Protecting the Loyal Hard Worker: The Need for a Fair Analysis of Venue Clauses in ERISA Plans

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Introduction

Imagine a scenario in which a participant in a retirement plan covered by the Employee Retirement Income Security Act of 1974 (ERISA) separates from employment or retires and a dispute arises (perhaps about benefit eligibility, a benefit form, or a benefit amount). The participant unsuccessfully appeals the plan's adverse determination according to the plan's claims procedures and now wishes to contest that decision in court. ERISA has liberal venue rules for federal court actions, allowing claims to be brought "where the plan is administered, where the breach took place, or where a defendant resides or may be found."[1] The employer, a national business, operates in every state and has its headquarters in Rochester, New York. The participant worked for the employer in Seattle for thirty years. Now imagine though that this employer amended the plan to permit venue for civil actions only in Rochester, New York, and that this amendment went into effect merely one year before the participant contested the plan's benefit decision.

Despite the venue clause, the participant sues in Seattle, and the defendant responds with a motion to transfer the action to Rochester or to dismiss. How should the court respond? Should it allow the suit to proceed where filed, relying upon ERISA's liberal venue provisions and the rationale that ERISA is a remedial statute designed to protect employee expectations and provide ready access to federal courts? Or should it respect the venue clause because such a provision may reduce plan costs and because the statute permits the contractual venue?

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1. 29 U.S.C. § 1132(e) (2012).

Does it matter that the employee and employer did not individually negotiate the clause? Is the venue clause a mere factor for the court to consider on a motion to transfer, or does filing suit in contravention of the venue clause deprive the court of jurisdiction altogether?

Since the 1970s, the Supreme Court has increasingly instructed federal courts to respect contractual clauses limiting venue, essentially holding that in the absence of extraordinary circumstances, such clauses should be given effect because of the parties' agreement.[2] Courts usually apply 28 U.S.C. § 1404's framework when assessing defendant's motions to transfer to a contractual venue.[3] Section 1404 provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any district or division where it might have been brought or to any district or division to which all parties have consented."[4]

Courts use a balancing test to resolve § 1404 motions to transfer venue.[5] In a line of four key cases beginning in 1972, the Supreme Court ruled that a contractual venue provision creates a strong presumption for an agreed-to venue.[6] Most federal district courts and all appellate panels considering the issue have held that ERISA does not mitigate the presumption's impact.[7] The Department of Labor (DOL), under the Obama administration, argued to the contrary in circuit court amicus briefs, but also asked the Supreme Court to allow the issue to ripen before it agrees to consider the issue.[8] It is unclear whether the Trump administration will take the same position. The Supreme Court has repeatedly declined to consider the issue.[9]

Part I of this Note explores the judicial history of respect for contractual venue clauses and how they intersect with ERISA. Part II analyses two cases that highlight arguments in favor of and against respecting venue clauses in ERISA plans. Part III argues that courts should not uphold contractual venue clauses in employee benefit plans unless unusual circumstances are present, essentially reversing the generally applicable presumption. The Note concludes by placing the venue issue in the context of other litigation barriers for ERISA participants to reverse plan benefit denials.

2. *See infra* Part II.A.
3. *See infra* Part II.A.
4. 28 U.S.C. § 1404(a) (2012).
5. *See infra* Part I.A.
6. *See infra* Part I.C.
7. *See infra* Part I.C.
8. *See infra* Part II.A.
9. *In re* Mathias, 867 F.3d 727 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 756 (2018); Clause v. Sedgwick Claims Mgmt. Servs., Inc., No. CIV 15-388-TUC-CKJ, 2016 WL 213008 (D. Ariz. Jan. 19, 2016), *cert. denied*, 137 S. Ct. 825 (2017); Smith v. Aegon Cos. Pension Plan, 769 F.3d 922 (6th Cir. 2014), *cert. denied*, 136 S. Ct. 791 (2016).

I. Background

A. Understanding Generic Forum-Selection and Venue Clauses

To decide whether courts should enforce contractual venue clauses in ERISA plans, discussion must begin with the history of forum-selection clauses and how courts generally regard them in contract disputes. Although the terms often are used interchangeably, forum-selection clauses are broad and determine which court or which type of court hears a case stemming from an agreement, while venue clauses define the geographical location where parties adjudicate claims.[10]

Courts treat forum-selection clauses differently depending on the case.[11] They have also wrestled with whether analysis of forum-selection clauses should proceed under procedural rules or contract law.[12] A federal procedural venue statute, 28 U.S.C. § 1391, dictates where suits may be filed,[13] but basic contract principles afford parties freedom to contract where they will litigate.[14] Moreover, federal courts may transfer cases to another venue under 28 U.S.C. § 1404(a).[15] Courts consider several factors in a balancing test before concluding whether to transfer.[16] However, if the case arises under a contract with a venue provision, a presumption exists that contract law governs the transfer issue absent strong countervailing considerations.[17]

Historically, courts disfavored forum-selection clauses for policy and jurisdictional reasons.[18] In 1972, however, the Supreme Court began easing skepticism of such clauses. The first key case, *M/S Bremen v. Zapata Off-Shore Co.*,[19] involved a dispute between a German enterprise and a U.S. corporation over damage to an oil rig being towed from Louisiana to Italy.[20] Although the parties' contract provided that disputes would be resolved in England, the oil rig's owner sued in

10. A forum-selection clause is a "contractual provision in which the parties establish the place (such as the country, state, or *type of court*) for specified litigation between them." *Forum-Selection Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Venue is defined as "[t]he proper or a possible place for a lawsuit to proceed, usu[ally] because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." *Id.*, *Venue*. Thus, arbitration may be chosen through forum-selection clauses, not venue clauses.

11. *See* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 299 n.21, 302–03 (1988).

12. *Id.* at 297.

13. 28 U.S.C. § 1391(b) (2012).

14. *See* 15 CORBIN ON CONTRACTS § 83.6 (2017).

15. 28 U.S.C. § 1404(a) (2012).

16. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 258 (1981).

17. Bar Grp., LLC v. Bus. Intelligence Advisors, Inc., 215 F. Supp. 3d 524, 539 (S.D. Tex. 2017) ("A party seeking to bar enforcement of a forum selection clause bears a heavy burden of demonstrating that the clause is unreasonable under the circumstances.").

18. *See* 15 CORBIN ON CONTRACTS, *supra* note 14, § 83.6.

19. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

20. *Id.* at 2.

Tampa, Florida, because, after a storm damaged the rig, the towing company towed it to Tampa, the nearest port of refuge.[21] The towing company moved to dismiss because the contract's venue clause designated England.[22] The lower courts refused to enforce the clause and retained jurisdiction.[23]

The Supreme Court reversed.[24] Although the Court recognized the long-standing precedent of invalidating forum-selection clauses partly on grounds of public policy and concerns about forum shopping, it concluded that venue clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[25] The Court's holding focused on freedom to contract.[26]

The *Bremen* Court noted that the oil rig was crossing through several jurisdictions and that, by agreeing in advance where to litigate, the parties eliminated uncertainty over where a suit might be filed.[27] This case shifted the treatment of forum-selection clauses from barely enforceable to "presumptively enforceable absent some countervailing reason making enforcement unreasonable."[28] Thus, courts now look to a venue provision's language and other contract principles.[29]

Bremen suggested the situation might have been different had the parties been two Americans and the designated forum was remote, in which case "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause."[30] There was uncertainty after *Bremen* about the proper test for overcoming the presumption.[31] However, for the past forty-five years, the Supreme Court has favored upholding forum-selection clauses under contract law principles.[32]

The Court's increasing respect for the validity of venue clauses continued in a diversity case, *Stewart Organization, Inc. v. Ricoh Corp*.[33] Validity of the venue clause depended on which law governed:

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21. *Id.* at 3–4.
22. *Id.* at 4.
23. *Id.* at 6.
24. *Id.* at 20.
25. *Id.* at 9–10.
26. *See id.* at 12.
27. *Id.* at 13–14. Eliminating uncertainties by agreeing in advance on a forum is an indispensable element in international trade, commerce, and contracting. *Id.*
28. Hansa Consult of N. Am., LLC v. Hansaconsult Ingenieurgesellschaft mbH, 35 A.3d 587, 593 (N.H. 2011).
29. *Id.* (modern courts "look to the language of the clause as evidence of the intent of the parties when they entered the agreement").
30. *Bremen*, 407 U.S. at 17; Mullenix, *supra* note 11, at 313.
31. Mullenix, *supra* note 11, at 358–60.
32. Mitsui & Co., Inc. v. Mira M/V, 111 F.3d 33, 35 (5th Cir. 1997) (citing Supreme Court cases since 1972 upholding forum-selection clauses).
33. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988).

state law or the federal law principles established in *Bremen*.[34] The Court held that courts should follow § 1404(a) and the balancing test, including the respect for contractual venue provisions, instead of state policy, when determining whether to enforce a forum-selection clause.[35]

The Court considered venue a third time in *Carnival Cruise Lines, Inc. v. Shute*.[36] There, the Court addressed whether a forum-selection clause appearing on the back of a cruise ticket should be respected even though it "was not freely bargained for" by the parties.[37] Much of the argument centered on *Bremen*'s rationale that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect."[38] *Bremen* had held that clauses should be upheld because of the parties' express agreement on venue.[39] *Bremen* was distinguishable because *Carnival* involved a contract of adhesion and the venue clause was on the back of a ticket.[40] The clause required litigation in Florida; the plaintiffs lived in Washington.[41] The Court considered the benefits and burdens to each party and the plaintiffs' opportunity to review the clause before the trip.[42] In upholding the forum-selection clause, it concluded that a form contract is not necessarily a reason to refuse to enforce a forum-selection clause, although other factors might require refusal.[43]

Carnival then created an opening for courts to deny enforcement of venue clauses in form contracts by stating that such clauses were "subject to judicial scrutiny for fundamental fairness."[44] Specifically, courts could consider the convenience of the venue, the venue's connection to the contract, relative bargaining power, and potential policy concerns.[45] Because a true negotiation would satisfy the majority of these factors, this test permits courts to address "take it or leave it" contracts in which signatories have no opportunity to object to the terms.[46]

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34. *Id.* at 23.

35. *Id.* at 32. "The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a)." *Id*. at 31. The Court recognized that the need to consider other factors was a drawback of the test. *See id.* at 30.

36. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

37. *Id.* at 589 (citing Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1990)).

38. *Id.* at 591 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12–13 (1972)).

39. *Bremen*, 407 U.S. at 14.

40. *Carnival*, 499 U.S. at 587.

41. *Id.* at 587–88.

42. *See id.* at 594–95.

43. *Id.* at 595.

44. *Id.*

45. *Id.* at 593–95.

46. *See generally id.*

These three cases create a doctrine in which forum-selection clauses are typically upheld and treated as "presumptively valid" absent unreasonable circumstances.[47] Although *Bremen* relied on the freedom to negotiate, *Carnival* applied the same analysis to a one-sided form contract's forum-selection clause, although it created uncertainty about the circumstances in which absence of true bargaining would warrant invalidation.[48]

In 2013, the Supreme Court further explained that if "parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied."[49] This holding is reflected more generally in the *Restatement (Second) of Conflict of Laws*: "The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable."[50]

Federal courts of appeals articulate various tests for enforceability of venue clauses that include similar components.[51] For example, the Sixth Circuit's three-part test considers "(1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust."[52] These tests establish a high bar to avoid transfer, reflecting a desire to uphold contract law principles, not permitting transfer if a plaintiff has a change of mind about where to sue.[53]

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47. P. Brian Bartels, *All (Not) Aboard: The Eighth Circuit Splits with the Eleventh, Fourth, and Seventh Circuits by Determining a Single-Participant "Plan" Is Not an ERISA Plan in* Dakota, Minnesota & Eastern Railroad Corp. v. Schieffer, 47 CREIGHTON L. REV. 539, 579–80 (2013); *see also* Union Elec. Co. v. Energy Ins. Mut. Ltd., 689 F.3d 968, 973 (8th Cir. 2012); M.B. Rests., Inc. v. CKE Rests., Inc., 183 F.3d 750, 752 (8th Cir. 1999); Bar Group, LLC v. Bus. Intelligence Advisors, Inc., 215 F. Supp. 3d 524, 539 (S.D. Tex. 2017); Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 973 (E.D. Tex. 2006).

48. *See infra* Part II.A.

49. Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex., 571 U.S. 49, 62 (2013).

50. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (AM. LAW INST. 1988).

51. *See* Barry L. Salkin, *Forum Selection Provisions in ERISA Plans*, 29 BENEFITS L.J. 1, 10 n.16 (2016) (giving examples of various circuit court tests).

52. Wong v. PartyGaming Ltd., 589 F.3d 821, 828 (6th Cir. 2009). The Ninth Circuit finds a forum-selection clause unreasonable to enforce if "(1) the inclusion of the clause in the agreement was the product of fraud or overreaching; (2) the party objecting to the clause would effectively be deprived of his day in court if the clause is enforced; and (3) the enforcement of the clause would contravene a strong public policy of the forum in which suit is brought." Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1140 (9th Cir. 2004) (quoting Richards v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir.1998)) (internal quotation marks omitted).

53. *See generally* Salkin, *supra* note 51, at 2.

B. ERISA's History and Goals

Despite general precedent favoring enforcement of contractual venue provisions, courts will not rely on such a presumption if it contravenes the objectives of a statute under which the dispute arises.[54]

ERISA is a broad statute with extensive reach, touching "virtually all areas of practice from collective bargaining to family law."[55] ERISA was enacted to address concerns about private pension plans, such as mismanagement, poor funding, and unreasonable vesting rules.[56] Before ERISA, employees faced procedural and substantive obstacles to challenge benefit denials and fiduciary breaches.[57] Plan participants were sometimes denied reasonably anticipated benefits for which they had worked and on which they depended.[58]

ERISA's primary goal was to ensure delivery of benefits reasonably expected by plan participants.[59] The statute created dispute resolution mechanisms, beginning with plan-specific claim and appeal procedures and culminating with "ready access" to federal courts to challenge benefit denials and fiduciary violations.[60] ERISA sought nationwide uniformity by including a broad preemption rule.[61] Congress wanted to protect employees without unnecessarily increasing plan sponsorship costs.[62]

When an ERISA dispute arises, 29 U.S.C. § 1132 permits a participant to sue in any district "where the plan is administered, where the breach took place, or where a defendant resides or may be found."[63] This is considered a "liberal venue provision designed to provide easy

54. *Forum Selection and Choice of Law in Contracts*, 8 BUS. & COM. LITIG. FED. CTS. § 88:38 (4th ed.); *see also Limits of Judicial Recognition of Public Policy*, 5 WILLISTON ON CONTRACTS § 12:3 (4th ed.).

55. Stephen E. Ehlers & David R. Wise, *So What's ERISA All About? A Concise Guide for Labor and Employment Attorneys*, 77 N.Y. ST. BAR ASS'N J. 22, 22 (Oct. 2005).

56. *See* 29 U.S.C. § 1001(c) (2012); Ehlers & Wise, *supra* note 55, at 23; *see also* Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?*, 47 J. MARSHALL L. REV. 145, 154 (2013). The statute also applies to welfare benefit plans, primarily for health and disability. Michelle L. Roberts & Glenn R. Kantor, *Practical Presuit Considerations and How to Ensure a Strong Record for Litigation*, 44 BRIEF 36, 37 (2015).

57. *See* Salkin, *supra* note 51, at 4.

58. Ehlers & Wise, *supra* note 55, at 22. Very few of the millions of workers would receive anything from their retirement plans. James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 1*, 14 J. PENSION BENEFITS 31, 33 (2006).

59. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983); Ehlers & Wise, *supra* note 55, at 22 (ERISA was intended to resolve concerns that "no standards existed to ensure the financial stability of pension plans, employees were being deprived of benefit information, there were few safeguards, workers were often denied their expected benefits, and plans were terminated without adequate funds."); *see also* Michael S. Sirkin, *The 20 Year History of ERISA*, 68 ST. JOHN'S L. REV. 321, 323 (1994).

60. *See* Salkin, *supra* note 51, at 4; Ehlers & Wise, *supra* note 55, at 27–28.

61. McDonald v. Artcraft Elec. Supply Co., 774 F. Supp. 29, 30–32 (D.D.C. 1991) ("ERISA's legislative history makes clear that Congress was concerned with uniformity in the laws governing employer conduct related to employee benefits.").

62. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987).

63. 29 U.S.C. § 1132(e)(2) (2012).

and ready access to the federal courts."[64] Some argue that the rise in ERISA plan venue limitations is intended to counter plaintiff success on substantive issues.[65]

C. How Courts Interpret ERISA's Venue Provision When Considering Venue Clauses

ERISA's frequently broad and open language leaves courts to interpret the meaning and reach of many of its provisions.[66] The issue of venue selection—whether it is a plan participant's inviolate right to choose or merely an outer limit on where a suit may be filed—is no different. Venue transfer issues generally arise when defendants file a motion to transfer under 28 U.S.C. § 1404(a).[67] Courts may transfer a case to any district where the case could have been brought originally.[68] Absent a contractual venue clause, courts balance various factors to decide whether these motions should be granted, and the moving party bears the burden of showing that transfer is necessary.[69] If the parties have a contractual forum-selection clause, the inquiry changes because of the presumption that the parties bargained for the clause.[70] When a forum-selection clause is at issue, "[t]he plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed."[71]

However, the analysis becomes more complicated if the venue clause is part of an ERISA plan because of ERISA's purpose and language and the absence of bargaining between the beneficiary and plan

64. Kathryn J. Kennedy, *Protective Plan Provisions for Employer-Sponsored Employee Benefit Plans*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 1, 58 (2016); *see also* Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987) (rejecting argument that § 1132 provides basis to file declaratory judgment action in Florida even though plaintiff lived in Tennessee).

65. Christopher Carosa, *Exclusive Interview: ERISA Attorney Stephen Rosenberg Says Litigation's Legacy Is Improved Plan Design*, FIDUCIARYNEWS.COM (Oct. 20, 2015), http://fiduciarynews.com/2015/10/exclusive-interview-erisa-attorney-stephen-rosenberg-says-litigations-legacy-is-improved-plan-design.

66. *See* Sirkin, *supra* note 59, at 324.

67. Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 62 (2013); Feather v. SSM Health Care, 216 F. Supp. 3d 934, 937 (S.D. Ill. 2016).

68. *See* 28 U.S.C. § 1404(a) (2012) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

69. *Feather*, 216 F. Supp. 3d at 937–38; *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). Although the case involved forum non conveniens, the *Gulf Oil* factors are commonly discussed on motions to transfer. Bd. of Trs., Sheet Metal Workers Nat'l Fund v. Baylor Heating & Air Conditioning, Inc., 702 F. Supp. 1253, 1256 n.7 (E.D. Va. 1988).

70. *See Atl. Marine Const.*, 571 U.S. at 62 ("Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied.").

71. *Id.* at 64.

administrator.[72] Should the venue clause be presumptively valid, as in a non-ERISA case? Should the clause be conclusively invalid because of the language and purpose of ERISA? Should the clause be given some lesser weight than in a non-ERISA case, because of the power imbalance between the parties? These questions will likely remain unresolved until the Supreme Court settles the issue or the circuit courts reach unanimity.[73]

Until recently, the Sixth Circuit had been the only circuit to address enforcement of ERISA venue clauses. In *Smith v. Aegon Companies Pension Plan*,[74] it held that such clauses are not inconsistent with ERISA and should be enforced.[75] In 2017, the Seventh Circuit also upheld an ERISA venue clause, finding ERISA's language merely permissive, leaving the contract language controlling.[76] The majority of district courts have also found the clauses enforceable.[77]

Feather v. SSM Health Care[78] illustrates the district court majority view. The defendant sought to transfer the case from Illinois to Missouri, the venue specified in the plan.[79] The plaintiff argued the clause was "unreasonable and unfair."[80] Following *Atlantic Marine*, the court considered as a threshold question whether the venue clause was valid and enforceable under ERISA's venue provision.[81] It noted the higher burden on plaintiffs to show why transfer should not be granted despite their agreement to the venue clause.[82] To overcome *Bremen*'s presumption, the plaintiff in *Feather* argued that the clause unlawfully limited her to one venue, while ERISA's § 1132 permits three options.[83] Following the "vast majority of federal district courts," the court found that the venue clause was consistent with ERISA because it did not prevent

72. Some may argue that, in some cases, a joint administrator, such as a union, bargains on the beneficiary's behalf and therefore the beneficiary may be deemed to have bargained for the provision. In other instances, the employer negotiates with an insurance company to include a venue clause. In both circumstances, however, the beneficiary may still have little to no voice in negotiations. Here, the focus is on the beneficiary's lack of power and control.

73. *See Feather*, 216 F. Supp. 3d at 941 (courts decide whether to uphold venue clauses before considering balancing factors analyzed for motion to transfer).

74. Smith v. Aegon Cos. Pension Plan, 769 F.3d 922 (6th Cir. 2014), *cert. denied*, 136 S. Ct. 791 (2016).

75. *Id.* at 931–33.

76. *In re* Mathias, 867 F.3d 727, 736 (7th Cir. 2017). The Eighth Circuit denied a petition for a writ of mandamus in a case similar to *Mathias* after considering the Secretary of Labor's amicus curiae brief. *See In re* Clause, No. 16-2607, 2016 U.S. App. LEXIS 19390 (8th Cir. Oct. 26, 2016) (order denying petition for a writ of mandamus).

77. *See, e.g.*, *Feather*, 216 F. Supp. 3d at 941.

78. *Id.* at 934.

79. *Id*. at 937.

80. *Id*. at 941.

81. *Id.* at 938.

82. *Id.* (private interest factors fall entirely in favor of existing forum due to the previous agreement and it is rare for a motion to transfer to succeed solely on public interest factors).

83. *See id.* at 939.

the plaintiff from accessing the federal court system, as intended by ERISA, and that enforcing venue clauses is consistent with ERISA's goals of uniform plan administration and reducing overall costs.[84] The court noted that ERISA contains no language prohibiting parties from agreeing to limit venue.[85]

The plaintiff also argued that the clause was unreasonable and unfair because the defendant unilaterally added it to the plan without informing participants.[86] Relying on *Carnival*, the court found that the plaintiff had ample time to review the plan, noting, however, this fact was irrelevant because the plan permitted the employer to alter the plan unilaterally.[87] Ultimately, the court concluded that the clause was valid and enforceable and granted transfer to the contractually specified venue.[88]

In contrast, departing from the majority, a Texas district court in *Nicolas v. MCI Health and Welfare Plan No. 501*,[89] reached the opposite result, declining to enforce a venue clause.[90] While recognizing the Fifth Circuit's preference to uphold forum-selection clauses, the Texas court concluded that the "policies of the ERISA statutory framework [supersede] the general policy of enforcing forum selection clauses."[91] The court found invalidation consistent with congressional intent.[92] It reasoned that Congress clearly intended employee benefit plans to abide by ERISA, including the policy to provide safeguards "with respect to the establishment, operation, and administration of [employee benefit] plans."[93] In the court's view, enforcement of the contractual venue clause would undermine the judicial access that Congress promised participants.[94] The court also believed that upholding the clause violated public policy because it would result in "severely limit[ing] many potential plaintiffs from having ready access to the federal courts."[95] *Feather* and *Nicolas* illustrate different outcomes of the same test. While one focused on the general presumption of venue clause validity, the other looked to ERISA's specific language and policy.

84. *Id.* at 938.
85. *Id.* at 941.
86. *Id.*
87. *Id.* at 941–42.
88. *Id.* at 943–44.
89. Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972 (E.D. Tex. 2006).
90. *Id.* at 974. The case involved a Texas resident-plaintiff whose long-term disability plan required that litigation occur in Washington, D.C., or Loudoun County, Virginia. *Id.* at 973.
91. *Id.* at 974.
92. *Id.*
93. *Id.* (citing and discussing 29 U.S.C. § 1001(a) (2012)).
94. *Id*.
95. *Id.*

Deciding whether to enforce forum-selection clauses that conflict with statutes is not unique to ERISA. In *Boyd v. Grand T.W.R. Co.*,[96] for example, the Supreme Court held that "contracts limiting the choice of venue are void as conflicting with the [Federal Employers'] Liability Act."[97] It examined the language of the Federal Employers' Liability Act (FELA), which permits four possible venues, and FELA's congressional mandate: "Any contract . . ., the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void."[98] The Court struck down the venue clause, finding that upholding the clause would contravene FELA's substantive right to select a venue from the forums provided.[99]

II. Both Sides of the Argument Viewed Through Two Key Decisions

Two cases outline the opposing arguments on whether to enforce venue clauses when plan participants must travel significant distances to litigate. Proponents of enforcement focus on congressional intent, arguing that Congress did not specifically prohibit narrowing venue choices, as well as general contract law and decisions enforcing forum-selection clauses in other contexts.[100] Opponents point out that Congress sought to protect participants by providing three forum options and argue that enforcing these clauses in ERISA plans violates public policy.[101]

A. Smith v. Aegon Companies Pension Plan

In *Smith v. Aegon Companies Pension Plan*,[102] the plaintiff appealed the lower court's decision that a pension plan venue clause was enforceable and the resulting order transferring the case from the Western District of Kentucky to Cedar Rapids, Iowa, the plan's specified venue.[103] The Sixth Circuit first addressed the extent of deference that it should give to an amicus brief by the Secretary of Labor arguing that courts should not enforce venue clauses.[104] The Sixth Circuit determined that the DOL's position, exclusively expressed in amicus

96. Boyd v. Grand Trunk W.R. Co., 338 U.S. 263 (1949).
97. *Id.* at 265.
98. *Id.*
99. *Id.* at 266.
100. *See* Salkin, *supra* note 51, at 1–4.
101. *See id.*
102. Smith v. Aegon Cos. Pension Plan, 769 F.3d 922 (6th Cir. 2014).
103. *Id.* at 925–26.
104. *Id.* at 926. This is another controversial question because the Supreme Court has not decided whether an agency's position discussed only in an amicus brief should receive deference. *Id.* at 927 (noting some circuits apply *Skidmore* deference); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (deference to agency positions depends on factors indicating persuasiveness).

briefs, warranted no deference.[105] The court concluded that the agency had no special expertise in interpreting the statute that would warrant deference.[106]

The court then turned to the main issue of whether it should enforce the venue clause.[107] Using contracts principles, the plaintiff argued that the plan added the amendment seven years after his benefits began, so it could not be and was "not the product of an arms-length transaction."[108] The court, however, did not believe lack of bargaining was relevant because *Carnival* had upheld a venue clause on the back of a cruise ticket for which no bargaining had occurred.[109] It also noted ERISA's broad flexibility for employers to design and amend plans.[110]

The plaintiff also argued that venue clauses should not be enforced because they could result in pension plans specifying faraway forums, like Alaska, imposing excessive burdens on plaintiffs.[111] The court dismissed this argument, stating that the plaintiff could challenge the forum's reasonableness under the Sixth Circuit's three-part test in *Wong v. PartyGaming Ltd.*[112] The plaintiff had not made an argument under *Wong*. Absent a specific showing, the court would not invalidate otherwise enforceable venue clauses merely because of the possibility that a plan might, in the future, use venue effectively to foreclose litigation.[113]

The court also considered the broader question of whether ERISA precludes contractual venue provisions.[114] It first noted that most courts uphold such clauses because Congress could have prohibited them but elected not to do so.[115] Both the Secretary of Labor and the plaintiff

105. *Smith*, 769 F.3d at 927–29 (*Chevron* deference is a two-step analysis requiring the agency decision to have been made "with the force of the law," which the amicus brief was not.); *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (government agencies receive considerable deference concerning statutory schemes they administer). *Skidmore* deference was inapplicable because the Secretary is not an expert in this matter, the Secretary's analysis was based only on a textual interpretation of ERISA, and the Secretary only expressed this opinion twice in nearly forty years, giving the appearance that it lacked careful consideration and is "an expression of [the agency's] mood." *Smith*, 769 F.3d at 929.

106. *Smith*, 769 F.3d at 929.

107. *Id.*

108. *Id.* at 930.

109. *Id.* at 931.

110. *Id.* at 930 (forum-selection clauses presumed valid and enforceable under *Bremen* unless unjust or unreasonable or the product of fraud or overreaching).

111. *Id.*

112. *Id.* In *Wong*, the Sixth Circuit created a three-part test to determine if a challenged forum-selection clause should be enforced: "(1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust." Wong v. PartyGaming Ltd., 589 F.3d 821, 828 (6th Cir. 2009).

113. *Smith*, 769 F.3d at 931.

114. *Id.*

115. *Id.*

argued that contractual venue clauses conflict with several ERISA provisions.[116] Regarding access to the federal court system, the court concluded that a venue clause does not conflict with ERISA because the clause required litigation in a federal court.[117] Consistent with proponents' typical arguments, the court stated that venue clauses actually further ERISA's goals by requiring all plan litigation to occur in a single forum, furthering predictability and uniformity.[118] The selected venue can develop familiarity with the plan, promoting judicial efficiency.[119] If plans were litigated throughout the country, plan administration would be more costly for plan sponsors and beneficiaries.[120]

In response to the plaintiff's argument that venue clauses conflict with ERISA's venue provision, the court stated that the provision is permissive.[121] In its view, a venue clause specifying a forum that comports with this provision does not conflict with ERISA.[122] The circuit cited two district court cases, each holding that, when Congress uses "may," it does not intend to prevent parties from limiting themselves to one of the permitted options.[123]

The court then took a notable turn, comparing venue clauses to arbitration clauses and interpreting both as forum-selection methods.[124] It stated that even if the specified venue was not one authorized by ERISA, the clause would still be upheld because the Sixth Circuit enforces mandatory arbitration clauses.[125] The court reasoned that it would be inconsistent to uphold an agreement keeping a case out of federal court and to not uphold one merely restricting it to one federal court because that would enforce the more extreme restriction while refusing the more moderate one.[126]

Last, the *Smith* court addressed the plaintiff's argument regarding fiduciary duties.[127] Under ERISA, "any provision in an agreement . . . which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty . . . shall be void as against public policy."[128] The court quickly dismissed the argument because it had

116. *Id.* (e.g., ready access to federal courts, proper venues, fiduciary duties).
117. *Id.* at 932.
118. *Id.* at 931.
119. *Id.* (citing Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007)).
120. *Id.* at 932.
121. *Id.*
122. *Id.*
123. *Id.* (citing Price v. PBG Hourly Pension Plan, No. 12-15028, 2013 WL 1563573, at *2 (E.D. Mich. Apr. 15, 2013); Williams v. CIGNA Corp., No. 5L:10-CV-00155, 2010 WL 5147257, at *4 (W.D. Ky. Dec. 13, 2010)).
124. *Id.*
125. *Id.*
126. *See id.*
127. *Id.*
128. *Id.* at 933 (quoting 29 U.S.C § 1110(a) (2012)).

not been properly presented.[129] While the panel affirmed the district court's order to transfer the case to Iowa, there was a dissent.[130]

Judge Eric L. Clay, dissenting, focused on public policy and ERISA's statutory purpose.[131] He emphasized that Congress intended ERISA to protect plan participants and beneficiaries.[132] The venue provision was included to "remov[e] jurisdictional barriers that would prevent [litigants] from asserting their statutory rights."[133] Forcing the plaintiff to litigate five hundred miles away would directly conflict with ERISA's goal and conflict with its venue provision.[134] Judge Clay also noted that the employer imposed the venue provision on participants without bargaining, and the provision applied to benefits already earned at the time of the amendment.[135] He observed that ERISA plaintiffs often live on fixed incomes, have limited resources, and may be sick or disabled.[136] Relying on *Bremen*, in which the Supreme Court stated that courts should not enforce contractual venue clauses antithetical to public policy and statutory purpose, Judge Clay concluded that the court should have reversed the district court's decision to transfer.[137]

B. Dumont v. PepsiCo, Inc.

Less than two years later, in *Dumont v. PepsiCo, Inc.*,[138] a Maine district court favored Judge Clay's *Smith* dissent over the majority's position. The plaintiff worked for PepsiCo for over twenty years.[139] Three years before his retirement, PepsiCo distributed a notice of change stating that the plan now required litigation in the United States District Court for the Southern District of New York.[140] The district court acknowledged the line of Supreme Court cases favoring venue clause enforcement as a matter of contract law, but also noted that the First Circuit had never addressed whether those cases dictate enforcement of venue clauses in ERISA cases.[141]

The court first reviewed the history of forum-selection clauses, focusing on *Bremen* and *Carnival*.[142] The court found those decisions inapplicable, as the plaintiff had not bargained over the venue limitation and, perhaps more importantly, did not realistically have the

129. *Id.*
130. *Id.* at 934.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 935.
137. *Id.*
138. Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209 (D. Me. 2016).
139. *Id.* at 211.
140. *Id.*
141. *Id.* The court confirmed that the Sixth Circuit is the only appellate court to have answered this question. *Id.* at 212.
142. *Id.* at 214.

option to exit the plan, as his benefits were already vested, and he was established in his career.[143] This plaintiff had less leverage than the *Carnival* plaintiffs, who could at least review venue restrictions before the cruise by reading the back of their tickets.[144]

The court criticized other courts for applying the presumption of validity without carefully analyzing whether the parties had actually contracted away their venue privileges.[145] Other courts had either bypassed this analysis or acknowledged that, while the participant did not agree, agreement itself was unnecessary if the participant had knowledge of the venue restriction.[146] A few courts have gone as far as stating that the plaintiff did not even need to be notified or aware of the clause if the employer was notified of it by the plan administrator.[147]

The court disagreed with this logic, quoting a case from another federal district which stated that a venue clause that an employer or plan administrator adds to an ERISA plan "obviously does not reflect any 'preference' of the beneficiaries."[148] *Dumont* therefore held that the venue clause should not enjoy the general presumption of enforceability.[149] It denied the motion to transfer based on traditional § 1404(a) analysis.[150] The court held that enforcement would contravene ERISA's public policy concerns and would not be consistent with Supreme Court precedent.[151]

The court distilled four questions from Supreme Court venue-clause opinions: "(1) [I]s the clause permissive or mandatory? (2) [I]s the dispute within the scope of the clause? (3) [I]s the clause unreasonable under the circumstances? (4) Given a valid clause, has the resisting party demonstrated that public interest factors overwhelmingly disfavor transfer?"[152] As to the question of reasonableness, the court indicated that enforcement would be unreasonable if the clause resulted from "fraud or overreaching," if the clause was unjust, if the clause caused such grave difficultly and inconvenience to litigation in the contractual forum that it would deprive plaintiffs of their "day in

143. *Id.* (plaintiff worked there for thirty-one years and could not quit to find new employer).

144. *See id.* (distinguishing *Carnival*).

145. *Id.*

146. *Id.* at 215.

147. *Id.* One court recognized the unfairness to the participant or beneficiary of being an ignorant third party, but justified its holding by stating that participants "must take the good with the bad." Schoemann *ex rel.* Schoemann v. Excellus Health Plan, Inc., 447 F. Supp. 2d 1000, 1007 (D. Minn. 2006).

148. *Id.* (discussing *Schoemann*, 447 F. Supp. 2d at 1007).

149. *Dumont*, 192 F. Supp. 3d at 215–16 (how much weight to give forum-selection clauses when deciding a motion to transfer).

150. *Id.* at 216.

151. *Id.* at 216–17.

152. *Id.* at 217; *see also* Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex., 571 U.S. 49, 65 (2013).

court," or if "enforcement would contravene a strong public policy."[153] The court strongly emphasized the public policy factor, which it viewed as both an element of reasonableness and an independent consideration.[154] The court reviewed ERISA's legislative history and language and found that Congress sought to protect participants' and beneficiaries' interests in their reasonably expected benefits, to provide "the full range of equitable remedies available," and "to remove jurisdictional and procedural obstacles" to litigating benefit denials.[155] Enforcing contractual venue clauses would be inconsistent with these objectives.

Additionally, the court observed that ERISA provided its own venue provision, rather than allowing 28 U.S.C. § 1391 to stand as the default.[156] It compared ERISA to the analysis of FELA in *Boyd* because both are "protective statutes with special venue provision[s]."[157] The *Dumont* defendants objected to the *Boyd* comparison, arguing that ERISA's venue provision provides litigants with *some* appropriate federal jurisdiction, not necessarily a full range of choices.[158] The court disagreed, noting that ERISA's purposes included giving participants "ready access to the Federal Courts."[159] The defendants' position would effectively remove the word "ready."[160] Forcing participants to sue thousands of miles away from where they worked and earned benefits would not provide "ready access."[161] Unilateral plan amendments requiring plaintiffs to travel considerable distances to effectuate statutory rights undermine ERISA.[162]

Last, defendants argued that another ERISA purpose is "uniformity, predictability, and efficiency in the administration of plans."[163] To this, the court responded that district-level decisions are not binding in other cases, even within the same district.[164] To achieve uniformity, a decision must come from the relevant circuit court or the Supreme Court.[165] Further, ERISA promotes these goals in other ways apart from venue.[166] Considering ERISA's historical context, the court noted that Congress likely would not have expected venue clauses to be enforceable against participants like the plaintiff, because venue

153. *Dumont*, 192 F. Supp. 3d at 217; *see also* Claudio-De León v. Sistema Universitario Ana G. Méndez, 775 F.3d 41, 48–49 (1st Cir. 2014).
154. *Dumont*, 192 F. Supp. 3d at 217.
155. *Id.* at 218.
156. *Id.*
157. *Id. See supra* notes 97–100 and accompanying text.
158. *Dumont*, 192 F. Supp. 3d at 221.
159. *Id.* at 220.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 221.
165. *Id.*
166. *Id*.

clauses were not popular in plans until the 2000s.[167] Thus, because enforcement of the clause was inconsistent with ERISA's language and policy, the court held the clause was not enforceable and, perhaps alternatively, that enforcement would violate public policy.[168]

III. ERISA and Venue Clauses: Possibilities for the Future

The issue of whether courts should respect ERISA venue clauses is complex. It presents a conflict between Supreme Court jurisprudence that generally regards contractual venue clauses as presumptively enforceable and a remedial statute with a broad venue provision espousing a purpose of facilitating "ready access" to federal courts. Early decisions focused on the former and enforced venue clauses; later courts generally followed the earlier courts. The paucity of appellate decisions concerning forum-selection clauses in ERISA plans may be the result of the issue generally being decided in the context of motions to transfer venue under § 1404, which are ordinarily not final orders.[169]

Whether ERISA venue clauses should be enforced is too important to be decided by a judicial game of follow-the-leader. Courts should stop following earlier courts automatically and start analyzing this issue independently.[170] Several opinions state that there is no reason to depart from the majority and instead rely on the reasoning of the same list of cases.[171] Decisions refusing to enforce venue clauses, however, provide thoughtful, detailed analysis and are more faithful to ERISA's language and policies.[172] Circuit court decisions enforcing venue clauses also had meaningful dissents focused on policy, statutory language, and congressional intent.[173]

Congress enacted ERISA to enhance protections for employee benefit plan participants and beneficiaries.[174] A key objective was to

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167. *See id.* at 222.

168. *See id.*

169. *See* 28 U.S.C. § 1404(b) (2012); *see also In re* Mathias, 867 F.3d 727, 729 (2017) ("Without the availability of mandamus relief, the question of proper venue escapes meaningful appellate review."). *Smith* was unusual because the defendant moved to dismiss rather than to transfer venue. *See* Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 935 (6th Cir. 2014).

170. *See, e.g.*, Shah v. Wellmark Blue Cross Blue Shield, No. CV 16-2397, 2017 WL 1186341, at *2 (D.N.J. 2017) ("Absent binding precedent or other clear direction from the Court of Appeals for the Third Circuit, this Court adopts the reasoning and holding of *Smith*.").

171. *Id.* Few district courts have rejected the majority and not enforced ERISA venue clauses. *In re Mathias*, 867 F.3d at 734 n.1 (Ripple, J., dissenting) ("[T]he majority [of courts] have determined that forum-selection clauses are not inconsistent with ERISA.").

172. *See generally* Feather v. SSM Health Care, 216 F. Supp. 3d 934 (S.D. Ill. 2016); *see also Dumont*, 192 F. Supp. 3d at 222.

173. *See Smith*, 769 F.3d at 935 (6th Cir. 2014) (Clay, J., dissenting); *In re Mathias*, 867 F.3d at 734 (Ripple, J., dissenting).

174. *See* U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 100 (2013); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 115 (2008).

federalize dispute resolution and remove "jurisdictional and procedural obstacles" to judicial review of plan decision-making.[175] One of ERISA's express statutory purposes is to provide participants with "ready access to federal courts."[176] Furthermore, while ERISA gives broad latitude to employers to design and amend plans, that discretion is not unchecked—fiduciaries are not permitted to enforce plan provisions inconsistent with the statute.[177]

In the absence of Supreme Court resolution, the Secretary of Labor could promulgate regulations or interpretative guidance. Without regulations or interpretive guidance, courts need not give the DOL *Skidmore* deference.[178] As the Secretary of Labor has not yet taken action with the force of law, the courts need not afford *Chevron* deference.[179] The DOL has stated strongly that forum-selection clauses conflict with ERISA's venue provision but has done so only in amicus briefs.[180] If the DOL were to issue regulations or interpretive guidance, the resulting judicial deference would promote uniform decisions and judicial efficiency.[181]

Courts should better analyze whether venue provisions conflict with ERISA's public policy and purposes.[182] Parties in ERISA venue cases tend to disagree whether the term "may" in the ERISA venue provisions is permissive, as well as the significance and scope of the purpose of "ready access."[183] Congress's use of "ready," coupled with the removal of other federal court jurisdictional hurdles, strongly suggests that Congress specifically intended to permit suits in the district

175. H.R. REP. NO. 93-533, at 17 (1973); *see also* Leslie L. Wellman, *An Overview of Pension Benefit and Fiduciary Litigation Under ERISA*, 26 WILLAMETTE L. REV. 665, 680 (1990).

176. 29 U.S.C. § 1132 (2012).

177. *Id.* § 1104(a)(1)(D) (plan fiduciaries must discharge duties "in accordance with" the plan "insofar as" the plan is consistent with ERISA).

178. *Smith*, 769 F.3d at 929; *see also* Salkin, *supra* note 51, at 5. *See supra* note 104 and accompanying text for discussion of *Skidmore* deference.

179. *Smith*, 769 F.3d at 927. Under *Chevron* deference, when legislative intent is unclear, courts should defer to agency interpretation if the interpretation is reasonable. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). *See supra* note 105 and accompanying text for additional discussion of *Chevron* deference.

180. Salkin, *supra* note 51, at 3. The Department of Labor (DOL) asserted that the public policy of ERISA's venue provision is strong and should not be modified by contracts. *Id.* at 3–4; *see also* Mozingo v. Trend Pers. Servs., 504 F. App'x 753, 758 n.2 (10th Cir. 2012); Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 972 (E.D. Tex. 2006).

181. *See* Salkin, *supra* note 51, at 5. The level of deference an agency receives depends on the circumstances in addition to the agency's care, consistency, formality, expertise in the matter, and persuasiveness. *Id.* (citing United States v. Mead Corp., 533 U.S. 218 (1984)). The judicial deference would be true regardless of whether the DOL was for or against enforcing venue clauses.

182. Salkin, *supra* note 51, at 2 (citing Turner v. Sedgwick Claims Mgmt. Servs., Inc., No. 7:14–CV–1244–LSC, 2015 WL 225495 (N.D. Ala. Jan. 16, 2015)).

183. *See supra* Part II.

where the plaintiff resides.[184] Venue clauses can preclude ready access to federal courts by forcing plaintiffs to litigate in inaccessible venues.[185] Although Congress did not expressly prohibit venue clauses, this statutory language, read in light of congressional intent, also indicates that Congress did not intend to allow plans to force litigants to travel many miles or forego a suit solely because of a court's location.[186] As *Smith*'s dissent observed, venue clauses sometimes adversely affect particularly vulnerable people.[187] Litigating farther from home will increase plaintiffs' expenses and, in some cases, may impair or preclude securing legal representation.[188]

Two assertions present a challenge to these arguments. Plaintiffs can hire national firms to represent them in ERISA matters so the distance from their homes may not impede ready access to the courts.[189] It is arguably unnecessary to litigate close to home for access to witnesses and discovery materials because cases are decided primarily on the administrative record.[190] Plaintiffs, however, should have the ability to attend proceedings because they fundamentally affect plaintiffs' financial security.[191] Plaintiffs should not be forced to hire national or unfamiliar firms in distant venues. Similar to FELA, Congress intended that plaintiffs could litigate ERISA cases close to home.[192]

Moreover, the argument that Congress could have expressly prohibited venue clauses is refuted by the argument that Congress also could have expressly permitted them.[193] More salient is that, in ERISA, Congress intended to provide additional rights to participants and to level the playing field between parties.[194] Congress would have intended for plaintiffs to choose among the three permissive venues and not to permit plans to retract that right or place barriers preventing convenient litigation close to plaintiffs' homes.[195]

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184. *See supra* Part II.

185. Brief for the United States as Amicus Curiae at 11, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016) (No. 14-1168), 2015 WL 7625682.

186. *See id.* at 9–10; Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 220 (D. Me. 2016).

187. *See* Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 935 (6th Cir. 2014) (Clay, J., dissenting).

188. *See id.*

189. *See* Salkin, *supra* note 51, at 5.

190. *See* Jeremy Bordelon, *ERISA Discovery*, ERISA & Disability Newsletter 1 (Jan. 2011), https://www.buchanandisability.com/wp-content/uploads/ERISA_Disability_Benefits_Newsletter_Volume_3_Issue_1.pdf.

191. *Id.* at 2.

192. *See* Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 219 (D. Me. 2016). Both laws have similar venue language and non-exculpatory provisions. *Id.* at 220.

193. *See id.* at 222.

194. *See* Brief for the United States, *supra* note 185, at 9–10.

195. *See* Carosa, *supra* note 65. "There is more . . . focus in plan draftsmanship on including terms that could limit, either substantively or tactically, the ability of participants or beneficiaries to successfully bring suit, such as . . . venue selection clauses . . . . [Thus] plaintiffs' successes in ERISA litigation . . . have really driven plan sponsors . . .

Furthermore, courts should consider the unequal bargaining power between participants and plans. On one side is a large pension plan and on the other is a lone person who simply wants earlier-promised benefits. Under *Carnival*, parties need not negotiate the forum if one party received notice and an opportunity to reject the contract.[196] While this may be a fair outcome for a person taking a cruise, it frequently is not in the more consequential context of ERISA disputes.[197] Furthermore, *Carnival* dealt with basic contract principles of notice and rejection and did not involve a clause potentially conflicting with a federal statute.[198]

In ERISA plans, it is unreasonable to expect employees who have worked for many years earning benefits to reject changes to a plan.[199] At that point, workers have either contributed a portion of their salaries directly to the plan, or the benefit was factored into compensation for a number of years.[200] Forfeiture of the benefit would thus be untenable.[201] Further, plaintiffs are typically third parties to agreements between employers and plan administrators, so they are even further removed from contract formation.[202]

The ultimate question is whether enforcing ERISA venue clauses is fundamentally unfair.[203] *Carnival* directed courts to consider multiple factors, including unequal bargaining power, policy concerns, and convenience.[204] Similarly, the *Restatement (Second) of Conflict of Laws* allows courts to deny transfer based on unfairness or unreasonableness.[205] Tests like the Sixth Circuit's may at first glance seem appropriate.[206] However, even that test might set the bar so high that the opportunity to prove unfairness is illusory.[207]

The *Smith* district court thought venue clauses were "enforceable and reasonable" if the plan and statutory right of plan modification did not reduce the benefit amount.[208] This test makes it nearly impossible for plaintiffs to succeed. Courts should instead determine

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to think proactively about what they can do, in writing their plans, to raise the level of difficulty for plaintiffs . . . in ERISA litigation." *Id.*

196. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

197. *See* Coleman v. Supervalu Inc. Short Term Disability Program, 920 F. Supp. 2d. 901, 908 (N.D. Ill. 2013) (unilaterally adding a venue clause contradicts Congress's desire for "open access to several venues").

198. Brief for the United States, *supra* note 185, at 11.

199. *See* Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 214 (D. Me. 2016).

200. *See id.*

201. *See id*.

202. *See id.* at 215.

203. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 591 (1991).

204. *See id.*

205. *See id.* at 595; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

206. *See supra* Part I.A.

207. *See generally* Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 927 (6th Cir. 2014) (plaintiff did not raise unreasonableness defense, so the court did not discuss it).

208. *See* Brief for the United States, *supra* note 185, at 4.

reasonableness in light of all relevant circumstances, including geographical distance and the parties' comparative financial resources.[209] Congress drafted ERISA to be participant-friendly and expected plan fiduciaries to travel to defend these suits.[210] This is a common congressional theme in statutes intended to protect "the little guy."[211]

Some proponents of enforcing forum-selection clauses compare venue clauses to mandatory arbitration provisions, but this analogy ignores a critical difference.[212] An arbitration clause drafted by a plan administrator could specify a forum that is convenient for the plaintiff, but disputed venue clauses always require plaintiffs to litigate many miles from home.[213] Further, the Federal Arbitration Act governing arbitration clauses specifically requires courts, with only narrow exceptions, to uphold arbitration provisions.[214]

A better comparison is to consider how courts treat venue clauses under comparable federal statutes, such as FELA, because both contain venue provisions designed to protect plaintiffs.[215] In *Boyd*, the plaintiff directly negotiated the agreement with the employer, giving it a stronger argument for enforcing the clause than defendants in ERISA cases, in which most agreements are only between plan administrators and employers.[216] Yet, even in *Boyd*, the court looked beyond contract principles to FELA's purposes to deny enforcement of the venue clause.[217]

Enforcement proponents also argue that the chosen venue will promote judicial efficiency because the chosen venue will gain familiarity with the plan and thus develop a more "uniform administrative scheme,"[218] but this argument is flawed. First, it is unclear that Congress sought uniformity of judicial administration, rather than uniformity in substantive plan requirements.[219]

Second, merely choosing a venue does not ensure either more uniform decisions or courts more familiar with particular plans.[220] Judges hear many cases each year.[221] It is not necessarily true that the same judge within a district will hear all cases involving a particular plan

209. *But see* Salkin, *supra* note 51, at 2; P & S Bus. Machs., Inc. v. Canon USA, Inc., 331 F.3d. 804, 807–08 (11th Cir. 2003) (discussing non-ERISA forum-selection clauses).

210. *See* Brief for the United States, *supra* note 185, at 9–10.

211. *See id.* at 10 (comparing ERISA to the Sherman Act and the Federal Employers' Liability Act).

212. Salkin, *supra* note 51, at 4.

213. *See* Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 932 (6th Cir. 2014).

214. *See generally* 9 U.S.C. §§ 1–16 (2012).

215. *See* Brief for the United States, *supra* note 185, at 13.

216. *See* Boyd v. Grand Truck W. R.R. Co., 338 U.S. 263, 263–64 (1949).

217. Brief for the United States, *supra* note 185, at 13.

218. *Smith*, 769 F.3d at 932; *see* Salkin, *supra* note 51, at 3.

219. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001) ("Uniformity is impossible . . . if plans are subject to different legal obligations in different States.").

220. *Contra* Klotz v. Xerox Corp., 519 F. Supp. 2d. 430, 436 (S.D.N.Y. 2007).

221. *See* Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 221 (D. Me. 2016) (noting the large number of judges—forty-seven—in the Southern District of New York).

or that the judge will remember plan specifics when another case arises.[222] In fact, it is the role of parties to present their case and not rely on a judge's previous knowledge.[223]

Third, more appropriate ways exist to promote uniformity than specifying a lawsuit's physical location. For instance, plans could specify choice of law to allow participants to litigate close to home while still ensuring consistent laws applied to each case.[224] The fact that plans do not choose this option suggests that the venue clauses are added to plans not for substantive uniformity of outcomes but to discourage suits.[225]

Conclusion

Venue clauses in ERISA plans are usually presumed valid unless the resisting party establishes unfair or unreasonable circumstances unrelated to convenience. Circuit court tests for determining whether such circumstances exist set the bar too high for ERISA plaintiffs to overcome the validity presumption. Unlike traditional contract issues, in ERISA cases, federal courts cannot consider state law, but instead they apply balancing factors, including a presumption of validity when determining whether to grant a § 1404 motion to transfer in the context of a contractual venue clause.

This presumption conflicts with ERISA where Congress insisted that plan participants have "ready access" to federal courts. Under ERISA's § 1132, a participant may sue in any district "where the plan is administered, where the breach took place, or where a defendant resides or may be found." Venue clauses, however, may limit litigation to only one of these venues. Nevertheless, the majority of federal courts enforce venue clauses. Only a few district courts have disagreed.

Proponents of enforcing venue clauses argue that Congress used permissive language, purposely not delimiting choice of venue, while intending nationwide uniformity of plan administration. Opponents look to congressional intent and public policy. Why would Congress want to protect participants, but permit plans to force them to litigate many miles away? ERISA's insistence on "ready access" and its elimination of other jurisdictional hurdles show that Congress intended to allow plaintiffs to choose to sue where they reside. Furthermore, venue clauses do not promote uniformity because courts throughout

222. *Id.*
223. *Id*.
224. *See* Brief for the United States, *supra* note 185, at 14–15.
225. *See id.* Additionally, because the statute used "administrative," it is not clear that Congress was referring to the court's judicial role. *See generally* Caleb L. Barron, *Should Your ERISA Plan Have a Forum Selection Clause?*, BRADLEY FIRM ALERT BLOG (Nov. 8, 2016), https://www.bradley.com/insights/publications/2016/11/should-your-erisa-plan-have-a-forum-selection-clause (discussing benefits of adding "too good to be true" venue clauses that save plans money by decreasing suits).

the country, and even judges within the same district, can reach differing outcomes.

Until the Supreme Court decides whether these clauses are enforceable, however, district and appellate courts should consider the fairness and reasonableness of forcing plan participants to forego litigation because of an inaccessible forum or to forego earned benefits by rejecting the plan.