reading of the "act or omission" clause comports with Congress' intent that ERISA be phased in as quickly as possible.

Other circuits apply the preemption exception found in section 514(b)(1) more liberally. Under this view, ERISA standards are not applied automatically to every post-1975 denial of benefits. A denial that does not involve any exercise of discretion is not an independent act or omission; it is merely an "inexorable consequence" of earlier conduct, such as the adoption of a pension plan rule or practice. The governing standards should therefore be provided by the state law in existence at the time that the conduct occurred. The rationale for this position is that it is unfair to apply ERISA standards retroactively to the past conduct of a plan trustee, particularly one who may have been acting in accordance with the law as it then existed.

Most circuits have assumed that Congress did not intend to confer federal jurisdiction over pension claims to which state law, rather than


12. See generally Rodriguez, 872 F.2d at 72 (attempt to define "act or omission"); Jameson v. Bethlehem Steel Corp. Pension Plan, 765 F.2d 49, 52 (3d Cir. 1985) (same); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1501-02 (9th Cir. 1984) (same); Coward v. Colgate-Palmolive Co., 686 F.2d 1230, 1234 (7th Cir. 1982) (same).

13. See infra notes 57-63 and accompanying text.


16. See infra notes 42-56 and accompanying text.


18. See, e.g., Lamontagne v. United Wire, Metal & Mach. Pension Fund, 869 F.2d 153, 155-56 (2d Cir.) (applying pre-ERISA state law to pension claim), cert. denied, 110 S. Ct. 72 (1989); Baum v. Nolan, 853 F.2d 1071, 1075-76 (2d Cir. 1988) (same); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1505 (9th Cir. 1984) (same); Quinn, 639 F.2d at 841 (same).

ERISA, is applicable. Under this approach, a claim based on a pre-ERISA act or omission, and thus governed by state law, will be dismissed from federal court. A minority of circuits, however, do not consider section 514(b)(1) to be a limitation on jurisdiction. These circuits have found that the provision governs the choice of substantive law only, and as such, a federal court should not decline to hear a case simply because state law is held to apply.

Part I of this Note presents the background of the jurisdictional provisions of ERISA. Part II analyzes the two-prong test derived from section 514(b)(1), that is used to determine the appropriate substantive law to be applied, which centers on the definition of "act or omission." Part III examines the relationship between choice of law and jurisdiction. The Note concludes that choice of law should be decided on a case-by-case basis, with all the relevant facts of a claim, not merely the date of the benefits denial, taken into account. Federal courts should recognize the preemption provision as an implicit restraint on jurisdiction, and decline to hear cases to which state law applies.

I. ERISA'S JURISDICTIONAL PROVISIONS

Section 502 is the only provision in ERISA that deals expressly with the question of federal jurisdiction. The provision gives federal courts exclusive jurisdiction over most ERISA actions. Federal and state courts have concurrent jurisdiction, however, over civil actions brought by participants or beneficiaries to recover benefits, or to enforce and clarify rights under plan terms. This increases the number of forums available to a claimant seeking review of a denial of benefits, and relieves the burden on federal courts caused by a large number of ERISA claims.

ERISA's act or omission preemption exception does not expressly limit section 502's grant of federal jurisdiction. Nevertheless, most circuits have found that Congress did not intend for federal courts to hear

20. See Lamontagne, 869 F.2d at 156; Menhorn, 738 F.2d at 1505; Coward v. Colgate-Palmolive Co., 686 F.2d 1230, 1234 (7th Cir. 1982); Quinn, 639 F.2d at 840-41; Paris v. Profit Sharing Plan, 637 F.2d 357, 359 (5th Cir.), cert. denied, 454 U.S. 836 (1981).
22. See Jameson, 765 F.2d at 51; Landro, 625 F.2d at 1352.
24. Section 502(e)(1) of ERISA states that "[e]xcept for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary [of Labor] or by a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(e)(1) (1982).
25. ERISA § 502(a) states: "A civil action may be brought—(1) by a participant or beneficiary— . . . (B) to recover benefits due 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." 29 U.S.C. § 1132(a).
26. See Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500 n.2 (9th Cir. 1984).
27. See Lee v. Garrett Corp. Retirement Plan, 803 F.2d 1082, 1084 (9th Cir. 1986);
pension cases based on pre-ERISA state law. Because federal courts must first decide what law should apply in order to determine whether federal jurisdiction exists, it is necessary to examine the scope of this preemption exception in greater detail.

II. SECTION 514'S TWO-PRONG TEST

Section 514(a) of ERISA provides a broad preemption provision that was intended to eliminate the threat of conflicting benefit plan regulation by the states. An exception is found in section 514(b)(1), however, which provides a two-prong test to determine whether pre-ERISA state law should apply in a given case. Under the test, two dates must be taken into account: when the cause of action arose, and when the acts or omissions occurred. ERISA applies if both of these events took place after January 1, 1975. Controversy exists, however, as to what this test, particularly the act or omission prong, specifically requires. How this test is construed affects the choice of law, and may ultimately determine whether the claimant will have access to a federal forum.

Jameson v. Bethlehem Steel Corp. Pension Plan, 765 F.2d 49, 52 (3d Cir. 1985); Menhorn, 738 F.2d at 1503.

28. See infra notes 90-98 and accompanying text.


Section 514 has been called "one of the most sweeping preemption clauses ever included in any federal legislation." See Gregory, supra note 3, at 431-32. The legislative history clearly indicates that this is indeed the intended interpretation. Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated in reference to section 514: "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions . . . are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29,933 (1974).

Senator Javits stated that "the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit plans." Id. at 29,942.

The Supreme Court has called the preemption provision "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)); see also Malone v. White Motor Corp., 435 U.S. 497, 499 n.1 (1978) (ERISA expressly preempts all state laws regulating benefit plans). The logical corollary is that any exception to this broad provision should be construed narrowly. See Degan v. Ford Motor Co., 869 F.2d 889, 894 n.7 (5th Cir. 1989).


32. See Rodriguez, 872 F.2d at 72; Smith, 857 F.2d at 589-90; Menhorn, 738 F.2d at 1500 n.3; Stevens, 711 F. Supp. at 386-87.

A. Time When Cause of Action Accrues

It is accepted that a cause of action for wrongful denial of benefits does not arise until a claim is made and formally denied. The reason for this is two-fold: it ensures fairness to plan participants, and promotes judicial economy. A plan participant is unlikely to be aware that his benefits are at risk until he receives a formal denial. To require that he be continually alert for any conduct by plan trustees that might give rise to a claim would be "burdensome and unfair." Establishing the time of accrual as the date of denial therefore "protect[s] unwary litigants against the inadvertent loss of benefits through the running of the statute of limitations." This view also serves to conserve judicial resources. A participant or beneficiary is less likely to burden the courts with multiple and premature actions if freed from the fear that a statute of limitations will deprive him of his cause of action.

If this prong were the only requirement set forth in section 514, ERISA standards would apply in nearly every case. The denial of benefits is typically the last of a series of events leading to a claim, and usually occurs long after ERISA's effective date. In order for ERISA standards to apply, however, the relevant "act or omission" must occur after January 1, 1975.

B. Timing of Acts or Omissions

Section 514(b)(1)'s second prong states that ERISA does not apply to any act or omission that occurred before January 1, 1975. The Act does not specify, however, at what point the conduct of plan trustees becomes the act or omission at issue: when they adopt a plan provision, or alternatively, when they deny a claim for benefits pursuant to that
policy. Nor does the legislative history reveal the term’s intended meaning. The burden of interpreting the phrase has thus fallen on the courts, which have had to balance several competing interests in accomplishing the task.

1. Broader Reading of Act or Omission Clause

The First, Second, and Ninth Circuits’ broader definition of the act or omission clause reflects a desire to protect defendant trustees. Their concern is that trustees will be treated unfairly if their conduct is judged by standards different from those that existed when they acted. Thus, in making a choice of law determination, a court should seek to prevent the retroactive application of remedial principles. This is best achieved by looking not only to the date of the claim denial, but also to the date of the act or omission underlying the denial. ERISA standards should not be applied solely on the basis of a perfunctory post-ERISA denial.


43. See Menhorn, 738 F.2d at 1500; Quinn, 639 F.2d at 841; Bacon, 445 F. Supp. at 1192.

44. See Menhorn, 738 F.2d at 1500 n.3; see also Bacon, 445 F. Supp. at 1192 (act or omission clause was apparently intended to permit the application of state law “in cases where that result most fairly accommodates the interests of all affected parties.”).

45. See Menhorn, 738 F.2d at 1500-01 & n.3; Quinn, 639 F.2d at 840-41.


In Quinn, plaintiff made a demand for benefits under his company’s employee benefit plan, which was denied in 1976. He had been told that he could not take part in the plan at its inception in 1960, and was given increased compensation in lieu of participation. According to the First Circuit:

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 established by 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.’

47. See Lamontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund, 869 F.2d 153 (2d Cir.), cert. denied, 110 S. Ct. 72 (1989). The “act central to” the case was determined to be the trustees’ pre-ERISA adoption of the break-in-service policy, which had been their only exercise of discretion. The denial of Lamontagne’s claim was merely the inevitable result of this prior act. See id. at 156-57.

The Lamontagne court noted in dicta that ERISA standards may have been applicable
There are situations, however, in which the post-ERISA denial of benefits may serve as the act or omission, as well as the accrual of the cause of action.\(^7\) The key question is whether the denial was discretionary in nature.\(^8\) If it is necessary to interpret the plan’s provisions or use discretion in applying them to a particular employee’s claim, the denial can be “both the event triggering accrual of a cause of action and the substantial act resulting in denial of benefits.”\(^9\) For example, the Ninth Circuit applied ERISA to a post-1975 denial which it found to be the result of a significant act of discretion.\(^{50}\)

It is important to note that even circuits that have adopted the broader view will not apply state law merely because any act related to a claim occurred before 1975.\(^{51}\) Only the “critical acts”\(^{52}\) or those facts fundamental to\(^{53}\) the claim are considered in determining the proper choice of law.

Similarly, ERISA will not be applied to what is essentially a state law claim simply because the pre-ERISA act or omission at issue is labeled a “continuous breach.”\(^{54}\) Several claimants have argued unsuccessfully\(^{55}\) to Lamontagne’s claim if he had requested an exemption from the break-in-service rule when he applied for benefits in 1978. The trustees would then have had to exercise discretion in determining whether to recognize his absence as a grace period. See id. Such a post-ERISA decision may have been sufficient to satisfy both prongs of the preemption exception.

47. See Menhorn, 738 F.2d at 1502-03.
48. See id.
49. Id. (emphasis in original) (citations omitted).
50. In Smith v. Retirement Fund Trust, 857 F.2d 587 (9th Cir. 1988), the Ninth Circuit held that the act or omission relevant to the claim was the trustees’ decision to deny Smith credit for his earlier years of service in 1986, when they denied his application. Id. at 589-90. This denial “was not based on an unambiguous plan provision adopted before the effective date of ERISA, but rather on what the trustees thought to be the current law governing participation in a . . . trust.” See id. at 590. The only pre-ERISA conduct, the failure to record pension credits for the years in question, was not an affirmative denial of pension credits. See id. ERISA standards were therefore applied to Smith’s case.
51. One court remarked 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.” Coward v. Colgate-Palmolive Co., 686 F.2d 1230, 1234 (7th Cir. 1982) (quoting Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307, 313 (8th Cir. 1979) (emphasis in original)), cert. denied, 460 U.S. 1070 (1983); see also Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 971-72 (5th Cir. 1981) (the “contention that causes of action are excepted from preemption whenever they involve any pre-1975 acts or omissions could deny many individuals the right to sue in federal court” (emphasis added)).
52. See Coward, 686 F.2d at 1233. The Coward court found the “voluntary, intelligible and meaningful” pre-ERISA waiver of benefits to be the critical act. See id. It therefore refused to assert jurisdiction over such a claim. See id. at 1234.
53. Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc., 721 F.2d 654, 656 (9th Cir. 1983). A waiver of benefits was found to be the material fact ultimately giving rise to Freeman’s claim. Since it occurred in 1971, the court determined that federal subject matter jurisdiction did not exist. See id.
54. The concept of a continuous breach is illustrated in Baum v. Nolan, 853 F.2d 1071 (2d Cir.), cert. denied, 109 S. Ct. 1313 (1988). The participants of a pension fund brought suit against its trustees for an alleged breach of fiduciary duty. They contended
that what were originally pre-ERISA acts or omissions were continuous in nature, and thus fell within the ambit of ERISA standards.\textsuperscript{56}

2. Narrow Interpretation of Act or Omission

The Third, Fourth and Fifth Circuits interpret the act or omission clause narrowly.\textsuperscript{57} Under their restrictive reading of the provision, a post-ERISA denial constitutes the act or omission needed to bring a case under federal law; earlier events are simply disregarded.\textsuperscript{58} Their rationale is that a denial is the relevant act or omission because it inevitably involves some form of discretion or interpretation of plan terms.\textsuperscript{59} More-
over, such a reading of the statute is consistent with Congress' goals of implementing ERISA as rapidly as possible and providing "ready access to the Federal courts." The date on which the plan trustees deny a plaintiff's application for benefits should therefore determine the choice of law. Under this approach, ERISA standards would apply to a greater number of claims.

C. Broader View Comports with Congressional Intent and Serves Interests of All Parties

The Fourth Circuit maintains that a narrow reading of the act or omission clause serves to provide "ready access to the Federal courts," as Congress intended. This phrase, however, is taken out of context. Congress seems to have intended to provide a federal forum for only those claims that would be governed by the Act. When read in its entirety, the passage quoted by the court suggests that access to the federal courts was intended to help enforce the new standards created by ERISA, and "not for all causes of action concerning employee benefit plans."

In addition, the Fourth Circuit claims that its view "fosters the congressional grant 'to extend the protections of ERISA . . . as soon as practicable,'" and comports with the intention that the preemption exception be narrowly construed. Rapid implementation and expansive preemption are certainly goals of ERISA. Section 514(b)(1), however,
is an exception to the general provisions of the Act; its purpose is to place
certain cases beyond ERISA’s reach. The narrow reading of the preemp-
tion provisions recommended by the Fourth Circuit undermines this in-
tent by including virtually every case within ERISA’s scope.\textsuperscript{69}

A statute should not be construed so as to render any provision “su-
perfluous or insignificant.”\textsuperscript{70} One commentator has suggested that sec-
tion 514(b)(1)’s two prongs are irreconcilable.\textsuperscript{71} Therefore, when a court
focuses on the act or omission prong, it does so at the expense of the
cause of action prong.\textsuperscript{72}

State law should not apply to a case merely because a minor act related
to the claim occurred by chance before ERISA’s effective
date.\textsuperscript{73} If the act
or omission clause were read to apply state law whenever any rele-
vant conduct occurred pre-ERISA, the cause of action prong would be-
come irrelevant.\textsuperscript{74} The time of the denial would have no bearing in such
a case; state law would always control.\textsuperscript{75} No decision has suggested that
the act or omission clause be read so broadly.

Likewise, a court should not overlook the act or omission prong by
limiting its inquiry exclusively to the date of the claim denial. ERISA
standards should not govern a claim based essentially on pre-ERISA
conduct simply because the formal denial was made after 1975.\textsuperscript{76} If the
term act or omission were to be interpreted as narrowly as is suggested
by the Fourth and Fifth Circuits, only the denial date would be of conse-
quence; the date of the act or omission at the heart of a case would be-
come irrelevant.\textsuperscript{77} The preemption exception as a whole would become
meaningless under this view, because the time of denial, which is usually
quite recent,\textsuperscript{78} would always determine the choice of law.

The broader approach taken by the Ninth Circuit recognizes and ap-

\textsuperscript{69} See supra note 39 and accompanying text.
\textsuperscript{70} See Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 970-71 (5th Cir.
\textsuperscript{71} See Note, Menhorn v. Firestone Tire & Rubber Co.: The Ninth Circuit’s Resolu-
tion of the Jurisdictional Conflicts Contained in the Employee Retirement Income Security
\textsuperscript{72} See id. at 932-933.
\textsuperscript{73} See Degan v. Ford Motor Co., 869 F.2d 889, 94 (5th Cir. 1989); Bacon v. Wong,
\textsuperscript{74} See, e.g., Degan, 869 F.2d at 894 (“[E]xcepting from ERISA preemption any suit
in which some of the facts occurred prior to 1975, would render the first clause of section
[514(b)(1)] superfluous.”); Bacon, 445 F. Supp. at 1192 (“[I]f the occurrence before Janu-
ary 1, 1975, of any act or omission relevant to a cause of action, even if it constituted
[only one] element of a multi-element cause of action, made state law controlling, the
clause of § 514(b)(1) concerning the accrual of a cause of action would be superfluous.”).
\textsuperscript{75} See Degan, 869 F.2d at 894; Bacon, 445 F. Supp. at 1192; Note, supra note 71, at
933-34.
\textsuperscript{76} See Lamontagne v. Pension Plan of the United Wire, Metal & Mach. Pension
Fund, 869 F.2d 153, 156 (2d Cir.), cert. denied, 110 S. Ct. 72 (1989); Quinn v. Country
Club Soda Co., 639 F.2d 838, 841 (1st Cir. 1981).
\textsuperscript{77} See Note, supra note 71, at 933-34.
\textsuperscript{78} See supra note 39 and accompanying text.
plies both prongs by taking all the facts into consideration: the date of the formal denial, as well as the dates of any relevant acts or omissions.\textsuperscript{79} This broader reading strikes a fair balance between acknowledging the interests of both plan participants and trustees.\textsuperscript{80} By considering the issue on a case-by-case basis, the true time of the relevant decision-making is determined as accurately as possible.\textsuperscript{81} This ensures that the law applied to a case is that which a trustee could have relied upon when he acted, and not standards that he could not have reasonably anticipated.\textsuperscript{82}

The broader view also considers the interests of plaintiff participants.\textsuperscript{83}

If federal jurisdiction is foreclosed because state law is held to apply, a claimant still may pursue her case, which is rooted in state law,\textsuperscript{84} in state court.\textsuperscript{85}

### III. Section 514's Effect on Jurisdiction

Having established that pre-ERISA state law should govern a claim, a federal court must determine whether it has the power to decide the case\textsuperscript{86} or whether it should be dismissed for lack of subject matter jurisdiction.\textsuperscript{87} Many circuits choose to dismiss claims based on pre-ERISA state law.\textsuperscript{88} A minority of federal decisions, however, have concluded that they are empowered to hear such cases and to apply the appropriate

\textsuperscript{79} See Smith v. Retirement Fund Trust, 857 F.2d 587, 589-90 (9th Cir. 1988); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1500-01 & n.3 (9th Cir. 1984).

\textsuperscript{80} See Menhorn, 738 F.2d at 1500 n.3.

\textsuperscript{81} See id.

\textsuperscript{82} See supra note 8 and accompanying text.

\textsuperscript{83} See Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1501 n.4 (9th Cir. 1984).

\textsuperscript{84} As in federal court, the statute of limitations is not likely to bar a plaintiff’s state pension claim. See Whitaker v. Texaco, Inc., 566 F. Supp. 745, 749 (N.D. Ga. 1983). In most instances, the time limitation will not begin running until the plaintiff learns or should have learned she had a claim. See id. This is usually the date a request for benefits is formally denied. See supra notes 33-38 and accompanying text.

\textsuperscript{85} See Menhorn, 738 F.2d at 1501 n.4; Quinn v. Country Club Soda Co., 639 F.2d 838, 841 n.3 (1st Cir. 1981).

\textsuperscript{86} See Jameson v. Bethlehem Steel Corp. Pension Plan, 765 F.2d 49, 52 (3d Cir. 1985); Menhorn, 738 F.2d at 1503.

\textsuperscript{87} The importance of this issue was noted in United States v. Hill, 694 F.2d 258, 260 (D.C. Cir. 1982):

It is a principle of first importance that the federal courts are courts of limited jurisdiction . . . . They are empowered to hear only those cases that (1) are within the judicial power . . . , and (2) that have been entrusted to them by a jurisdictional grant by Congress . . . . The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists.

\textit{Id.} (quoting 13 C. Wright, A. Miller & E. Cooper, \textit{Federal Practice & Procedure} § 3522 (1975) (footnotes omitted)).

\textsuperscript{88} See Lee v. Garrett Corp. Retirement Plan, 803 F.2d 1082, 1084 (9th Cir. 1986); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1505 (9th Cir. 1984); Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 971-92 (5th Cir. 1981); Quinn v. Country Club Soda Co., 639 F.2d 838, 841-42 (1st Cir. 1981).
state law.89

In Menhorn v. Firestone Tire & Rubber Co.,90 the Ninth Circuit determined that state law governed plaintiff's claim. It therefore dismissed the case for lack of subject matter jurisdiction,91 stating that "without any provision of federal law to interpret or enforce, there is no interest in providing a federal forum."92 Menhorn further noted that such cases are an unnecessary burden on the federal judiciary.93

The most serious concern over granting a federal forum for such claims, however, is the "lurking constitutional difficulty"94 it would present under Article III of the Constitution. Absent diversity of citizenship, federal jurisdiction extends only to cases and controversies "arising under" federal law.95 Most courts do not consider a claim brought under ERISA, but to which state law applies, as arising under federal law.96 It is therefore doubtful whether Congress intended to grant the federal judiciary jurisdiction to apply state law.97 Many courts, apparently assuming that Congress could not have intended such a grant, simply dismiss these cases for lack of subject matter jurisdiction without offering a rationale.98

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89. See Jameson, 765 F.2d at 51-52; Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1352 (8th Cir. 1980).
90. 738 F.2d 1496 (9th Cir. 1984).
91. See id. at 1503. The court asked:
Did Congress intend that, even in cases where ERISA by its own terms does not supplant otherwise applicable state law, a federal forum should be open to enforce that state law? The statement of the issue suggests its resolution. Although § [514] speaks only in terms of preemption, we think the conclusion inevitable that it also indicates legislative intent regarding the scope of the jurisdiction conferred under § [502(e)].

92. Id.
93. See id.
95. Article III states: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ." U.S. Const., art. III, § 2, cl. 1.
96. See, e.g., Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1505 (9th Cir. 1984) (suggesting that pension plan based on pre-ERISA act or omission does not arise under federal law); Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 971 (5th Cir. 1981) ("A state claim not preempted by ERISA obviously does not arise under federal law and the federal forum is thus, absent diversity, closed to it.");

A court that decides it lacks subject matter jurisdiction may nonetheless find another
A minority of circuits find that section 514 does not limit federal jurisdiction. These circuits maintain that this provision speaks to the issue of preemption only, and "does no more than inform the court that ERISA's substantive provisions are not to be used." In addition, declining federal jurisdiction in these cases "would substantially weaken the remedy of clarification provided by section [502](a)(1)(B)," which could be provided by the federal courts.

The dissent in Menhorn advanced another reason for finding federal jurisdiction to hear claims that straddle ERISA's effective date. A plaintiff who is denied a federal forum will seek redress from a state court which may be required to apply ERISA standards to those acts in the case that occurred after 1975. This is an ironic result, since it "commits to the state courts the duty to apply federal law . . . [but] denies federal courts the power to apply this same federal body of regulation."

The First, Second and Ninth Circuits correctly interpret the preemption provision as an implicit restraint on federal jurisdiction. Because a basis upon which to hear the state law pension claim. Diversity of citizenship is one possibility. See, e.g., Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 971 (5th Cir. 1981) (absent diversity, federal forum is closed to pre-ERISA claim); Stevens, 711 F. Supp. at 387 (a plaintiff "may have a cause of action based on pre-ERISA state law over which this Court may have jurisdiction if diversity and amount in controversy requirements [are] met"). Pendent jurisdiction may be another option if plaintiff has raised a valid ERISA claim in addition to the claim governed by state law. See Pension Benefit Guar. Corp. v. Greene, 570 F. Supp. 1483, 1489 (W.D. Pa. 1983), aff'd, 727 F.2d 1100 (3d Cir.), cert. denied, 469 U.S. 820 (1984).

In Jameson, the Third Circuit found that applying state law to a pension claim was constitutional. See id. at 52. According to this court, a cause of action arises under federal law if it accrues after ERISA's effective date, even if ERISA standards are not applicable. See id. Since the cause of action in Jameson accrued in 1980 when plaintiff's request for benefits was denied, the court determined that it had subject matter jurisdiction to hear the case. The court noted that it is not unusual for federal courts to apply state law on occasion. See id.

The Eighth Circuit also found federal jurisdiction to decide pension claims based on state law in Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1352 (8th Cir. 1980). The court determined that the interests of all the parties to that case would best be served if state law governed the claim. It then decided the case according to state law principles, as it found section 514(b)(1) "authorized and perhaps even required" it to do, without ever directly addressing the issue of subject matter jurisdiction. See id.

100. Jameson, 765 F.2d at 52; Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1507 (9th Cir. 1984) (Ferguson, J., dissenting). Congress also intended that the federal courts develop a body of federal common law that "supplements the statutory scheme interstitially [and] . . . serves to ramify and develop the standards that the statute sets out in only general terms." Menhorn, 738 F.2d at 1499. The Menhorn court stressed, however, that like the Act, any federal common law created was only to be applied prospectively. See id. at 1504.


102. Menhorn, 738 F.2d at 1507-08 (Ferguson, J., dissenting); Note, supra note 71, at 934.
grant to the federal system to hear state law claims in the absence of a federal question or diversity of citizenship is of dubious validity, it should be assumed that Congress intended to withhold such a grant. This seems to be the likely intent of Congress, since the federal interest in hearing state pension claims is minimal when there is no federal law to enforce or apply. It also seems unlikely that Congress would want to make a federal forum available to clarify rights that are derived from state law; the remedy of clarification was intended to pertain to rights created by ERISA.

Nor does the contention that a state court may have to apply ERISA to part of a claim further the argument in favor of federal jurisdiction. There is nothing objectionable about a state court applying ERISA. Although a state law that attempts to regulate pension plans is invalid, a state court may interpret and apply federal law. A distinction between the regulation of benefit plans and the interpretation of federal employee benefit law must be made. The former involves the creation of law in the pension field, while the latter involves simply the interpretation of an existing body of federal law.

CONCLUSION

Congress intended that the exception to ERISA's preemption provision be construed narrowly. However, the overly restrictive interpretation offered by the Fourth and Fifth Circuits has the effect of reading the exception out of the Act entirely. By assuming that every claim denial operates as both the accrual of the cause of action and a discretionary or interpretive act or omission, this view causes ERISA standards to be applied in every case in which a claim denial occurred post-ERISA. The broader view advocated by the Ninth Circuit considers each prong of the exception separately, thereby ensuring that ERISA is not applied retroactively to pre-1975 acts or omissions that have resulted in post-1975 denials.

Federal courts should decline to hear the limited number of pension benefits claims to which state law is determined to apply. Although the preemption exception does not expressly restrict jurisdiction, it seems

103. See supra notes 94-96 and accompanying text.
104. See Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1503 (9th Cir. 1984).
105. See id.
106. See id.
107. See id. at 1500 n.2; see also Jameson v. Bethlehem Steel Corp. Pension Plan, 765 F.2d 49, 52 (5th Cir. 1985) (noting, for example, that federal court will apply state claim preclusion law in determining res judicata effect of state judgment on pending civil rights case.)
likely, given the constitutional issues implicated, that Congress did not intend to grant the federal judiciary jurisdiction to hear state law pension cases.

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