No. 11-3284

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SARAH C. MOZINGO and MARY S. MOZINGO,
Plaintiffs-Appellants,

v.

TREND PERSONNEL SERVICES and DAN W. BOBST,
Defendants-Appellees.

On Appeal from the United States District Court for the
District of Kansas, No. 10-4149-JTM
The Honorable Thomas Marten

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

M. PATRICIA SMITH
Solicitor of Labor

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

TIMOTHY D. HAUSER
Associate Solicitor for
Plan Benefits Security Division

STACEY E. ELIAS
Trial Attorney
United States Department of Labor
200 Constitution Avenue, N.W.
Room N-4611
Washington, D.C. 20210
(202) 693 5611

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Cases--continued:

Cases--continued:

Cases--continued:

Federal Statutes:

Federal Statutes--continued:

Federal Rule:

Miscellaneous:

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"), invalidates a forum selection clause that prohibits a participant or beneficiary from bringing an ERISA claim, as permitted by the deliberately expansive venue provision contained in ERISA, in a venue where the breach took place.

INTEREST OF THE SECRETARY

The Secretary of Labor (the "Secretary") has primary authority to interpret and enforce the provisions of Title I of ERISA to ensure fair and impartial plan administration and compliance with ERISA's requirements. See 29 U.S.C. §§ 1132, 1135; Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). Although the Secretary does not have a particular interest in the resolution of any factual issues in this case, the Secretary does have an interest in the correct interpretation of ERISA's venue provision. ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2), allows an ERISA plan participant to bring suit for plan benefits "where the plan is administered, where the breach took place or where the defendant resides or may be found." The Secretary has a strong interest in ensuring that this venue provision governs ERISA suits rather than any forum selection clause to the contrary. Otherwise, employers and insurers could unilaterally create obstacles that would impede participants and their beneficiaries from enforcing their

important statutory rights, a result directly contrary to the congressionally expressed goal to provide plan participants and beneficiaries "ready access to the Federal courts." 29 U.S.C. § 1001(b).

The Secretary files this brief pursuant to her authority under Fed. R. App. P. 29(a).

STATEMENT OF THE CASE

On July 10, 2000, Appellee Trend Personnel Services, a Texas Corporation, hired Samuel Mozingo as an employee in its Dallas office. Mozingo v. Trend Personnel Services, 2011 WL 3794263, at *1 (D. Kan. 2011). On May 8, 2003, Mr. Mozingo entered into a Key Employee Restricted Bonus Agreement ("Bonus Agreement") with Trend Personnel providing, among other things, that as long as it employed Mr. Mozingo, the company would pay the premiums on a life insurance policy for him. Under the Bonus Agreement, Trend Personnel provided Mr. Mozingo with a life insurance policy in the amount of $250,000. Id. Mr. Mozingo designated the plaintiffs-appellants, Sarah Mozingo and Mary Mozingo, his sister and mother, respectively, as beneficiaries of his policy. Id. The Bonus Agreement also contained a forum selection clause stating: "This agreement shall be construed under and in all respects governed by the laws of the State of Texas. Further, Employee and Company both stipulate and agree that Rockwall County,

Texas is exclusively where venue will lie for any dispute relating to or arising out of this agreement."[1] Id. at *2.

On October 15, 2007, Mr. Mozingo stopped working for Trend Personnel. 2011 WL 3794263, at *1. As part of his separation from the company, he and Trend Personnel entered into an "Employment, Non-Competition and Non-Disclosure Agreement," ("Employment Agreement") which, among other things, provided that Mr. Mozingo would "forfeit all rights and benefits to the life insurance policy created by Trend Personnel Services" if he broke the terms of the Bonus Agreement. Id. In 2008, Mr. Mozingo moved to Lawrence, Kansas, where the plaintiffs-appellants also live, and thereafter was diagnosed with cancer. Id. On May 8, 2009, he emailed Dan W. Bobst, President and CEO of Trend Personnel, requesting information about his life insurance policy. Id. Over the next few months they exchanged several emails, but Mr. Bobst never provided Mr. Mozingo with any information regarding the policy. Id. Finally, on October 12, 2009, the insurance company sent Mr. Mozingo a letter informing him that the policy had lapsed on August 10, 2009, and that, despite Trend Personnel's agreement to pay the insurance premiums while Mr. Mozingo was employed by

[1] Rockwall County, Texas is the location of the Trend Personnel office where Mr. Mozingo worked. A similar forum selection clause was also contained in a non-compete agreement dated June 20, 2005, between Mr. Mozingo and Trend Personnel, which does not appear to be at issue in this appeal.

the company, premiums had not been paid since May of 2006. Mr. Mozingo later passed away. Id.

Following his death, his beneficiaries, Sarah Mozingo and Mary Mozingo (collectively, "the Mozingos"), filed a suit against Trend Personnel and Mr. Bobst (collectively, "Trend Personnel") in the United States District Court for the District of Kansas, alleging failure to pay benefits in violation of ERISA, breach of fiduciary duty in violation of ERISA and state law, and breach of contract and fraudulent concealment in violation of state law. 2011 WL 3794263, at *1. As most relevant here, the Mozingos claimed that Trend Personnel, as administrator of the plan, and Mr. Bobst, as a fiduciary under an employee benefit plan, deprived the Mozingos of life insurance benefits by allowing the life insurance policy to lapse and by failing to inform Mr. Mozingo that premiums had not been paid since 2006 and that the policy was going to and in fact did lapse. Plaintiffs-appellants claimed both a violation of ERISA for failing to pay benefits to which they were or should have been entitled, and a breach of fiduciary duty. After an unsuccessful motion to dismiss for improper venue based on the 2005 Employment Agreement, Trend Personnel filed a second motion to dismiss alleging improper venue under Federal Rule of Civil Procedure 12(b)(3), arguing that the forum selection clause in the 2003 Bonus Agreement governed and required that the claim be brought solely in Rockwall County, Texas.

The district court granted this motion. The court indicated that "[f]orum selection clauses are prima facie valid and should be enforced unless the resisting party shows the clause is unreasonable under the circumstances." 2011 WL 3794263, at *2 (citations omitted). The court therefore reasoned that it must enforce a forum selection clause so long as it was freely negotiated, "unaffected by fraud, undue influence, or overweening bargaining power," and enforcement of the clause would not be unreasonable or unjust because "the contractual forum will be so gravely difficult and inconvenient that [a plaintiff] will for all practical purposes be deprived of his day in court." Id. (citations omitted). The court also indicated that although "all factual disputes are resolved in plaintiff's favor," the "plaintiff bears the burden of establishing that venue . . . is proper." Id. at *2, *3 (citations omitted). The district court then reviewed this particular forum selection clause, and concluded that it was "presumptively valid and applies to any dispute involving life insurance arising out of the Bonus Agreement." Id. at *3.

In opposing the dismissal, the Mozingos argued that "[i]f the ERISA plan documents contain a forum selection clause, then that forum selection clause is enforceable," but that "if the ERISA plan documents here do not contain a forum selection clause, then . . . it is 'immaterial' that the 2003 [Bonus] Agreement contains a forum selection clause." Pl[s] Mem.in Opp. to Def's Second Mot. to Dismiss for Improper Venue, p. 3. Thus, based on the view that the 2003 Bonus

Agreement was not an ERISA plan document, the Mozingos argued that "the record does not presently contain any ERISA plan documents," and that, consequently, "the motion to dismiss for improper venue must be denied pending further discovery." Id. at 3-4. They also argued that, under the terms of the Bonus Agreement, their claims were not governed by the forum selection clause because they did not arise out of the Bonus Agreement but arose from the defendants' actions in 2009 in letting the policy lapse. Finally, they argued that the forum selection clause did not govern because neither the Mozingos nor Bobst were signatories to the Bonus Agreement in which it was set forth. Id. at 4.

The court rejected each of these arguments. Although the court apparently agreed that the forum selection clause in the Bonus Agreement "was not in an ERISA document," it concluded that "even if ERISA governs this action," and preempts all of the Mozingos' state-law claims, because state courts have concurrent jurisdiction over ERISA benefits claims, "the Texas state court has jurisdiction over the matter and can apply ERISA to the plaintiffs' claims." 2011 WL 3794263, at *4. The court next found that the Mozingos' claims arose out of the Bonus Agreement despite the fact that the specific breach claims were based on the defendants' later actions, and consequently concluded that the forum selection clause in that Agreement applied by its terms to the Mozingos' claims. Id. at *5-*6. The court also held that the Bonus Agreement bound the Mozingos, even

though neither they nor Mr. Bobst were signatories to it, because as beneficiaries of the insurance policy provided by the Agreement, they are "closely related" enough to the dispute to be bound by the contractual provision. Id. at *6-*8. Finally, the court held that the Mozingos could not show that enforcement of the clause would be unjust or unreasonable. Id. at *8.

SUMMARY OF ARGUMENT

The Secretary advocates no specific relief for either party. Instead, the Secretary files this brief solely in order to argue that forum selection clauses are incompatible with ERISA. In the ERISA context, the public policy expressed in the statute's broadly-worded venue provision is exceptionally strong given the express provision in ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), which precludes modifying ERISA rights and remedies by contract, as well as the expressly stated statutory goal to "protect the interests of participants of employee benefits plans and their beneficiaries . . . by providing appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (emphasis added). Moreover, the reasons for giving effect to contractual forum selection clauses – honoring contractual provisions freely negotiated between parties of roughly equal bargaining power – is generally weak in the context of individual employment contracts. Even in cases where this freedom-of-contract rationale has more force, transfer of venue under 28 U.S.C. § 1404(a) is the proper way to

handle situations where there is real unfairness to the employer in litigating in a distant forum.[2]

ARGUMENT

I. The Forum Selection Clause Contradicts Sections 502(e)(2) And 404(a)(1)(D) And Is Contrary To The Policy Concerns Underlying The Statute

In enacting ERISA, "Congress intended that the venue provision for ERISA claimants be broad so as to advance their claims." Nicolas v. MCI Health and Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006); see Shanehchian v. Macy's, Inc., 251 F.R.D. 287, 292 (S.D. Ohio 2008) (affording ERISA "plaintiff's choice of venue . . . a heightened level of deference" given the statute's "broad choice of venue for all ERISA plaintiffs"). Congress expressly stated that the statute was designed, among other things, to eliminate "jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary duties." H.R. Rep. No. 93-533 (1973), 1974 U.S.C.C.A.N. 4639, 4655. Congress emphasized this point in the very first section of the statute, declaring that ERISA is designed to provide "ready access to the Federal courts" so as "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b).

[2] The court should review the enforceability of the forum selection clause de novo. Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc., 428 F.3d 921, 925 (10th Cir. 2005) (citing K & V Scientific Co. v. BMC, 314 F.3d 494, 497 (10th Cir. 2002)).

Consistent with the congressional goal of removing jurisdictional barriers that would prevent plan participants and their beneficiaries from asserting their statutory rights, ERISA section 502(e)(2) provides broad jurisdiction for benefit claims in state and federal district courts, allowing that:

> Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where the defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. § 1132(e)(2).

The Secretary's claims regulations also affirm ERISA's concern with eliminating jurisdictional and other obstacles to the claims process. The regulations, promulgated pursuant to the statutory mandate in section 502 to provide for "full and fair review" of benefit claims, 29 U.S.C. § 1133, require that benefit claim "procedures do not contain any provision, and are not administered in a way, that unduly inhibits or hampers the initiation or processing of claims for benefits." 29 C.F.R. § 2560.503-1(b)(3). Although this provision was aimed, like the claims regulation itself, at a plan's claims processing procedures rather than at federal suit, it underscores the concern in the statute and the regulations with providing benefit claimants a procedure for making their claims for benefits free of unnecessary obstacles.

To this end, section 502(e)(2) affords ERISA plan participants and beneficiaries wide latitude in selecting a forum, thereby furthering Congress' goal of removing obstacles faced by participants in challenging fiduciary breaches and benefit denials. See McCracken v. Auto. Club of S. California, Inc., 891 F. Supp. 559, 561 (D. Kan. 1995) ("ERISA has a liberal venue provision."). This provision has been broadly and correctly construed to make venue proper any place where the plan and its fiduciaries are "found" in the sense that they have sufficient minimum contacts to satisfy personal jurisdiction requirements, Peay v. Bellsouth Medical Assistance Plan, 205 F.3d 1206, 1211-12 (10th Cir. 2000), and to allow suit where the beneficiary lives as the location where the breach "took place." See Blevins v. Pension Plan for Roanoke Plant Hourly Employees of ITT Industries Night Vision, 2011 WL 2670590, at * 2 (D.S.C. July 8, 2011) ("The vast majority of courts have found that a breach occurs in the location 'where the beneficiary was supposed to receive his benefits, i.e., his residence.'") (citing cases).

Plans cannot alter this liberal venue provision by adopting a contrary, contractual forum selection provision in the plan documents, despite the general judicial policy of enforcing contractual forum selection clauses first given effect by the Supreme Court in the admiralty context in M/S Bremen v. Zapata Off Shore Co., 407 U.S. 1, 9-10, 15 (1972), in order to facilitate international trade. Although the Supreme Court has long since extended the Bremen ruling beyond

admiralty, Scherk v. Alberto-Culver Co., 417 U.S. 506, 518-21 (1974), and other courts have applied the principle even where there is a statutory venue provision that conflicts with the forum selection clause, e.g., In re Fireman's Fund Ins. Companies, 588 F.2d 93 (5th Cir. 1979), the Bremen decision itself cautioned that a "contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy," including policy "declared by statute." 407 U.S. at 15. ERISA expresses just such a strong public policy both in its purposes section and in its broad venue provision set forth in section 502(e)(2).

Moreover, ERISA expressly precludes giving effect to plan terms that are inconsistent with ERISA's provisions, including section 502(e)(2). Specifically, ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), mandates that although plan fiduciaries are required to follow plan documents, they may do so only "insofar as such documents and instruments are consistent with the provisions" of Title I and Title IV of ERISA. Thus, plan fiduciaries must reject plan terms that are contrary to the statute or the Secretary's regulations. E.g., Central States, Se. and Sw. Area Pension Fund v. Central Transp., Inc., 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA"); Herman v. NationsBank Trust Co., 126 F.3d 1354, 1368 (11th Cir. 1997) ("According to § 1104(a)(1)(D), NationsBank was obligated to determine whether the plan provisions" at issue "were contrary to ERISA"); Laborers Nat. Pension Fund v. N.

Trust Quantitative Advisors, Inc., 173 F.3d 313, 322 (5th Cir. 1999) ("In case of a conflict, the provisions of the ERISA policies as set forth in the statute and regulations prevail over those of the Fund guidelines."); cf. Eaves v. Penn, 587 F.2d 453, 459 (10th Cir. 1978) (rejecting argument that fiduciaries were required under section 404(a)(1)(D) to follow plan documents with regard to investments in the stock of the sponsoring company even where such investments were disloyal or imprudent).

In this case, the Bonus Agreement's forum selection clause forbids the plaintiffs-appellants from bringing their action anywhere outside of a single Texas county, even though ERISA broadly permits the plaintiffs-appellants to bring suit elsewhere. Although the district court apparently agreed with plaintiffs that the Bonus Agreement is not a plan document, 2011 WL 3294263, at *4, in fact, the Bonus Agreement is a plan document under ERISA because it is a "contract, or other instrument under which the plan is established or is operated." See 29 U.S.C. § 1024(b)(2)) (requiring the plan administrator to make such documents available to plan participants and beneficiaries). See also Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991) (an ERISA plan was created by a letter from the company president that outlined the source of funding, the intended beneficiaries and the procedures for paying and administering benefits). Cf. Heffner v. Blue Cross and Blue Shield of Alabama, 443 F.3d 1330, 1441 (11th Cir. 2006) (noting that the

statute contemplates that there may be numerous plan documents that govern the operation of the plan); Dep't of Labor Op. Letter 96-14a (July 31, 1986) ("any document or instrument that specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement under an employee benefit plan would constitute an instrument under which the plan is established or operated, regardless of whether such information is contained in a document designated as the 'plan document'"). The forum selection provision in this plan document prohibiting suit anywhere other than Rockwall County, Texas, is not "consistent with" a statutory provision that authorizes suit "where the plan is administered, where the breach took place or where the defendant resides or may be found," 29 U.S.C. § 1132(e)(2), and is therefore prohibited under ERISA section 404(a)(1)(D).[3]

[3] Given ERISA's broad preemption provision, the Bonus Agreement is also unenforceable to the extent that it purports to require that the Mozingos litigate their claims under "the laws of the State of Texas" rather than under ERISA. See 29 U.S.C. 1144 (preempting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (holding that "ERISA's civil enforcement remedies were intended to be exclusive"); Bruce v. Allianz Life Ins. Co., 247 F.3d 1133, 1148-1149 (11th Cir. 2001) (choice of law provision, even where agreed to in the plan's terms, will not apply if it "would be subversive of ERISA policy"). We note, however, that the parties are not arguing that state law applies, and the court below appears to have assumed that the state court in Texas would apply ERISA and not state law in determining the claims.

But, whether or not a forum selection clause is contained in a plan document or in a separate contract, giving effect to a forum selection clause that potentially forces a participant to litigate his claim in a far away locale is also objectionable because it would thwart Congress' express goal of giving participants and beneficiaries "ready access to the federal courts," 29 U.S.C. 1001(b), and contravene section 502(e)(2). See also Nicolas, 453 F. Supp. 2d at 974 (rejecting forum selection clause in ERISA plans because they "override a Congressionally enacted statutory framework aimed at assisting employees," "severely limit . . . plaintiffs from having ready access to the federal courts" and "vitiate the congressional intent of enacting ERISA").

Moreover, although the provisions at issue in this particular case may have resulted from an arm's-length negotiation, ERISA plans more typically are not the product of roughly equal bargaining power. The Supreme Court has relied heavily on freedom-of-contract principles to uphold forum selection clauses. E.g. Bremen, 407 U.S. at 11 (upholding a foreign forum selection clause because it "accords with ancient concepts of freedom of contract"). But these principles generally do not support giving effect to contractual forum selection clauses in the ERISA context because ERISA plans are generally not "freely bargained for," and "unaffected by . . . undue influence, or overweening bargaining power." Bremen, 407 U.S. at 12; see Wegner v. Standard Ins. Co., 129 F.3d 814, 818 (5th Cir. 1997)

(terms of ERISA welfare plans "are generally not the result of typical bargaining and negotiated processes between roughly equal parties that is the hallmark of freedom to contract"). Individual plan participants do not typically negotiate, or even sign, plan documents. Even where, as here, they do so, they often lack anything like equal bargaining power with their employer. In some cases, they will not even be aware of a clause limiting their statutory venue rights or understand its significance. See Mezyk v. U.S. Bank Pension Plan, 2009 WL 3853878, *3-4 (S.D. Ill. 2009) ("Without such reasonable communication," an ERISA forum selection clause "can hardly be said to represent the parties' shared legitimate expectations" and in the face of such unequal bargaining power and lack of notice, it is "manifestly unjust" to apply forum selection clauses to ERISA plan participants). And here, as non-consenting recipients of this clause, the plaintiffs – beneficiaries of the decedent but not themselves signatories to the Bonus Agreement – clearly did not "freely bargain for" it.

All of this is not to say that courts should do an individual analysis to determine the fairness of giving effect to the agreement under the circumstances, as in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594-95 (1991) (noting that it "bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness"). Rather, it is further support for the conclusion that Congress – which enacted a broad venue provision

consistent with its intent to protect plan participants and beneficiaries by removing jurisdictional and other barriers to suit, and which forbade parties from contractually overriding ERISA's protections – could not have intended that such forum selection clauses be given effect in the context of ERISA-governed employee benefits. Indeed, all these factors distinguish the ERISA context from the forum selection provision that was issue in the Carnival Cruise case, which, like Bremen, was a case in admiralty, not a case about the statutory rights of workers to their employee benefits. Unlike in this case, there was no specific statutory venue provision at issue in Carnival Cruise comparable to section 502(e)(2); instead the cruise ship passengers cited a federal statute prohibiting passenger ships from limiting the right of passengers to a "trial by a court of competent jurisdiction" in tort suits, 46 U.S.C. § 183c, which the Court correctly held inapplicable to the forum selection clause at issue. 499 U.S. at 595-95. In light of ERISA section 502(e)(2), a plan, unlike a cruise company, does not have "a special interest in limiting the fora in which it potentially could be subject to suit." Id. at 593. And ERISA section 502(e)(2) itself takes care of any "confusion about where suits arising from the contract must be brought and defended." Id. at 594. Moreover, as discussed further is Section II below, in cases where courts are concerned about fundamental fairness to the defendants, they may transfer to another forum under section 1404, although in the vast run of ERISA cases, courts

should be loathe to do so. See, e.g. In re Warrick, 70 F.3d 736, 740-741 (2d Cir. 1995); Shanehchian v. Macy's, Inc., 251 F.R.D. at 292.[4]

Although no circuit, including the Tenth, has yet decided the issue, the Eleventh Circuit's decision in Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987), is instructive. In that case, an ERISA plan participant filed a claim for benefits under the terms of his plan. Rather than administratively determine his claim, Gulf Life filed a declaratory judgment action in Florida federal court, invoking ERISA section 502(e)(2), even though neither the participant nor his claim had any connection with or presence in the state of Florida. The Eleventh Circuit affirmed the district court's dismissal, noting that ERISA was drafted to protect participants and beneficiaries, including by providing "ready access to federal courts" to enforce their statutory rights. 809 F.2d 1520, 1524. The court reasoned that it would be contrary to this statutory purpose if ERISA's broad venue provision, "the sword that Congress intended participants/beneficiaries to wield in asserting their rights could instead be turned against those whom it was designed to aid." Id. at 1525.

---

[4] There is no legislative history specifically concerning forum selection clauses as far as the Secretary has been able to ascertain. This is not surprising or significant, however, because at the time ERISA was enacted in 1974, Bremen had still not generally been extended beyond admiralty and thus, until the Supreme Court issued its decision in Scherk the same year and at roughly the same time that ERISA was enacted, the longstanding rule disfavoring forum selection clauses as against public policy still generally prevailed in the employment context.

Similarly, when ERISA defendants have sought a change of venue, the courts have "uniformly" interpreted the congressional record to favor a "broad choice of venue for all ERISA plaintiffs," so that "the plaintiff's choice of venue . . . must be afforded a heightened level of deference, beyond the usual deference afforded plaintiffs under § 1404(a) analysis." Shanehchian, 251 F.R.D. at 292 (citations omitted); Warrick, 70 F.3d at 740-741 (ERISA plaintiffs' choice of venue is "entitled to substantial consideration"); Boilermaker-Blacksmith Nat'l Pension Fund v. Gendron, 67 F. Supp. 2d at 1257 ("Disturbing plaintiffs' chosen venue should be more difficult in an ERISA case"); Briesch v. Automobile Club of Southern California, 40 F. Supp. 2d at 1322 ("Congressional policy favors plaintiff's choice of forum in ERISA actions" (citations omitted)). See also Holland v. ACL Transportation Services, LLC, 815 F. Supp. 2d 46, 57 (D.D.C. 2011) (ERISA "plaintiff's choice of forum generally merits strong deference"); Fanning v. Capco Contractors, Inc., 711 F. Supp. 2d 65, 69 (D.D.C. 2010) ("Courts give special weight to a plaintiff's choice of forum in ERISA cases.") (citations omitted); Bd. Of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Sullivant Avenue Properties, LLC, 508 F. Supp. 2d 473, 477, n.2 (E.D. Va. 2007) (because "Congress recognized as a special goal of ERISA . . . to provide the full range of legal and equitable remedies . . . Plaintiff's venue selection under ERISA is entitled to greater deference than typically afforded to Plaintiff's choice of venue.")

(quoting H.R. Rep. No. 93-533,(1973) reprinted in 1974 U.S.C.C.A.N. 4639, 4655) (other citations omitted)); DeFazio, 406 F. Supp. 2d at 1089.

The district court cited a number of recent district court decisions that have upheld forum selection clauses in ERISA plans. E.g., Drapeau, 2011 WL 3477082, * 5, Sharp, 2010 WL 4291644, at *3; Schoemann, 447 F. Supp. 2d at 1007, and Rogal, 446 F. Supp. 2d at 339. For the reasons discussed above, these cases (and others like them) are wrongly decided. However, they do highlight the disturbing and fairly recent trend of plan administrators relying on such clauses to deny plan participants and beneficiaries the ready access to courts that Congress intended to provide in the statute. This court should decline to follow these cases in light of ERISA's jurisdiction and venue provisions, its provision trumping contrary plan terms, and "strong public policy" supporting participants' ready access to federal court so as to protect their benefits. This policy, which ERISA has "declared by statute," Bremen, 407 U.S. at 15, would be significantly undermined if plan participants and their beneficiaries were bound by contractual forum selection provisions that required them to bring suit hundreds or even thousands of miles away from where they reside.

II. Under 28 U.S.C. § 1404(a), Courts May, For The Convenience Of The Parties And As A Matter Of Justice, Transfer Cases, Including Those Brought Under ERISA, To Another District Where The Action Might Have Been Brought, But They May Not Dismiss On That Basis, And May Transfer Only Where Warranted For The Convenience Of The Parties And As A Matter Of Justice

28 U.S.C. § 1404(a) permits a change of venue within the federal courts, in limited circumstances: "[f]or the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Although this provision was based on the common law doctrine of *forum non conveniens* it was "intended as a revision of the common law." Piper Aircraft v. Reyno, 454 U.S. 235, 253 (1981). Unlike *forum non conveniens*, section 1404(a) allows transfer, not dismissal, and gives district courts "more discretion to transfer . . . than they had to dismiss on grounds of *forum non conveniens*." Id. Nevertheless, while section "1404(a) partially displaces the common law doctrine of *forum non conveniens,*" courts have recognized that "the doctrine's considerations are helpful in deciding a § 1404(a) motion." DeFazio v. Hollister Employee Share Ownership Trust, 406 F. Supp. 2d 1085, 1088 (E.D. Cal. 2005) (citing Decker Coal Co. v. Commonwealth Edison, 805 F.2d 834, 843 (9th Cir. 1986)).[5]

[5] *Forum non conveniens* is an ancient doctrine that was often applied in admiralty, and became, early on, part of the common law of many states. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 237 (1981). The doctrine permits courts to dismiss suits if, for instance, foreign law applies, Collins v. American Automobile Insurance

Chief among these considerations is the plaintiff's choice of venue. "It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and the choice should not be lightly disturbed." Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970) (internal citations and quotations omitted). "Unless the balance is strongly in favor of the movant the plaintiff's choice of forum should rarely be disturbed." Scheidt v. Klein, 956 F.2d 963, 965 (10th Cir. 1992). See also Piper Aircraft Co. 454 U.S. at 262 (dismissal for *forum non conveniens* appropriate only if "plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reason of convenience supporting his choice."). This is particularly true in ERISA cases in light of the statute's text and goal of ensuring participants and beneficiaries "ready access" to the federal courts, as discussed in the preceding section.

Nevertheless, in cases, including those brought under ERISA, where the plaintiff's choice of forum is so inconvenient or unjust that public and private

---

Co., 230 F.2d 416 (2d Cir. 1956); Yavuz v. 61 MM, Ltd., 576 F.3d 1166, 1174 (10th Cir. 2009), but the Supreme Court long ago extended the doctrine to federal diversity cases where the law of a distant state is applicable. Williams v. Green Bay &W.R. Co., 326 U.S. 549 (1946). But then, as now, it is not applied unless maintaining suit in the forum selected by the plaintiff would amount to "vexatiousness" or "oppression" and the inconvenience occasioned by the suit amounts to "actual hardship." Id. at 557 n.4 (citation omitted). Moreover, as discussed *infra*, p. 24, since enactment of 28 U.S.C. § 1404(a), the appropriate remedy for an inconvenient forum is transfer, not dismissal.

factors strongly favor litigating in another valid forum, courts retain their ability under section 1404(a) to transfer the case. See Cargill Inc. v. Prudential Ins.,Co. of America, 920 F. Supp. 144, 147-148 (D. Colo. 1996) (granting defendants' motion to transfer ERISA claim to Minnesota after noting that there was a total lack of factual connection to Colorado; only 110 of plaintiff's 2750 Colorado employees participated in the plan; the claims administration at issue took place exclusively in Minnesota and North Carolina; relevant documents were in Minnesota, rather than Colorado; and none of the 24 witnesses identified by the parties resided in Colorado, while 10 resided in Minnesota); see also Fanning v. Trotter Site Preparation, LLC, 668 F. Supp. 2d 60, 65 (D.D.C. 2009) ("Although the plaintiff's choice of forum is due particular deference in an ERISA action, the defendant has carried its burden of demonstrating that the private and public interests weigh in favor of transfer."); Flynn v. Berich, 603 F. Supp. 2d 49, 51-52 (D.D.C. 2009) ("notwithstanding the heightened deference owed to the Pension Fund's choice of forum under ERISA," the court transferred the case "for the convenience of parties and witnesses, and in the interest of justice.").

Thus, even if the Court determines that Kansas is an inappropriate venue notwithstanding the strong presumption in favor of the plaintiffs' choice of forum, the appropriate remedy is not dismissal, but transfer. "Since the enactment of 28 U.S.C. § 1404(a), the courts have universally held that if the forum is found to be

inconvenient, the remedy is transfer and not dismissal." Lawford v. New York Life Ins., Co., 739 F. Supp. 906, 919 (S.D.N.Y. 1990) (citing Norwood v. Kirkpatrick, 349 U.S. 29 (1955); Collins v. Am. Automobile Ins. Co., 230 F.2d 416 (2d Cir. 1956)). Only "if the more convenient forum is a court to which transfer cannot be made, for instance a foreign court," a situation that does not pertain to an ERISA suit, may the case properly "be dismissed on *forum non conveniens* grounds." Id. (citation omitted). In fact, all of the ERISA cases that the district court cited in support of its opinion resulted in transfer of venue rather than dismissal. Drapeau v. Airpax Holdings, Inc., Severance Plan, 2011 WL 3477082, *5 (D. Minn. 2011); Sharp v. Wellmark, Inc., 2010 WL 4291644, *3 (D. Kan. 2010) (unpublished); Schoemann v. Excellus Health Plan, Inc., 447 F. Supp. 2d 1000, 1007 (D. Minn. 2006); Rogal v. Skilstaf, Inc., 446 F. Supp. 2d 334, 339 (E.D. Pa. 2006).

As discussed above, a party seeking transfer must overcome a strong presumption in favor of the plaintiff's choice of forum. However, section 1404(a) gives the courts a flexible means of avoiding injustice while still honoring the policy choices reflected in ERISA's broad venue provisions.

CONCLUSION

Accordingly, this Court should hold that forum selection clauses are incompatible with ERISA.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor of Labor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

/s/ Stacey E. Elias
STACEY E. ELIAS
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
P.O. Box 1914
Washington, D.C. 20013
(202) 693-5611

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2012, I delivered a copy of the foregoing Brief of Secretary of Labor as Amicus Curiae via electronic mail to the following parties:

ALAN V. JOHNSON, Esq.
Sloan, Eisenbarth, Glassman, McEntire & Jarboe, LLC
534 S. Kansas Ave.
Suite 1000
Topeka, Kansas 66603
Tel. 785 357 6311
Fax 785 357 0152
ajohnson@sloanlawfirm.com
Attorney for Plaintiffs/Appellants

DAVID L. MARCUS, Esq.
ELIZABETH A. MURRAY, Esq.
1100 Main Street
Suite 2700
Kansas City, Missouri 64105
Tel. 816 256 3181
Fax 816 222 0534
dmarcus@gbmglaw.com
emurray@gbmglaw.com
Attorneys for Defendant/Appellee

/s/ Stacey E. Elias
STACEY E. ELIAS
Trial Attorney
United States Department of Labor
200 Constitution Avenue N.W.
Room N-4611
Washington, D.C. 20210
Tel. 202 693 5611
Fax 202 693 5610
elias.stacey@dol.gov

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,697 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point Times New Roman font.

Dated: May 24, 2012

/s/Stacey E. Elias
STACEY E. ELIAS
Trial Attorney
United States Department of Labor
Attorney for Amicus Curiae
Secretary of Labor