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the employees' designation of a representative, rather than the employer's recognition of a representative, triggers the application of subsection (A)(i). Under the *Wilson* dissent's and the Tenth Circuit's rationale, the FLSA prohibits employers from reaching an agreement with individual employees if those employees have already designated a representative.

N. LIMITATION OF ACTIONS

Shofer v. Hack Co.

970 F.2d 1316 (4th Cir. 1992)

The Employee Retirement Income Security Act⁵⁵⁷ (ERISA), like many federal statutes, does not provide time limitations for all causes of action within its domain. When the timeliness of litigation under such legislation is at issue, a federal court must often look to the statutes of limitation in the state in which the court sits, and must apply the state's statute of limitation most analogous to the substance of the federal law in question.⁵⁵⁸

The common law has long included the principle of equitable tolling to prevent, in special circumstances, patently unjust applications of a statute of limitations. This judicial doctrine is embodied in both federal and state court decisions, but the circumstances required for its application vary among jurisdictions. The United States Supreme Court in *Burnett v. New York Central Railroad Co.*⁵⁵⁹ held that the statute of limitations should be tolled for an action under the Federal Employers' Liability Act (FELA) when the plaintiff had initially brought timely suit in a state court having jurisdiction but lacking venue.⁵⁶⁰ Since *Burnett*, the federal courts have struggled with how to dispose of similar cases, under a variety of federal statutes, in which the state court lacked not only venue, but jurisdiction as well. Some have broadened *Burnett's* reasoning to include such cases,⁵⁶¹ while others have taken *Burnett* at face value and have restricted its application to cases involving dismissal for improper venue.⁵⁶² A number of

557. 29 U.S.C. §§ 1001-1461 (1988).

558. See *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975, 981 (4th Cir. 1987) (ruling that suit brought under civil enforcement provisions of ERISA was governed by limitation under Maryland law for breach of contract actions); see also *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980) (holding that federal courts hearing 42 U.S.C. § 1983 claims must apply analogous statutes of limitation and tolling rules of states in which they sit).

559. 380 U.S. 424 (1965).

560. *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 434-35 (1965).

561. See *Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1054-55 (5th Cir.) (relying on Supreme Court's reasoning in *Burnett* to toll statute of limitations in action originally filed in court lacking jurisdiction), *cert. denied*, 449 U.S. 901 (1980); *Reynolds v. Logan Charter Serv., Inc.*, 565 F.Supp. 84, 86 (N.D. Miss. 1983) (applying *Burnett* doctrine to Jones Act action originally filed in court lacking subject matter jurisdiction).

562. See *Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989) (maintaining that Fifth Circuit had not yet ruled on applicability of equitable tolling to Jones Act cases dismissed for want of jurisdiction, but nevertheless denying equitable tolling to plaintiff who filed claim twice in court of improper jurisdiction).

courts have steered a course between those extremes, concluding that equitable tolling may be appropriate when the original forum's lack of jurisdiction was not clear at the initiation of litigation.⁵⁶³

The United States Court of Appeals for the Fourth Circuit, in *Shofer v. Hack Company*,⁵⁶⁴ addressed the procedural issue of equitable tolling in the narrow context of ERISA litigation, and provided alternative evaluations of an equitable tolling claim under both federal common law and Maryland law. Plaintiff Shofer owned a business that had established an ERISA tax qualified pension plan for its employees. Shofer hired defendant Hack to administer the plan, and relied on Hack to perform certain ministerial duties and to give advice on tax questions with respect to the pension plan.

In 1984, Shofer asked Hack whether he could borrow money from the pension plan. Hack's written reply assured Shofer that such borrowing was permissible, but did not mention the significant tax consequences attendant to it. Relying on Hack's advice, Shofer drew loans totaling \$375,000 from the pension plan. In late 1986, he realized that he was liable for income tax on all of this money.

Shofer initiated litigation in 1988, stating claims under Maryland law and ERISA. He filed suit, however, in the state court system rather than in federal court. The Circuit Court of Maryland for Baltimore City dismissed the claims in 1990, acknowledging both the exclusive jurisdiction of federal courts over these ERISA matters⁵⁶⁵ and ERISA's preemption of the state law claims filed.

Immediately following this dismissal, Shofer brought his ERISA action in the United States District Court for the District of Maryland, only to be met with Hack's motion for summary judgment based on the expiration of the statute of limitations. The district court granted summary judgment for Hack, relying on one of ERISA's few enumerated limitations, a three year period for breach of a fiduciary duty.⁵⁶⁶ The court dated the accrual of Shofer's claims from 1986, when he had become aware of his monumental

563. See *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932, 935 (7th Cir. 1988) (holding that where plaintiff lacked reasonable legal basis for invoking state court jurisdiction, equitable tolling was not warranted); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 (9th Cir. 1986) (upholding equitable tolling, noting that at time plaintiff filed action in state court it was unclear whether federal courts had exclusive jurisdiction over Title VII claims); *Silverberg v. Thomson McKinnon Secs., Inc.*, 787 F.2d 1079, 1082 (6th Cir. 1986) (denying tolling where federal securities law expressly and unambiguously vested jurisdiction exclusively in federal courts, and holding that initiation of action in clearly inappropriate forum does not equitably toll statute of limitations); *Fox v. Eaton Corp.*, 615 F.2d 716, 719-20 (6th Cir. 1980) (holding that filing action in court not clearly lacking jurisdiction tolls limitations period if there existed reasonable legal theory for invoking jurisdiction of state court, but acknowledging that filing action in court clearly lacking jurisdiction generally will not toll statute of limitations); cf. *Walck v. Discavage*, 741 F. Supp. 88, 91 (E.D. Pa. 1990) (dealing with problem of personal, not subject matter, jurisdiction, and allowing tolling because plaintiff had reasonable legal basis for originally selecting state court system).

564. 970 F.2d 1316 (4th Cir. 1992).

565. 29 U.S.C. § 1132(e)(1) (1988).

566. *Id.* § 1113(a)(2).

unexpected tax liability. Shofer appealed. He did not question the arithmetic of his claims' timing, but he argued for equitable tolling of the statutes of limitation based on his timely filing of suit in Maryland state court.

The Fourth Circuit explained that the three year ERISA limitation invoked by the district court applies only to claims for a breach of fiduciary duty,⁵⁶⁷ and that for other claims raised in the District of Maryland under ERISA, Maryland statutes of limitation apply.⁵⁶⁸ Though the district court's reliance on only the ERISA fiduciary claims limitation suggested a finding that Hack owed a fiduciary duty to Shofer, the court had not explicitly found such a relationship, and the Fourth Circuit declined to make such a determination itself. Instead, the court analyzed Shofer's claims with respect to both the ERISA fiduciary limitation and similar Maryland statutes of limitation, and found that under either restriction the claims were barred.

Shofer first argued that the court should admit his claims by applying federal tolling principles. All the precedent decisions he mustered, however, involved state trial courts that had had subject matter jurisdiction over the claims originally filed with them. The Fourth Circuit found this distinction crucial. Because the ERISA claims Shofer pressed were clearly within the exclusive jurisdiction of the federal courts,⁵⁶⁹ the Fourth Circuit found federal equitable tolling inappropriate. The court held that the initiation of an ERISA action in a forum clearly lacking jurisdiction will not toll the statute of limitations.⁵⁷⁰

The court analogized nonfiduciary ERISA claims to state negligence and breach of contract actions, and found applicable, as an alternative to the limitation spelled out in ERISA, Maryland's statute of limitations for ordinary civil suits. Coincidentally, this period was also three years. In addition, the court had to evaluate Maryland's own application of equitable tolling, which it discovered was even more stringent than the federal doctrine.⁵⁷¹ Shofer was unable to persuade the Fourth Circuit that the circumstances of his case would warrant equitable tolling under either federal or Maryland principles, and thus his claims were fully barred.

Because the Fourth Circuit confined *Shofer's* procedural issues to the very narrow context of ERISA fiduciary claims litigation, its decision is unique. For example, the United States Court of Appeals for the Sixth Circuit's ERISA tolling decision in *Farrell v. Automobile Club of Michigan*⁵⁷² involved a slight but significant variation. The Sixth Circuit granted equitable tolling of the statute of limitations in an ERISA action which had been

567. *Id.*

568. See *supra* note 558 and accompanying text (explaining that state periods of limitation apply to claims brought under federal law if federal statutes themselves provide no specific periods of limitation).

569. 29 U.S.C. § 1132(e)(1) (1988).

570. *Shofer v. Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. 1992).

571. See *Walko Corp. v. Burger Chef Sys., Inc.*, 378 A.2d 1100, 1101-02 (Md. 1977) (stating Maryland's "strict constructionist" application of equitable tolling).

572. 870 F.2d 1129 (6th Cir. 1989).