PROTECTING THE LOYAL HARDWORKER: THE NEED FOR A FAIR ANALYSIS OF VENUE CLAUSES IN ERISA PLANS

Part I. Introduction

Imagine this scenario. A participant[1] in an ERISA-covered retirement plan separates from employment or retires and a dispute, perhaps about benefit eligibility, a benefit form, or a benefit amount, arises. The participant appeals the plan's determination in accordance with the plan's claims procedures without success and wishes to file a civil action contesting the plan's denial of the appeal. The Employee Retirement Income Security Act of 1974 (ERISA) has liberal venue rules for actions in federal court, providing that a civil action may be brought "where the plan is administered, where the breach took place, or where a defendant resides or may be found."[2] The employer is a national business with operations in every state. The employer is headquartered in Rochester, New York. The participant worked for the employer at its Seattle location for thirty years.

But, in this scenario, the employer amended the plan to provide that venue for civil actions lies only in Rochester, New York. This amendment went into effect merely one year before the participant contested the plan's benefit decision. Now assume that, despite the plan's venue clause, the participant files a civil action in Seattle and that the defendant responds either with a motion to transfer the action to Rochester or a motion to dismiss. How should the court respond to such a motion? Should it allow the suit to commence where it was filed, given ERISA's liberal venue provisions and that ERISA is a remedial statute designed to protect employee expectations and to provide ready access to federal courts? Or should it respect the venue clause in the plan, given that such a provision may reduce plan costs and that the

[1] Hypothetical character in a hypothetical scenario.
[2] 29 U.S.C.A. § 1132

contractual venue is one of the permitted venues in the statute? Does it matter that the clause was not individually negotiated by the employee and employer? Is the venue clause a mere factor for the court to consider on a motion to transfer venue or does the filing of the 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 in most cases, essentially holding that in the absence of extraordinary circumstances, a contractual venue clause should be given effect since the parties agreed in advance to the provision.[3] Courts mostly apply the framework under 28 U.S.C. § 1404 when ruling on a defendant's motion to transfer to the venue identified in the governing contract.[4] Section 1404 provides that "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. "[5]

It is well-established that courts use a balancing test in response to a § 1404 motion to transfer venue.[6] In a line of four key cases, beginning in 1972, the Supreme Court has ruled that a contractual venue provision creates, in essence, a strong presumption favoring the venue agreed to by the parties.[7] The majority of federal judges and all appellate panels considering the issue have held that ERISA does not mitigate the presumption's impact.[8] The Department of Labor, under the Obama administration, has argued to the contrary in amicus briefs before appellate courts, but has also cautioned the Supreme Court to allow the issue to ripen before it agrees to consider the issue.[9] It is not clear whether the change in administration will affect the

[3] *Infra* Part II. A.
[4] *Infra* Part II. A.
[5] 28 U.S.C.A. § 1404(a).
[6] *Infra* Part II. A.
[7] *Infra* Part II. C.
[8] *Infra* Part II. C.
[9] *See infra* Part III. A.

Department's position. The Supreme Court has twice declined the opportunity to consider the issue.

This paper considers whether the emerging judicial consensus is correct. The first substantive section of the paper begins by exploring the basic foundation of the issue, which is the judicial history of whether to respect contractual venue clause and how the judicial respect for venue clauses generally intersects with ERISA particularly. The next section presents the positions of each advocate through the analysis of two cases that have considered the issue. The paper then argues that courts should not uphold contractual venue clauses in employee benefit plans, unless unusual circumstances are present, essentially reversing the presumption in non-ERISA cases that contractual venue clauses will generally be respected. The paper then concludes by placing the venue issue in the context of other issues making it difficult for participants seeking to reverse plan benefit denials to have their day in court.

Part II. Background

A. The importance of understanding generic forum selection and venue clauses

In order to understand whether a contractual venue clause in an ERISA plan should be enforced, one must understand the history of forum selection clauses and how the courts treat them in general contract disputes. A forum selection clause is a contractual agreement where the parties have predetermined how to litigate any disputes arising under the contract.[10] These clauses may include choice of law, arbitration preferences, or venue. Venue clauses set forth "the physical location where a court exercises its power."[11]

[10] *Forum Selection Clause*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/forum_selection_clause#_ftnref2.
[11] *Id.*

The courts have given different treatment to forum selection clauses depending on the specific issue at bar.[12] They have also wrestled with whether the treatment of forum selection clauses should fall under procedural rules or contract law.[13] Procedural rules for venue are set forth in 28 U.S.C § 1391 and dictate where the suit may be filed, but basic contractual principles permit the parties to exercise the freedom to contract where they will litigate.[14] Moreover, if a motion to transfer has been filed, federal courts have the ability to transfer cases to another venue under the guidelines of 28 U.S.C. § 1404(a).[15] Courts consider a series of factors in a balancing test before granting a motion to transfer such that it must be justified to approve the transfer.[16] However, when applicable, there is a strong argument that contract law should dictate the transfer since the parties previously agreed to the venue in a forum selection clause thus creating a higher burden for the movant to meet.[17]

Historically, forum selection clauses were disfavored by the courts based on policy and jurisdictional concerns.[18] But in 1972, the Supreme Court began easing its skepticism of such clauses. The first key case, *M/S Bremen v. Zapata Off-Shore Co.*[19] ("*Bremen*"), involved a dispute between a German enterprise and a United States-based corporation over damage to an oil rig being towed from Louisiana to Italy.[20] Although the contract between the parties provided that disputes would be resolved in England, when a storm damaged the rig and the towing

[12] Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 300 (1988) (forum selection clauses regarding Erie are substantive whereas the clauses are treated as procedural matter in other circumstances).
[13] *Id.* at 297.
[14] 28 U.S.C. § 1391.
[15] 28 U.S.C. § 1404(a). "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. " *Id.*
[16] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981).
[17] B. Group, LLC v. Bus. Intelligence Advisors, Inc., 2017 WL 698536, at *7 (S.D. Tex. Feb. 22, 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] 15-83 Corbin on Contracts § 83.6.
[19] 407 U.S. 1 (1972).
[20] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

company was forced to delay in Tampa, the owner of the rig brought a civil action there.[21] The towing company moved to dismiss since the parties had agreed to resolve the dispute in England.[22] The lower courts had refused to enforce the clause and retained jurisdiction.[23]

The Supreme Court reversed the decision.[24] Although the Court recognized the longstanding precedent to invalidate forum-selection clauses partly due to public policy and forum-shopping concerns, It agreed with the defendant that venue-selection "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 the freedom to contract.[26]

Pertaining specifically to the case at bar, the *Bremen* Court pointed out that the subject of the dispute was crossing through several jurisdictions and that by agreeing to litigate in a forum prior to the issue, the parties eliminated the uncertainty over where a suit may arise.[27] This case shifted the treatment of forum selection clauses from barely enforced to "presumptively enforceable absent some countervailing reason making enforcement unreasonable."[28] Thus, courts now look to whether the language of the contract and other contract principles.[29]

It should be noted that the *Bremen* Court suggested the situation may be different if the parties were two Americans and the forum was remote where "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the

[21] *Id*. at 3-5.
[22] *Id*. at 3-4.
[23] *Id*. at 6.
[24] *Id*. at 20.
[25] *Id*. at 9-10.
[26] *Id*. at 12.
[27] *Id*. at 14. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. *Id.*
[28] Hansa Consult of N.A., LLC v. Hansaconsult Ingenieurgesellschaft mbH, 35 A.3d 587, 593 (N.H. 2011).
[29] *Id*.

reasonableness of the forum clause."[30] There was uncertainty post-*Bremen* as to what the right test was to apply when analyzing whether to make an exception and void the clause.[31] However, for the past forty-five years, the Supreme Court has now favored upholding forum-selection clauses under contract law principles.[32]

The Court's increasing respect for the validity of venue clauses continued in *Stewart Org., Inc. v. Ricoh Corp*,[33] a diversity case. Although the parties' agreement specified Manhattan as the venue of choice, the case was brought in Alabama, where the state law looked with disfavor on forum selection clauses.[34] The validity of the venue clause thus depended on which law governed, Alabama law or the principles of federal law established in *Bremen*.[35] While the lower court had considered the issue under *Bremen*, the Court looked to whether the transfer was warranted under § 1404(a) and agreed with the lower court's decision.[36] Section 1404(a) requires the court to perform a balancing test, which takes into consideration the fact that the parties previously agreed to litigation in a specific forum.[37] However, the Court recognized that the drawback to this test was that there are other remaining factors which may alter the outcome.[38] After weighing the options, the Court held that district court judges should follow § 1404(a) and the balancing test, including the respect for a contractual venue provision, instead of state policy when determining whether to enforce a forum-selection clause and thus It approved the motion to transfer.[39]

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[30] *Bremen*, 407 U.S. at 17; Mullenix, *supra* note 12, at 313.
[31] Mullenix, *supra* note 12, at 358.
[32] Mitsui & Co. (USA), Inc. v. Mira M/V, 111 F.3d 33, 35 (5th Cir. 1997) (citing a series of Supreme Court cases since 1972 upholding forum selection clauses).
[33] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988).
[34] *Id.* at 28.
[35] *Id.*
[36] *Id.* at 29.
[37] *Id.* at 30.
[38] *Id.*
[39] *Id.* at 32.

The Court considered venue a third time in *Carnival Cruise Lines, Inc. v. Shute*.[40] 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" between the parties.[41] Much of the argument revolved around the *Bremen* rationale that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect."[42] The *Bremen* Court had held that the clauses should be upheld based on the fact that the parties had expressly agreed to the venue.[43] The facts were obviously less supportive in *Carnival,* which involved a contract of adhesion that appearred on the back of a ticket.[44] The clause required litigation in Florida and the plaintiffs lived in Washington.[45] The Court considered the benefits and burdens for each party in addition to the fact that the plaintiffs had time to review the clause prior to taking their trip.[46] It concluded that a form contract is not in itself a reason to refuse to enforce a forum-selection clause, although other factors might result in a refusal.[47]

The *Carnival Cruise* Court thus left an opening for courts to deny a form contract by stating the clauses were "subject to judicial scrutiny for fundamental fairness."[48] Therefore, a court could look to the convenience of the venue, the venue's connection to the contact, the existence of one-sided bargaining power, and potential policy concerns.[49] Since a true negotiation would satisfy the majority of these factors, this test provides a way for the courts to

[40] Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
[41] *Id.* at 589
[42] *Id.* at 591 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972)).
[43] *Id.* at 591.
[44] *Id.* at 591.
[45] *Id.* at 589.
[46] *Id.* at 594.
[47] *Id.* at 595.
[48] *Id.*
[49] *Id.*

address a "take it or leave it" contract situation where the signee does not have the flexibility to *not* agree to the terms.[50]

This triumvirate of cases has resulted in a doctrine in which forum selection clauses are typically upheld and treated as "presumptively valid" unless there are unreasonable circumstances.[51] Although *Bremen* based its holding on the freedom to negotiate, *Carnival Cruise* made it clear that the same formal analysis should be applied to a one-sided form contract forum-selection clause, although the lack of true bargaining might make judicial enforcement of the clause somewhat less certain.[52]

A 2013 case gave reinforced voice to this understanding, when the Court stated where "the 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."[53] This view is now part of the Restatement (Second) of Conflict of Laws, which states, "the parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable."[54]

Circuits have set forth various tests to determine whether a clause should be unenforceable. Each has the same general components.[55] For example, the Sixth Circuit has a three-part test where the courts consider: "(1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly

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[50] *See generally id.*
[51] 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 (2014); *see* Union Elec. Co. v. Energy Ins. Mut. Ltd., 689 F.3d 968, 973 (8th Cir. 2012); M.B. Restaurants, Inc. v. CKE Restaurants, Inc., 183 F.3d 750, 752 (8th Cir. 1999); B. Group, LLC v. Bus. Intelligence Advisors, Inc., CV H-16-0428, 2017 WL 698536, at *7 (S.D. Tex. Feb. 22, 2017); Nicolas v. MCI Health and Welfare Plan No. 501, 453 F. Supp. 2d 972, 973 (E.D. Tex. 2006).
[52] *See supra* Part II.A.
[53] A. Marine Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas, 134 S. Ct. 568, 581 (2013).
[54] Restatement (Second) of Conflict of Laws § 80 (1971).
[55] *See* Barry L. Salkin, *Forum Selection Provisions in ERISA Plans*, 29 BENEFITS L.J. 1, n. 16 (2016) for examples of the various circuit court tests.

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."[56] These tests create a high bar for a party to avoid transfer in deference to contractual venue clause.[57] This is partly due to the rationale that courts should uphold contract law principles and not support a plaintiff who merely has changed his mind.

B. The history of ERISA and its goals

Since the rights in question are governed by a statute, the courts consider the language and purpose of the statute when deciding the outcome of the case.[58] The courts do not want to create a precedent or outcome that is contrary to the statute. For this reason, one must understand the history of ERISA, including its statutory language and Congress's intention behind enacting it, before fully grasping the issues surrounding how the courts are currently deciding cases involving venue clauses in ERISA plans. If enforcing the clauses contravenes ERISA, the clauses should not be upheld.

ERISA was enacted on September 2, 1974 to address concerns with private pension plans.[59] In some cases, defined benefit plans were poorly funded and had no insurance backstop for plan failure. [60] Plan vesting rules sometimes required long and unbroken periods of service before a plan participant earned a benefit.[61] Plan officials sometimes mismanaged plans and

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[56] 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).
[57] Salkin, *supra* note 55, at 2.
[58] *See also* Turner v. Sedgwick Claims Management Services, Inc., 2015 WL 225495 (N.D. Ala. January 16, 2015).
[59] 29 U.S.C.A. § 1001; Stephen E. Ehlers & David R. Wise, *So What's ERISA All About? A Concise Guide for Labor and Employment Attorneys*, 77 N.Y. ST. B.J. 22 (October 2005); *see* Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?*, 47 JOHN MARSHALL L. REV. 145, 154 (2013).
[60] Ehlers & Wise, *supra* note 58, at 22; *see also* Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 217 (D. Me. 2016).
[61] *See generally* Salkin, *supra* note 55; Ehlers & Wise, *supra* note 59.

yielded to conflicts of interest.[62] Employees faced procedural and substantive obstacles to challenge benefit denials and lapses in fiduciary behavior.[63] Disclosure of rights and benefit limits were in many cases inadequate.[64] As a result, plan participants were sometimes denied benefits that they had reasonably expected, had worked for, and on which they depended.[65] After all, private pension plans were used as a tool for employers to supplement compensation because of wage controls and thus the benefits were rightfully owed to the employees.[66]

Congress enacted ERISA to address these and other issues, with its primary goal being to ensure the delivery of benefits reasonably expected by plan participants.[67] The statute imposed fiduciary and disclosure rules, requiring that plans adhere to vesting, funding, and other substantive standards, and it created dispute resolution mechanisms, beginning with plan-specific claim and appeal procedures and culminating with "ready access" to challenge benefit denials and fiduciary violations in "the federal courts."[68] ERISA was also concerned with nationwide uniformity and included a broad preemption rule.[69] The Supreme Court has also found that Congress wanted to balance employee protection without unnecessarily increasing the costs of plan sponsorship.[70]

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[62] *See generally* Salkin, *supra* note 55; Ehlers & Wise, *supra* note 59.
[63] *See generally* Salkin, *supra* note 55; Ehlers & Wise, *supra* note 59..
[64] *See generally* Salkin, *supra* note 55; Ehlers & Wise, *supra* note 59.
[65] Ehlers & Wise, *supra* note 59, at 22; Michael S. Sirkin, *The 20 Year History of ERISA*, 68 ST. JOHN'S L. REV. 321, 323 (1994). 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 (Autumn 2006).
[66] Ehlers & Wise, *supra* note 58, at 22 ("National Labor Relations Board[ruled] that pensions were a mandatory subject of collective bargaining.").
[67] Shaw v. Delta Air Lines, 463 U.S. 85, 90 (1983); Ehlers & Wise, *supra* note 59, at 22. (ERISA was intended to resolve the following issues: "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."); Sirkin, *supra* note 65, at 323.
[68] *See generally* Salkin, *supra* note 55; Ehlers & Wise, *supra* note 59.
[69] 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").
[70] *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987); Miara v. First Allmerica Fin. Life Ins. Co., 379 F. Supp. 2d 20, 28 (D. Mass. 2005); *see also* Barnett v. Barnett, 67 S.W.3d 107, 116 (Tex. 2001).

ERISA is a broad statute.[71] Although when Congress enacted ERISA it was motivated primarily by problems with pension plans, the statute applies to welfare benefit plans—primarily health and disability plans—as well.[72] The statute applies to plans maintained by single employer, multiple employers, and multi-employer organizations.[73] Therefore, the reach of ERISA is extensive. ERISA however does not require employers to offer an employee benefit plan but if the employer does offer a plan that falls under ERISA, it must abide by the regulations.[74] For example, it is only once the employer establishes the plan that ERISA mandates that employees are given detailed information about the plan and that the employer adequately fund the plans.[75] ERISA also requires that the plan be offered to nearly all employees, not only to the highly-compensated employees.[76] Furthermore, there are reasonable vesting rules to ensure the employee will receive the promised retirement benefit if he leaves the employer after a specified length of time.[77] It is clear from these initiatives that ERISA was designed to ensure the average worker receives fair benefits.

In the event that a dispute arises under ERISA, § 1132 stipulates the litigation process.[78] It states that employee benefit plans may be sued as an entity.[79] It also addresses venue and confers jurisdiction to the federal courts.[80] A participant may bring suit in any district "where the plan is administered, where the breach took place, or where a defendant resides or may be

[71] *See supra* note 55 and 59.
[72] *See supra* note 55 and 59.
[73] Michelle L. Roberts & Glenn R. Kantor, *Practical Presuit Considerations and How to Ensure a Strong Record for Litigation*, 44 Brief 36, 37 (Summer 2015); Ehlers & Wise, *supra* note 58, at 23.
[74] Ehlers & Wise, *supra* note 59, at 23.
[75] *Id.*; *see* Massachusetts v. Morash, 490 U.S. 107, 112 (1989).
[76] Ehlers & Wise, *supra* note 59, at 23.
[77] Id.
[78] 29 U.S.C.A. § 1132; Ehlers & Wise, *supra* note 59, at 27.
[79] Ehlers & Wise, *supra* note 59, at 27.
[80] 29 U.S.C.A. § 1132(e)(1); Ehlers & Wise, *supra* note 59, at 27.

found."[81] This is considered a "liberal venue provision designed to provide easy and ready access to the federal courts."[82] Although it cannot be said with certainty, there is reason to believe that few ERISA plans included venue limitations after ERISA's enactment in 1974, for cases involving such clauses were not reported for the first years of ERISA. [83]

C. How the courts interpret ERISA's venue provision when considering venue clauses

Many of ERISA's provisions are framed in broad and open language and it has fallen on the courts to interpret their meaning and reach in various situations.[84] The question of venue—whether it is a right of the plaintiff or merely an outer limit on where a civil action may be filed—is no different. The venue transfer issue generally arises when the defendant files a motion to transfer under 28 U.S.C 1404(a).[85] A court may grant the transfer for any civil action to any district where the case may have been brought originally.[86] As previously discussed, in the absence of a contractual venue clause, courts balance various factors to decide whether a transfer should be granted and the moving party bears the burden of showing the transfer is necessary.[87] In the event that the parties have agreed to a contract that includes a forum selection clause, the

[81] 29 U.S.C.A. § 1132(e)(2); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987); Don Zupanec, *ERISA Venue Provision Supersedes Forum Selection Clause*, 21 NO. 12 FEDERAL LITIGATOR 6 (Dec. 2006).
[82] Kathryn J. Kennedy, *Protective Plan Provisions for Employer Sponsored Employee Benefit Plans*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 1, 58 (2016); *see* Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987) (denying Gulf's position that § 1132 is the basis to file a declaratory judgment action in Florida although plaintiff lived in Tennessee).
[83] *See ERISA Attorney Stephen Rosenberg Says Litigation Legacy is Improved Plan Design*, FIDUCIARY NEWS.COM (Oct. 2015), http://strogoread.astro.com.my/topics/articles/s-1226_s_1226-1483726 (suggesting that venue clauses were a recent development to counter plaintiff success in ERISA substantive issues).
[84] Sirkin, *supra* note 65, at 324.
[85] Atl. Marine Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas, 134 S. Ct. 568, 581 (2013); Feather v. SSM Health Care, 2016 WL 6235772, at *2 (S.D. Ill. Oct. 25, 2016). Venue issues typically arise under a motion to transfer but may also arise on a motion to dismiss.
[86] 28 U.S.C.A. § 1404(a) ("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. ").
[87] *Feather*, 2016 WL 6235772, at *2; *see also Gulf Oil*, 330 U.S. at 508. Although the case involved forum nonconveniens, the *Gulf Oil* factors are commonly discussed in relation to motions to transfer. Bd. of Trustees, Sheet Metal Workers Nat. Fund v. Baylor Heating & Air Conditioning, Inc., 702 F. Supp. 1253, 1256 n.7 (E.D. Va. 1988).

threshold changes because of a presumption that the clause was bargained for by the parties, reduces ex-post facto forum shopping, and should generally be upheld.[88]

But the analysis becomes more complicated when the contractual venue clause is part of an ERISA employee benefit plan, both because of the purpose and language of ERISA and the reality that the venue clause was not a bargained-for provision. 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, or should the clause be given some but lesser weight than in a non-ERISA case, particularly given the imbalance of the parties' bargaining position? This inquiry is a threshold question and will probably remain one until the issue is ultimately settled by either the Supreme Court or by unanimity among the circuit courts. [89]

But to date, the Sixth Circuit Court of Appeals is the only circuit court has addressed whether venue clauses should be enforced in ERISA cases and it held that they should be enforced on the basis that the clauses are not inconsistent with ERISA.[90] Despite the lack of direction from the Supreme Court and circuit courts, the majority of the district courts also find the clauses enforceable.[91]

The recent case, *Feather v. SSM Health Care*,[92] provides an example of the majority approach. An Illinois district court was faced with whether to uphold a venue clause and transfer the case to Missouri.[93] (As noted, the Seventh Circuit has yet to weigh in on the issue.[94]) The

[88] *Alt. Marine Const*., 134 S. Ct. at 581 ("Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied ").
[89] *See generally Feather*, 2016 WL 6235772, at *4. (noting that courts will decide whether to uphold the venue clause before considering the balancing factors analyzed for a motion to transfer).
[90] Smith v. Aegon Companies Pension Plan, 769 F.3d 922, 931-33 (6th Cir.) cert denied. 136 S. Ct. 791 (2016); *Feather*, 2016 WL 6235772, at *11.
[91] *Feather*, 2016 WL 6235772, at *11.
[92] 2016 U.S. Dist. LEXIS 147558 (S.D. Ill. Oct. 25, 2016).
[93] *Feather*, 2016 WL 6235772, at *4.
[94] *Id*. at 11.

plaintiff argued the clause was "unreasonable and inconsistent with ERISA."[95] First, the court acknowledged that, under § 1404(a), it should apply a balancing test to weigh the plaintiff's choice of forum and private-interest factors against the public-interest factors.[96] It pointed out that the plaintiff has a higher burden to show why the transfer should not be granted in light of the fact the plaintiff previously agreed to litigate in that forum.[97]

Next, the court considered as a threshold question whether the venue clause was valid and enforceable given ERISA's venue provision.[98] To overcome the validity presumption under *Bremen*, the plaintiff argued that the clause unlawfully limited her to one venue when ERISA permits three options under § 1132.[99] The court, though, stated it had no reason to go against the same conclusion as the "vast majority of federal district courts" that found to the contrary.[100] The court agreed with the other courts that the venue clause did not prevent the plaintiff from accessing the federal court system, as intended by ERISA.[101] The court also noted that enforcing venue clauses follows ERISA's goals of having uniformity of administration costs and reducing overall costs.[102] Finally, the court noted ERISA does not prohibit the parties from agreeing to limit the venue.[103]

The plaintiff also argued that the clause was unreasonable and unfair because the defendant had unilaterally added it to the plan and did not inform participants of the clause.[104] But using the *Carnival Cruise* analysis, the court looked at whether there was evidence of bad

[95] *Id*. at 4.
[96] *Id.* at 5.
[97] *Id.* at 5,7 (explaining the private-interest factors fall entirely to favor the existing forum due to the previous agreement and it is rare for a motion to transfer to succeed solely on public-interest factors).
[98] *Id.* at 7.
[99] *Id.* at 10.
[100] *Id.* at *11-12 ("The Court sees no need to rewrite or rehash at length what has already been said.").
[101] *Id.* at 12.
[102] *Id.*
[103] *Id.*
[104] *Id.*at 13.

faith and fraud and whether the plaintiff had a reasonable opportunity to reject the contract.[105] The court found the plaintiff had ample time to review the plan but also mentioned this fact was irrelevant since the employer retained the right to add the venue clause to the plan.[106] Ultimately, the court concluded the clause was valid and enforceable and granted the transfer to the venue specified in the plan.[107]

In contrast, ten years before *Feather*, a district court in Texas, in *Nicolas v. MCI Health and Welfare Plan No. 501,* reached the opposite result.[108] It chose to go against the majority of the courts and found it would be improper to uphold the venue clause.[109] The case involved a Texas resident-plaintiff who had a forum selection clause in his long-term disability plan that specified litigation must occur in Washington, D.C or Loudoun County, Virginia.[110] The court acknowledged the Fifth Circuit Court of Appeal's preference to uphold forum selection clauses in contracts before it concluded that the "policies of the ERISA statutory framework supercede the general policy of enforcing forum selection clauses."[111] The court initially looked to the plain language of the statute and determined the plaintiff could have brought the suit in any of the three venues set forth in § 1132.[112]

This, the court held, was consistent with Congressional intent.[113] The court found that Congress clearly intended for employee benefit plans to abide by ERISA and that included the policy to provide safeguards "with respect to the establishment, operation, and administration of

[105] *Id.* at 14.
[106] *Id.* at 15 (explaining the plan had a provision that permitted it to unilaterally change the plan).
[107] *Id.* at 20.
[108] Nicolas v. MCI Health and Welfare Plan No. 501, 453 F. Supp. 2d 972 (E.D. Tex. 2006).
[109] *Id.*
[110] *Id.*
[111] *Id.* at 974.
[112] *Id.*
[113] *Id.*

[employee benefit] plans."[114] In the court's view, enforcement of the contractual venue clause would undermine the judicial access that Congress created for participants.[115] The court also pointed out that it would be improper to uphold the clause as a matter of public policy because it would ultimately result in "severely limit[ing] many potential plaintiffs from having ready access to the federal courts."[116]

These two cases illustrate the different views that the courts have had under the same analysis. While one focused on the general strong presumption given to contractual venue clauses in the federal courts, the other looked beyond that to ERISA's specific language and the policy considerations that undergird the language. Regardless of the approach, the courts are supposed to act in a manner that ensures venue clauses do not contravene ERISA since it is the statute that should guide the analysis, not a general presumption.

Part III. Both Sides of the Argument as Viewed Through Two Key Decisions

Smith v. Aegon Cos. Pension Plan[117] and *DuMont v. PepsiCo,Inc.*[118] were decided in 2014 and 2016, respectively. *Smith* was decided by the United States Court of Appeals for the Sixth Circuit[119] whereas *DuMont* was heard by the United States District Court for the District of Maine.[120] These two cases outline the arguments that proponents and opponents frequently use for their stance on whether a venue clause should be enforced when the plaintiff would be forced to travel a significant distance to litigate in the chosen forum. Proponents of enforcing venue clauses focus on congressional intent by arguing that Congress did not specifically prohibit narrowing the venue whereas opponents point out that Congress intended to protect participants

[114] *Id.* (citing to and discussing 29 U.S.C. § 1001).
[115] *Id.* at 974.
[116] *Id.*
[117] Smith v. Aegon Companies Pension Plan, 769 F.3d 922 (6th Cir. 2014).
[118] Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209 (D. Me. 2016).
[119] 769 F.3d 922.
[120] 192 F. Supp. 3d 209.

by providing three forum options. Opponents also argue that enforcing these clauses goes against public policy. Proponents focus more on contract law and previous decisions involving forum selection clauses in general.

A. Smith v. Aegon Cos. Pension Plan

In *Smith*, the plaintiff appealed the lower court's decision that the venue clause in his pension plan was enforceable and the resulting order transferring the case from Western District of Kentucky, where it was filed, to Cedar Rapids, Iowa, the venue specified by the plan.[121] The Sixth Circuit began its analysis by addressing the amount of deference to give to the position taken by the Secretary of Labor in an amicus brief, which supported that venue clauses should not be enforced.[122] The Sixth Circuit determined that the Department's litigation position, which found its exclusive expression in amicus briefs, accorded no deference to the Secretary of Labor's position.[123] The question was a legal question for the court and the agency had no special expertise on the relevant statutory considerations.

The court then turned to the relevant issue, whether the venue clause should be enforced.[124] Using the basic principles of contracts, the plaintiff argued that the amendment was added seven years after his benefits began so it could not and was "not the product of an arms-length transaction."[125] The court, however, did not believe the lack of bargaining was relevant, given that the *Carnival Cruise* holding regarding a venue clause spelled out on the back of a

[121] *Smith*, 769 F. 3d at 925, 926.
[122] *Id.* at 926. This is another controversial question since the Supreme Court has not set a precedent as to whether deference should be given to an agency's position that has only been expressed in an amicus brief. Id. at 927 (noting some circuits apply *Skidmore* deference).
[123] *Id.* at 927-29 (explaining that *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 and *Skidmore* is inapplicable because the Secretary is not an expert in this matter, the Secretary's analysis was only based on the textual interpretation of ERISA, and the Secretary only expressed this opinion twice in nearly forty years giving the appearance that it lacks careful consideration and is "an expression of [the agency's] mood ").
[124] *Id.* at 929.
[125] *Id.* at 930.

cruise ticket and for which no bargaining occurred was entitled to enforcement in the absence of compelling reasons not to enforce it.[126] It also explained that ERISA provides broad flexibility for employers to design and amend their plans.[127]

The plaintiff also argued that venue clauses should not be enforced because they could result in pension plans specifying faraway forums, like Alaska, which would create an excessive burden being placed on litigants.[128] The court dismissed this argument by stating the plaintiff can challenge the reasonableness of the forum under the Sixth Circuit's three-part *Wong* test,[129] which looks at "(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."[130] The plaintiff could have raised this issue regarding the test but did not and thus the court would not find venue clauses generally unenforceable because of the possibility that some plan might in the future use venue to effectively foreclose litigation.

The court also considered the broader question of whether ERISA's language simply precludes contractual vesting provisions.[131] Before turning to the plaintiff's arguments, the court explained that most courts uphold the clauses on the basis that Congress had the ability to prohibit the clauses yet it did not previously and still has not done so.[132] Both the Secretary of Labor and the plaintiff argued that contractual venue clauses conflict with several ERISA

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[126] *Id.*
[127] *Id.* (applying the *Bremen* holding that forum selection clauses are presumed valid and enforceable unless it would be unjust or unreasonable to enforce it or that it should be invalidated for fraud or overreaching).
[128] *Id.* at 930.
[129] *See supra* note 58 and accompanying text.
[130] *Id.* at 930. The Sixth Circuit created a three part test to analyze if a challenged forum selection clause should be enforced using the following: "(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).
[131] *Smith*, 769 F.3d at 931.
[132] *Id.*

provisions.[133] Regarding access to the federal court system, the court concluded that a venue clause does not conflict with this ERISA goal because the clause requires litigation to occur in a federal court.[134] Consistent with other proponents' arguments, the court stated that venue clauses actually further ERISA's goals by requiring all litigation against the plan to occur in a single forum.[135] This allows predictability and uniformity.[136] The selected venue also gains familiarity with the plan, which may lead to judicial efficiency.[137] The court expressed that it would be more costly to the employees of the plan if the plan had to litigate in forums throughout the country.[138]

In response to plaintiff's argument that venue clauses conflict with the ERISA venue provision, the court stated it was a permissive provision.[139] A venue clause specifying a forum that fell within the ERISA provision does not conflict with it.[140] This point was supported by two district cases, each holding that when Congress uses "may" it does not mean that Congress intended to prevent the parties from limiting themselves to one of those options. [141]

The court then took an interesting turn by comparing venue clauses to arbitration clauses since both are forms of forum selection clauses.[142] It stated that even if the venue was not one authorized by ERISA, the clause would still be upheld because the Sixth Circuit has a precedent of enforcing mandatory arbitration clauses.[143] The rationale is based on the question of how can a court uphold an agreement that keeps the issue out of federal court and then not uphold a clause

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[133] *Id.*
[134] *Id.* at 932.
[135] *Id.* at 931.
[136] *Id.*
[137] *Id.* at 932 (citing to Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007).
[138] *Id.*at 932.
[139] *Id.*
[140] *Id.*
[141] *Id.* (citing to Price v. PBG Hourly Pension Plan, 2013 WL 1563573, at *2 (E.D.Mich. Apr. 15, 2013) and Williams v. CIGNA Corp., 2010 WL 5147257, at *4 (W.D.Ky. Dec. 13, 2010)).
[142]*Smith*, 769 F.3d at 932.
[143] *Id.*

that merely restricts it to one federal court.[144] Such a holding would mean that the court is enforcing the more extreme restriction while refusing to enforce a more moderate one.[145]

Lastly, the court addressed the plaintiff's argument regarding fiduciary duties.[146] 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."[147] This was quickly dismissed because the argument was not raised properly.[148] Although it was a divided panel, the court thus affirmed the district court's order to transfer the case to Iowa.[149]

Judge Clay, writing in dissent, focused on public policy and statutory purpose.[150] He emphasized that Congress intended ERISA to protect participants and beneficiaries of the plans.[151] The venue provision was included to "remov[e] jurisdictional barriers that would prevent [litigants] from asserting their statutory rights."[152] Forcing the plaintiff to litigate five hundred miles away would directly conflict with the goal of ERISA in addition to conflicting with its venue provision.[153] Judge Clay also noted the employer imposed the venue provision on participants without bargaining for it and that the provision applied to benefits already earned at the time the plan was amended. [154] Judge Clay further commented that the plaintiffs in these

[144] *Id.*
[145] *See id.*
[146] *Id.*
[147] *Id.* at 933 (quoting 29 U.S.C § 1110(a)).
[148] *Id.* at 933.
[149] *Id.* at 934.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*

types of cases are often living on fixed incomes, have limited resources, and may be sick and disabled.[155]

Relying on *Bremen,* where the Supreme Court stated that courts should not enforce contractual venue clauses when they are antithetical to public policy and statutory purpose, Judge Clay would have reversed the district court's decision to transfer venue and thus the courts would have grounds to not uphold the clause.[156]

B. *Dumont v. PepsiCo, Inc*

Just one and one-half years later, the United States District Court for the District of Maine rejected the approach in *Smith*, essentially adopting the position of Judge Clay.[157] The plaintiff worked for PepsiCo for over twenty years.[158] Three years before he retired, PepsiCo distributed a notice of change stating that the plan now required litigation to occur in the United States District Court for the Southern District of New York.[159] In this matter, the plaintiff would be forced to litigate in southern New York instead of Maine. The court acknowledged the line of Supreme Court cases favoring enforcement of venue agreements as a matter of contract law but also noted the First Circuit had never addressed whether those cases dictate enforcement of venue clauses in a civil action seeking benefits under ERISA.[160] The First Circuit has not addressed whether venue clauses in ERISA plans should be upheld and the court confirmed that the Sixth Circuit is the only appellate court to have answered this question.[161]

[155] *Id.* at 935.
[156] *Id.*
[157] Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209 (D. Me. 2016).
[158] *Id.* at 211.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 212 (noting Sixth Circuit addressed it in Smith v. Aegon Companies Pension Plan, 769 F.3d 922 (6th Cir. 2014)).

The court began its analysis by reviewing the history of forum selection clauses, particularly the *Bremen* and the *Carnival Cruise* decisions.[162] The court, however, found those decisions were inapposite to the facts before it, since plaintiff neither bargained over the venue limitation, and perhaps more important, did not realistically have the option to exit the plan as his benefits were already vested and he was established in his career.[163] Here we can note that the plaintiffs had less leverage than the plaintiff in *Carnival Cruise,* who at least had the opportunity to review the restriction before embarking on the cruise.

The court next explained that other courts apply the presumption of validity without carefully analyzing whether the party had actually contracted away his venue privilege.[164] Other courts either bypass this analysis or acknowledge that, while the participant did not agree, that agreement itself was unnecessary if the participant had knowledge of the venue restriction.[165] A few courts have gone as far as stating that the plaintiff did not even need to be notified or aware of the clause as long as the employer was made aware of it by the plan administrators.[166]

The court disagreed with this logic and quoted from *Schoemann v. Excellus Health Plan, Inc*., which stated a venue clause that an employer/plan administrator added to an ERISA plan "obviously does not reflect any 'preference' of the beneficiaries."[167] The court thus held that the venue clause before it should not enjoy the presumption of enforceability that would otherwise extend to such clauses and therefore denied the motion to transfer based on the traditional §

[162] *Id.*at 214.
[163] *Id.* (noting the plaintiff had worked there for thirty-one years and could not quit to find a new employer).
[164] *Id.*
[165] *Id.* at 215.
[166] *Id.* (noting one court even went as far as to recognize the unfairness of the participant or beneficiary being the ignorant third-party but it justified its holding by stating the participants "must take the good with the bad").
[167] *Id.* (discussing and quoting Schoemann ex rel. Schoemann v. Excellus Health Plan, Inc., 447 F. Supp 2d 1000, 1007 (D. Minn. 2006)).

1404(a) analysis. [168]The court further held that enforcement of the venue clause also contravened the public policy concerns of ERISA and should not be enforced under *Bremen* and subsequent Supreme Court cases.[169] The court distilled four questions from the Supreme Court venue-clause opinions, as follows: "(1) is the clause permissive or mandatory (2) is the dispute within the scope of the clause (3) is the clause unreasonable under the circumstances (4) given a valid clause, has the resisting party demonstrated that public interest factors overwhelmingly disfavor transfer."[170] As to the third question, whether the clause was unreasonable, the court indicated enforcement would be unreasonable if the clause was a result of "fraud or overreaching," if the clause were unjust, if the clause caused such grave difficultly and inconvenience to litigation in the contractual forum that it would deprive the plaintiff of his "day in court," or if "enforcement would contravene a strong public policy."[171]

The *DuMont* court found the strongest foothold was within the fourth factor—public policy—which it viewed as both an element of unreasonableness and an independent consideration.[172] The court reviewed the legislative history and language of ERISA and found that Congress enacted ERISA to protect the interests of participants and beneficiaries in their reasonably expected benefits and to provide "the full range of equitable remedies available" and "to remove jurisdictional and procedural obstacles" to litigating benefit denials.[173] Enforcing contractual venue clauses would be inconsistent with these purposes.

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[168] *Dumont*, 192 F. Supp. 3d at 215-216 (regarding also how much weight to apply to forum selection clauses when a motion to transfer has been filed).
[169] *Id.*
[170] *Id.* at 217; *see* Atl. Marine Constr. Co. v. United States Dist. Court, 134 S. Ct. 568, 583 (2013).
[171] *Dumont*, 192 F. Supp. 3d at 217; *see* Claudio-De Leon v. Sistema Universitario Ana G. Mendez, 775 F.3d 41, 48-49 (1st Cir. 2014).
[172] *Dumont*, 192 F. Supp. 3d at 217.
[173] *Id.* at 218.

Additionally, the court considered that ERISA provided its own venue provision instead of letting 28 U.S.C. § 1391 stand as the default.[174] It compared this to the Federal Employers' Liability Act (FELA) since both are "protective statutes with special venue provision[s]."[175] FELA's provision has similar language specifying three forums for litigants to bring a suit.[176] The Supreme Court in *Boyd v. Grand Truck Western Railroad Co.*[177] had held that the FELA provision superceded venue clauses.[178] The Court explained that enforcing the venue clause "would thwart the express purpose of the [statute]" and that the plaintiff has a substantive right to the forums listed in the statute despite that the provision was permissive.[179] It was based on public policy, similar to the ERISA issue.[180]

The *Dumont* defendants objected to the comparison with *Boyd* and argued that ERISA's venue provision were intended only to provide litigants with some appropriate federal jurisdiction, not necessarily a full range of choices.[181] The court disagreed, noting that ERISA's purposes included giving participants "ready access to the Federal Courts."[182] The defendants position would effectively remove the word "ready" from this formulation.[183] Forcing a participant to bring a civil action thousands of miles away from where the plaintiff worked and earned benefits does not provide ready access to the federal courts.[184] A unilateral amendment to a plan that requires a plaintiff to travel so far undermines ERISA.[185]

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] 338 U.S. 263 (1949).
[178] *Dumont*, 192 F. Supp. 3d at 218-19 (discussing Boyd v. Grand Truck Western Railroad Co., 338 U.S. 263 (1949) where an injured worker agreed to litigate in a specific forum in exchange for money but later chose a forum authorized under the Federal Employers' Liability Act).
[179] *Dumont*, 192 F. Supp. 3d at 219.
[180] *See id.* at 218.
[181] *Id.* at 219-20.
[182] *Id.* at 220.
[183] *Id.*
[184] *Id.*
[185] *Id.*

Lastly, the defendants raised the argument that ERISA intended to promote "uniformity, predictability, and efficiency in the administration of plans."[186] To this, the court reminded the defendants that district judge decisions are not binding on each other, even within the same district.[187] Therefore, to become uniform, the decision must come from the Circuit Court of Appeals or the Supreme Court.[188] Furthermore, these three goals are promoted throughout ERISA in other ways and were not intended to target venue so it should not take precedence over access to a federal court.[189] The court circled back to what Congress would have anticipated when ERISA was enacted and it would not have been venue clauses considering they were not popular in plans until the 2000s.[190] Thus, because enforcement of the clause was inconsistent with the language and policy foundation of ERISA, the court held that the clauses were not enforceable and perhaps alternatively, that enforcement would violate public policy.[191]

Part IV. ERISA and Venue Clauses: Possibilities for the Future

The issue of whether courts should respect venue clauses in ERISA plans is a complex issue, pitting against each other a Supreme Court jurisprudence that generally regards a contractual venue clause as presumptively enforceable and a remedial statute with a broad venue provision and evincing a statutory purpose to facilitate "ready acces" to federal courts. Early decisions focused on the former and enforced such venue clauses; later courts generally marched in lockstep with the earlier courts. There have only been two circuit court decisions (one of which was a single sentence order affirming the district court), which both affirmed the district court's transfer of venue in accordance with a plan venue clause, although the first such decision

[186] *Id.*
[187] *Id.* at 221.
[188] *Id.*
[189] *Id.*
[190] *Id.* at 222.
[191] *See id.*

produced a well-reasoned dissent. It should be said that one reason for the paucity of appellate-level decisions is that the issue generally is decided in the context of a motion to move venue under § 1404, which is not a final order. (The *Smith* case was unusual; the defendant moved to dismiss rather than to transfer venue.)

The issue of whether ERISA venue clauses should be enforced is too important to be decided through a judicial game of follow-the-leader. It is time for the courts stop automatically taking the same path as their sister courts and start thoroughly analyzing this issue. Very few courts have been willing to go against the majority and hold that venue clauses in ERISA plans should not be enforced.[192] Yet, the decisions that have backed the trend toward enforcement of such clauses have engaged in serious analysis and seem grounded on a strong fidelity to ERISA's language and the policies reflected therein [193]

It is generally accepted that Congress enacted ERISA to provide new protections to participants and beneficiaries in employee benefit plans.[194] An important reform was to federalize dispute resolution and in doing so remove "jurisdictional and procedural obstacles" to afford participants the opportunity to bring a suit.[195] An express statutory purpose is to provide participants with "ready access to federal courts."[196] Furthermore, while ERISA gives broad latitude to employers to design and amend plans, that latitude is not unchecked; indeed,

[192] As of June 2016, only three district courts had refused to uphold a venue clause in an ERISA plan. *See also id.* at 213.
[193] *See* Feather v. SSM Health Care, 2016 WL 6235772, at *4 (S.D. Ill. Oct. 25, 2016); Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 222 (D. Me. 2016).
[194] U.S. Airways, Inc. v. McCutchen, 133 S. Ct. 1537. 1548 (2013); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 115 (2008).
[195] H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973); *see* Leslie L. Wellman, *An Overview of Pension Benefit and Fiduciary Litigation Under ERISA*, 26 WILLAMETTE L. REV. 665, 680 (1990).
[196] 29 U.S.C.A. § 1132.

fiduciaries are not permitted to enforce plan provisions that are inconsistent with the statute.[197] Each of these points must remain in the forefront of the judges' minds.

Since the Supreme Court has not spoken to the issue, perhaps one solution would be for the Secretary of Labor to issue regulations, interpretative guidance, or to act with the force of law. As the court expressed in *Smith*, without regulations or interpretive guidance stating that venue clauses should not be enforced in ERISA-governed plans, the courts do not necessarily have to give *Skidmore* deference to the agency.[198] Similarly, the Secretary of Labor has not acted with the force of law, which would require the courts to give it *Chevron* deference.[199] Despite the lack of these formalities, the Department of Labor (DOL) has expressed in several briefs that forum selection clauses conflict with ERISA's venue provision.[200] The DOL continuously has held this viewpoint yet it has not taken further actions to promote deference.

Arguably, it is unclear as to the amount of deference that would be given because the DOL would be interpreting the statute instead of leaving this role to the courts but it could strength the argument for not enforcing venue clauses.[201] Therefore, if deference were given, it would result in uniform decisions and judicial efficiency because the courts would be giving deference to the same material thus furthering some of the ERISA goals. This would be true regardless of whether the DOL was for or against enforcing the venue clauses.

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[197] ERISA § 404(a)(A)(1)(4); Brief for Pension Rights Center as Amici Curiae Supporting Petitioner at 15, Clause v. United States Dist. Court, 137 S. Ct. 825 (2017).
[198] Smith v. Aegon Companies Pension Plan, 769 F.3d 922, 929 (6th Cir. 2014); *see also* Salkin, *supra* note 55, at 5.
[199] *Smith*, 769 F.3d at 927.
[200] Salkin, *supra* note 55, at 3. The Department of Labor has expressed that the public policy in ERISA's venue provision is strong and should not be modified by contracts. *Id.*at 3-4; *see* Mozingo v. Trend Pers. Servs., 504 F. App'x 753, 758 n.2 (10th Cir. 2012); Nicolas v. MCI Health and Welfare Plan No. 501, 453 F. Supp. 2d 972, 972 (E.D. Tex. 2006).
[201] *See generally* Salkin, *supra* note 55, at 5. The amount of deference given to an agency varies and depends on the circumstances in addition to the agency's care, consistency, formality, expertise in the matter, and persuasiveness. *Id.* (citing to United States v. Mead. 533 U.S. 218 (1984)).

The courts look to statutory interpretation to analyze whether a provision conflicts with the public policy purpose of a statute.[202] As discussed, the parties in these ERISA venue cases tend to argue over the permissiveness interpretation of "may" and the inclusion of "ready access."[203] Congress's use of "ready" coupled with the removal of other jurisdictional hurdles for federal court access strongly suggests that Congress specifically intended to permit suits to be brought in the district where the plaintiff resides.[204] Venue clauses can directly *inhibit* this ready access by forcing an inaccessible venue on the plaintiff.[205] Although Congress did not expressly prohibit venue clauses, this statutory language coupled with congressional intention presents a strong argument that Congress would not have desired for plans to force litigants to either travel many miles or forego a suit solely based on the venue location.[206]

Moreover, the argument that Congress could expressly prohibit venue clauses is neutralized by the argument that Congress could also have expressly permitted them.[207] The overarching theme is that Congress intended to provide more rights to participants and also to even the playing field between the parties.[208] This strongly supports the argument that Congress would have intended to allow plaintiffs to choose between the three permissive venues and not permit a plan to retract those rights or place barriers to prevent the immediate and realistic access to the federal courts closest to the plaintiff's domicile.[209]

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[202] Salkin, *supra* note 55, at 2. (citing to Turner v. Sedgwick Claims Management Services, Inc., 2015 WL 225495 (N.D. Ala. January 16, 2015)).
[203] *See supra* Part III.
[204] *See supra* Part III; Brief for Pension Rights Center as Amici Curiae Supporting Petitioner at 12, Clause v. United States Dist. Court, 137 S. Ct. 825 (2017) (stating ready access means unobstructed access).
[205] Brief for United States as Amici Curaie Supporting Respondents at 11, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016).
[206] Brief for Pension Rights Center as Amici Curiae Supporting Petitioner at 12, n.7, Clause v. United States Dist. Court, 137 S. Ct. 825 (2017); *see also* Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 220 (D. Me. 2016).
[207] *See Dumont*, 192 F. Supp. 3d at 222.
[208] Brief for Pension Rights Center as Amici Curiae Supporting Petitioner, Clause v. United States Dist. Court, 137 S. Ct. 825 (2017)
[209] *See generally* Christopher Carosa, *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-

As the dissent in *Smith* articulated, these venue clauses sometimes impact particularly vulnerable individuals.[210] Litigating further from home will increase the plaintiff's expenses and in some cases may result in an inability to secure representation.[211]

Moreover, there is unequal bargaining power between the parties. On one hand, there is the large pension plan and on the other hand is the individual who simply wants the benefit that he was promised so he can retire. Under *Carnival Cruises*, the parties do not have to negotiate the clause as long as the party was given notice and the opportunity to reject the contact.[212] While this may be a fair outcome for a person taking a vacation, it is unfair and should be inapplicable in the ERISA venue clause context.[213] Furthermore, *Carnival Cruise* dealt with basic contract principles and did not involve a clause that potentially conflicted with a federal statute.[214] The case focused on whether the plaintiff had notice of a unilaterally added provision and whether the plaintiff could have reject it.[215]

Unlike a person who can turn down a cruise, it is unreasonable to expect an individual that has worked for twenty years to even have the option to reject his pension or benefit.[216] At that point, he has either contributed money from his salary directly to the plan or the benefit was factored into his compensation for each of those years.[217] He would be forced to forfeit so much

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attorney-stephen-rosenberg-says-litigations-legacy-is-improved-plan-design. "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 . . . plaintiffs' successes in ERISA litigation . . . have really driven plan sponsors . . . to think proactively about what they can do, in writing their plans, to raise the level of difficulty for plaintiffs . . . in ERISA litigation." *Id.*

[210] *See* Smith v. Aegon Companies Pension Plan, 769 F.3d 922, 935 (6th Cir. 2014).

[211] *See id.*

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

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

[214] Brief for United States as Amici Curaie Supporting Respondents at 11, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016).

[215] *Id.*

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

[217] *See id.*

of the future that he counted on such that it is unfair and unreasonable to allow a plan to make changes as it sees fit.[218] Moreover, in many cases, the plaintiff was a third party to the agreement between the employer and the plan administrator so he was even further removed from the formation of the contract.[219]

The bulk of this issue rests on whether enforcing the clauses are fundamentally unfair.[220] As stated in *Carnival Cruise*, the courts should consider several factors, such as uneven bargaining power, policy concerns, and convenience.[221] Similarly, the Restatement provides the courts with a reason to deny a transfer based on unfairness or unreasonableness.[222] Tests, such as the Sixth Circuit's test, may at first glance seem like a feasible solution.[223] Realistically, the bar may be set so high that the test is merely for show.[224]

The lower court in *Smith* explained that a clause was "enforceable and reasonable" based on the plan and ERISA's leeway for the plan to modify its terms in any way as long as it did not reduce the benefits amount.[225] Under this explanation, it would be nearly impossible for a plaintiff to succeed. Reasonableness should be viewed in light of the circumstances, such as distance and the financial position of the parties, instead of these high burden of proof tests.[226] This stance is contrary to the fact that Congress drafted the statute to be participant-friendly and expected plan fiduciaries to travel distances to defend these suits.[227] This is not an uncommon

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[218] *See id*.
[219] *See id.* at 215.
[220] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 591 (1991).
[221] *See id.*
[222] *See id.* at 595.
[223] *See supra* note 130 and accompanying text.
[224] *See generally* Smith v. Aegon Companies Pension Plan, 769 F.3d 922, 927 (6th Cir. 2014) (noting the plaintiff did not raise the unreasonable defense so it did not discuss the possibility).
[225] Brief for United States as Amici Curaie Supporting Respondents at 4, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016).
[226] *But see* Salkin, *supra* note 55, at 2; P & S Bus. Machine, Inc. v. Canon USA, Inc., 331 F.3d. 804, 807-08 (11th Cir. 2003) (referring to non-ERISA forum selection clauses).
[227] Brief for United States as Amici Curaie Supporting Respondents at 9-10, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016).

theme for Congress to adopt when enacting statutes that were intended to help protect "the little guy."[228]

There is a push from proponents to compare a venue clause to a mandatory arbitration clause yet this is ignoring a large difference—arbitration can occur in any forum whereas a venue clause may require a plaintiff to litigate thousands of miles away from his home.[229] Another major difference is that arbitration clauses fall under the Federal Arbitration Act, which requires courts to uphold it in most situations. Therefore, this argument comparing the two clauses is inaccurate and not persuasive.

A better comparison is to look at how courts have treated venue clauses under other federal statutes, such as FELA because both have venue provisions designed to protect the plaintiff.[230] In *Boyd*, the plaintiff had directly negotiated the agreement with the employer so it had a stronger contract foundation that the ERISA plan cases since most of those agreements are between the plan administrator and the employer.[231] The court still managed to look beyond contract principles to the purpose of the statute to find it should not be upheld.[232]

Proponents also argue that the chosen venue will promote judicial efficiency because the venue will gain familiarity with the plan and thus develop a more "uniform administrative scheme."[233] There are flaws with this argument. First, it is unclear that Congress referred to

[228] *See id.* at 10 (comparing ERISA to the Sherman Act and FELA).
[229] *See generally* Smith v. Aegon Companies Pension Plan, 769 F.3d 922, 932 (6th Cir. 2014).
[230] *See* Brief for United States as Amici Curaie Supporting Respondents at 13, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016).
[231] *See* Boyd v. Grand Truck Western Railroad Co., 338 U.S. 263 (1949).
[232] *See* Brief for United States as Amici Curaie Supporting Respondents at 13, Smith v. Aegon Cos. Pension Plan, 136 S. Ct. 791 (2016).
[233] Smith v. Aegon Companies Pension Plan, 769 F.3d 922, 932 (6th Cir. 2014); *see* Salkin, *supra* note 55, at 3.

uniformity in regards to venue versus the other aspects of plans, such as the application and requirements of various state laws.[234]

Second, merely choosing a venue does not ensure a more uniform decision or that the court will be more familiar with the plan.[235] After all, judges hear many cases every year. It is not necessarily true that the same judge will hear the cases or that the judge will remember the specifics of the plan later for another case.[236] In fact, it is the role of the parties to present their case and not to rely on the judge's previous knowledge.

Third, there are more appropriate ways to promote uniformity than specifying the physical location of the suit. For instance, the plans could specify choice of law to allow the participant to litigate close to home while still ensuring the same laws applied to each case.[237] The fact that plans are not choosing this option supports that the venue clauses are added to plans to strongly discourage suits.[238]

Part V. Conclusion

While following the masses is an easy avenue for the district courts to take, it is for the sake of justice that courts should began to thoroughly and thoughtfully analyze cases involving venue clauses in ERISA plans. Until the Supreme Court answers whether these clauses should be enforced, it is up to the district and appellate courts to consider the fairness and reasonableness

[234] Brief for Pension Rights Center as Amici Curiae Supporting Petitioner at 13-14, Clause v. United States Dist. Court, 137 S. Ct. 825 (2017); *see* Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001).
[235] *Contra* Klotz v. Xerox Corp., 519 F.Supp 2d. 430, 436 (S.D.N.Y. 2007)
[236] *See also* Dumont v. PepsiCo, Inc., 192 F. Supp. 3d 209, 221 (D. Me. 2016) (stating there were 47 judges in the Southern District of New York).
[237] Brief for Pension Rights Center as Amici Curiae Supporting Petitioner at 15, Clause v. United States Dist. Court, 137 S. Ct. 825 (2017).
[238] *Id.* Additionally, since the statute used "administrative," it is not clear that Congress was referring to the court's judicial role. *Id*.; see generally Caleb L. Baron & J. S. Christie Jr., *Should Your ERISA Plan Have a Forum Selection Clause?*, FIRM ALERT BLOG, www.bradley.com/insights/publications/2016/11/should-your-erisa-plan-have-aforum-selection-clause (discussing the benefit of adding "too good to be true" venue clauses that will save the plan money because of the decrease in amount of suits filed).

of forcing a plan participant to either forego litigation because of an inaccessible forum or to forego their earned benefits by not agreeing to the plan. It is their judicial duty.

It is important that the courts do not to lose sight of why ERISA was enacted—to protect workers—and to keep this in mind when hearing these cases. A vulnerable retiree or disabled worker cannot realistically afford to litigate hundreds of miles away thus losing his opportunity for his day in court. The plan then automatically wins and justice is not served. Even the *Bremen* court, who granted forum selection clauses their presumption of validity, stated that clauses should not be upheld when "enforcement would contravene a strong public policy."[239] For these reasons, venue clauses harm the average plan participant and should be afforded careful consideration before the courts opt to enforce them.

[239] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).