No. 16-2607

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE LORNA CLAUSE,
Petitioner,

On Petition for a Writ of Mandamus to the United States District Court
for the Eastern District of Missouri in No. 4.16-cv-ooo71-RLW,
Hon. Ronnie L. White

The Secretary of Labor's Amicus Curiae Brief in Support of Petitioner

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act ("ERISA") invalidates a welfare plan's forum-selection clause that deprives the petitioner-participant of the venue choices afforded by ERISA's venue provision, and instead requires her to bring suit at a considerable distance from her home.

THE SECRETARY'S INTEREST

At the invitation of the Supreme Court, the United States recently articulated its position on the question presented that forum-selection clauses which restrict a participant's choice of venue conferred by ERISA, 29 U.S.C. § 1132(e), are not "consistent" with ERISA, 29 U.S.C. § 1104(a)(1)(D), and, hence, are unenforceable. Brief of the United States as Amicus Curiae, Smith v. Aegon Companies Pension Plan, 134 S. Ct. 2459 (Nov. 2015) (No. 14-1168), http://1.usa.gov/24P2gbV. The Secretary of Labor 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. The Secretary has a substantial interest in ensuring that ERISA's jurisdictional provision in section 502(e)(2), 29 U.S.C. § 1132(e)(2), rather than a more restrictive forum-selection clause in the plan documents, governs ERISA benefits suits. Under the forum-selection clause at issue here, a plan participant's suit for disability benefits was transferred to the U.S. District Court for the Eastern

District of Missouri, a distant forum to which plaintiff has no connection. Giving effect to a plan provision such as this allows employers to unilaterally erect obstacles that impede plan participants from enforcing their important statutory rights, an effect antithetical to ERISA's purposes.

STATEMENT OF THE CASE

Plaintiff Lorna Sue Clause was a Patient Care Technician at Carondelet St. Joseph's Hospital in Tucson, Arizona. Dkt. 12-1 ¶¶ 7-8. Clause is a participant in the Ascension Plan, which is administered by her employer and plan sponsor, Ascension Health Alliance, and Sedgwick Claims Management Services, the claims administrator. Id. ¶¶ 1, 3. In 2012, Clause claimed and was granted long-term disability benefits under the Plan. Id. ¶ 10. In 2013, Sedgwick notified Clause that it was terminating her benefits; Clause successfully appealed, and her benefits were reinstated. Id. ¶¶ 13-15. In January 2015, Sedgwick again terminated her benefits, claiming that she was not disabled. Id. ¶ 43-44. Clause alleges that defendants relied on incorrect information and therefore improperly denied her benefits. Id. ¶ 48.

On August 28, 2015, Clause filed a complaint in the U.S. District Court for the District of Arizona. The complaint seeks declaratory relief and asserts a claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and for equitable relief under section 502(a)(3), 29 U.S.C. § 1132(a)(3). On October 15,

2015, defendants filed a Motion to Dismiss, or in the Alternative, to Transfer Venue, based on a forum-selection clause in the Plan's documents. Clause v. Sedgwick Claims Mgmt. Servs., Inc., No. CIV 15-388-TUC-CKJ, 2016 WL 213008, at *1 (D. Ariz. Jan. 19, 2016). The Plan provides:

> **9.20 Forum Selection Clause.** Except as the laws of the United States may otherwise require, any action by any Plan Participant relating to or arising under this Plan shall be brought and resolved only in the U.S. District Court for the Eastern District of Missouri . . . .

Defendants' Memorandum [Dkt. 16], at *3, Clause v. Sedgwick Claims Mgmt. Servs., Inc., No. 4:15-cv-00388 (D. Ariz. filed Oct. 15, 2015). The District Court of Arizona entered an order transferring the case to the Eastern District of Missouri. Clause, 2016 WL 213008, at *5. Clause then moved to retransfer the case back to the District Court of Arizona, which the District Court for the Eastern District of Missouri denied (Dkt. 51) ("Op."). Clause has lived and worked in Arizona for over a decade, Dkt. 12-1, and has no connection to Missouri.

DISCUSSION

The Forum-Selection Clause Is Unenforceable Because It Contradicts ERISA and Is Contrary to the Policy Concerns Underlying the Statute

1. Public Policy is Sufficient to Invalidate a Forum-Selection Clause

While forum-selection clauses are "'prima facie valid[,]' . . .public policy against enforcement" may be "sufficient to invalidate the forum selection clause." Union Elec. Co. v. Energy Ins. Mut. Ltd., 689 F.3d 968, 973, 975 (8th Cir. 2012)

(citation omitted). In M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972), the Supreme Court recognized that forum-selection clauses "should be held unenforceable if enforcement would contravene strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." Id. (citing Boyd v. Grand Trunk W. R. Co., 338 U.S. 263, 265 (1949) (per curiam)).

ERISA's plain text confers on plaintiff-participants a choice of venues in section 502(e), 29 U.S.C. § 1132(e), to file an ERISA claim. Congress stated in ERISA's text that a "policy" of ERISA is to "protect . . . the interests of participants . . . by providing . . . ready access to the Federal courts." 29 U.S.C. § 1001(b). Here, the forum-selection clause contravenes this text by eliminating the plaintiff's choice of venue. The clause is not "consistent" with ERISA, 29 U.S.C. § 1104(a)(1)(D), and thus is unenforceable.

As an example of how the Bremen standard applies, the Supreme Court in Bremen, 407 U.S. at 15, cited to its prior decision in Boyd. Boyd involved a forum-selection agreement in an action brought under the Federal Employers Liability Act ("FELA"), which has its own venue provision. 338 U.S. at 265. The venue provision in section 6 of FELA states, "[u]nder this Act an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56. Section

5 of FELA, 45 U.S.C. § 55, states, "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created to this chapter, shall to that extent be void . . . ." Reading these provisions together, the Supreme Court found that the "petitioner's right to bring the suit in any eligible forum [under section 6 of FELA] is a right of sufficient substantiality" to be protected by section 5 of FELA, which voids any contract or agreement that serves to purposefully or intentionally exempt the employer from any liability. Boyd, 338 U.S. at 265. The Court therefore held that "contracts limiting the choice of venue are void as conflicting with [FELA]" because they "would thwart" FELA's "express purpose" by "sanction[ing] defeat of that right [to select the forum]." 338 U.S. at 265-66.

ERISA is analogous to FELA in many respects. Like the broad venue provision in section 6 of FELA, the venue provision in ERISA section 502(e) provides several choices where the plaintiff "may" bring suit. 29 U.S.C. § 1132(e). Like section 5 of FELA, ERISA also contains protections against contractual terms that depart from the Act's minimum requirements. ERISA section 404(a)(1)(D) provides that plan fiduciaries are required to follow plan documents only "insofar as such documents and instruments are consistent with the provisions of [title I] and title IV [of ERISA]." 29 U.S.C. § 1104(a)(1)(D). "The Plan cannot contract around the statute." Esden v. Bank of Bos., 229 F.3d 154, 173 (2d Cir. 2000). By

eliminating the plaintiff's choice of venue, a forum-selection clause in an ERISA plan is inconsistent with ERISA's text, and thus unenforceable.

In addition to the similarities between FELA and ERISA's plain text, the Supreme Court identified several other characteristics of FELA that animated the Court's finding a "substantial right" to venue in Boyd that warranted protection. In South Buffalo Ry. Co. v. Ahern, the Court noted, in citing Boyd, that the Court, "mindful of the benevolent aims of the Act, [has] jealously scrutinized private arrangements for the bartering away of federal rights." 344 U.S. 367, 372-73 (1953). In Bisso v. Inland Waterways Corp., 349 U.S. 85, 91 (1955), the Court, citing Boyd, articulated a general rule that courts may "prevent enforcement of [obligations under] contracts in many relationships such as . . . employers and employees, [in order] . . . to discourage [wrongdoing] by making wrongdoers pay damages, and . . . to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Id. at 90-91 (applying the rule to releases of negligence claims). The Court thus scrutinizes private contracts in situations with special relationships, like employers and employees, where there is unequal bargaining power and the contractual arrangement impedes the pursuit of statutory claims to deter wrongdoing.

2. The Congressional Intent and Policy Behind ERISA Support the Protection of the ERISA Participants' Right to Choose Venue

The analysis of FELA that supported the Court's decision to recognize

plaintiff's right to choose venue in Boyd leads to the same conclusion in ERISA because: (1) the text and purpose of ERISA is to protect participants' and beneficiaries' rights, which includes a participant's right to choose venue; (2) ERISA creates a special fiduciary relationship within an employment context, obligating fiduciaries to protect and not impede participants' rights; (3) participants' legal actions are necessary to deter and police fiduciary misconduct, and participants should be granted ready access to court; and (4) individual participants typically do not have bargaining power with respect to plan design, including the forum selected in a plan's forum-selection clause. For these reasons, this Court should conclude that the participant's right to choose venue in ERISA section 502(e) is protected under ERISA section 404(a)(1)(D), which requires that plan terms that are inconsistent with ERISA be disregarded.

First and foremost, ERISA provides: "It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries" by, among other things, "providing . . . ready access to the Federal courts." 29 U.S.C. § 1001(b) (emphasis added). To "safeguar[d] . . . the establishment, operation, and administration" of employee benefit plans, ERISA sets "minimum standards . . . assuring the equitable character of such plans and their financial soundness . . . ." 29 U.S.C. § 1001(a) (emphasis added). As Congress recognized, ERISA provides "[l]iberal venue and service provisions," S.

Rep. No. 383, 93d Cong., 1st Sess. 106 (1973), which were enacted despite objections that they could result in plan fiduciaries "having to defend actions in court far removed from their principal places of business." Tax Proposals Affecting Private Pension Plans: Hearings Before the H. Comm. on Ways & Means, 92d Cong. 784 (1972) (statement of Emp. Trusts Comm. of the Corp. Fiduciaries Ass'n of Ill.). ERISA's plain text and legislative history demonstrate the clear congressional intent "to open the federal forum to ERISA claims to the fullest extent possible." Fulk v. Bagley, 88 F.R.D. 153, 167 (M.D.N.C. 1980); see Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006). ERISA's venue provision is distinct from typical venue provisions because ERISA protects the plaintiff's choice to venue, not the defendants' choice. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 134 S. Ct. 568, 582 n.7 (2013). ERISA, including its venue provisions, must be construed to protect participants' rights. E.g., Maune v. Int'l Bhd. of Elec. Workers, Local No. 1, Health & Welfare Fund, 83 F.3d 959, 964 (8th Cir. 1996).

Specifically, ERISA's venue provision provides that venue is proper "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). Section 502(e)(2) governs "an action under this subchapter," which is entitled "Subchapter I – Protection of Employee Benefit Rights." 29 U.S.C. § 1132(e)(2); see also Gulf Life Ins. Co. v. Arnold, 809

F.2d 1520, 1525 n.9 (11th Cir. 1987). Courts readily interpret the ERISA venue provision broadly to ensure the protection of beneficiaries' and participants' rights. See, e.g., Varsic v. U.S. Dist. Ct. for Cent. Dist. of Cal., 607 F.2d 245, 252 (9th Cir. 1979). As an example, courts have repeatedly interpreted the phrase, "where the breach took place," to allow participants to bring benefit claims where they reside. See, e.g., Barnum v. Mosca, No. 108-CV-567(LEK/RFT), 2009 WL 982579, at *4 (N.D.N.Y. Apr. 13, 2009). Thus, section 502(e)(2) "is not a neutral provision merely describing the venues in which ERISA actions can be heard, but is rather intended to grant an affirmative right to ERISA participants and beneficiaries." Coleman v. Supervalu, Inc. Short Term Disability Program, 920 F. Supp. 2d 901, 906 (N.D. Ill. 2013). ERISA, including section 502(e)(2), protects participants' rights to seek their benefits in the venue they select.

Second, ERISA places the defendant-fiduciary in a special relationship to the plaintiff-participant or -beneficiary. This fiduciary relationship further counsels protection of the participant's access to court over a defendant-fiduciary's choice of venue. "ERISA abounds with the language and terminology of trust law." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). In Gulf Life Insurance Co., 809 F.2d at 1524-25, the U.S. Court of Appeals for the Eleventh Circuit concluded 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." Section 502(e)(2) protects plaintiffs' choice of venue, not that of defendants. See id. at 1525 n.7.

Third, the right of plan participants and beneficiaries to select the venue in which to file suit is vital to protecting their promised benefits and also to ensure the fiduciary's proper plan and claim administration. Cf. Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 689 (7th Cir. 1986) (recognizing that the monitoring of fiduciaries has traditionally relied on the "initiative of the individual employee to police the management of his plan" (quoting S. Rep. No. 1150, 92d Cong., 2d Sess. 5 (1972))). Accordingly, ERISA was intended 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 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655. "The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties [such as individual participants] as to whom Congress presumably determined the right to enter federal court was necessary to further the statute's purposes." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 21 (1983) (emphasis added).

The U.S. Court of Appeals for the First Circuit in Volkswagen Interamericana, S. A. v. Rohlsen, 360 F.2d 437, 439 (1st Cir. 1966), discussed a

similarly "broad" venue provision in the Automobile Dealers' Day in Court Act, which was "designed to assure the dealer as accessible a forum as is reasonably possible" because

> [t]he very purpose of the act is to give the dealer certain rights against a manufacturer independent of the terms of the agreement itself. . . . This protection would be of little value if a manufacturer could contractually limit jurisdiction to a forum practically inaccessible to the dealer. The act cannot so easily be thwarted.

Id. Similarly, a participant's right to sue under ERISA section 502(a)(1)(B) is independent of plan terms. A participant's section 502(a)(1)(B) claim for benefits, in part, enforces the statutory requirement that those administering benefits plans provide "a full and fair review" of benefits claims that are denied, 29 U.S.C. § 1133(2); see Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 115 (2008), including procedural requirements governed by regulation and fiduciary obligations that override contrary plan terms. See Bond v. Twin Cities Carpenters Pension Fund, 307 F.3d 704, 707 (8th Cir. 2002); Werdehausen v. Benicorp Ins. Co., 487 F.3d 660, 666-67 (8th Cir. 2007). An ERISA statutory claim is thus separate and apart from a claim under the plan; it invokes judicial review of plan administration in light of statutory, regulatory, and fiduciary obligations. See, e.g., Aetna Health Inc. v. Davila, 542 U.S. 200, 219 (2004). This statutory claim should be governed by the statutory venue provision, not the plan's own forum-selection clause.

If participants and beneficiaries are prevented from choosing a local forum

permitted under ERISA, they may be prevented from protecting their ERISA benefits and rights and from ensuring proper plan and claims administration. "[M]any of those individuals whose rights ERISA seeks to protect," including "retirees on a limited budget, sick or disabled workers, widows and other dependents[,] . . . are often the most vulnerable individuals in our society, and are the least likely to have the financial or other wherewithal to litigate in a distant venue." Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 935 (6th Cir. 2014) (Clay, J., dissenting) (citation omitted); see also French v. Dade Behring Life Ins. Plan, Civil Action No. 09-394-C, 2010 WL 2360457, at *3 n.12 (M.D. La. Mar. 23, 2010); Gulf Life Ins., 809 F.2d at 1525 n.7; cf. Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc., 680 A.2d 618, 628 (N.J. 1996); Tandy Comput. Leasing v. Terina's Pizza, Inc., 784 P.2d 7, 8 (Nev. 1989). Here, Clause is disabled with a "maximum earning potential before disability [that] was limited to $14.41/hour," Dkt. 12-1 ¶ 73.5, and is now forced to litigate over a thousand miles from her home in order to assert her right to disability benefits. Clause's original attorney could not represent her, because he was not licensed in Missouri, id. ¶ 73.4, and the law firm now representing her was "retained exclusively for the specific purpose of litigating the public-interest venue issue on appeal." Plaintiff's Petition, at *29 n.9. ERISA’s venue provision is necessary to ensure participants have ready access to the courts so they can ensure proper claims review.

Finally, employers that sponsor plans and their employees, the plan participants, have unequal bargaining power. This unequal bargaining power also counsels against enforcement of venue provisions in plan documents that cede important participant rights. "[E]mployees are rarely involved in plan negotiations." Glenn, 554 U.S. at 114 (citing Langbein, Trust Law as Regulatory Law, 101 Nw. U. L. Rev. 1315, 1323-24 (2007)); see also Coleman, 920 F. Supp. 2d at 908; Viti v. Guardian Life Ins. Co. of Am., 817 F. Supp. 2d 214, 228 (S.D.N.Y. 2011); cf. Kubis & Perszyk Assocs., 680 A.2d at 627 (identifying unequal bargaining power as a basis for restricting forum-selection clause). Generally, plans cannot be considered bilateral arms-length contracts but are designed by the employer/plan sponsor. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) (employers generally can modify plans at any time).

ERISA's protective purpose extends to the creation of a broad venue provision that protects a participant's right to police plan administration. The venue provision ensures the participant has the ability to perform this important role. These statutory policies cannot be thwarted by plan terms that are a product of unequal bargaining and favor the fiduciary-defendant or employer. 29 U.S.C. § 1104(a)(1)(D); Smith, 769 F.3d at 934 (Clay, J., dissenting).

3. Arguments for Enforcing Forum-Selection Clauses Are Unsupported

The district court enforced the forum-selection clause because, in its view,

such clauses promote ERISA's goal of uniformity. Op. at *4; see also Smith, 769 F.3d at 931. The district court misunderstood this particular goal, which might support a choice-of-law provision, but does not support applying a forum-selection clause.[1] Coleman, 920 F. Supp. 2d at 909. Congress was concerned about uniformity because it did not want plans to be subject to different legal requirements under the laws of "different States." Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001); Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 945 (2016). Congress included a preemption provision, section 514(a), 29 U.S.C. § 1144(a), to ensure that the federal courts would have jurisdiction over ERISA claims, not that one federal court would have jurisdiction over all claims for one ERISA plan.

Some courts have also concluded that such clauses are analogous to arbitration agreements, which can be enforceable in some ERISA contexts. See Smith, 769 F.3d at 932 (citing cases). This argument is misguided. Courts enforce arbitration agreements not on the basis of a general judicial policy favoring arbitration, but because that is what federal law – in this case the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2, 3 – requires. In Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc., 847 F.2d 475, 479 (8th Cir. 1988), this Court relied on

[1] For example, the Eleventh Circuit stated that a choice-of-law provision can choose a state's substantive law the parties wish to use for gaps not covered by ERISA. Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1148 (11th Cir. 2001). The chosen law must, however, still be consistent "with the language of ERISA or the policies that inform that statute and animate the common law of the statute." Id.

decisions interpreting the FAA to conclude that there was "no congressional intent to single out ERISA claims for exemption from the general federal policy favoring rigorous enforcement of agreements to arbitrate." Sulit, 847 F.2d at 479. There is no such similar requirement regarding forum-selection clauses under any federal statute. Moreover, the FAA serves a different purpose than ERISA section 502(e)(2). See Coleman, 920 F. Supp. 2d at 909. Rather than addressing where the action should be brought – which could result in "a substantial increase in expense and inconvenience" – the FAA addresses whether arbitration is required – which focuses on the dispute resolution procedure "without necessarily creating such hardships for the individual." Id. Finally, arbitration of ERISA benefit claims is non-binding. Franke v. Poly-Am. Med. & Dental Benefits Plan, 555 F.3d 656, 658 (8th Cir. 2009); 29 C.F.R. § 2560.503–1(c)(4). Thus, while an arbitration agreement may narrow the district court's review, an arbitration agreement does not void or interfere with a participant's right to choose the venue for his section 502(a) suit. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 385-86 (2002); 29 C.F.R. § 2560.503-1(c)(4). The congressional policy favoring arbitration is simply not implicated here, either directly or by analogy.

CONCLUSION

For the reasons set forth above, the forum-selection clause under which this case was transferred is inconsistent with ERISA and unenforceable.

Respectfully submitted,

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FOR CASE NO. 16-2607

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/s/ Thomas Tso
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Dated: June 16, 2016

CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check, using McAfee Security VirusScan Enterprise 8.0, was performed on the PDF file and paper version of this brief, and no viruses were found.

/s/ Thomas Tso
Attorney for the U.S. Department of Labor, Plan Benefits Security Division

Dated: June 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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