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Application of the Laches Defense in the Employee Benefit Context

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Laches, referred to by one commentator as the "golden girl"[1] of equity jurisprudence,[2] stems from the principle *vigilantibus non dormientibus aequitas subvenit*[3] that "equity aids the vigilant, not those who slumber on their rights, and is designed to promote diligence and prevent enforcement of stale claims."[4] The doctrine of laches is rooted in public policy grounds that require, for the peace of society, the discouragement of stale claims.[5] Except perhaps in the Seventh Circuit as discussed more fully *infra*,[6] what a statute of limitations, a legislative construct, is to law, laches, a judicial doctrine, is to equity.[7] However, while a distinct defense, a laches determination is made with reference to the limitations period for the analogous action at law.[8]

BACKGROUND AND GENERAL PRINCIPLES[9]

A leading treatise offers the following commentary on the doctrine of laches, which is part of the common law of trusts:[10]

"[L]aches does not result from a mere lapse of time[11] but from the fact that, during the lapse of time, changed circumstances inequitably

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work to the disadvantage or prejudice of another if the claim is now to be enforced. By his negligent delay,[12] the plaintiff may have misled the defendant or others to acting on the assumption the plaintiff has abandoned his claim, or that he acquiesces in the situation, or changed circumstance may make it more difficult to defend against the claim."[13]

The applicability of the laches doctrine is based upon the circumstances specific to each case.[14] It is an affirmative defense[15] that addresses an inexcusable delay on the part of the party bringing the claim[16] to the prejudice of the party asserting the defense.[17] Because it is an affirmative defense, it must be raised in a "responsive pleading in short and plain statements,"[18] and if these conditions are not satisfied the defense will be struck,[19] although generally with an opportunity to file an amended answer.

As laches is an equitable doctrine, the decision to apply it is left to the discretion of the district court,[20] and a district court's laches determination is reviewed for abuse of discretion.[21] As an equitable doctrine, it can be raised in the ERISA context as a defense, for example, in an action for an injunction,[22] for successor liability,[23] for constructive trust or equitable lien,[24] in an action for restitution,[25] for interest on delayed pension benefits,[26] for interpleader,[27] for equitable reformation,[28] a claim for benefits,[29] or breach of fiduciary duty.[30] The relationship between laches and equitable tolling[31] is less clear. It has been held that laches cannot be asserted with respect to a period during which the statute of limitations is tolled.[32] However, in *Ortega Candelaria v. Orthobiologics, LLC*,[33] the US Court of Appeals for the First Circuit, citing *Veltri v. Building Service 32B-J Pension Fund*[34] stated that a defendant may rely upon "the equitable defense of laches and estoppel so as to avoid any surprise from the filing of untimely claims by plaintiffs who seek to rely upon equitable tolling as the result of defective notice."[35]

There are no bright-line rules for determining whether a laches defense will be successful. Rather, "laches is a question of degree."[36] A court will "focus upon the length of the delay, the reasons therefore, how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim."[37] The US Court of Appeals for the Seventh Circuit explained that:

"The amount of delay and prejudice required for a finding of laches vary based on the amount of one versus the other—where a short period of time has elapsed since accrual of the claims, the amount of prejudice required is great, whereas a lengthy delay means less prejudice is required."[38]

The party invoking the defense of laches has the burden of establishing its elements.[39] However, if the defendant establishes the delay, the plaintiff may bear the burden of explaining the delay in bringing

the suit.[40] If the delay is inexcusable, the defendant must demonstrate prejudice resulting from the delay. Also, as noted above, if a statutory limitation period that would bar legal relief has expired, then the defendant in an action for equitable relief enjoys the benefit of a presumption of inexcusable delay and prejudice. In that case, the burden shifts to the plaintiff to justify its delay and negate prejudice.[41] Procedurally, because a defendant to succeed on its laches claim must show that it suffered harm from the claimed undue delay, the issue cannot be dealt with on a motion to dismiss under Federal Rules of Civil Procedure (FRCP) 12(b)(6).[42] Although it is not *per se* imprudent to grant summary judgment on a claim of laches,[43] a motion for summary judgment will frequently be denied because it presents a factual question.[44] However, a party's failure to satisfy its heavy burden[45] on a motion for summary judgment does not render its laches defense invalid.[46]

The filing of class actions in employee benefits litigation is a topic onto itself, and the effects of a laches defense can only be briefly noted. In *Chesmore, et al. v. Albanz Holdings,* a Wisconsin district court[47] stated that:

"The presence of potential affirmative defenses such as laches, estoppel, or unclean hands are rarely an obstacle to typicality … [the] mere fact that plaintiffs and other members of the subclass may have to address defenses unique to the subclass is hardly grounds for finding plaintiffs are inadequate representatives of the larger class, especially in light of the fact that nothing suggests that the affirmative defenses will swallow the case."[48]

There is however also authority for the proposition that the class action format is not suitable for the individualized treatment required for the exercise of equitable powers.[49]

There is substantial authority for the proposition that so long as the statute of limitations has not run, the equitable defense of laches cannot be raised, at least if it is an action at law.[50] In *United States v. Mack,* decided before the merger of law and equity in 1938, the US Supreme Court stated that "laches within the term of the statute is no defense at law."[51] More recently, in *City of Oneida v. Oneida Indian Nation,* the Supreme Court said in a footnote "that application of the equitable defense of laches in an action at law would be novel indeed."[52] Most cases arising under ERISA concur with this analysis,[53] although some cases leave the door slightly ajar.[54] There is, however, authority to the contrary, primarily in the Seventh Circuit.[55]

One of the more interesting and frequently cited discussions of laches in the ERISA context is Judge Posner's decision in *Teamster and Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix,*[56] an action by a multiemployer plan under ERISA Section 515 to collect delinquent contributions. He begins with the etymology of the word, noting that laches is the corruption of an Old French word (lasche),

meaning lax. He defines it as a culpable delay in suing. Traditionally, suits in equity were not subject to a statute of limitations but could be dismissed on the basis of unreasonable,[57] prejudicial delay by the plaintiff. "Laches cuts off the right to sue when the plaintiff has delayed 'too long' in suing. Too long for this purpose means that the plaintiff delayed inexcusably and the defendant was harmed by the delay."[58] Judge Posner then went on to explain that just as various tolling doctrines can be used to extend a statute of limitations, laches can be used to contract it,[59] regardless of whether the suit is at law or in equity, because as with many equitable defenses, the defense of laches is equally available in suits at law.[60] He was aware that some courts had invoked a presumption against the use of laches to shorten the statute of limitations,[61] with one court making the presumption conclusive,[62] on the ground that abridging a statutory period for suit by means of a judge-made doctrine is in tension with the separation of powers.[63] Judge Posner then set forth his disagreement with that analysis:

When Congress fails to enact a statute of limitations, a court that borrows a state statute of limitations but permits it to be abridged by the doctrine of laches is not invading Congressional prerogatives … It is merely filling a legislative hole.[64]

He then explained why laches is the "mirror image of equitable estoppel,"[65] and why "laches and equitable estoppel are interchangeable:"[66]

"The doctrine of equitable estoppel allows the plaintiff to extend the statute of limitations if the defendant has done something that makes the plaintiff reasonably believe that he had more time to sue. … Conversely, if the plaintiff does something that reasonably induces the defendant to believe he would not be sued and the defendant's ability to defend himself against the plaintiff's suit is impaired as a result, the plaintiff can be barred by the defense of laches from suing. What is sauce for the goose (the plaintiff seeking to extend the statute of limitations) is sauce for the gander (the defendant seeking to contract it). Laches is thus a form of equitable estoppel rather than a thing apart. The only difference is which party asserts it."[67]

The equation of laches with equitable estoppel can be determinative of the outcome, as evidenced by *Central States, Southeast and Southwest Area Pension Fund v. John Clark Trucking & Rigging Company*.[68] In that case, the defendants pled laches when the Fund had delayed filing suit for eight years within an applicable 10-year statute. The district court agreed that laches could be applicable in such a situation, but only when, citing *Gorman Bros.,* "a plaintiff does something that reasonably induces the defendant to believe he would not be sued and the defendant's ability to defend himself against the plaintiff's suit is impaired as a result."[69]

The analysis in *Gorman Bros.* can also result in analytic complexities, which was the result in *Central States Southeast & Southwest Areas Pension Fund v. The Kroger Co.*[70] The plaintiff argued that Kroger was collaterally estopped[71] from raising the laches defense because it had unsuccessfully raised estoppel as a defense in a prior litigation. It is clear that the elements of estoppel in the context of an ERISA claim are not the same as the elements of laches. In *Coker v. Trans World Airlines, Inc.,*[72] the US Court of Appeals for the Seventh Circuit recited the four elements of equitable estoppel: "(1) a knowing misrepresentation, (2) made in writing; (3) with reasonable reliance on that misrepresesentation by the party claiming equitable estoppel; (4) to the party's detriment."[73] In contrast, in the Seventh Circuit, laches applies when a "plaintiff has waited for an unreasonable length of time to assert his claim and the defendant has been prejudiced by the delay."[74] Thus as the district court stated in *Kroger*:

It would appear that laches requires only (1) unreasonable delay and (2) prejudice to the other party as a result of that delay. Estoppel, on the other hand, appears to require both a knowing misrepresentation and reasonable reliance on that misrepresentation.[75]

In *Kroger II,*[76] Kroger had argued that Central States had misrepresented to it that its reporting was accurate. On appeal, the court of appeals concluded, without deciding whether a claimed misrepresentation was a misrepresentation in fact, that Kroger's reliance on the alleged misrepresentation was not reasonable because Kroger was in a better position than the Fund to know that its practice violated the collective bargaining agreement. In this case, Kroger's laches claim was applicable to contributions made dating back to 1977, whereas in the prior action plaintiff's collection action was for the 1987 to 1989 periods, which made unreasonable delay difficult to argue. Not only were the relevant periods different but laches also does not require a knowing misrepresentation on which the defendant has relied. The difficulty for the district court arose from the language in *Gorman Bros.* that "laches and equitable estoppel are the same thing,"[77] and laches is the "mirror image"[78] of equitable estoppel. It also suggested that—but did not decide whether—"laches and equitable estoppel might be interchangeable."[79] The court in *Gorman Bros.* later stated that "the fault that consists in being unreasonable in relying on a promise or other words (or conduct) of an opposing party is a defense in all estoppel cases, including all cases of laches, whether the conduct giving rise to the claim of estoppel or laches is intentional or accidental."[80] From the language, it might be inferred that reasonable reliance is an element of laches. The district court then set forth the different meanings of reasonable reliance in the estoppel and laches context:

[T]he reliance at issue in laches is the reliance on delay while the reliance at issue in estoppel is the reliance on a misrepresentation. We believe, therefore, that reliance on delay is really part and parcel to the detriment element of laches… If a defendant does not rely in some way on the delay there can be no detriment. … Furthermore, if unreasonable reliance is a defense to laches it is probably because the party asserting the defense cannot be prejudiced by unreasonably relying on the delay, or because some conduct by the asserting party caused the delay, resulting in the delay itself as not unreasonable."[81]

It should be noted that, although he stated that his views were provisional, Circuit Judge Easterbrook, in his concurring opinion in *Gorman Bros,* would not have applied the laches doctrine. His analysis was rooted in a choice of law analysis. He agreed with the majority that if state law provides the period of limitations, then it also supplies all related doctrines of tolling and laches. He then stated that if Illinois law supplies the period of limitations, a court must ask how Illinois law would apply the laches defense to the enforcement of a writing, "not how a federal court should deal with laches as a matter of first principles"—an analysis lacking in the majority opinion. He acknowledged that borrowing state statutes of limitations is the norm when federal law is silent, a rule with which most ERISA practitioners are familiar, but then quoted the less frequently cited proviso to that principle:

[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes and when the federal policies at stake and practicalities of litigation make that rule a significantly more appropriate vehicle for institutional lawmaking then federal law supplies the period of limitations.[82]

Judge Easterbrook noted that ERISA contains a statute of limitations governing debt collection suits by multiemployer plans—ERISA Section 4301(f)—which provides:

An action under this section may not be brought after the later of (i) six years after the date on which the cause of action arose or three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action.

That section deals with a collection of withdrawal liability, while the action in *Teamster Bros. v. Gorman* was a suit under ERISA Section 515 to recover delinquent contributions. However, although it is not directly on point, Judge Easterbrook concluded that ERISA Section 4301(f) was a better fit than a rule drawn from state law.

First, if ERISA Section 4301(f) deals with one kind of collection suit by multiemployer plans, "why not use it for this collection suit by multiemployer plans." Second:

ERISA is similar to labor law, which also has strong preemption rules accompanied by the creation of federal common law; *DelCostello* deemed the preemption of state substantive law a strong reason not to obtain periods of limitations from state law. Why, in a complex body of federal pension law, should the statute of limitations be the only bit of state law? Statutes of limitations often are tailored to the substantive rule; to import a body of state limitations law into field from which all other state tendrils have been excluded makes little sense.[83]

Third, ERISA Section 1451(f), based upon Supreme Court precedent, addressed the problem presented by a laches defense:

The six-and-three structure of this rule, like the three-and-one structure of the statute used for securities fraud claims, is incompatible with equitable tolling. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 at 363, 111 S. Ct. 2773. Subsection 1451(f)(2) supplies a limit of three years from discovery, which demonstrates that the six-year period in § 1451(f)(1) is a statute of repose; equitable extensions are incompatible with periods of repose, according to *Lampf, Pleva*, and that message is driven home by the special extension to six years from discovery if fraud is entailed. Courts could not allow for additional equitable extensions without displacing a legislative choice; and if laches is just a mirror image of equitable tolling, then abbreviating the time on account of laches also is inappropriate. I see no reason to impute to Congress a decision that the six-and-three rule would be inappropriate in any way for other collection suits. *Lampf, Pleva* shows that there is no rule against applying a period of limitations in one section to a claim under a different section of the same statute; to the contrary, in *Lampf, Pleva* the Court took the existence of some limitations rules in the Securities Exchange Act as a reason to use federal rather than state law when resolving claims under sections that lacked their own periods of limitations.[84]

Although the precise formulation of the laches doctrine varies among the circuits,[85] and sometimes within a circuit,[86] and is sometimes described as having two elements[87] and sometimes three elements,[88] there is general agreement about its essential elements:[89] As the Supreme Court stated in *Costello v. United States*,[90] laches occurs when the party asserting the defense is prejudiced by the lack of diligence of the opposing party. A lack of diligence will be found when there is an unreasonable delay[91] in bringing suit after the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action.[92] Thus, laches focuses upon the unreasonableness of the delay after possession of

knowledge of the facts,[93] and "the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put upon a man of ordinary knowledge the duty of inquiry."[94] As one court recently expressed it:

When evaluating the reasonableness of a delay, the evaluation period begins when the plaintiff knew (or should have known) of the [potential cause of action], and ends with the initiation of the lawsuit in which the defendant seeks to invoke the laches defense.[95]

With respect to prejudice, a showing of material prejudice, not merely the mere allegation of prejudice, is required before prejudice can properly apply.[96] When the plaintiff's conduct is unjustified, the defendant's need to establish prejudice ceases.[97] Traditionally, laches is invoked when witnesses have died or evidence has gone stale,[98] but it is not so limited. Prejudice can be either economic (such as a change in the value of an asset); evidentiary (such as the impairment of a defendant's ability to put on a full and fair defense due to the loss of records or unreliability of memories of past events);[99] or both.[100] A delay in claiming asserted damages during a period in which damages accumulated might constitute laches barring recovery at a later date.[101] In *Conopco, Inc. v. Campbell Soup Co.,*[102] the US Court of Appeals for the Second Circuit explained that:

"A defendant is prejudiced by a delay when the assertions of a claim available some time ago would be inequitable in light of the delay in bringing the claim. Specifically, prejudice ensues when a defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed."[103]

The US Court of Appeals for the Seventh Circuit indicated that prejudice also occurs "when the plaintiff's unexcused failure to exercise its rights caused the defendant to rely, to its detriment."[104]

As a general proposition, courts have been reluctant to apply the doctrine of laches in pension cases, because the claim occurs on retirement, even though a participant could sue earlier on an anticipatory breach theory. Thus, in *Teeter v. Supplemental Pension Plan of Consolidated Rail Corporation,*[105] the district court did not treat an informal letter by a plan participant 30 years before retirement as indicating a 30-year delay in pursuing a matter. In a similar vein, in *Gaynor M.D. v. Ephratia Community College,*[106] the district court stated that "the prejudice suffered by the defendant is not so great as to overcome the policy of ERISA favoring recovery of benefits that has been earned by long years of service."

The following are some concrete examples of successful invocations of the laches doctrine:

- In *Winchester v. Pension Committee of Michael Reese Health Plan, Inc.,* the court of appeals held that the defendant's

laches defense was warranted when the defendant reasonably assumed that the matter was closed and that the plaintiff had all the information necessary to determine "exactly where she stood with the plan" given her two-year delay in renewing her request for plan information.[107]

- In *Preston v. the American Federation of Television and Radio Artists Health Fund,*[108] the district court dismissed claims brought more than 10 years after the artist's death on the grounds of laches, citing the Fund's difficulty in gathering evidence necessary to defend the claim.

- In *Samaritan Health Care Center v. The Simplicity Health Care Plan,*[109] commenting upon an unexplained five-year delay in filing a lawsuit (but still within the applicable six-year statutory period), the district court stated that "If there is no reason, there can be no good reason for the delay."[110]

- In *Turner v. Retirement Plan of Marathon Oil Company,*[111] a district court found an action barred by laches when the plaintiff delayed filing a complaint for more than nine years, he offered no legitimate reason for the delay; evidence was lost; and the plaintiff had difficulty during his deposition recalling names, dates, and details regarding an alleged representation made to him. In contrast, a two-year delay between an alleged oral waiver of claims for benefits and the filing of a claim was held not to be unreasonable.[112] When a defendant was notified of liability within seven months of a mass withdrawal, and the Fund had repeatedly attempted to contact defendants for two years until it filed suit, the delay in filing was not an unreasonable delay.[113]

- In *Combs v. Indiana Kentucky Regional Council of Carpenters,*[114] described by the district court as "one of these rare cases in which laches applies," the union waited at least 15 years to file an action, when the closest statute of limitations was two years, and the defendant was prejudiced by the union's acquiescence in the company's nonunion behavior between 1990 and 2005.

- In *Humphrey v. United Way of the Texas Gold Coast,*[115] the district court concurred with plaintiff's contention that defendant's counterclaim for reformation should be dismissed because of laches. It agreed that plaintiff would be unduly prejudiced, since the "substantial passage of time will have caused memories to fade and some testimony to be lost forever. Moreover, Humphrey has spent many hours and

significant actuarial fees litigating this case based on defenses asserted before this court ruled on the cross motions for summary judgments, all of which would be increased by allowing defendants to add a counterclaim now."[116]

- In *Mills v. Twentieth Century Fox Film Corp,*[117] the US Court of Appeals for the Ninth Circuit upheld a laches defense, when a plaintiff waited 25 years to assert its rights, with the result that many of the relevant actors and records were no longer available.

Central States Southwest and Southeast Pension Fund v. Kroger[118] illustrates the difficulty that a defendant can have in establishing prejudice. The issue in that long-running litigation was the treatment of Kroger's casual employees. In response to Kroger's laches defense, the district court first concluded that there was no unreasonable delay. It then rebutted each of Kroger's assertions with respect to the prejudice it had suffered. First "Kroger cannot show prejudice because the only steps Kroger could have taken had it known previously of the Fund's position, would have been to pay the very contributions now in dispute."[119] In response to Kroger's contention that its exposure to additional liability in the form of interests and penalties had been greatly increased by the Fund's delay, the district court indicated that even if the Fund's delay was unreasonable, any increases in interest for interest and penalties must stop at the point at which Kroger first became aware of the Fund's position with regard to the part-time/casual distinction:

Once Kroger knew that the Fund disagreed with its use of the casual designation, its continued use of that designation was done with full knowledge of the risk of incurring liability. So, too, any failure on Kroger's part to preserve any evidence necessary to defend itself from that point forward, was done with full knowledge of the risk involved.[120]

In effect, this is the estoppel variation of the laches defense: Kroger could only reasonably rely upon the Fund's conduct and establish prejudice on that basis when it was unaware of the Fund's position.

In *Lacorazza v. Lacorazzo,* the plaintiff was found guilty of laches for a nine-year delay in moving to vacate a qualified domestic relations order when she was clearly aware of its terms immediately after the parties were divorced.[121]

In *Duch v. Allied Structural Steel Company,* the laches doctrine was applied when the plaintiff waited 10 years before filing a suit for enhanced benefits.[122]

In *Witmeyer v. Kilroy,*[123] a former railway employee's attempt to challenge the granting of prior service credit to members of a union that was merged into a railway employee's union and pension plan

on state common law grounds was barred by laches, when the plaintiff sought to add the state law claims 13 years after the merger, plan audits had been conducted regularly and were available for inspection by plaintiff, and the employee did not object until he was terminated from employment involuntarily.

In *Trustees Local 639 Employee's Pension Trust v. Johnson,*[124] the defendant was barred by laches from pursuing an action when a 27-year period had elapsed in which the participant did not assert that a marriage had not been dissolved and no justification for the delay was offered.

COLLECTION ACTIONS

Certain courts have stated that "it is an open question of law whether laches applies to ERISA actions."[125] Although some courts have held that in a collection action under ERISA Section 515,[126] which includes the failure of the employer to make a withdrawal liability payment within the prescribed time, the common law defenses of estoppel and laches are not available,[127] there are a number of cases to the contrary.[128]

The plaintiff's argument, which has had only limited success, has been that there are only three defenses that employers may invoke to defeat an obligation to make ERISA payments: (1) the pension contributions themselves are illegal; (2) the collective bargaining agreement is void *ab initio*, as in such cases in which there is fraud in the execution;[129] and (3) the employees decertify the union as the bargaining representative.[130] Particularly in the Sixth Circuit, plaintiffs rely upon the proposition that multiemployer trust funds are entitled to rely on an employer's promises to make contributions to a fund, irrespective of any breach or omission by the union.[131] Consequently, as the US Court of Appeals for the Seventh Circuit stated in *Gerber Trucks,* "If the employer simply points to a defect in formation—such as fraud in the inducement, oral promises to disregard the text, or the lack of majority support for the union and the consequent ineffectiveness of the pact under labor law—it must still keep its promise to the pension plan."[132] However, in an ERISA Section 515 collection action, case law does not foreclose inquiry into the actions of the fund itself in asserting its rights so the defendant can in certain limited circumstances raise laches as a defense. As the district court explained in *Laborers Pension Fund v. Litgen Concrete Company:*[133]

[Defendant] correctly observes that while *Gerber Trucks* may foreclose certain employer defenses which are based on conduct of the parties who negotiated and executed the agreement which created § 1145 liability, *Gerber Trucks* does not foreclose inquiry into the actions of the Fund itself in asserting its rights. Hence, [defendant]

could raise as a defense against the fund any of the actions which amount to laches, waiver, estoppel, misrepresentation or accord, and satisfaction.[134]

WITHDRAWAL LIABILITY

Under ERISA Section 4219(b)(1), a fund is required to provide an employer with notice of liability, "as soon as practicable." In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*[135] the Supreme Court stated that "if an employer believes the trustees have failed to comply with their 'as soon as practicable'[136] responsibility, the employer may assert that violation as a laches obligation at an arbitration contesting the withdrawal liability assessment."[137] *Bay Area Laundry* "has been interpreted to stand for the proposition that a defense of laches must be addressed in arbitration as part of a challenge to withdrawal liability or else it is waived."[138] For example, in *Amalgamated Lithographers of America v. Unz & Co., Inc.,* the district court, citing *Bay Area Laundry* stated that "if laches is claimed as a defense to a claim for withdrawal liability, the issue must be arbitrated."[139] However, laches in the prosecution of an action to collect withdrawal liability is not barred by the failure to arbitrate.[140]

In *Robbins v. Lehman Transport, Inc.,*[141] in an action to assess withdrawal liability when the requirements of the asset sale exception under ERISA Section 4204 were not satisfied, the district court held that a three-year delay in attempting to assess was not barred by laches, because several provisions under ERISA Section 4204 have a five-year period.[142]

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

In *Rivera-Melendez v. Pfizer Pharmaceuticals,*[143] Judge Lynch asked the DOL whether a service member could, in effect, sit on his or her rights under USERRA,[144] accepting a reemployment position that was not the escalator position,[145] and then requesting, after a period of time had elapsed, placement in the escalator position. The DOL, after noting that pursuant to an October 2008 amendment,[146] USERRA explicitly states that no statute of limitations applies to its requirements, acknowledged that "other principles, such as the doctrine of laches, might nonetheless operate to preclude a service member from requesting an appropriate escalator position long after accepting another position."[147] However, the DOL then continued:

But even in cases involving delay by service members in requesting their escalator position, courts should bear in mind the Supreme

Court's command that legislation protecting service members "is to be liberally construed for the benefit of these who left private life to serve their country in its time of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Accordingly, in cases in which a service member asserts entitlement to an escalator position long after accepting another position, a case-by-case analysis is required, taking into account such factors as the reason for the delay, any resulting prejudice to the employer, whether the service member freely and knowingly rejected the escalator position, and the like.[148]

AGAINST THE GOVERNMENT

Under certain circumstances, the laches defense will be precluded by the party maintaining the action, or the issue presented. Thus, in *United States v. Summerlin,*[149] the US Supreme Court stated that the United States is not bound by state statutes of limitations, or subject to the defense of laches in enforcing its rights,[150] a doctrine that has been followed in a number of ERISA cases.[151] As the district court explained in *Reich v. Valley National Bank of Arizona:*[152]

Laches cannot be invoked against the federal government when it acts in a sovereign capacity either to enforce a public right or protect a public interest. It is within the public interest to protect the financial integrity of employee benefit plans.[153]

Also, laches cannot be raised as a challenge to a court's subject matter jurisdiction,[154] nor can it be raised as a defense to awards of reasonable attorneys' fees, interest, and liquidated damages under 29 USC § 1132, because these awards are mandatory when a fund prevails in a suit to compel withdrawal liability interim payments.[155]

WHICH LAW GOVERNS?

In many instances, which law governs will not be determinative of the outcome, because the elements of laches, as noted above, despite some differences in the formulation of the test, are substantially the same.[156] However, in those instances in which there may be a difference in result, the issue has been addressed.

Judge Posner, in the majority opinion in *Gorman Bros.,* observed that "we may assume without having to decide that, as with equitable tolling and (perhaps the question is unsettled), equitable estoppel, the relevant doctrine of laches is that of the state whose statute of limitations is being borrowed."[157] In his concurring opinion in that case, Judge Esterbrook did not equivocate: "If a state law supplies the period of limitations it also supplies all related doctrines of tolling and laches."[158] Citing among other authorities *Hardin v. Straub,*[159]

in *Samaritan Health Center v. The Simplicity Health Care Plan,* a Wisconsin district court further elaborated:

Where there is no federal statute of limitations and there is a borrowing of a state statute of limitations, the analogous state limitations period serves as a baseline for a presumption of laches. The baseline principle presumes that an action is not barred by laches if it is brought within the applicable state limitations period.[160]

In almost all of the ERISA cases examined, the laches principles cited are federal, but there are some exceptions.[161]

ARBITRATION

In International Union of Operating Engineers, *Local 150 v. Builders, Inc.* the Supreme Court stated that:

Once a court finds as here that the parties are subject to an agreement to arbitrate, and the agreement extends to any differences between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement.[162]

Similarly, if a party voluntarily and unreservedly submits an issue to an arbitration, he can no longer argue that the arbitration lacks authority.[163] Also, an arbitrator may decide an issue of laches that relates to the issue that he or she must decide.[164]

CONCLUSION

In defending a claim that appears to have been brought a number of years after the cause of action accrued, practitioners will consider a statute of limitations defense, but should also consider asserting a laches defense, although it is unlikely to be successful if the IRS, DOL, or other government agency is maintaining the action or when the action is governed by a statute of limitations (although the Seventh Circuit has a different view on this issue). Although courts may be hesitant to apply the doctrine when the claimant is maintaining a claim for pension benefits, in an appropriate case a court will apply the doctrine.

NOTES

1. Gail I. Heriot, "A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches," 1992 *Brigham Young University Law Review* 917, 918, quoted in Emily A. Calwell, "Can the Application of Laches Violate the Separation of Powers?: A Surprising Answer From a Copyright Circuit Split," 44 *Valparaiso University Law Review* 469 (August 2010), n11.

2. *Rogers v. City of San Antonio*, 392 F3d 758, 773 (5th Cir. 2004), *cert. den.* 545 US 1129 (2005), cited in *Humphrey v. United Way of the Texas Gulf Coast*, 2010 WL 4791486 (S.D. Tex. 2010); *King v. Innovative Books,* 976 F2d 824, 832 (2d Cir. 1992), cited in *Veltri v. Building Service 32B-J Pension Fund*, 393 F.3d 326 (2d Cir. 2009); *Moyle v. Liberty Mutual Retirement Plan*, 2013 WL 3316898 (S.D. Cal. July 1,

2013); *Kennedy v. Electricians Pension Plan, IBEW # 995,* 954 F.2d 1116, 1121 (5th Cir.1992); *Wells v. United States Steel & Carnegie Pension Fund*, 950 F.2d 1244 (6th Cir. 1991); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Custom Cartage Co.,* 1991 WL 160966 (E.D. Pa. 1991); *Turner v. Retirement Plan of Marathon Oil Company,* 659 F. Supp 534 (N.D. Ohio 1987); *Brassley v. Fearless Farris Service Stations, Inc.,* 2009 WL 631460, (D. Idaho 2009); *Cecil, Jr. v. AAA Mid-Atlantic, Inc.,* 118 F.Supp.2d 659 n.3 (D. Md. 2000); *Hoover v. Bank Of America Corp.,* 286 F.Supp.2d 1326 (M.D. Fla. 2003); *Langone v. Esernia,* 847 F. Supp 214, n.2 (D. Mass. 1994). Laches has been recognized by the US Supreme Court in other contexts. *See, e.g., National Railroad Passenger Corp. v. Morgan,* 536 U.S. 106, 121-122 (2002). Federal equitable claims under statutes without a limitation period are normally governed by the doctrine of laches. *Holmberg v. Armbrecht,* 327 U.S. 392, 395-396, (1946); *Erkins v. Bryan,* 785 F.2d 1538, 1543 (11th Cir. 1986), both cited in *Merriken v. American Maritime Offices Vacation Plan*, Case No. 08-60687-CIV-JORDAN (S.D. Fla. September 29, 2008. Because laches is an equitable defense, if the party asserting it has unclean hands, it will be denied. *Andrea Doreen Ltd. v. Building Material Local Union 282*, 2003 WL 1094072 (E.D.N.Y. 2003).

3. Ivani Contracting Corp. v. City of New York, 103 F.3d 257, 259 (2d Cir. 1997).

4. *Powell v. Zucker,* 366 F.2d 634 (D.C. Cir. 1996), quoted in *Holland v. Valley Services, Inc.,* 2009 WL 1241612 (D.C. D.C. 2009). *See also Moyle v. Liberty Mutual Retirement Plan,* 2013 WL 3316898 (S.D. Cal. July 1, 2013); *Stone v. Williams*, 873 F.2d 620, 623-624 (2d Cir. 1989) *opinion vacated, reh'g on other grounds* 891 F.2d 409, quoted in *Wagner v. Metropolitan Life Ins. Co.*, 2011 WL 2638143 (S.D.N.Y. 2011); *Merrill Lynch Investment Managers v. Optibase Ltd.,* 337 F3d 125, 132 (2d Cir. 2003) ("A party asserting a laches claim must show that the plaintiff has inexcusably slept on his rights, so as to make a decree against the defendant unfair," quoted in *Castle v. Southern New England Telephone Company,* 2008 WL 222558 (D. Ct. 2008); *Hot Wax v. Turtle Wax, Inc.,* 191 F3d 813,820 (7th Cir. 1999) ("The equitable doctrine of laches is derived from the maxim that those who sleep on their rights lose them"), quoted in *Moriarty v. Thompson-Kuenster Funeral Home,* 95 F.Supp.2d 864 (N.D. Ill. 2000); *Official Committee of the Unsecured Creditors Of Metalsource, Corp. v. US Metalsource Corp.*, 63 BR 260 (W.D. Pa. 1993) (plaintiff who has "slept" on his or her rights for an unreasonably long time should not be permitted to bring suit when the delay has been prejudicial to the defendant); *Combs v. Indiana Kentucky Regional Council of Carpenters, Case #2: 09 cv 1550 PPS* (N.D. Ind. November 3, 2010) ("at bottom the union has slept on its rights, and so this is one of the rare cases in which laches applies."); *Holt v. Winpisinger*, 811 F2d 1532, 1541 (D.C. Cir. 1987) ("equity aids the vigilant not those who sleep on their rights"). *Teamsters Local 639 Employer's Pension Fund v. Johnson,* 1992 WL 200075 (D.C.D.C. 1992) ("Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon the rights, and show no excuse for his laches in asserting them)," quoting *Bliss v. Bliss,* 50 F2d 1002, 1004-05 (D.C. Cir. 1931), quoting *Speidell v. Henrici,* 120 US 377, 387 (1887); *New York State Teamsters Pension and Retirement Fund v. Hoh,* 554 F.Supp. 519, fn 13 (N.D.N.Y. 1982).

5. Don E. Tomlinson, "Federal versus State Jurisdiction and Limitations versus Laches in Songwriter Disputes: The Split among the Federal Circuits in Let the Good Times Roll, Why Do Fools Fall in Love, and Joy to the World," 23 *Loy. L.A. Entertainment Law Review* 55, 77 (2002), quoted in Misty Kathryn Noll, "(In) Equity in Copyright Law: The Availability of Laches to Bar Copyright Infringement Claims," 35 *Northern Kentucky Law Review* 328,344 (2008).

6. *See,* for example, *Samaritan Health Center v. Simplicity Health Care Plan*, 2007 WL 2704237 (E.D. Wis. 2007) quoting *Maksym v. Loesch*, 937 F2d 1237, 1248 (7th Cir. 1991)

("The doctrine of laches may apply even before the statute expires as it is a doctrine of estoppel rather than a substitute for the statute of limitations.") Similarly, in the Tenth Circuit, laches and the statute of limitations are not mutually exclusive even when a statute is made specifically applicable to the claim and the claim was brought within the statutory period. *Armstrong v. Maple Leaf Apts., Inc.,* 622 F2d 466, 472 (10th Cir 1979), *cert. den.* 469 US 901 (1980), quoted in *Trustees of Centennial State Carpenters Pension Fund v. Centric Corp.,* 901 F2d 1514 (10th Cir. 1990). *See also Trustees of the Carpenters and Millwrights Health Benefit Trust v. Willard & Clark Construction Co., Inc.,* 780 F.Supp. 738 (D.Col. 1990) (While generally if a claim is brought within the applicable statute of limitations laches will be unavailable, "an action may be barred by laches where the existence of special facts makes the delay culpable.")

7. "Laches acts as a sort of equitable statute of limitations." *Trustees for Michigan BAC Health Law Fund v. CSS Contracting Company,* 2008 WL 1820879 (E.D. Mich. 2008); Misty Kathryn Nall, "(In) Equity in Copyright Law: the Availability of Laches to Bar Copyright Infringement Claims," 35 *Northern Kentucky Law Review* (2008) ("Statute of limitations serves the same interest as the equitable doctrine of laches"). *Holmberg v. Armbrecht,* 327 US 392, 395-396 ("Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief."), quoted in *Merriken v. American Maritime Officers Vacation Plan, et al.,* Case No. 08-60687-CIV-JORDAN (S.D. Fla. 2008).

8. *Moyle v. Liberty Mutual Retirement Plan,* 2013 WL 3316898 (S.D. Cal. July 1, 2013).

9. Many of the general principles have equal application outside the employee benefits context, but it seemed useful for ERISA practitioners to consider these principles in the ERISA context. There are some obvious exceptions, such as Supreme Court cases discussing the laches doctrine, many of which were decided prior to ERISA.

10. Under *Restatement (Second) of Trusts*, Section 219, a beneficiary may be barred from holding a trustee liable for losses by laches. *See Meinhardt v. Unisys Corp.,* 74 F.3d 420 (3rd Cir. 1996), n.24.

11. *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 31 (1951), cited in *Kentucky v. Electrician Pension Plan IBEW #995*, 954 F.2d 1116 (5th Cir. 1992); *Ganley v County of San Mateo*, 2007 WL 902551 (N.D. Cal. 2007), citing *Dangerfield Island Protective Society v. Lujan*, (D.C. Cir. 1990) ("A finding of laches cannot rest simply upon the length of the delay"); *Day v. Wall*, 112 F. Supp. 2d 833 (E.D. Wisc. 2000); *Clarke v. Ford Motor Co.*, 220 FRD 568 (E.D. Wisc. 2004); *Money Store v. Harriscorp Fin., Inc.*, 689 F.2d 666, 674 (7th Cir. 1982), cited in *Beech v. Commonwealth Edison Co.*, 2003 WL 22287353 (N.D. Ill. 2003); *Reconstruction Fin. Corp. v. Harrison & Crosfield*, 204 F.2d 366, 370 (2d Cir. 1953), quoted in *Puccio v. L.M.G. Air Corporation and All Pro Air Delivery, Inc.*, 1998 WL 887008, (E.D.N.Y. 1998); *Pattern Makers Pension Trust Fund v. Production Pattern Shop, Inc.*, 1998 WL 173299 (N.D. Ill. 1998).

12. The US Court of Appeals for the Sixth Circuit has described laches as "a negligent and unintentional failure to protect one's rights." *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.,* 936 F.2d 889, 891 (6th Cir. 1991), quoted in *Trustees of Printing Industry Insurance Fund v. Pharach Glass Systems*, 2008 WL 276412 (N.D. Ohio 2008) and *Chirco v. Crosswinds Communications, Inc.,* 474 F.3d 227, 231 (6th Cir. 2007), *cited in Trustees for Michigan BAC HealthCare Fund, et al v. CSS Contracting Company*, (E.D. Mich. 2008), 2008 WL 1820879.

13. Wright, Miller & Kane, *Federal Practice and Procedure* § 2946 at 117 (2nd Ed. 1995) quoting de Funiak, *Handbook of Modern Equity* § 24 at 41 (2nd Ed. 1956), quoted in *Chirco v. Crosswinds Communications, Inc.,* 474 F.3d 227, 231 (6th Cir. 2007), quoted in *Trustees of Painting Industry Ins. Fund v. Pharaoh Glass System, Inc.*, 2008 WL 276412 (N.D. Ohio 2008).

14. *Wagner v. Metropolitan Ins. Co.,* 2011 WL 2638143 (S.D.N.Y. 2011); *Steiner Corp. Retirement Plan v. Johnson & Higgins*, 31 F3d 935 (10th Cir. 1994); Misty Kathryn Nall, "(In) Equity in Copyright Law: The Availability of Laches to Bar Copyright Infringement Claims," 35 *Northern Kentucky Law Review* 322 (2008).

15. *Hearn v. Mckay*, 07-60209-Civ (July 1, 2008) (S.D. Fla. 2008), quoted in *BNA Pension & Benefit Daily* July 8, 2008. *See*, Fed. Rule Civ. Proc. 8(e) – in responding to a pleading, a party must affirmatively state any available affirmative defense, including laches. *See,* for example, *Dotson v. Arkema*, 2009 WL 499149 (E.D. Mich. 2009); *Chevron Corporation and ACHSR Solutions, LLC v. Barrett,* 2008 WL 2961778 (S.D. Fla. 2007); *California Service Employees Health & Welfare Trust Fund v. Advance Building Maintenance*, 2007 WL 3232344 (N.D. Cal. 2007); *Central Laborers' Pension Fund et al v. Aero Concrete Ltd*., 2007 WL 30536 (C.D. Ill. 2007); *Central States Southeast and Southeast Areas Pension Fund v. Mars Leasing Co.,* 2003 WL 21995192 (N.D. Ill. 2003); *Reybar v. TWA, Inc.,* 881 F.Supp 574 (M.D. Fla. 1995); *Moriarty v. Glueckert Funeral Home, Ltd*., 925 F.Supp. 1389 (N.D. Ill. 1996); *Central States Southeast and Southeast Areas Pension Fund v. Melody Farms, Inc.,* 969 F.Supp 1034 (E.D. Mich. 1997); *Moriarty v. Modell Funeral Homes,* 960 F. Supp. 1336, n.4 (N.D. Ill. 2000); *Moriarty v. Thompson-Kuenster Funeral Home,* 95 F.Supp.2d 864 (N.D. Ill. 2000); *Central States Southeast and Southeast Areas Pension Fund v. Heineman Distributing, Inc.,* 1994 WL 496730 (N.D. Ill. Sept.9, 1994) ("In general, when a party fails to raise an affirmative defense in the pleadings, the party waives the right to raise the issue at trial;") *Plumbers Pension Fund Local 130 v. Pittman Plumbing & Heating Co.,* 1990 WL 1391412 (N.D. Ill. 1990); *Hasson v. United States Postal Service,* 842 F2d 260, 263 (11th Cir. 1988), quoted in *Hearn v. McKay,* (S.D. Fla. July 1, 2008), Case No. 07-cv-60209 JEM, quoted in *BNA Pension & Benefits Daily* July 8, 2008. *cf. Fanelli, M.D. v. Div. Continental Casualty Co,* Case 1:06-cv-0141 (M.D. Pa. September 13, 2006), quoted in *BNA Pension & Benefits Daily,* September 20, 2006 (plaintiff may not assert laches, an affirmative defense, because it is not in a position to do so).

16. Laches is equally applicable to a delay in re-initiating litigation as it is to a delay in initiating litigation. *Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp.,* 901 F.2d 1514, 1519 (10th Cir. 1990).

17. Haymond, Napoli Diamond, P.C. v. Haymond, 2004 WL 2030134 at *16 (E.D. Pa. 2004), citing Degussi Constr. Chem. Operations, Inc. v. Berwind Corp., 280 F.Supp.2d 393, 411 (E.D. Pa. 2003); quoted in Fanelli, MD v. Continental Casualty Co., (M.D. Pa. Sept. 13, 2006), quoted in BNA Pension & Benefits Daily, September 20, 2006; Frank Brisco Company v. The United States, (D.N.J. March 15, 2006), quoted in BNA Pension & Benefits Daily, March 31, 2006.

18. *Huertas v. United States Dept. of Education*, 2009 WL 2132429 at pg. *3 (D.N.J. July 13, 2009), cited in *Damon v. Lincoln National Corp*., 2011 WL 487207 (E.D. Pa. February 10, 2011).

19. *Damon v. Lincoln National Corp.,* 2011 WL 482707 (E.D. Pa. 2011); *Barr v AT&T Pension Benefit Plan Nonbargain Program*, 2010 WL 2507769 (N.D. Cal. 2009) (striking the affirmative defense of laches because of no identifiable facts, with leave to replead); *Central Laborers Pension Welfare and Annuity Fund v Parkland Environmental Group, Inc.,* 2011 WL 4381429 (C.D. Ill. 2009) (affirmative defense of laches struck for insufficient facts); *Moriarty v. Tower Home for Funerals*, 2000 WL 1304452 (N.D. Ill. 2000); *cf. Operating Engineers Pension Trust Fund v. Fife Rock Products Company*, 2010 WL 2635782 (N.D. Cal. 2010) (denying plaintiff's motion to strike the affirmative defense of laches because of insufficient facts); *Central Laborers Pension Fund v. Aero Concrete, Ltd.,* 2007 WL 30536 (C.D. Ill. 2007) (denying injunction to strike the affirmative defense of laches on the grounds that there

was no allegation of undue delay); *Funds v. Hope Cartage*, 2003 WL 22116201 (N.D. Ill. 2003).

20. *Gruca v. U.S. Steel Corp.*, 495 F.2d 1252, 1258 (3rd Cir. 1974), cited in *Verizon Employee Benefit Comm. v. Burke*, 2007 WL 4150928, n. 17 (W.D. Pa. 2007); *Holmes v. Pension Plan of the Bethlehem Steel Corporation*, 213 F.3d 124 (3rd Cir. 2000); *Fanning v. SM La Russo & Sons, Inc.*, 2004 WL 187230 (D. Mass. 2004); *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 30-31 (1951), quoted in *Preston v. American Federation of Television and Radio Artists*, 2002 WL 1009458 (S.D.N.Y. 2002); *Teeter v. Supplemental Pension Plan of Consolidated Rail Corporation*, 705 F. Supp. 1089 (E.D. Pa. 1989). Although questions of laches are usually committed to the equitable direction of the district court, the court of appeals may resolve the issue without remand. *Leonard v. United States Airlines Corp*, 972 F.2d 155 (7th Cir. 1992).

21. *Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp.,* 901 F.2d 1514 (10th Cir. 1990); *In re Beatty*, 306 F.3d 914, 921 (9th Cir. 2002), quoted in *Johnson v. Pacific Corp.,* 260 Fed. Appx. 991 (9th Cir. 2007) and 2009 WL 1311896 (9th Cir. 2009); *Holmes v. Pension Plan of Bethlehem Steel Corp.,* 213 F.3d 124 (3rd Cir. 2000); *The Southern California, Arizona, Colorado and Southern Nevada Glaziers, Architectural Metals & Glass Workers Pension Fund v. Seay*, 66. Fed. Appx. 114 (9th Cir. 2003); *The Travelers Ins. Co. v. Cuomo*, 1993 WL 429778 (2d Cir. 1993) (withdrawn on other grounds); *Kennedy v. Electronics Pension Plan IBEW, #995,* 954 F2d 1116 (5th Cir. 1992).

22. Although it arises infrequently in the ERISA context, laches should be available as an affirmative defense to an injunction. *See Fechter v. HMW Industries, Inc.,* 879 F.2d 1111 (3rd Cir. 1989) and *Verizon Employee Benefits Comm. v. Adams,* 2007 WL4150928 (W.D. Pa 2007). For a more general discussion of the availability of laches as an affirmative defense to an injunction, *see Oriental Financial Group, Inc. v. Cooperativa De Ahorro Y Credito Oriental,* (1st Cir. Oct. 18, 2012), and cases cited therein.

23. *California Service Employees Health & Welfare Trust Fund v. Advance Building Maintenance, Inc*, 2010 WL 3448512 (N.D. Cal. 2010).

24. *Chao v. Meixner*, 2007 WL 4225069 (N.D. Ga. 2007); *Verizon Employee Benefit Comm v. Adams*, 2007 WL4150928 (W.D. Pa. 2007).

25. *UIC Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers of America*, 998 F2d 509, 513 (7th Cir. 1993), quoted in *Marsh Supermarkets, Inc. v. Marsh*, 2010 WL 2985149 (S.D. Ind. 2010); *Greater St. Louis Construction Laborers Welfare Fund v. Park-Mark, Inc.*, 52 EBC 2615 (E.D. Mo. 2011), aff'd 2012 WL 5894983 (8th Cir. 2012); *Reinhart Companies Employee Benefit Plan v. Vial,* 2011 WL 976505 (W.D. Mich. 2011); *Lumente Control Technology, Inc. v. Jarvis*, 2003 WL 1585091 (N.D. Ill. 2003) (laches is an equitable defense to a claim for restitution); *Iron Workers Tri-State Welfare Plan v. Jaraczewski*, 2002 WL 31854792 (N.D. Ill. 2002); *Young America, Inc. v. Union Central Life Ins,. Co.*, 101 F3d 546 (8th Cir. 1996); *MacDougall v. The Unified Retirement Plan of the Bank of New England Corp.*, 1995 WL 96962 (D. Mass. 1996) (pension plan estopped under the equitable doctrine of laches from attempting to recoup supplemental benefits); *Dunnigan v. Metropolitan Life Insurance Co.*, 99 F. Supp. 2d 307, 325 (S.D.N.Y. 2001), cited in *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 2001 WL 303746, 25 EBC 2560 (S.D.N.Y. 2001). A recovery for an overpayment by a plan is subject to equitable defenses. *Bliwas Inc. v. Central States Southeast and Southwest Areas Health and Welfare Fund,* 21 EBC 2867 (S.D. Ohio 1998) and cases cited therein; *Kraft Foods, Inc. Supplemental Benefit Plan v. Woods,* 1999 WL 1069247 (N.D. Ill. 1999); *Phillips v Maritime Association – I.L.A. Local Pension Plan,* 194 F.Supp. 2d 549 (E.D. Tex. 2001).

26. *Fotta v. Trustees of the United Mineworkers of America Health & Retirement Fund*, 166 F. 3d 209, 214 (3rd Cir. 1998), quoted in *Belleville v. United Food and Commercial Workers Association*, 2008 WL 544628 (D.R.I. 2008).

27. *Decourley v. Prudential Ins. Co.,* 2008 WL 1967501 (E.D. Mo. 2008); *Teamsters Local 639 Employer's Pension Trust v. Johnson,* 1992 WL 200075 (D.C. D.C. 1992). For a more detailed discussion of the equitable origins of interpleader, see Salkin, "ERISA Aspects of Interpleader" *Journal of Pension Planning and Compliance* (Spring 2010).

28. *Young v. Verizon Bell Atlantic Cash Balance Pension Plan*, 49 EBC 1993, 2010 WL 312275 (7th Cir. 2010); *Humphrey v. United Way of the Texas Gold Coast*, 2010 WL 4791486 (S.D. Texas 2010) (laches doctrine applied to defendant's counterclaim for reformation.)

29. Preston v. American Federation of Television and Radio Artists, 2002 WL 1009458 (S.D.N.Y. 2002).

30. Dameron v. Sinai Hospital of Baltimore, Inc., 815 F.2d 975 (4th Cir. 1987); Corley v. Hecht, 530 F.Supp. 1155 (D.C. D.C. 1982). Cf. Trustees of the Operative Plasterers and Cement Masons Local Union Officers and Employees Pension Fund v. Journeymen, Plasterers Protective and Benevolent Society Local Union, 794 F.2d 1217 (7th Cir. 1980) (A breach of fiduciary duty under Section 501 of the LMRDA is equitable in nature, and subject to the equitable defense of laches). See also White v. Fosco, 599 F.Supp. 710, 717 (D.D.C. 1981), and Morrisey v. Curran, 482 F.Supp. 31, 40 (S.D.N.Y. 1979).

31. For a more detailed discussion of equitable tolling, see Salkin, "Equitable Tolling in the ERISA Context," 22 *Benefits Law Journal* 39 (Summer 2008).

32. Central States Southeast & Southwest Areas Pension Fund v. The Kroger Co., (N.D. Ill. 2004).

33. 2011 WL 5041744 (1st Cir. 2011), n. 7.

34. 393 F3d 318, 326 (2d Cir. 2009) *See also, Hemphill v. Personal Representative of the Estate of James Ryskamp, Jr.,* 2006 WL 1837917, 38 EBC 2584 (E. D. Cal. 2006).

35. *Id*.

36. Smith v. City of Chicago, 769 F.2d 408, 410 (7th Cir. 1985) quoted in Trustees of the Will County Local 174 Carpenters Pension Trust Fund v. FVE Associates, 2001 WL 1298803 (N.D. Ill. 2001).

37. Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 806 (8th Cir. 1979), cert. den. 446 U.S. 913 (1980), quoted in Turner v. Retirement Plan of Marathon Oil Company, 659 F. Supp. 534 (N.D. Ohio 1987). See also Dennis v. Sawbrook Steel Castings Co., 792 F.Supp. 552 (S.D. Ohio 1991).

38. Hot Wax, Inc. v. Turtle Wax, Inc., 141 F.3d 813, 824 (7th Cir. 1999) quoted in Samaritan Health Center v. The Simplicity Health Care Plan, 2007 WL 2704237 (E.D. Wisc. 2007). See also Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 806 (8th Cir. 1979), cert. den. 446 U.S. 913 (1980) ("If the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required."), quoted in Turner v. Retirement Plan of Marathon Oil Company, 659 F. Supp. 534 (N.D. Ohio 1987).

39. King v. Innovative Books, 976 F.2d 824, 832 (2d Cir. 1992), cited in Veltr GMBH v. Building Services 32B-J Pension Fund, 393 F.3d 318 (2d Cir. 2009); *Iron Workers Local 25 Pension Fund v. Future Fence Company*, 2006 WL 2077639, 38 E.B.C. 2462 (E.D.

Mich. 2006); *Eppendorf-Netheler-Hinz GMBH v. Enteron Co.*, 89 F. Supp.2d 483, 485 (S.D.N.Y. 2000), quoted in *Wagner v. Metropolitan Life Ins. Co.*, 2011 WL 2638143 (S.D.N.Y. 2011); *Central States Southeast and Southwest Areas Pension Fund v. Melody Farms, Inc.*, 969 F. Supp. 1034 (E.D. March 1997); *Frank Brisco Company v. The Travelers Ins. Co.*, (D.N.J. March 15, 2006); *Johnson v. Georgia Pacific Corporation*, 2009 WL 1311896 (9th Cir. 2009); *Hearn v. McKay* (S.D. Fla. July 1, 2008), Case No. 07-Civ-60209 JEM, quoted in July 8, 2008 BNA Pension & Benefits Daily; *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 181, n. 5 (7th Cir. 1994), cited in *Moriarty Thompson-Kuenster Funeral Home*, 95 F. Supp. 2d 864 (N.D. Ill. 2000); *Moriarity v. Glueckert Funeral Home, Ltd.*, 925 F. Supp. 1389 (N.D. Ill. 1996); *Central States Southeast and Southwest Areas Pension Fund v. Heineman Distributing, Inc.*, 1994 WL 496730 (N.D. Ill. 1994); *Papesh v. American National Can Co.*, 1997 WL 799117 (D. Md. 1997).

40. Central States Southeast and Southwest Area Pension Fund v. Kroger, (N.D. Ill. 2004), quoted in BNA Pension & Benefit Daily, November 5, 2004; Edward Duch v. Allied Structural Steel Co., 1986 WL 7074 (N.D. Ill. 1986).

41. *EEOC v. Great Atlantic and Pacific Tea Company,* 736 F.2d 64, 80 (3rd Cir. 1984), *quoted in In re Mushroom Transportation Company*, 382 F.3d 325 (3rd Cir. 2004). *Cf. Corley v. Hecht,* 530 F.Supp. 1155 (D.C. DC 1982) (while a statute of limitations does not control an action for equitable relief, the applicable statute of limitations is a guide for determining whether laches should be applied).

42. Svec v. Board of Trustees of Teamsters Local Union No. 727 Pension Fund, 2002 WL 1559640 (N.D. Ill. 2002); Blakey v. Caterpillar, Inc., 2010 WL 2089292 (C.D. Ill. 2010); Plumbers Pension Fund Local 130 v. Pittman Plumbing and Heating Co., 1990 WL 139142 (N.D. Ill 1990). Cf. Livolsi v. City of New Castle, 501 F.Supp. 1146 (W.D. Pa. 1980) (denying a motion to dismiss based upon the equitable doctrine of laches because resolution typically depends upon a full resolution of the facts).

43. *Hearn v. McKay*, (S.D. Fla. July 1, 2008), Case # 03-Civ-60209 JEM, quoted in *BNA Pension & Benefits Daily,* July 8, 2008.

44. *Vreeland v. Cardio, M.D.,* 134 F. Supp.2d 270 (E.D.N.Y. 2000).

45. To prevail on a motion for summary judgment on a laches defense, the defendant must have credible evidence that would entitle them to a directed verdict if not contradicted at trial. *Hearn, supra,* n.15.

46. Central States Southeast and Southwest Areas Pension Fund v. XTL Transport, Inc., 1996 WL 435136 (N.D. Ill. 1996).

47. 52 E.B.C. 1703 (W.D. Wisc. 2011).

48. *Id. See also Gaspar v. Linvatec Corp.*, 167 F.R.D. 51 (N.D. Ill. 1996); *McKay v. Tharaldson*, 2011 WL 1206167 (D.N.D. 2011) (If the defendant has a valid statute of limitations or laches defense against certain class members, the definition of the class can be modified).

49. *Dunnigan v. Metropolitan Life Ins. Co.,* 99 F. Supp.2d 307, 325 (S.D.N.Y. 2001). *See alsoHolmes v. Pension Plan of Bethlehem Steel Corp.,* 1999 WL 54591 at *8-10 (E.D. Pa. 1999) (claim for interest on the delayed payment of benefits is unsuitable for class treatment).

50. *Patterson v. Hewitt*, 195 U.S. 309, 318 (1904). If a suit in equity raises claims as to which there is an applicable statute of limitations, it does not preclude the defense of laches, provided there has been unreasonable delay within the terms limited by the statute.

51. 295 U.S. 480, 489 (1935), quoted in *United States v. Gordon*, 78 F.3d 781, 786 (2d Cir. 1996), quoted in *Yoon v. Fordham University Faculty & Admin Ret. Plan*, 2004 WL 3019500 (S.D.N.Y. 2004).

52. 470 U.S. 226, 244 n. 16 (1985).

53. In *Harris Trust & Savings Bank v. John Hancock*, 1997 WL 2778116 (S.D.N.Y. May 23, 1997), Judge Chin stated "It is the law of this Circuit that laches may not be asserted as a defense if the applicable statute of limitations has not run … . I can see no reason not to apply that rule to ERISA cases," *quoted in Wagner v. Metropolitan Life Ins. Co.,* 2011 WL 2638143 (S.D.N.Y. 2011). *See also Connors v. Hi-Heat Coal Co., Inc.,* 772 F. Supp. 1, n.1 (D.D.C. 1991) (declining to permit the defense of laches in an ERISA action because there is an applicable statute of limitations); *Combs v. W Coal Corp.,* 611 F. Supp. 917, 920 (D.D.C. 1985) (same), *quoted in Holland v. Valley Services*, (D.D.C. May 7, 2009); *Preite v. Charles of the Ritz Group, Ltd. Pension Plan,* 2006 WL 2691534 (M.D. Fla. 2006); *Solis v. Couturier*, 2009 WL 2022343, n.2 (E.D. Cal. 2009) (no laches defense available as a matter of law in an ERISA action), *Yoon v. Fordham University Faculty and Administrative Ret. Plan*, 2005 WL 3019500 (S.D.N.Y. 2004); *Western & Southern Life Ins. Co. v. Wall*, 903 F. Supp. 115 (E.D. Mich. 1995); *Ashley v. Boyles Famous Corned Beef Co.,* 66 F.3d 164, 169 (8th Cir. 1995) *cited in Maki v. Allete, Inc.,* 2003 WL 21980481 (D. Minn. 2003); *Wagner v. Metropolitan Life Ins. Co.,* 2011 WL 2623390 (S.D.N.Y. 2011); *Trustees of the Utah Carpenters and Cement Masons' Pension Trust v. Industrial Power Contractors Plant Maintenance Service, et al.,* 2011 WL 6130932, 53 E.B.C. 1459 (D. Utah 2011); *Holmes v. Pension Plan of Bethlehem Steel Corp.,* 213 F.3d 124, 134 (3rd Cir. 2000 (in the absence of fraud or concealment, laches follows the statute of limitations.), *quoted in Sturgis v. Mattel, Inc.,* 2007 WL 4225277 (D.N.J. November 29, 2007); *Central States Southeast & Southwest Areas Pension Fund v. White*, 2000 WL 690346 (N.D. Ill. 2000). *UA Local 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Nor-Cal Plumbing*, 48 F.3d 1465, fn. 3 (9th Cir. 1994); *In re Cardon Realty Corp.,* 472 B.R. 182, 1994 WL 531553 (court "doubts it may apply the equitable doctrine of laches to a MEPPA cause of action in such a manner as to nullify the express command of Congress granting a six-year statute of limitations"); *ILGWU National Retirement Fund v. Madison*, 735 F.Supp. 103 (S.D.N.Y.1990); *Trustees of the Hollow Metal Trust Fund v. FHA Firedoor Corp.*, 2013 WL 1809673 (S.D.N.Y. 2013)

54. For example, in *Peter Leteresee & Associates, Inc. v. World Institute of Scientology Enterprises,* 533 F.3d 1287, 1320 (11th Cir. 2008), the US Court of Appeals for the Eleventh Circuit, in refusing to adopt a bright-line rule that laches can never be filed within the applicable statute of limitations, indicated that while there is a strong presumption that the plaintiff's suit is timely filed if filed within the applicable statute of limitations, "laches may still be recognized as a defense in such cases, albeit only in the most extraordinary circumstances," quoted *in PBGC v. Divin,* 2010 WL 2196114 (M.D. Ga. 2010). Similarly, in *Finley v. Dun & Bradstreet Corp.,* 471 F. Supp. 2d 485 (D. N.J. 2007), the district court stated that because the claim is not barred by the applicable statute of limitations, "it would be extraordinary to find inexcusable delay that justifies the invocation of laches," *citing Mantilla v. United States*, 302 F.3d 182, 186 (3rd Cir. 2002) ("laches is presumptively inapplicable") and *United States v. One Toshiba*, 213 F.3d 147, 158 (3rd Cir. 2000) ("laches would generally be unavailable"). In the Sixth Circuit, "there is a strong presumption that where the statute of limitations has not elapsed, the equitable doctrine of laches should not bar the claim." *Chirco v. Crossroad Communications, Inc.,* 474 F.3d 227, 231 (6th Cir. 2007), cited in *Trustees of the Michigan BAC Health Fund*, 2008 WL 1820879 (E.D. Mich. 2008). *See also* in the Sixth Circuit, *Tandy Corp. v. Malone & Hyde, Inc.,* 769 F.2d 362, 366

(6th Cir. 1985) (a presumption that "in the absence of unusual circumstances, a suit will not be barred before the analogous statute has run, but will be barred after the statutory time has run," quoted in *Dotson v. Arkansas, Inc.,* 2009 WL 499149 (E.D. Mich. February 26, 2009). In the Tenth Circuit, in *United States v. Rodriquez Aguirre,* 264 F. 3d 1195, 1200 (10th Cir. 2001), the court of appeals indicated that "[w]hen a limitation on the period for bringing an action has been set by statute, laches will rarely be invoked to shorten the statutory period;" *quoted in Trustees of the Utah Carpenters and Cement Masons' Pension Fund v. Industrial Power Contractors Plant Maintenance Services, et al.,* 2011 WL 6130932, 53 E.B.C. 1459 (D. Utah 2011). In *Ikelionwu v. United States,* 150 F.3d 233, 238 (2d Cir. 1998), the US Court of Appeals for the Second Circuit stated that "when a suit is brought within the time fixed by the analogous statute, the burden is on defendant to show … circumstances exist which require the application of the doctrine of laches." and *Conopco, Inc. v. Campbell Soup Co.,* 95 F.3d 187, 191 (2d Cir. 1996) ("If the applicable statute of limitations has not expired, there is rarely an occasion to invoke the doctrine of laches," both cases quoted in *Wagner v. Metropolitan Life Ins. Co.,* 2011 WL 2638143 (S.D.N.Y. 2011)).

55. *See Martin v. Consultants and Administrators, Inc.,* 966 F.2d 1078, 1091 (7th Cir. 1992) (concluding that laches could apply in an ERISA case even if filed within the applicable statute of limitations and listing cases) discussed in *PBGC v. Divin,* 2010 WL 2196114 (M.D. Ga. 2010), but also noting that "courts are often hesitant to apply laches where plaintiff has sued within the time period expressly provided by the applicable statute." *Martin v. Consultants & Administrators, Inc.,* 966 F.2d 1078, 1090 (7th Cir. 1992), *quoted in Trustees of the Will County Local 174 Carpenters Pension Trust Fund v. FVE Assoc., Inc.,* 2001 WL 1298803 (N.D. Ill. 2001); *Bennett v. Tucker*, 827 F.2d 63, 68 (7th Cir. 1987); *Clarke v. Ford Motor Co.,* 220 F.R.D. 568 (E.D. Wisc. 2004); *Day v. Wall*, 112 F. Supp. 2d 833 (E.D. Wisc. 2000); *Moriarty v. Thompson-Kuenster Funeral Home,* 95 F. Supp. 2d 864 (N.D. Ill. 2000); *Pension Benefit Guaranty Corp. v. Divin,* 2010 WL 2196111 (M.D. Ga. 2010); *Pattern Makers Pension Trust Fund v. Production Pattern Shop, Inc.,*1998 WL 173299 (N.D. Ill. 1998).

56. 283 F.3d 877 (7th Cir. 2002).

57. Generally, a delay caused by settlement negotiations is not unreasonable. *Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990); *Stone v. Williams,* 873 F.2d 620, 625 (2d Cir. 1989); *EEOC v. Vucitech*, 842 F.2d 936, 943 (7th Cir. 1988); *Leonard v. United Airlines Corp.,* 972 F.2d 155 (7th Cir. 1992) (attempts to resolve a dispute without resorting to court do not constitute an unreasonable delay).

58. *Gorman Bros., supra,* n.56, 283 F.3d at 880.

59. *Id.* at 884. *See also Hutchinson v. Spanierman*, 190 F.3d 815, 823 (7th Cir. 1999); *Maksym v. Loesch*, 937 F.2d 1237, 1248 (7th Cir. 1991); *Martin v. Consultants & Administrators, Inc.,* 996 F.2d 1078, 1100-101 (7th Cir. 1992) (concurring opinion), discussed in *PBGC v. Divin*, 2010 WL 2196119 (M.D. Ga. 2010). Judge Posner's analysis in *Gorman* has been cited with approval by other circuit courts in other contexts. *See Chirco v. Crosswind Communities, Inc.,* 474 F.3d 227 (6th Cir. 2007) holding that laches is available as an affirmative defense in a copyright action in the Sixth Circuit.

60. *Id.* at 880. This statement represented a departure from hornbook law. *See*, for example, 5 *Williston on Contracts* § 695 at 336 (3rd Ed. 1961), *quoted in United Steelworkers of America v. Crane Company,* 605 F.2d 714 (3rd Cir. 1979): "The doctrine of laches is peculiar to courts of equity and is not grounds for an equitable injunction

of legal rights. Accordingly, it is only an equitable remedy to enforce a legal right, or an equitable right which is wholly unrecognized in court of law, which can be thus barred." For a critique of Judge Posner's decision, *see* Misty Kathryn Nall, "(In)Equity in Copyright Law: The Availability of Laches to Bar Copyright Infringement Claims," 35 *Northern Kentucky Law Rev.* 322, 343-44 (2008).

61. *Herman Miller v. Palazzetti Import & Export, Inc.,* 270 F.3d 298, 321 (6th Cir. 2001); *United States v. Rodriguez-Aguirre,* 264 F.3d 1195, 1207-08 (10th Cir. 2001); *Lyons Partnership v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001) (when Congress provides a limitations period, "a court should not apply laches to override the legislative judgment as to the appropriate time limits to apply for actions brought under a statute.") *quoted in Price v. Fox Entertainment Group, Inc.*, 2007 WL 241387 at *3 (S.D.N.Y 2007).

62. *Ivani Contracting Corp. v. City of New York,* 103 F.3d 257, 259 (2d Cir. 1997). However, language in other opinions rendered by the US Court of Appeals for the Second Circuit is not so absolute. For example, in *Ikelionwu v. United States,* 150 F.3d 233, 238 (2d Cir. 1999) ("Where a suit is brought within the limit fixed by the analogous statute, the burden is on defendant to show … circumstances exist which require the application of the doctrine of laches"); and *Conopco, Inc. v. Campbell Soup Co.,* 95 F.3d 187, 191 (2d Cir. 1996) ("If the applicable legal statute of limitations has not expired, there is rarely an occasion to invoke the doctrine of laches"), both cited in *Wagner v. Metropolitan Life Ins. Co.,* 2011 WL 2638193 (S.D.N.Y. 2011). *Cf. In Peter Letterese & Associates, Inc. v. World Institute of Scientology*, 533 F.3d 1287, 1320 (11th Cir. 2008), in which the Court, in refusing to adopt the bright line test that laches can never be involved in a copyright action filed within the applicable statute of limitations, indicated that while there would be a strong presumption that plaintiff's suit is timely filed within the applicable statute of limitations "laches may still be recognized as a defense in such cases, albeit only in the most extraordinary circumstances," cited in *PBGC v. Divin's*, 2010 WL 2196114 (N.D. Ga. 2010). In *Chirco v. Crosswind Communities, Inc.,* 474 F.3d 227 (6th Cir. 2007), the US Court of Appeals for the Sixth Circuit expressed agreement with Judge Posner's analysis ("As has the Seventh Circuit, we conclude that a flat proscription such as that invoked by the Fourth Circuit against the defense of laches in cases involving a federal statutory claim is both unwise and unnecessary").

63. *Id.* at 881. For a discussion of this issue outside the ERISA context, see Emily A. Calwell, "Can the Application of Laches Violate the Separation of Powers? A Surprising Answer from a Copyright Circuit Split," 44 *Valparaiso Law Review* 469 (Winter 2010) (hereinafter "Separation of Powers") and Vikas K. Diduania, "The Defense of Laches in Copyright Infringement Class," 75 *University of Chicago Law Review* 1227, 1239-124 (2008).

64. *Id.* at 881. Although *Gorman Bros.* dealt with a borrowed statute of limitations, Judge Posner's analysis would be equally applicable if there was an express federal statute of limitations. *See Calwell* "Separation of Powers," fn. 7.

65. Id. See also Central States Southeast & Southwest Areas Pension Fund, et al. v. The Kroger Co., (N.D. Ill. November 1, 2004). See Dan B. Dobbs, Law of Remedies § 2.4(4) at 105 (2d Ed. 1995) quoted in Dotson v. Arkema, Inc., 2009 WL 499149 (E. Mich. 2009), n. 2.

66. *Id. SeeBurghen v. Consolidated X-Ray,* 515 F. Supp. 1180 (N.D. Texas 1980) ("no significant difference between laches and estoppel in this instance"); *Bennett v. Tucker*, 827 F.2d 63, 69 (7th Cir. 1989) *quoted in Local 738 I. B. of T Ford and Allied Employees Health and Welfare Fund v. Pickle,* 709 F. Supp. 134 (N.D. Ill. 1981) (laches

is akin to an estoppel). *Cf. Moriarty v. Glueckert Funeral Home, Ltd.,* 925 F. Supp. 1389 (N.D. Ill. 1999) (laches rather than estoppel is the more appropriate equitable defense when the assertion was that the fund had failed to seek collection for several years.)

67. *Id.*

68. 2009 WL 780455 (N.D. Ill. 2009).

69. *Id., citing Gorman,* 283 F.3d at 882.

70. 2003 WL 1720023 (N.D. Ill. 2003). This action was the second federal district court case between the parties to collect unpaid pension fund contributions. The prior action produced two Seventh Circuit opinions:73 F.3d 727 (7th Cir. 1996) (*Kroger I*) and 226 F.3d 903 (7th Cir. 2000) (*Kroger II*).

71. Under the doctrine of collateral estoppel, a party cannot litigate a previously adjudicated issue in a subsequent lawsuit if the resolution of that issue was necessary to the prior judgment. *Kunzelman v. Thompson*, 799 F.2d 1172, 1176 (7th Cir. 1986). There are four elements that must be satisfied for collateral estoppel to apply: (1) the party against whom collateral estoppel is asserted must have been fully represented in the prior litigation; (2) the issue sought to be precluded must be identical to an issue raised in the prior litigation; (3) the issue must have been actually litigated and decided on the merits in the prior litigation; and (4) the resolution of that issue must have been necessary to the court's judgment." *Kraushaar v. Flanigan,* 45 F.3d 1040, 1050 (7th Cir. 1995) both quoted in *Central States Southeast and Southwest Areas Pension Fund v. Kroger*, 2003 WL 1720023 (N.D. Ill. 2003) at *4.

72. 165 F. 3d 579 (7th Cir. 1999).

73. *Id.* at 585.

74. 288 F.3d 969, 973 (7th Cir. 2002).

75. 2003 WL 1720023 (N.D. Ill. 2003) at p. 8.

76. 226 F.3d 903 (7th Cir. 2000).

77. 283 F.3d 882.

78. *Id.* at 881.

79. *Id.* at 882.

80. *Id.* at 883-884.

81. 2003 WL 1720023 (N.D. Ill. 2003) at *p. 9.

82. Del Costello v. Teamsters, 462 U.S. 151 (1983), quoted and reaffirmed in North Star Steel Co. v. Thomas, 515 U.S. 35 (1995).

83. 283 F.3d 882.

84. *Id.*

85. The elements of the defense of laches in the Second Circuit are (1) plaintiff's knowledge of defendant's conduct, (2) plaintiff's unreasonable delay in filing suit; and (3) prejudice to the defendant. *Eppendorf-Netheler-Hinz GmbH v. Enterton Co.*, 89 F.Supp. 2d 483, 485 (S.D.N.Y. 2000), *quoted in Wagner v. Metropolitan Life Ins. Co.,* 2011 WL 2638143 (S.D.N.Y. 2011). In the Third Circuit, "laches ensues when a defendant's position is so prejudiced by the length of time and inexcusable delay that it would be injustice to permit the assertion of a claim against him." *Burke v. Gateway*, 441 F.2d 946, 949 (3rd Cir. 1971), quoted in *Verizon Employee Benefits Comm. v. Adams*, 2007 WL 4150928 (W.D. Pa. November 19, 2007), n.17. In the

Seventh Circuit, for laches to apply as a bar to a claim, a defendant must demonstrate (1) an unreasonable or inexcusable delay or lack of diligence by plaintiff, and (2) prejudice resulting from that delay or lack of diligence. *Samaritan Health Center v. The Simplicity Health Care Plan*, 2007 WL 2704237 (E.D. Wisc. 2007), *citing Hot Wax, Inc. v. Turtle Wax, Inc.,* 191 F.3d 813, 820 (7th Cir. 1999) and *Winchester v. Pension Comm. of Michael Reese Health Plan, Inc. Pension Plan,* 942 F.2d 1190, 1194 (7th Cir. 1991). In the Eighth Circuit, "laches applies when a claimant unreasonably delays in asserting its claims, and thereby unduly prejudices the party against whom the claim ultimately is asserted." *Hubbard Feeds, Inc. v Animal Feed Supplement, Inc.*, 182 F.3d 598, 602 (8th Cir. 1999), *quoted in Greater St Louis Construction Laborers Welfare Fund v. Park Mark*, 2012 WL 5894983 (8th Cir. November 23, 2012). In the Eleventh Circuit, the elements of laches are (1) a delay in asserting a right or a claim, (2) the delay was not excusable, and (3) there was undue prejudice to the party against whom the claim was asserted. *Venus Lines Agency, Inc. v. CVG Intl Am, Inc.,* 234 F.3d 1225, 1230 (11th Cir. 2000), *quoted in Hoover v. Bank of America Corp.,* 286 F.Supp. 2d 1326 (M.D. Fla. 2003) n.11.

86. For example, in *Rogers v. City of San Antonio*, 392 F.3d 758,773 (5th Cir. 2004), *cert. den.* 545 US 1129 (2005), *cited in Humphrey v. The United Way of the Texas Gulf Coast*, 2010 WL 4791486 (S.D. Texas 2010). The Court indicated that the equitable defense of laches required a showing of an (1) inexcusable delay in asserting a claim and (2) undue prejudice to the party against whom the claim is asserted. In contrast, in *Johnson v. Crown Enterprises, Inc.,* 398 F.3d 339, 344 (5th Cir. 2005), *quoted in Belmonte v. Examination Management Services, Inc.,* 2010 WL1741330 (N.D. Texas 2010), the Court indicated that the doctrine of laches had three elements: (1) a delay in asserting the right or claim; (2) the delay was not excusable; and (3) there was undue prejudice to defendant. In the Third Circuit, *compare Burke v. Gateway*, 441 F.2d 946, 949 (3rd Cir. 1971), *supra*, with *University of Pittsburgh v. Champion Products Inc.,* 686 F.2d 1040 (3rd Cir. 1982), indicating that laches contains two elements: inexcusable delay in commencing a suit and resulting prejudice to the defendant resulting from the delay.

87. *Iron Workers Local No. 25 v. Future Fence Company*, 2006 WL2077639, 38 EBC 2462 (E.D. Mich. 2006); *King v. Innovation Books*, 976 F.2d 824, 832, quoted in *Veltri v. Building Services 32B-J Pension Fund*, 393 F.3d 318 (2d Cir. 2001); *Frank Briscoe Company v. The Travelers Inc. Co.*, (D. N.J. March 15, 2006) quoted in *BNA Pension & Benefits Daily*, March 31, 2006; *Samaritan Health Center v. Simplicity Health Care Plan*, 2007 WL2704237 (E.D. Wisc. 2007).

88. *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1517, quoted in *Hearn v. McKay* (S.D. Fla., July 1, 2008), Case No. 07-civ-60209 JEM, quoted in *BNA Pension & Benefits Daily*, July 8, 2008; *University of Pittsburgh v. Champion Products Inc.*, 686 F.2d 1040, 1044 (3rd Cir. 1982); *Belmonte v. Examination Management Services, Inc.* 2010 WL1741330 (N.D. Texas 2010).

89. In some instances the formulation of the laches doctrine can be determinative of the outcome. For example, in *Central States Southeast and Southwest Area Pension Fund v. David A. Janelle, Inc.*, 2002 WL1636578 (N.D. Ill. 2002), the plaintiff argued that the defendant failed to report an individual's hours and also failed to pay pension contributions for him. The plaintiff filed a collection action, which the defendant argued was, *inter alia*, barred by the laches doctrine. In response, the plaintiff argued that in order to establish laches, the defendant must show that it reasonably relied upon a plaintiff's failure to file suit and that, based upon the assumption that the plaintiff would not sue, it altered its position in a detrimental manner. In response, the district court stated that the plaintiff's characterization is "Certainly one

formulation of the laches concept, but not the only one. Another one is unreasonable delay in pressing one's right that prejudices the defendant, and that prejudice includes loss of evidence and proof of damage."

90. 365 US 265, 281, (1961), *quoted in Chao v. Chemark*, 2006 WL 3751191 (N.D. Ohio 2006). *See also Horbach v. Kaczmarek*, 288 F.3d 969, 973 (7th Cir. 2002) (laches occurs when a "plaintiff has waited for an unreasonable length of time to assert his claim and defendant has been prejudiced by the delay") *cited in Central States SE & SW Pension Fund v. Kroger,* 2008 WL 21947108 (N.D. Ill. 2003).

91. The reasonableness of the delay varies with the facts and circumstances of each case. *Burnett v. New York Central Railroad*, 380 U.S. 424 (1965), *quoted in Puccio v. LMG Aer Corporation and All-Pro Air Delivery, Inc.,* 1998 WL 887008 (E.D.N.Y. 1998). "To determine whether an inexcusable delay occurred, it is first necessary to identify the applicable statute of limitations." *Combs v. Indiana/Kentucky Regional Council of Carpenters,* Case No. 2:09-CV150-PPS (N.D. Ind. November 3, 2010), *citing Gorman Brothers*, 283 F.3d at 880. Depending upon the court's formation of the doctrine, the relationship between the two concepts can be reversed. Thus, in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2077 (2002), *quoted in Central States, Southeast & Southwest Areas Pension Fund v. Kroger*, 2003 WL 21947108 (N.D. Ill. 2003), the Supreme Court indicated that a party's unreasonable delay is shown by proof of a lack of diligence. *Central States, Southeast & Southwest Areas Pension Fund v. Melody Farms, Inc.,* 969 F.Supp. 1034 (E.D. Mich. 1997); *Papesh v. American National Can Co.*, 1997 WL 799117 (D. Md. 1997). "[I]t is the reasonableness of the delay rather than the number of years that elapsed, which is the focus of the laches inquiry." *Stone v. Williams*, 873 F.2d 620, 624 (2d Cir.), *cert. den.* 493 U.S. 957, *vacated on other grounds,* 891 F.2d 401, *cert. den.* 496 US 937 (1990). Fear of reprisal or retaliation may make a delay excusable but providing defendant with the opportunity to right a wrong does not. *Akhdary v. City of Chattanooga*, 2002 WL 32060140 (E.D. Tenn. 2002). That same district court also concluded that the inability to pay counsel fees is not a basis for delaying the commencement of legal action, although it has also been held that lack of diligence in pursuing a pension claim was mitigated by the fact that the plaintiff was unrepresented by an attorney and uninformed of his right of appeal. *Cann v. Carpenters Pension Trust for Southern California*, 662 F. Supp. 501, 510 (C.D. Cal. 1987), *quoted in Teeter v. Supplemental Pension Plan of Consolidated Rail Corp.,* 705 F. Supp. 1089 (E.D. Pa. 1989). Attempts to resolve a dispute without resorting to court do not constitute an unreasonable delay. *EEOC v. Vucitech*, 842 F.2d 936, 943 (7th Cir. 1988); *Leonard v. United Airlines Corp.,* 972 F.2d 155 (7th Cir. 1992). Courts are divided on the issue of whether government delay in pursuing a veteran's act claim should count against the plaintiff. *See Leonard v. United Airlines Corp.,* 972 F.2d 155 (7th Cir. 1992). The failure of a legally required audit does not constitute unreasonable delay, because the audit is designed to protect plan beneficiaries, not contributing employers. *Central States SE & SW Areas Pension Fund v. Heineman Distributing, Inc.,* 1994 WL 496730 (N.D. Ill. 1994).

92. *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990), quoted in *U.S. Foodservice, Inc. v. Truck Drivers & Helpers Local Union No. 335 Health and Welfare Fund, et al.*, (D. Md. June 21, 2010), Case No. 1:09-CV-266, quoted in June 23, 2010 *BNA Pension & Benefit Daily*.

93. *Wells v. US Steel and Carnegie Pension Fund*, 950 F.2d 1244, 1250 (6th Cir. 1991), quoted in *Lumenite Control Technology, Inc. v. Jarvis*, 2003 WL 1585091 (N.D. Ill. 2003). *See also Preston v. American Federation of Television and Radio Artists*, 2002 WL 1009458 (S.D.N.Y. 2002) and *Kraft Foods, Inc. Supplemental Benefit Plan v. Woods*, 1999 WL 1069247 (N.D. Ill. 1999) (no unreasonable delay because plaintiff notified defendant "as soon as the plaintiffs determined the defendants had been overpaid.")

At least in the Tenth Circuit, the plaintiff must have had full knowledge of the facts for laches to be available as a defense. *Trustees of the Wyoming Laborers Health & Welfare Plan v. Morgan and Oswood Construction Company*, 850 F.2d 613 (10th Cir. 1988); *Trustees of the Colorado Statewide Iron Workers* (*Erectors*) *Joint Apprenticeships and Training Trust Fund v. A&P Steel, Inc.*, 812 F.2d 1518 (10th Cir. 1987).

94. *Johnston v. Standard Mining Co.*, 198 U.S. 360, 370 (1893) quoted in *Preston v. American Federation of Television and Radio Artists*, 2002 WL 1009458 (S.D.N.Y. 2002). *See also Weniger v. Success Mining Co.*, 227 F. 548, 557 (8th Cir. 1915), quoted in *Greater St. Louis Construction Laborers Welfare Fund v. Park Mark*, 2012 WL 5894983 (8th Cir. November 23, 2012).

95. *Moyle v. Liberty Mutual Retirement Plan*, 2013 WL 3316898 at * 10 (S.D. Cal. July 1, 2013). *See also Trustees of the S. Cal. Bakery Drivers Sec. Fund v. Middleton,* 366 Fed Appx. 810, 813 (9th Cir. 2010) (in an ERISA case, for a laches defense the defendant must show inexcusable delay in asserting a known right, and prejudice to the defendant).

96. *Smith v. Caterpillar Co.*, 338 F.3d 730, 734 (7th Cir. 2003), quoted in *Cassidy v. The Quaker Oats Co.*, 31 E.B.C. 3042, 2003 WL 22282516 (N.D. Ill. 2003); *Central States Southeast and Southwest Areas Pension Fund v. David & Jaselle, Inc.*, 2002 WL 1636578 ("argument is not a substitute for a specific record of prejudice"). *Moyle v. Liberty Mutual Retirement Benefit Plan*, 2013 WL 3316898 at * 10 (S.D. Cal. July 1, 2013) (conclusory statement that there are missing witnesses and that witnesses' memories have lessened are not sufficient to establish evidentiary prejudice). *See also Adidas America, Inc. v. Payless Shoesource, Inc.*, 529 F.Supp. 2d 1215, 1254 (D. Ga. 2007) (general allegation that many witnesses had difficulty recalling facts is not sufficient to establish evidentiary prejudice).

97. *Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp.*, 901 F.2d 1514, 1519 (10th Cir. 1990); Stone v. Williams, 873 F.2d 620, 625 (2d Cir. 1989).

98. Trustees for Atlanta Laborers Construction Industry Health & Security Fund, 812 F.2d 512, 518 (9th Cir. 1987).

99. *See*, for example, *Acosta v. Bank of Louisiana*, 200 WL 33968102 (E.D. La. 2000) (citing as examples of prejudice "the death of needed witnesses, failing memories, or lost records"); *Samaritan Health Care v. The Simplicity Health Care Plan*, 2007 WL2704237 (E.D. Wisc. 2007); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 808 n.17 (8th Cir. 1979) *cert. den.* 446 U.S. 913 (1980) ("Prejudice to a defendant may take the form of loss of evidence and the unavailability of witnesses which diminishes the defendant's chance of success") quoted in *Turner v. Retirement Plan of Marathon Oil Company*, 659 F.Supp. 534 (N.D. Ohio 1987); *Robins Island Preservation Fund, Inc. v. Sutherland Devo Co.*, 959 F.2d 409, 424 (2d Cir. 1992) (prejudice results from a loss of evidence), *quoted in Preston v. American Federation of Television and Radio Artists,* 2002 WL 1009458 (S.D.N.Y. 2002). A district court has held that it was not reasonable for a multimillion dollar company to claim prejudice when it decided to discard six years of payroll records, solely to save space. *Trustees of Chicago Plastering Institute Pension Funds v. R.G. Construction Services, Inc.,* 2009 WL 1733036 (D.C. Ill. 2009). As noted above, the concerns addressed by a statute of limitations are similar. Statutes of limitations are designed to promote justice by preventing surprises through the "renewal of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R. R. Tell v. Railway Express Agency,* 321 U.S. 348-349 (1944), discussed in Nall, "(In) Equity in Copyright Law: the Availability of Laches to Bar Copyright Infringement Claims," 35 *Northern Kentucky Law Review* 328 (2008). *Cf. White v. Daniel,* 990 F.2d 99, 102 (4th Cir. 1990) (prejudice is demonstrated by a disadvantage on the part of a

defendant in asserting a claimed right or harm) *quoted in US Foodserve, Inc. v. Truck Drivers and Helpers Local Union No. 335 Health & Welfare Fund et al.*, (D. Md. June 21, 2010), Case No. 1:09-CV-266, *quoted in BNA Pension & Benefits Daily*, June 23, 2010. The defendant need not show that the plaintiff's delay hindered its defense of the plaintiff's claim. Prejudice can also flow from outside conditions, such as arrangements to liquidate arising during the hiatus. *Trustees & Centennial State Carpenters Pension Trust & Fund v. Centric Corp.,* 901 F.2d 1514 (10th Cir. 1990). *But see United States Fire Insurance Co. v. Asbestospray, Inc.,* 182 F.3d 201, 208 (3rd Cir. 1999) (the mere loss of what one would have otherwise kept does not establish prejudice) *quoted in In Re Mushroom Transportation Co., Inc.,* 382 F.3d 325 (3rd Cir. 2004).

100. *Winchester v. Pension Committee of Michael Reese Health Plan, Inc.*, 942 F.2d 1190, 1194 (7th Cir. 1991), quoted in *Day v. Wall*, 112 F.Supp. 2d 833 (E.D. Wisc. 2000).

101. *Trustees of the Hudson Valley District Council of Bricklayers and Allied Craftsmen Retirement Welfare & Apprenticeship Training v. WMG, Inc.*, 851 F.Supp. 133 (S.D.N.Y. 1994).

102. 95 F3d 187 (2d Cir. 1996).

103. *Id.* at 192, quoted in *Custer v. Southern, New England Telephone Co.*, 2008 WL222558 (D. Conn. January 25, 2008) and *Chattanooga Mfg., Inc. v. Nike Inc.*, 301 F.3d 789, 795 (7th Cir. 2002), quoted in *Samaritan Health Center v. The Simplicity Health Care Plan*, 2007 WL2707237 (E.D. Wisc. 2007).

104. *Chattanooga Mfg., Inc. v. Nike Inc.*, 301 F.3d 789, 795 (7th Cir. 2002), quoted in *Samaritan Health Center v. The Simplicity Health Care Plan*, 2007 WL2707237 (E.D. Wisc. 2007).

105. 705 F.Supp. 1089 (E.D. Pa. 1989).

106. 690 F.Supp. 373 (E.D. Pa. 1988).

107. 942 F.2d 1190, 1194 (7th Cir. 1991), *quoted in Gretzky v. Edelstein & Co., LLC,* 52 E.B.C. 2468 (E.D. Mass. 2011).

108. 2002 WL 1009458 (S.D.N.Y. 2002), *aff'd* 63 Fed Appx. 536, 2d Cir. 2003).

109. 2007 WL 2704237 (E.D. Wisc. September 17, 2007).

110. *Id.*

111. 659 F.Supp. 534 (N.D. Ohio 1987). *Cf. Gluck v. Unisys Corp.,* 960 F.2d 1168 (3rd Cir. 1992) (laches might preclude an action involving a claim for an ERISA violation affecting the retirement benefit of a 20-year-old participant that might accrue 45 years later).

112. *Katzenberg v. Lazzari*, 2010 WL 680985 (E.D.N.Y. 2010).

113. *Trustees of the Utah Carpenters and Cement Masons Pension Trust v. Industrial Power Contractors Plant Maintenance Service, et al.*, 2011 WL 6130932, 53 E.B.C. 1959 (D. Utah 2011).

114. Case # 2:09-CV-150 PPS (N.D. Ind. November 3, 2010).

115. 2010 WL 4791486 (S.D. Texas 2010).

116. *Id.* at *24.

117. 57 F.3d 1077 (9th Cir. 1995).

118. Case #01-C-2680 (N.D. Ill. October 28, 2004) reported in *BNA Pension & Benefits Daily*, November 5, 2004.

119. *Id*. The Court cited *Brown-Graves Co. v. Central States Southeast & Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000) ("there was no resulting prejudice to Brown-Graves. Brown-Graves states that if it had been notified of Central States' claim sooner it would have taken steps to avoid being sued for the delinquent contributions. However, the only steps Brown-Graves could have taken would have been to make the contributions. Consequently, the laches defense fails.").

120. *Id*.

121. 47 A.D.3d 897, 899 (2d Dept. New York 2008).

122. 1986 WL 7074 (N.D. Ill. 1986). On the other hand, laches did not apply when an employee waited 13 years from when he could have enrolled in a plan to make a claim when the employer failed to enroll him in a plan. Under the terms of the plan, the employee should have been enrolled automatically even though he or she did not ask to participate. Since the employer did not comply, in the court's view the employee did not know that he had a claim. *Healy v. Axelrod Construction Co. Defined Benefit Pension Plan,* 1993 U.S. Dist. LEXIS 13886 (D. Ill. 1993).

123. 788 F.2d 1021 (4th Cir. 1986).

124. 1992 WL 200075 (D.D.C. 1992).

125. *Central States SE & SW Areas Pension Fund v. Kroger*, 2008 WL 21947108 (N.D. Ill. 2003); *Trustees of the Will County Local 174 Carpenters Pension Trust Fund v. FVE Associates, Inc*., 2001 WL 1298803 (N.D. Ill. 2001) ("The law is unclear as to whether laches can be applied in ERISA actions, with different courts reaching different conclusions, although that applying the doctrine to ERISA causes of action would be 'an overextension of the principles of laches.'"). *In re Iron Workers Local 25 Pension Fund v. Klassic Services, Inc*., 913 F.Supp. 541 (E.D. Mich. 1996) ("plaintiffs do not put forward conclusive authority to support the position that defendants may not raise equitable defenses" to a collection action); *Iron Workers Local 25 Pension Fund v. Future Fence Company*, 2006 WL 2077639, 38 E.B.C. 2462 (E.D. Mich. 2006) (not clear whether the Sixth Circuit would recognize laches as an available defense in an action brought against an employer by the trustees of a fringe benefit fund seeking delinquent contributions"); *Iron Workers Local 25 Pension Fund v. Allied Fence & Sec. Systems, Inc*., 922 F.Supp. 683 (E.D. Mich. 1996); *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 763 (9th Cir. 1981) (questioning the applicability of the laches defense in an ERISA collection action, but finding insufficient evidence to support it), quoted in *District Council 16 Northern California Health and Welfare Trust Fund v. Alvarado*, 2011 WL 1361572 (N.D. Cal. 2011) and *Oregon Laborers Employers Trust Fund v. Pacific Fence and Wire Company*, 726 F.Supp. 786 (D. Ore. 1989); *Pattern Makers Pension Trust Fund v. Production Pattern Shop, Inc*., 1998 WL 173299 (N.D. Ill. 1998) (after concluding that laches defense not barred because the applicable statute of limitations had not run, stating that "a much closer question is whether a laches defense can be raised at all in an ERISA collection case"); *Moriarty v. Glueckert Funeral Homes Ltd*., 925 F.Supp. 1389 (N.D. Ill. 1996) ("neither party has sufficiently addressed the applicability of [laches and estoppels] defenses to a fund's collection action against an employer."); *Trustees of the New Mexico Pipe Trades Health & Welfare Trust Fund*, Civ. No. 11-1065 BB-WDS (D. N. Mex. 2012) ("The Tenth Circuit has not … categorically stated that the defense of laches and estoppel are unavailable in a Section 515 collection action"); *Operating Engineers Local 324 Health Care Plan, et al. v. G&W Construction Company, et al.* (E.D. Mich. December 22, 2011) (plaintiffs do not cite conclusive authority that the equitable defense of estoppels, laches, and waiver are not available in an ERISA collection action); *Operating Engineer Local 324 Health Care Plan v. Mid Michigan Crushing & Recycling LLC*, 2011 WL 1464851

(E.D. Mich. April 18, 2011). Cf. *Trustees of the Michigan Laborers Health Care Fund v. Gibbons*, 209 F.3d 587, 591 (6th Cir. 1999) (unnecessary to decide whether or not equitable estoppel should be available as a defense in an action to recover delinquent contributions because the defendant could not establish the elements of estoppel defense.)

126. ERISA § 4301(b).

127. *Orrand v. Keim Concrete Pumping, Inc.,* 2010 WL 3447647 (S.D. Ohio Aug. 30, 2010); *Operating Engineers Pension Trust v. O'Dell,* 682 F.Supp. 1506, 1516 (D. Nev. 1988) ("it is well established that these particular defenses are unavailable under LMRA [Labor Management Relations Act] and ERISA to collect delinquent contributions"); *Central State Southeast and Southwest Areas Pension Fund v. Blue Ridge Trucking,* 1993 WL 303128 (granting summary judgment to the plaintiff because laches is not a defense to a collection action under Section 515); *Southwest Administrator's Inc. v. Rozay Transfer,* 791 F.2d 769 (9th Cir. 1986); *Southern California Retail Clerks Union v. Bjorklund*, 728 F.2d 1262 (9th Cir. 1984). A number of courts have held that if an action to collect withdrawal liability is filed within the six-year withdrawal period under ERISA Sec. 1301(f), laches will not preclude the action. *See*, for example, *I.A.M. National Pension Fund v. Cullman Industries, Inc.,* 640 F.Supp. 1284 (D.D.C.1986); *Combs v. Western Coal Corp.,* 611 F.Supp. 917 (D.D.C.1985); *Stormer v. Charles Café Exceptionale, Inc.,* 1988 WL 236418 (D. Miss. 1988); *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 579 (2d Cir.1988); *Robbins v. Pepsi Cola Metropolitan Bottling Co.,* 636 F.Supp. 641, 681 n6 (N.D. Ill. 1986), *aff'd* 800 F.2d 641 (7th Cir. 1986) (per curiam); *Connors v. Petitte Bros. Mining Co., Inc.,* 1988 WL 23245 (D.D. C. 1988).

128. *Iron Workers Local 25 Pension fund v. Klassic Services, Inc*., 913 F.Supp. 541, 545-46 (E.D. Mich. 1996); *Oregon Laborers-Employee Trust Funds v. Pacific Fence & Wire Co*., 726 F.Supp. 786, 788-89 (D. Ore. 1999); *Fanning v. SM Lorusso & Sons, Inc*., 2004 WL 187230, n.1 (D. Mass. 2004); *Central Pennsylvania Teamsters Pension Fund v. McCormick*, 85 F.3d 1098, 1103 (3d Cir.1996); *Trustees for Michigan BAC Healthcare Fund v. C.S.S. Contracting Co*., 2008 WL 1820879 (E.D. Mich. 2008) (equitable estoppel, laches, and waiver); *Bricklayers' Pension Trust Fund Metropolitan Area v. Chirco*, 675 F.Supp 1083 (E.D. Mich. 1980); *Brown-Graves Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000) (considering laches in a case brought by an employer seeking a declaration of judgment that it was not required to make contributions to a trust fund); *Trustees Of Wyoming Laborers Health And Welfare Plan v. Morgen & Oswood Construction Co*., 850 F.2d 613, 624 (10th Cir. 1988) and *Trustees of Colorado Statewide Iron Workers Joint Apprenticeship* and *Training Trust Fund v. A&P Steel, Inc*., 812 F2d 1518, 1528 (10th Cir. 1987) (both considering a laches defense to a claim under ERISA for delinquent contributions) cited in *Teamsters and Employers Welfare Trust of Illinois v. Gorman Brothers Ready Mix*, 139 F.Supp.2d 976 (C.D.Ill.2001) aff'd 283 F3d 877 (7th Cir. 2002); *Bd of Trustees of the Plumbers Local Union No. 93 UA v. Boston Plumbing, Inc*., (N.D. Ill August 27, 2012) (laches permitted as a defense but not shown in a delinquent contribution action). A number of courts have held that the defense of laches is available in a suit to collect a claim for withdrawal liability. *Trustees of the Centennial State Carpenters Pension Trust Fund v. Centric Corp*., 901 F.2d 1514, 1519 (10th Cir. 1990); *Central States Pension Fund v. Lloyd L. Sztanzo Trust*, 693 F.Supp. 531, 538 (E.D. Mich. 1988); *Jaspan v. Certified Indus., Inc*., 645 F.Supp. 998, 1007 (E.D.N.Y.1985) (laches available whether or not the amount assessed has become due and owing).

129. Fraud in the execution arises when a party executes an agreement "with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms," *Iron Workers Local No. 25 Pension Fund v. Allied Fence and*

Security Systems, 922 F.Supp. 1250, 1257 (E.D. Mich. 1996), *quoted in Michigan Gage Specialties, Inc. v. International Association of Machinists and Aerospace Workers Local Lodge PM2843 Defined Benefit Pension Fund* (E.D. Mich., August 5, 2004). *See also,Operating Engineers Local 324 Health Care Plan v. G&W Construction Company* (E.D. Mich., December 22, 2011).

130. *Agathos v. Starlite Motel*, 977 F.2d 1500 (3rd Cir. 1992); *Iron Workers Local No. 25 Pension Fund v. Future Fence Company*, 2006 WL 2077639 (E.D. Mich., July 24, 2006), quoting *Iron Workers Local No. 25 Pension Fund v. Allied Motors and Security System, Inc.*, 922 F.Supp. 1250, 1256 (E.D. Mich. 1996); *Operating Engineers Local 324 Health Care Plan, et al. v. G&W Construction Company* (E.D. Mich., December 22, 2011); *Michigan Gage Specialties v. International Association of Machinists and Aerospace Workers Local lodge PM2843 Defined Benefit Pension Fund* (E.D. Mich., 2004). *See also Trustees of Colorado Tile Marble & Terrazzo Workers Pension Fund v. Wilkinson & Co., Inc.*, 1998 WL 43172 at *4 (10th Cir. 1998) (stating that circuits generally recognize only two defenses to a collection action: "the pension contributions themselves are illegal or the collective bargaining agreement is void and not merely voidable."), cited in *Trustees of the New Mexico Pipe Trades Health & Welfare Trust Fund v. Mares Plumbing & Mechanical, Inc.*, Civ. No. 11-1065 BB-WDS (D. New Mex. 2011).

131. *Laborers Pension Trust Fund Detroit & Vicinity v. Rockwell Co.*, 357 F.Appx. 638, 640 (6th Cir. 2009), cited in *Orrand v. Keim Concrete Pumping, Inc.*, 2010 WL 3447647 (S.D. Ohio 2010). *See also Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Services, Inc.*, 870 F.2d 1148, 1149, n.1 (7th Cir. 1989) (en banc) (noting the unanimous view of the Third, Sixth, Ninth, Tenth, Eleventh and DC Circuits that the trustees of a multiemployer plan are "entitled to enforce the writing [of a collective bargaining agreement] without regard to understanding or defenses applicable to the original parties."

132. *Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1153 (7th Cir. 1989). *See also Trustees of the New Mexico Pipe Trades Health & Welfare Trust Fund v. Mares Plumbing & Mechanical, Inc.*, Civ. No. 11-1065 BB- WDS (D. New Mex. 2011) (laches unavailable in a collection action because it involved the conduct of a union and its representatives, not the conduct of the trustees.).

133. 128 F.R.D. 96 (N.D. Ill. 1989).

134. *Id.*, n.2, cited in *Massachusetts Laborers Health & Welfare Fund v. Explosive Engineering*, 136 F.R.D. 24, 13 EBC 1987, 1991 WL 42391 (D. Mass. 1991); *William v. Salt City Painting, Inc.*, 1992 WL 265944 (N.D.N.Y. 1992).

135. 522 US 192 (1997).

136. Courts have been liberal in interpreting the phrase "as soon as practicable" in this context. *See Michigan Gage Specialties, Inc. v. International Assn of Machinists and Aerospace Workers Local Lodge PM2843 Defined Benefit Pension Fund,* 02-72335 and 02-72336 (E.D. Mich., August 15, 2004) ("there is a substantial body of case law which holds that given Congress' clear intent to help plans collect withdrawal liability, even a period of years can be as soon as practicable.") *See, e.g., Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Canny*, 900 F.Supp. 583 (N.D.N.Y. 1995) (a six-year delay does not violate the "as soon as practicable" requirement under MEPPA.). *Brentwood Financial Corp. v. Western Conf. of Teamsters Pension Fund*, 902 F.2d 1456 (9th Cir. 1990); *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 896 F.2d 874 (2d Cir. 1988); *Lundington News Co. v. Michigan/UFCW/Employers Pension Fund*, 9 EBC 1413 (Arb. 1987). In Levy Bros. Frocks, *supra*, the US Court of Appeals for the Second Circuit stated that the notice

of withdrawal liability "was commenced well within the six-year statute of limitations under 29 USC § 1451(f), and in light of the complexity of the tasks imposed on the Fund under the Statute and Congress' clear intention to help the Plans collect withdrawal liability, one cannot say that the appellant's delay was so unreasonable as to support a defense of laches." *Building Services Employees Pension Trust v. Ogden Allied Services Corp.* (1988 Arb.) (10 EBC 1401); *Korman Corp. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity* (1988 Arb.); *Western Conference of Teamsters Pension Fund v. Transco Corp.*, 902 F.2d 1456 (9th Cir. 1990) (a two-year delay in providing notice insufficient to allow a laches defense under 29 USC § 1399); *IAM National Pension Fund v. Cullman*, 640 F.Supp. 1284 (D.D.C. 1986) (10-month delay in notification insufficient to allow a laches defense); *Combs v. Western Coal Corp.*, 611 F.Supp. 917, 920 (D.D.C. 1985) (one-year delay in notification not unreasonable). But *see Teamster Pension Trust Fund v. Custom Cartage*, 1991 WL 160966 (E.D. Pa. 1991) (a 5 year delay in providing notice is not "as soon as practicable" and action is barred by laches).

137. 522 US at 205. This statement was actually *dicta*. The holding in the case was that the six-year statute of limitations applicable to a cause of action for unpaid withdrawal liability runs from the employer's failure to make a scheduled payment, and that a separate cause of action arose from each missed payment with its own six-year statute of limitations. *Id.* at 202, 204.

138. *Pace Industry Union Management Pension Fund v. Troy Rubber Engraving Company*, 805 F.Supp 2d 451 (N.D. Tenn. 2011).

139. 670 F.Supp 2d 214, 229 (S.D.N.Y. 2009). *See also Chicago Truck Drivers, Helpers & Warehouse Workers Pension Fund v. Gateco,* 1993 WL 210539 (N.D. Ill. 1993) (the issue of whether notice was timely could have been raised in arbitration, and this was waived if not raised), *citing Vaughn v. Sexton*, 975 F.2d 498, 502 (8th Cir. 1992), *cert. den.* 507 US 915 (1993); *Central States Southeast and Southwest Areas Pension Fund v. XTL Transport, Inc.,* 1996 WL 296649 (N.D. Ill. 1996); *Operating Engineers Pension Trust Fund v. Clark's Welding & Machine,* 2010 WL 1729475 (N.D. Cal. 2010) and 688 F.Supp. 902 (N.D. Cal. 2010); *Giroux Bros. Transportation, Inc. v. Trucking Industry Pension Fund,* 73 F.3d 1, 3-4 (1st Cir. 1996); *Central States, Southeast and Southwest Areas Pension Fund v. Mars Leasing Co.,* 2003 WL 21995192 (N.D. Ill. Aug. 18, 2003); *Central States, Southeast and Southwest Areas Pension Fund v. MGS Transportation, Inc.,* 611 F.Supp. 54 (N.D. Ill. 1987); *ILGWU National Retirement Fund v. Smart Modes of California, Inc.,* 735 F.Supp 103, 16-07 (S.D.N.Y. 1990); *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 119, 1127 (D.C. Cir. 1989), *cert. den.* 493 US 918 (1989); *ILGWU v. Madison 7*, 735 F.Supp 103 (S.D.N.Y. 1990); *Central States, Southeast and Southwest Areas Pension Fund v. XTL Transport, Inc.,* 1996 WL 296649 (N.D. Ill. 1996). *Cf. In Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Canny,* 900 F.Supp. 583 (N.D.N.Y. 1999), the district court stated that the defendants could arguably raise a laches defense because notice under Section 1399(b) was not provided as soon as practicable, even though the issue was not raised in arbitration. The district court concluded, however, that if laches had been raised it would not have been successful.

140. *In re Centric Corp.,* 901 F.2d 1514, 1516-19 (10th Cir. 1998) ("Laches in the prosecution of an action to collect the amount assessed against it is not a defense that goes to the merits of the liability assessment itself, for it goes to the effect of a delay in bringing suit, not to the merits of the claim."). *See also Trustees of Colorado Pipe Industry Pension Trust v. Howard Electric & Mechanical, Inc.,* 909 F.2d 1379, 1385-86 (10th Cir. 1990) ("because a failure to arbitrate does not waive a defense that the employer does not yet have, an employer who fails to arbitrate may still assert a laches defense in a subsequent withdrawal action."), *quoted in Trustees of the Utah Carpenters and Cement Masons Pension Trust v. Industrial Power Contractors*

Plant Maintenance Services, et al., 2011 WL 6130932, 53 EBC 1459 (D. Utah 2011); *Central States, Southeast and Southwest Areas Pension Fund v. Melody Farms, Inc.,* 969 F.Supp. 1034 (E.D. Mich. 1997); *Central States, Southeast and Southwest Areas Pension Fund v. XTL Transport,* 1996 WL 296649 (N.D. Ill. 1996). The availability of the laches defense does not mean that it will be easy to satisfy. *See, e.g. In Re Asbestos Workers Local 53 Pension Fund,* 21 EBC 1075, 1077 (1977) (rejecting laches despite a 12-year lapse between withdrawal and the first assessment of liability).

141. 1986 WL 9158 (D. Minn. 1986).

142. ERISA § 4204(a)(1(B) (purchaser must provide to the plan for a period of 5 years a bond or place a prescribed amount in escrow which bond or escrow is paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan, at any time during the first 5 plan years beginning after the sale); ERISA § 4204(a)(1)(c) (if purchaser withdraws or there is a partial withdrawal during such first five years, seller is secondarily liable); ERISA § 4204(a)(3)(A) (if substantially all of seller's assets are distributed or if seller is liquidated during the five years after the sale, seller must provide a bond or place a prescribed amount in escrow).

143. No. 12-1023 (1st Cir. 2013)

144. USERRA, 38 USC § 4301-4334, is the acronym for the Uniformed Services Employment and Reemployment Rights Act of 1994.

145. USERRA requires, in pertinent part, that a service member who served in the uniformed services for more than 90 days be promptly reemployed "in the position of employment in which [he] would have been employed if [his] continuous employment had not been interrupted by such service, or a position of like seniority, status and pay." As the Supreme Court explained in *Fishgold v. Sullivan Drydock and Repair Corp.*, a returning service member "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." 328 U.S. 275, 284–285 (1946). Congress explicitly referred to this escalator principle in enacting USERRA. (U.S. Rep. No. 158, 103rd Congress, 1st session (1993) and H.R. Rep. No. 65, Part 1, 103rd Congress, 1st session (1993)), and the DOL incorporated the principle in the final USERRA regulations. DOL Reg. § 20C.F.R. § 1002.191–197.

146. 38 U.S.C. § 4327(b) ("If any person seeks to file a complaint or claim with the Secretary, the Merit System Protection Board or a Federal or State court under this Chapter alleging a violation of this Chapter, there shall be no limit on the period for filing this complaint or claim.") Even prior to the 2008 amendment, there was clear authority for the proposition that "the doctrine of laches is the only doctrine used to prevent stale claims under the VRRA and USERRRA." *Akydary v. City of Chattanooga,* 2002 WL 32060140 (E.D. Tenn. 2002); *O'Neill v Putnam Retail Mgmt,* 407 F. Supp. 2d 310 (D. Mass. 2005); *Miller v. City of Indianapolis*, 281 F3d 648, 653 (7th Cir. 2002); *Garner v. Yellow Freight Systems, Inc.,* 19 Fed. Appx. 834, 836 (10th Cir. 2001); *Stevens v. TVA,* 712 F2d 1047, 1054 (6th Cir. 1983); *Leonard v. United Airlines,* 972 F2d 155 (7th Cir. 1992). In the legislative history of USERRA, "however, Congress advised that laches should be used sparingly." *See* H.R. Ref. No. 103-65 (l) at 39 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2472, *quoted in Akydary v. City of Chattanooga,* 2002 WL 32060140 (E.D. Tenn. 2002).

147. DOL Reg. § 20 C.F.R. § 1002.311 ("[I]f an individual unreasonably delays asserting his or her rights and that unreasonable delay causes prejudice to the employer, the courts have recognized the availability of the equitable doctrine of laches to bar a claim under USERRA"). *See also Rogers v. City of San Antonio*, 392 F3d 758, 773 (5th Cir. 2004), *cert. den.* 545 U.S. 1129 (2005) (stating, in a USERRA case, that "[i]n

order to invoke the doctrine of laches, [defendant] must show an inexcusable delay in asserting a right and undue prejudice … as a result of that delay").

148. March 19, 2013, letter from DOL to Margaret Carter, Clerk of the Court, US Court of Appeals for the First Circuit.

149. 310 U.S. 414 (1940). *See also SEC v Gulf & Western,* 502 F. Supp. 343, 348 (D.D.C. 1980).

150. 310 U.S. at 416, *cited in In re Beacon Associates Litigation*, Case No. 1:10-cv-08000-LBS-AJP (S.D.N.Y. August 11, 2011) quoted in August 17, 2011 *BNA Pension & Benefits Daily. See also United States Can Co. v. NLRB*, 254 F.3d 626 (7th Cir. 2001) ("equitable principles such as laches play little if any role in the federal government's litigation"); *Michota v. Anheuser Busch*, 29 F3d 863, Fn. 7 (3rd Cir. 1994) (while government is not subject to the defense of laches, that principle does not apply to an action to dismiss under FRCP 41(b)); *Donovan v. Cody*, 5 EBC at 1774(E.D. N.Y. 1984) quoted in *Reich v. Valley National Bank of Arizona*, 837 F. Supp 1259 (S.D.N.Y. 1993) (laches not available as a defense against the United States when statute of limitations is complied with). The Senate Report on RICO (p. 160) commented that "It should be noted that there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, nor is the doctrine of laches applicable," quoted in *United States v. The Bonanno Organized Crime Family of La Cosa Nostra,* 683 F. Supp. 1411 (E.D.N.Y. 1988). *Cf Reich v. Sea Sprite Boat Co.,* 50 F3d 415 (7th Cir. 1995) (reserving the question of whether laches applied to an action brought by the federal government). This proposition is long standing. Thus, in 1879, in *United States v Thompson*, 98 U.S. 486, 489 (1879) the Supreme Court explained that "It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants," quoted in *Martin v Consultants & Administrators, Inc.,* 966 F2d 1078 (7th Cir. 1992). *But see Martin v Consultants & Administrators, Inc.,* 966 F2d 1078, 1091 (7th Cir. 1992), *cited in Pattern Makers Pension Trust Fund v. Production Pattern Shop, Inc.,* 1998 WL 173299 (N.D. Ill. 1998) and *Donovan v. Dorfman*, 99 F.R.D. 593 (N.D. Ill. 1983), in which the district court noted that there was substantial authority that estoppel could be raised against the government, and that there may be a "similar development or evolution of the rule with respect to laches," citing *United States v. Ruby Co.,* 588 F2d 697, 705, n.10 (9th Cir.), *cert. den*. 442 U.S. 917 (1978), although to date (September 30, 2013) none have been successful. *See also* GCM 38082 (IRS was concerned that the court would focus on IRS laches in failing to question items that should have been unrelated business taxable income when such taxes were filed).

151. *See* for example, *Dole v. Guido*, 13 EBC 2148, 1991 WL 35843 at *5 (S.D.N.Y. March 14, 1991); *Solis v. Brewster,* 2012 WL 776028 (S.D. Miss. 2012), *citing United States v. Arrow Transportation Company*, 658 F. 2d 392,394 (5th Cir. 1981); *First Bank Systems, Inc. v. Martin,* 782 F. Supp 425, 426–427 (D. Minn. 1991); *Chao v. Chermak*, 2006 WL 3751191, 40 EBC 1057 (N.D. Ohio 2006); *Herman v. South Carolina National Bank,* 140 F3d 1412, 1427 (11th Cir. 1996), *quoted in Solis v. Zenith Capital, LLC,* 2009 WL 4324051 (N.D. Cal. 2009); *Donovan v. Schmoutey*, 592 F. Supp 1361 (D. Nev. 1984); *See also SEC v. Rosenfeld,* 1997 WL 4000131 at *1(S.D.N.Y. July 16, 1997), *quoting SEC v. Elec Warehouse Inc.,* 689 F Supp 53-73 (D. Conn. 1988) (the defenses of laches and unclean hands, if available at all against the government, require that the "misconduct is egregious and the resulting prejudice to the defendant rises to the constitutional level.")

152. 837 F.Supp. 1259 (S.D.N.Y. 1993).

153. *Id*., *quoting Donovan v. Cody*, 5 EBC 1773, 1774 (E.D.N.Y. 1984). *See also Martin v. Nationsbank of Georgia, N.A.,* 16 EBC 2138 (N.D. Ga. 1993) ("As a general rule, the

defense of laches is unavailable against the United States since it serves to vindicate public, as well as private, interests."). *Martin v. Carr*, 16 EBC 1752, 1993 WL 172885 (W.D. Pa. 1993); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) (en banc) (Congress's intent in enacting ERISA was to "safeguard the national interest in the private pension fund system."), *followed in First Bank System, Inc. v. Martin*, 782 F.Supp. 425 (D. Minn. 1991).

154. *Leeson v. Transamerica Disability Income Plan*, 2010 WL 1141445 (W.D. Wash. 2010).

155. *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Headley's Express and Storage Company*, 1993 WL 189933 (E.D. Pa. 1993).

156. *In re Worldcom, Inc.,* 2006 WL 3782712 (S.D.N.Y. 2006) n.3 ("The elements of laches defenses, at least to the extent relevant in this instant, mostly are universal.").

157. 283 F3d 877 (7th Cir. 2002). *See, e.g., Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190 (6th Cir. 1992) (applying Ohio law); and *Johnson v. Mutual Life Assurance Co. of America,* 942 F.2d 1260 (8th Cir. 1991) (applying Missouri law).

158. *Id.* However, adoption of a state limitations period does not supplant the Federal Rules of Civil Procedure governing the proceeding by which affirmative defenses such as laches are raised. *Papesh v. American National Can Co.,* 1977 WL 790, 117 (D. Md. 1997).

159. 490 U.S. 536 (1989)

160. 2007 WL 2704237 (E.D. Wisc. 2007), *citing Hot Wax, Inc. v. Turtle Wax, Inc.,* 191 F3d 813, 821 (7th Cir. 1999), and *Chattanooga Mfg. Inc. v Nike, Inc.,* 304 F3d 789, 793 (7th Cir. 2002).

161. *Holmes v. Pension Plan of Bethlehem Steel Corp.,* 213 F3d 124 (3rd Cir. 2000) (applying Pennsylvania law of laches to a request for interest on delayed payment); *Combs v. Indiana Kentucky Regional Council of Carpenters* (N.D. Ind. November 3, 2010), case #2:09-cv-150-185 (applying Indiana laches). In *Crosky v. Ford Motor Company-UAW* (S.D.N.Y. 2002) reported in May 24, 2002, *BNA Pension & Benefits Daily*, the district court applied the Michigan law of laches. The issue was the validity of a subsequent marriage under Michigan law with the second wife claiming that the first wife's challenge was barred by laches; *Southern Electrical Retirement Fund v. George Arp Electrical Corp.,* 635 F.Supp. 139 (E.D. Tenn. 1986), (in a collection action under ERISA Section 515, the district court looked to the Tennessee law of laches); *Wells v. United States Steel & Carnegie Pension Fund Inc.,* 950 F2d 1244 (6th Cir. 1991) (applying, without discussion, Kentucky laches principles).

162. 406 U.S. 987, 491–492 (1972).

163. *Faiola v. The Youngstown Steel Door Co.*, 1989 WL 107604 (N.D. Ohio 1988); *Jones Day Farm v. Local No. 1-1236, United Food and Farm Workers International Union*, 760 F2d 173, 175 (7th Cir.), cert. den. 474 US 845 (1985).

164. *Mangan v. Owens Truckmen, Inc.,* 715 F. Supp. 436 (E.D.N.Y. 1989); *see also Application of Metropolitan Jewish Center,* 1987 WL 13241 (E.D.N.Y. 1987) (arbitrator must decide if arbitration is barred by waiver or laches.).