CASE NO. 09-40326

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM NICOLAS,

Plaintiff-Appellee-Cross-Appellant,

v.

MCI HEALTH AND WELFARE PLAN NO. 501,

Defendant-Appellant-Cross-Appellee,

and

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant-Cross-Appellee.

Appeal From The United States District Court
For The Eastern District Of Texas

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE-CROSS-APPELLANT

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QUESTION PRESENTED

Whether the forum selection clause contained in the summary plan description of a plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., which would require a plan participant to bring suit more than 1200 miles from where he works and resides, supersedes ERISA's jurisdictional provision, contained in section 502(e)(2), 29 U.S.C. § 1132(e)(2), which allows a plaintiff to sue for employee benefits in the district in which 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). ERISA section 502(e)(2) liberally provides that a participant may 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 jurisdictional provision governs ERISA benefits suits rather than any forum selection clause to the contrary. Otherwise, employers and insurers could unilaterally erect jurisdictional and financial obstacles that might 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).

STATEMENT

Plaintiff William S. Nicolas was an employee of MCI in Dallas, Texas, and a participant in the MCI Health and Welfare Plan No. 501 (the "Plan"), an ERISA-covered employee welfare plan under ERISA sections (3)(1) and 4(a), 29 U.S.C. §§ 1002(1), 1003(a), which, among other things, provides long-term disability benefits to employees of MCI. USCA5 341. MCI is named as the Plan Administrator in the Plan documents. Principal Brief of Appellant, p. 4 (hereinafter "Appellant's Br."). Nicolas worked for MCI from 1985 until July 2003, when he allegedly became disabled. USCA5 341, 616. After his claim was denied and Nicolas exhausted his administrative appeals, USCA5 2, he brought this action for disability benefits pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Pursuant to the terms of ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2), he filed his suit in the United States District Court for the Eastern District of Texas, the district where he lives and where he alleges the breach took place. USCA5 2, 10.

The Plan document provides that a participant whose claim has been denied may bring suit and "that any such legal action or proceeding may be initiated only

in a court of competent jurisdiction located in Loudon County, Virginia (or Washington, D.C., through 2003) or the county where the Employee's worksite is located." The summary plan description ("SPD") for the Plan, which was distributed to the participant and upon which MCI relies, likewise states that a participant or beneficiary may assert a claim against the Plan in "Washington, D.C. or the county in which the employee's Employer has its principal place of business," but omits the language allowing suit where the employee works. USCA5 226. Pursuant to the terms of section 502(e)(2), Nicolas filed in the Eastern District (the close by Collin County), where Nicolas resides and claims the breach (denial of benefits) occurred.

Asserting that the forum selection clause in the SPD trumped ERISA section 502(e)(2), MCI moved to dismiss for improper venue under Rule 12(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1406(a). USCA5 36, 258, 335. The district court denied MCI's motion to dismiss. Id. The court weighed the Fifth Circuit's policy favoring enforcement of forum selection clauses, see Haynsworth v. The Corp., 121 F.3d 956, 962-63 (5th Cir. 1997) (forum selection clauses are presumptively reasonable and should be enforced absent a showing that under the circumstances it would be unreasonable to do so), against the policies behind ERISA. USCA5 336-38. Noting that Nicolas brought suit in the Eastern District of Texas, where he resides, and that the forum selection clause would require him

to prosecute his claim for Plan benefits more than 1200 miles from his home, the court concluded that it could not allow the Plan's forum selection clause to override ERISA's statutory framework, as expressed in section 502(e)(2) and the statutory policy aimed at protecting plan participants and providing them "ready access to the Federal courts," 29 U.S.C. § 1001(b). USCA5 337-38.

On the merits, the district court ultimately concluded that the Plan administrator had abused its discretion by ignoring objective medical evidence supporting Nicolas' claim. USCA5 874. The court reversed the denial of benefits, ordered the payment of over $137,000 in past due benefits and interest and over $64,000 in attorneys fees, and the parties cross-appealed. USCA5 985 and 8-9.

In this brief, the Secretary addresses only the issues of the enforceability of the forum selection clause. On that issue, the Secretary respectfully submits that the decision of the district court should be affirmed. Her reasons follow.

SUMMARY OF ARGUMENT

Two provisions of ERISA are relevant here. First, ERISA section 502(e)(2) provides that "[w]here 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 a defendant resides or may be found." 29 U.S.C. § 1132(e)(2). Second, ERISA section 404(a)(1)(D) provides that ERISA fiduciaries must act "in accordance with the documents and instruments governing

the plan [only] insofar as such documents and instruments are consistent with the provisions of this title and title IV." 29 U.S.C. § 1104(a)(1)(D).

The express terms of ERISA thus provide that only those plan provisions that are otherwise consistent with ERISA may be given effect. Pursuant to section 404(a)(1)(D), the inconsistent forum selection clause in the SPD must yield to section 502(e)(2), which established jurisdiction in the Eastern District of Texas. Unlike other statutory schemes that contain venue provisions that the Fifth Circuit and others have held may be superseded by contrary forum selection clauses in contracts, ERISA uniquely provides in section 404(a)(1)(D) that venue under section 502(e)(2) may not be varied by contract or agreement.

This reading of the statute is underscored by ERISA's express statutory goal, set forth in section 2 of the statute, that plan participants be given ready access to the federal courts to enforce their statutory rights. And it is supported, at least indirectly, by the Secretary's claims regulation, 29 C.F.R. § 2560.503-1(b)(3), which provides that plans may not be set up or administered in a way that "unduly inhibits or hampers" claims processing. While this regulation was aimed at a plan's claims processing procedures, it underscores the need to protect the rights of plan participants and beneficiaries to make their claims for benefits.

Finally, it is quite clear that plan participants and beneficiaries do not generally bargain for forum selection clauses in ERISA plans, which are, in many

respects, contracts of adhesion. Moreover, as the district court properly recognized, the unfairness of requiring a disabled plan participant to bring suit for benefits more than 1200 miles from his home is stark. The unequal bargaining power and the resulting unfairness of the forum selection clause here underscore the problematic nature of such clauses in light of ERISA's stated objectives, and easily distinguish this case from others where courts have upheld forum selection clauses.

ARGUMENT

THE FORUM SELECTION CLAUSE IS UNENFORCEABLE UNDER ERISA BECAUSE IT CONTRADICTS SECTION 502(e)(2)

In enacting ERISA, Congress expressly stated, both in the legislative history and in the purposes section of the statute, 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. 93-553, 93d Cong., 1st Sess. 17 (1973), 1974 U.S.C.C.A.N. 4639, 4655; see also 29 U.S.C. § 1001(b). To this end, ERISA section 502 enumerates the proper plaintiffs and causes of action under ERISA and, in a section denominated "Jurisdiction," provides concurrent jurisdiction for benefit claims in state and federal district courts, 29 U.S.C. §1132(e), and explains that:

> (2) 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.

Moreover, ERISA section 404(a)(1)(D) provides that plan fiduciaries can enforce plan terms only to the extent that they are "consistent with the provisions" of ERISA. It thereby ensures that plan terms do not undercut or eliminate the statutory requirements and protections, including ERISA's guarantee of ready access to federal courts for plan participants as set forth in section 502(e)(2). Pursuant to the terms of section 502e)(2), Nicolas properly filed his ERISA complaint in the Eastern District of Texas.

Ignoring section 404(a)(1)(D), MCI asserts that venue is improper because the Plan's forum selection clause forbids Nicolas from proceeding in accordance with the terms of the statute, and requires him to file suit in Virginia where MCI is headquartered. The Secretary disagrees. Section 404(a)(1)(D) forbids this result by invalidating plan terms, such as the forum selection clause in this case, that contradict or violate ERISA. Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA"); Laborers Nat. Pension Fund v. Northern 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.").

Moreover, the expressly stated statutory goal – to protect "the interests of participants in employee benefit plans and their beneficiaries . . . by providing appropriate remedies, sanctions, and ready access to the Federal courts," 29 U.S.C. 1001(b) (emphasis added) – must inform the analysis. In this regard, the Eleventh Circuit's decision in Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987) is instructive.

In Gulf Life, an ERISA plan participant filed a claim for benefits in accordance with 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 the plan participant had no connection with or presence in the state of Florida and the claim arose elsewhere. The Florida district court dismissed the action, and the Eleventh Circuit affirmed, noting that ERISA was drafted to provide remedies to participants and beneficiaries and access to the courts to obtain those remedies. The court of appeals pointed out that if it allowed a plan fiduciary to use ERISA section 502(e)(2) to file a declaratory judgment action where it was headquartered even if that were hundreds or thousands of miles from the participant "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 1524. Likewise, allowing enforcement of contractual venue provisions, such as the one at

issue in this case, that require plan participants and beneficiaries to litigate hundreds or even thousands of miles from their homes, would thwart Congress' goal of giving participants "ready access" to federal courts and contravene the express provisions of sections 502(e)(2) and 404(a)(1)(D).

Accordingly, as the district court recognized, ERISA's policies and statutory framework "supersede the general policy of enforcing forum selection clauses." USCA5 337-38. It is true that the Supreme Court's decision in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-10 (1972), reversed a long judicial history of disfavoring forum selection clauses as against public policy because they ousted the jurisdiction of the federal courts. Based on concerns for the growth of international trade and contracting, the Bremen Court announced that a court sitting in admiralty should uphold the validity of a forum selection clause unless the resisting party can show that enforcement would be unreasonable under the circumstances. Id. at 10. Moreover, in the decades since the Bremen decision, courts have extended the ruling beyond admiralty, Scherk v. Alberto-Culver Co., 417 U.S. 506, 518-21 (1974), and have applied the principle even where there is a statutory venue provision that conflicts with the forum selection clause. See, e.g., In re Fireman's Fund Ins. Companies, 588 F.2d 93 (5th Cir. 1979) (holding that a contractual forum selection clause prevailed when it conflicted with the venue

designated by the Miller Act, 40 U.S.C. § 3133(b), a statute that allows government contractors to sue for payment).

But these non-ERISA cases are clearly distinguishable from the present case because section 404(a)(1)(D) of ERISA provides that ERISA's statutory protections may not be contractually overridden. Under section 502(e)(2) of ERISA, Nicolas had a statutory right to bring suit where he resides and alleges the breach occurred. Section 404(a)(1)(D) prohibits MCI, the Plan administrator, from relying on Plan terms that contravene the statutory framework and compel litigation in a distant forum.[1]

The Secretary's understanding of the statute as invalidating plan terms that purport to override section 502(e)(2) finds further support in the Secretary's claims regulation, which was promulgated pursuant to the statutory mandate in ERISA section 503 for "full and fair review" of benefit claims. 29 U.S.C. § 1133.

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[1] The Fireman's Fund case is distinguishable for another reason. In that case the court noted that the Miller Act venue provision existed for the special protection of the very defendants seeking to invoke the contractual forum selection clause. 588 F.2d at 945. That is very different from the situation here where MCI seeks to strip Nicolas of particular rights and protections afforded him under ERISA. Moreover, in Fireman's Fund, there was no contention that the venue in which the plaintiff filed pursuant to the statutory venue provision was improper. Rather, the defendant's motion to transfer was granted on convenience grounds in light of the forum selection clause, which provided for venue in addition to statutorily prescribed venue. Here, MCI does not (and certainly could not) seek transfer on convenience grounds, but instead seeks dismissal, arguing that a forum selection clause renders a statutorily permitted venue legally improper. Appellant's Br. at 15.

Specifically, the regulation requires that plans "establish and maintain a reasonable claims procedure," a requirement that will be met only if, among other things, "the 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).[2] Although this provision was aimed, like the claims regulation itself, at a plan's claims processing procedures, it underscores the concern with fairness to benefit claimants that underlies both the statutory provision and the regulation.

The facts of this case starkly demonstrate why this concern is warranted. As the district court recognized, USCA5 336, enforcement of the forum selection clause here would require a Plan participant claiming to be totally disabled to litigate his claim for benefits more than a thousand miles from where he lives. Such a result is particularly unwarranted given the recognition by this Court that the terms of ERISA disability plans "are generally not the result of the typical

[2] The regulation also provides the rebuttal to another of MCI's contentions. MCI argues that because mandatory arbitration is permissible in the ERISA context and is a form of forum selection, forum selection clauses in plans must likewise be enforceable. Appellant's Br. at 25-26. The cases that MCI cites for this proposition are all about fiduciary breaches and are not benefit claims cases. The Secretary's claims regulation deals expressly with arbitration in the group health and disability benefit claim context. In addition to describing the circumstances where mandatory arbitration is permissible, the regulation provides that any such arbitration must be non-binding, that is, it may not limit the claimant's ability to challenge the benefit determination. See 29 C.F.R. § 2560.503-1(c)(3). See also Claims procedure FAQs, D-6 (available at www.dol.gov/EBSA/faqs/faq_claims_proc_reg.html).

bargaining and negotiated processes between roughly equal parties that is the hallmark of freedom to contract." Wegner v. Standard Ins. Co., 129 F.3d 814, 818 (5th Cir. 1997).

Thus, the justification for enforcing forum selection clauses – that they are "freely bargained for," and "unaffected by fraud, undue influence, or overweening bargaining power," Bremen, 407 U.S. at 12-14 – is not present in the ERISA plan context. Cf. Haynsworth v. The Corporation, 121 F.3d 956, 963 (5th Cir. 1997) (citing Bremen for the proposition that "[t]he presumption of enforceability may be overcome, however, by a clear showing that the clause is "'unreasonable' under the circumstances"). Although MCI cites this Court's unpublished decision in Hartash Constr., Inc. v. Drury Ins., Inc., 252 F.3d 436, 2001 WL 361109, at *2 (5th Cir. March 23, 2001), for the proposition that even serious inconvenience to Nicolas is not a grounds for invalidating the forum selection provision, Appellant's Br. at 27, the Hartash case involved a contract dispute between two commercial entities, and the Fifth Circuit merely upheld the district court's conclusion that "under the facts of this case, the inconvenience of trying a case in one state versus another is insufficient to invalidate a forum-selection clause." 2001 WL 361109, at *2.[3] The

[3] MCI also argues, without support, that transferring this matter would not inconvenience Nicolas because the issue is the denial of benefits, which, under the applicable abuse of discretion standard, the court may review only on the existing administrative record. Appellant's Br. at 28-29. Even so, there may still be

Supreme Court's decision in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596 (1991), is likewise distinguishable. Carnival Cruise Lines recognized that a forum selection clause may not be enforced where it is clearly unreasonable, but concluded that it was not unreasonable to decide a dispute involving an accident off the coast of Mexico between a ship passenger and the ship in Florida, as the contract provided, rather than in Washington, where the passenger resided. 499 U.S. at 594. Neither the holding in Carnival Cruise Lines nor the holding in Hartash foreclose the district court's conclusion here that, in the context of an ERISA disability case, requiring that the Plan participant litigate his denial of benefits in a forum 1200 miles from where he lives is unreasonable, particularly in light of ERISA's stated protective purposes. More fundamentally, neither case involved a statutory scheme akin to ERISA, which includes a specific venue provision and expressly forbids enforcement of any plan terms contrary to the statute's provisions.

MCI cites a number of recent district court decisions that have upheld forum selection clauses in ERISA plans. See Rogal v. Skilstaf, 446 F. Supp. 2d 334, 338 (E.D. Pa. 2006); Schoemann ex rel. Schoemann v. Excellus Health Plan, Inc., 447 F. Supp. 2d 1000 (D. Minn. 2006); Bernikow v. Xerox Corp. Long-Term

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requirements, for example, to obtain local counsel, appear at oral argument or attend settlement conferences.

Disability Income Plan, No. CV 06-2612 RGKSHX, 2006 WL 2536590 (Aug. 29, 2006 C.D. Cal.); Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007). For the reasons discussed above, these cases are poorly reasoned and wrongly decided. However, they do highlight the disturbing recent trend of plan administrators relying on such clauses to deny plan participants, such as Nicolas, the ready access to courts that Congress intended to give plan participants and beneficiaries to enforce their rights under the plan. This Court should decline to do so in light of ERISA's jurisdiction and venue provisions, its provision trumping contrary plan terms and its expressly-stated purpose to protect benefit claimants and to provide them with ready access to federal courts.

CONCLUSION

Accordingly, this Court should affirm the holding of the district court that the forum selection clause was unenforceable under ERISA.

August 31, 2009

Respectfully Submitted,

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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 3,026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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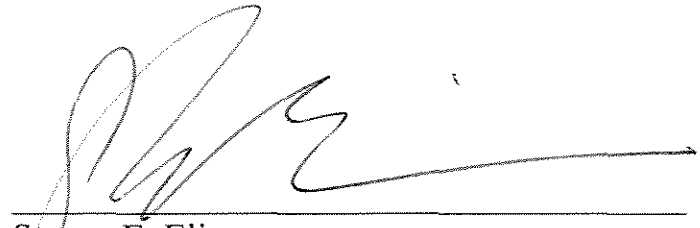
Dated: August 31, 2009



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I hereby certify that I have served two paper and one electronic (on CD) copies upon counsel listed below, by Federal Express, marked for next day delivery on this the 31st day of August, 2009:

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