Till Death Do Us Part

# The Probate Exception to Federal Jurisdiction

By Patrick W. Begos
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**Understanding the exception's history and the split among the circuits about whether it applies in cases for which federal question jurisdiction exists can help you explain to a judge why it should not apply to ERISA claims.**

The "probate exception" to federal jurisdiction is a little-known, poorly understood, and inconsistently applied doctrine that can force plan fiduciaries into state court when they seek to enforce equitable liens against deceased participants or beneficiaries. Understanding what the exception is, and when it applies, will help you spot potential problems before they arise.

Federal courts are courts of limited jurisdiction, possessing "only that power authorized by the Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). One such statute is 29 U.S.C. §1132(e)(1), which provides federal courts with "exclusive jurisdiction of civil actions… brought by a fiduciary" to enjoin any act that violates ERISA or the terms of an ERISA-regulated plan, or to obtain other appropriate equitable relief to redress such violations or enforce ERISA or the plan's terms.

An ERISA-governed health benefit plan typically requires beneficiaries to reimburse the plan for health care costs paid by the plan in the event that a beneficiary obtains a third-party recovery. When a beneficiary resists repayment, a plan will often sue in a federal court, invoking ERISA's civil remedy to impose and to enforce an equitable lien over the beneficiary's recovered funds. However, a recent decision highlights one obstacle that has been lurking out there since before ERISA existed. The probate exception to federal jurisdiction may limit plan fiduciaries' flexibility in enforcing subrogation rights against the estates of deceased beneficiaries.

## The Probate Exception

The probate exception has been described by Judge Richard A. Posner as "one of the most mysterious and esoteric branches of the law of federal jurisdiction." *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982). Supreme Court Justice Ruth Bader Ginsberg has similarly opined that its "longstanding limitation[ ] on federal jurisdiction" has been clouded "in large

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measure from misty understandings of English legal history." *Marshall v. Marshall*, 547 U.S. 293, 299 (2006).

The ultimate source of the probate exception is eighteenth century England, and specifically, the notion that the equity jurisdiction of the English Court of Chancery at Westminster in the 1780s did not extend to probate matters. *Marshall*, 547 U.S. at 308; *Markham v. Allen*, 326 U.S. 490, 494 (1946). Rather, "probate of wills and the administration of estates were left to England's ecclesiastical courts[.]" *In re Boisseau*, 2017 U.S. Dist. Lexis 11964, at *5 (N.D.N.Y. Jan. 30, 2017).

Though there has been academic debate about the precise scope of English Chancery Court jurisdiction in the 1780s, the greater source of murkiness is "made in the USA." In particular, there have been two versions of precisely how that limitation became effective in the United States, and the choice of creation stories affects the scope of the exception.

One school of thought is that the exception is found in Article III of the Constitution. Specifically, by limiting the power of the United States Judicial Branch to "cases and controversies," Article III confined the jurisdiction of the federal courts to "matters that were the traditional concern of the courts at Westminster." *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). Thus, because probate administration was handled by England's ecclesiastical courts rather than by the royal courts at Westminster, it fell beyond the scope of the judicial authority contemplated by Article III. *Id*.; *see also Lloyd v. Loeffler,* 694 F.2d 489, 491 (7th Cir.1982); *Csibi v. Fustos*, 670 F.2d 134, 136 (9th Cir. 1982); 13B Charles Alan Wright, Arthur E. Miller, Edward H. Cooper, *Federal Practice and, Procedure* §3609, p. 460 (2d ed. 2006).

The other school of thought is that the probate exception is statutory because the "original diversity jurisdiction statute, the Judiciary Act of 1789, was read to grant federal courts jurisdiction over those suits that would have been within the jurisdiction of" the courts at Westminster. *In re Boisseau*, 2017 U.S. Dist. Lexis 11964, at *5 (citations omitted). Similar to the exception's constitutional origin theory, because the Westminster courts did not admit wills to probate or appoint estate fiduciaries, "issues of probate fell outside the jurisdiction of those courts[.]" *Id*. at *6.

This latter reading of early American legal history was adopted by the Supreme Court in *Markham* v. *Allen*, 326 U.S. 490, 494 (1946), in which the Supreme Court declared that "the equity jurisdiction conferred by the Judiciary Act of 1789…, which is that of the English Court of Chancery in 1789, did not extend to probate matters." However, *Markham*'s limitation on federal jurisdiction was qualified, if not eliminated, by additional commentary from the Court, which stated,

> federal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

*Markham*, 326 U.S. at 494.

It turns out that this debate about whether the probate exception arises out of the Constitution or the Judiciary Act is significant in determining whether the exception only applies to diversity jurisdiction, or whether it also applies to claims arising under federal statutes, such as ERISA. We'll get to that in a minute, but first we need to talk about Anna Nicole Smith.

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### Enter Anna Nicole Smith

For those of you too young to remember her, Anna Nicole Smith was essentially Kim Kardashian before the internet proliferated. In 1994—fresh off her designation as Playboy's Playmate of the Year but not yet an omnipresent tabloid and reality-TV celebrity—she married 89-year-old billionaire oil man (and lawyer) J. Howard Marshall. Mr. Marshall died 14 months later without providing for Anna Nicole. Not surprisingly, there began a high-profile dispute over his estate. Surprisingly, the Supreme Court decided that this dispute raised the issue of the scope of the probate exception, which required revisiting *Markham*. In particular, the Court acknowledged that the *Markham* test was "not a model of clear statement," and the Court attempted to bring clarity to its "enigmatic words" by defining what constituted "interfering with" a state's probate proceedings. *Marshall*, 547 U.S. at 311. Hardly tabloid-worthy words, but relevant to us.

First, a little legal backstory is necessary. After J. Howard died, Anna Nicole claimed that he had intended to provide for her through a gift in the form of a "catch-all" trust. *Id*. at 300. She also claimed (to the delight of the salivating tabloid press) that J. Howard's son, Pierce, had engaged in forgery, fraud, and overreaching to gain control of J. Howard's assets. *Id*. at 301. Before that dispute was resolved, Anna Nicole filed for bankruptcy, and Pierce filed a proof of claim against her bankruptcy estate for defamation and sought a declaration that his claim was not dischargeable. *Id*.

Anna Nicole objected and filed counterclaims, including a claim that Pierce tortiously interfered with a gift that she expected from J. Howard. The counterclaims transformed her objection to Pierce's claim into an adversary proceeding under Federal Rules of Bankruptcy Procedure §3007, and the bankruptcy court then entered judgment in favor of Anna Nicole. *Id*. at 302. The district court sided with the bankruptcy court and awarded Anna Nicole "$44.3 million in compensatory

damages and, based on 'overwhelming' evidence of Pierce's willfulness, maliciousness, and fraud, an equal amount in punitive damages." *Id*. at 304.

Now comes the probate exception. Pierce appealed, and the Ninth Circuit reversed on the ground that the probate exception barred federal jurisdiction over Anna Nicole's counterclaim. The Supreme Court explained the Ninth Circuit's analysis:

> It read the exception broadly to exclude from the federal courts' adjudicatory authority not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument, whether those questions involve fraud, undue influence, or tortious interference with the testator's intent.

*Id*. at 298.

**According to *Marshall*,** the probate exception barred federal courts from (1) probating or annulling a will; (2) administering a decedent's estate; or (3) "seek[ing] to reach a res in custody of a state court" by "endeavoring to dispose of [such] property."

The Supreme Court then reversed the Ninth Circuit, holding, "The Ninth Circuit had no warrant from Congress, or from this Court's decisions, for its sweeping extension of the probate exception." *Id*. at 300. The Supreme Court reasoned that Anna Nicole's claim did not involve "the administration of an estate, the probate of a will, or any other purely probate matter." *Id*. at 312. Rather, her claim alleged "the widely recognized tort of interference with a gift or inheritance." *Id*. As such, the Court concluded, Anna Nicole sought an *in personam* judgment against Pierce, "not the probate or annulment of a will" or "a *res* in a state court's custody." *Id*.

Thus, the Court concluded that Anna Nicole's tort claim did not implicate the probate exception, and the Court clarified the extent of the exception. According to *Marshall*, the probate exception barred federal courts from (1) probating or annulling a will; (2) administering a decedent's estate; or (3) "seek[ing] to reach a *res* in custody of a state court" by "endeavoring to dispose of [such] property." *Id*. at 311–12. But "it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." *Id*.

### Does the Probate Exception Override Federal Question Jurisdiction?

As previously noted, in *Markham*, the Supreme Court adopted and confirmed its belief that the probate exception to federal jurisdiction derives from the Judiciary Act of 1789, which conferred jurisdiction over "suits" in "law or equity" between diverse parties. Judiciary Act of 1789 ch. 20, §11. *Marshall* left standing this historical underpinning of the exception.

Because the Judiciary Act governs only diversity jurisdiction, "[i]t is unclear if the probate exception even applies to federal question cases[,]… [as] the courts of appeals are currently split on this very issue." *United States v. Blake*, 942 F. Supp. 2d 285, 295 (E.D.N.Y. 2013) (quoting *United States v. Tyler*, 2012 U.S. Dist. Lexis 34093, at *10 (E.D. Pa. Mar. 13, 2012)).

On the one hand, the Sixth and Seventh Circuits have determined that the probate exception is applicable in both federal question and diversity cases. *See Jones v. Brennan*, 465 F.3d 304, 306–09 (7th Cir.2006) (holding that probate exception is equally as applicable to federal question cases as it is to diversity cases in which it is usually invoked); *Tonti v. Petropoulous*, 656 F.2d 212, 215 (6th Cir. 1981) (stating, "[i]t is well settled that the federal courts have no probate jurisdiction" and finding that a "district court clearly had no jurisdiction" to hear claims under 42 U.S.C. §1983 arising out of probate proceedings).

On the other hand, the Eleventh Circuit has determined that the probate exception "relates only to 28 U.S.C. §1332 [diversity jurisdiction], and has no bearing on federal question jurisdiction." *In re Goerg,* 844 F.2d 1562, 1565 (11th Cir. 1988).

The Eleventh Circuit's decision in *Goerg* was considered and rejected by the Ninth Circuit in its initial review of *Marshall*. *In re Marshall*, 392 F.3d 1118, 1132 (9th Cir. 2004) (commenting that "no other circuit has followed the Eleventh Circuit's lead in refusing to apply the exception to federal question cases," and declaring, "[w]e specifically reject the *Goerg* pronouncement"). But, as noted above, the Supreme Court subsequently reversed the Ninth Circuit on other grounds, and it expressly declined to consider "whether there exists any uncodified probate exception to federal [question] jurisdiction." *Marshall,* 547 U.S. at 308–09.

Uncertainty thus endures.

### The Probate Exception and ERISA

Since *Marshall*, district courts have cautiously refrained from venturing into the domain of probate administration. Most recently, a judge in the U.S. District Court for Northern District of New York joined ranks with a small but growing number of federal district courts issuing decisions that recognize the probate exception as an absolute bar to federal jurisdiction over any *in rem* action concerning property in the custody of a state probate court, including claims by ERISA plan fiduciaries seeking to enforce equitable liens. *In re Boisseau*, 2017 U.S. Dist. Lexis 11964 (N.D.N.Y. Jan. 30, 2017).

*In re Boisseau* involved a decedent, Edward Boisseau, a beneficiary of the Hanover HHR Employee Benefit Plan (the plan) who received treatment for prostate cancer, for which the plan paid approximately $300,000. Upon Edward's passing, his wife, Brenda, commenced a personal injury action against Edward's doctors and others. That lawsuit was settled, at which time the plan asserted a lien against the settlement fund for the medical expenses that it had paid on Edward's behalf.

Brenda, as executor of Edward's estate, filed a "Petition to Extinguish Claim" in the New York State Surrogate's Court, seeking a declaration that the plan's lien was "null and void" and that the plan possessed no "claimed subrogation right, lien,

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or other reimbursement claims… against the Estate." The plan removed the petition to the federal court, asserting federal question jurisdiction under ERISA. Brenda filed a motion to remand the matter back to the surrogate's court on the ground that the removal was procedurally and jurisdictionally improper. The plan objected, arguing that regardless of how the estate characterized the petition, the district court possessed concurrent, if not exclusive, jurisdiction over the plan's pursuit of its equitable lien rights under ERISA.

The district court sided with the estate, though "on a separate basis" than the estate had argued. The court held that the probate exception to federal jurisdiction required remand. *In re Boisseau*, 2017 U.S. Dist. Lexis 11964, at *4.

Tracking the development and application of the exception since *Marshall*, the court commented that it was "clear that the probate exception applies to diversity jurisdiction," but that it was less clear "whether it also applies to federal question jurisdiction." *Id*. (stating that Second Circuit had yet to rule on the issue, and referencing the "split among circuits that have").

The court adopted the "Seventh and Ninth Circuits' reasoning and f[ound] that the probate exception applies to cases arising out of both federal question and diversity jurisdiction[,]" and it further determined that "there is no carve out for cases arising under ERISA." *Id.* at *7.

Thus, the U.S. District Court for the Northern District of New York has become the most recent district court to hold that the probate exception strips federal courts of jurisdiction to consider ERISA cases. *Id.* ("Having found that the probate exception applies to federal question cases, the Court sees no reason why it should not apply to cases arising under ERISA."). *See also Carpenters' Pension Tr. Fund-Detroit & Vicinity v. Century Truss Co.*, 2015 U.S. Dist. Lexis 39106 (E.D. Mich. Mar. 27, 2015).

## Conclusion

As if the rules governing enforcement of equitable liens under ERISA were not challenging enough to understand, the probate exception lurks out there, ready to throw a wrench into your litigation plans. Though much about the exception is murky, it is clear that lawyers seeking to enforce equitable liens held by benefit plans will find themselves in situations to which it could apply.

In contemplating what effect the probate exception might have on any particular claim, counsel should be cognizant of two important distinguishing factors.

First, courts will (or should) recognize a bright-line distinction between *in rem* actions (as in *Boisseau*) and *in personam* actions (as in *Marshall*). This distinction may be of limited value in the ERISA context when a plan seeking reimbursement may be forced to seek relief against a fund, rather than a person. But certainly, when a choice can be made, an *in personam* action is preferable.

Second, be aware of the dispute among the circuits regarding whether the exception applies in cases for which federal question jurisdiction exists. Understanding the historical context for the exception will aid in explaining to a judge—who may never have heard of the exception before hearing your case—why it should not apply to ERISA jurisdiction.

When all else fails, learn to enjoy the teachable moments that you will have explaining the intricacies of ERISA equitable-remedies law to a state court judge. FD