

# BENEFITS LAW JOURNAL

## Forum Selection Provisions in ERISA Plans

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*In recent years, in addition to substantive changes to 401(k) plans to increase both the level of participation and the level of contributions, there has been an increased focus on the procedural aspects of all types of employee benefit plans. One such modification has been the addition of internal statutes of limitations,<sup>1</sup> shorter than what would otherwise be the applicable state statute of limitations. Another change has been providing an explicit contractual basis for the recovery of overpayments, and a third addition to plans, and the subject of this article,<sup>2</sup> has been the inclusion of mandatory forum selection clauses,<sup>3</sup> which limit plaintiffs to only one of the three permissible federal venues for ERISA causes of action.<sup>4</sup> This article discusses in detail how courts are divided on the issue of the enforceability of forum selection clauses in ERISA plans.*

Regarding forum selection clauses, there is agreement on a number of general governing principles.<sup>5</sup> First, in federal court cases, federal law determines the enforceability of forum selection clauses.<sup>6</sup> Second, a US Court of Appeals will review *de novo* the enforceability of a forum selection clause.<sup>7</sup> Third, an action under the federal *forum*

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*non conveniens* statute, 28 USC 1404(a), is the correct procedure by which a defendant may seek to enforce a contractual venue provision.<sup>8</sup> Fourth, forum selection clauses have long been held to be presumptively valid,<sup>9</sup> including in the ERISA context,<sup>10</sup> thus requiring them to be honored “absent some compelling and countervailing reason.”<sup>11</sup> Despite their presumptive validity, however, forum selection clauses will not be enforced if the resisting party<sup>12</sup> can satisfy the “heavy burden” of proof<sup>13</sup> of making a “strong showing”<sup>14</sup> that enforcement of the provision would be unreasonable and unjust or contrary to the public policy of the forum<sup>15</sup> or that the clause was invalid for reasons such as fraud and overreaching.<sup>16</sup> Fifth, the financial difficulty that a party may have in litigating in the selected forum is not a sufficient ground by itself for refusal to enforce a valid forum selection clause.<sup>17</sup>

Moreover, the economic disparity between the parties asserted in connection with a financial hardship is also insufficient to refuse the enforcement of a forum selection clause.<sup>18</sup> When a party contends that a forum selection clause conflicts with the public policy manifested by a statutory provision, courts “are to discern the public policy in the statute through the process of statutory interpretation including examining the plain wording of the statute and its legislative history.”<sup>19</sup> Additionally, forum selection clauses found in form contracts are subject to judicial scrutiny for fundamental fairness.<sup>20</sup> To determine whether a forum selection clause is fundamentally fair and thus enforceable, courts consider three factors: the absence of a bad motive,<sup>21</sup> the absence of fraud or overreaching, and notice of the forum provision.<sup>22</sup>

In the ERISA context, the third of these factors is the only relevant one, and in *Mezyk v. U.S. Bank Pension Plan*,<sup>23</sup> an Illinois District Court refused to enforce a forum selection provision in an ERISA plan on the grounds that it was not reasonably communicated to plaintiffs.<sup>24</sup> In most instances, however, an argument that the forum selection clause was not reasonably communicated to the plaintiff has not been successful.<sup>25</sup> Thus although “strict application of this principle would invalidate every forum selection clause in an employee welfare benefit plan,”<sup>26</sup> forum selection clauses in ERISA cases may be upheld even when, as is frequently the case, the plan participant originally had no knowledge of the claim.<sup>27</sup> However, as is true of internal statutes of limitation, the best practice would be to include a description of such provisions in the plan’s summary plan description.

A substantial majority of district courts<sup>28</sup> and, as of the date of this article, one circuit court of appeals<sup>29</sup> have found forum selection clauses in ERISA plans to be enforceable, while the Department of Labor (DOL) and two district courts<sup>30</sup> have held them to be unenforceable. There have been a number of grounds that have been relied upon for enforcing these forum selection clauses. First, the US

Court of Appeals for the Sixth Circuit observed that the DOL had not explained how a venue provision inhibits access to federal courts when it provides for venue in a federal court.<sup>31</sup>

Second, many district courts reason that if Congress had wanted to prevent private parties from waiving ERISA venue provisions, Congress could specifically have prohibited such action.<sup>32</sup> For example, in *Rodriguez v. Pepsico Long Term Disability Plan*,<sup>33</sup> the district court stated that, “Nothing in ERISA bars those negotiating ERISA plans from narrowing that menu of options to one venue in particular. As many other district courts have already observed, Congress could have but has not expressly barred parties from agreeing to restrict ERISA’s venue provisions.”<sup>34</sup>

Third, courts have relied upon case law in upholding the validity of mandatory arbitration clauses in ERISA plans,<sup>35</sup> which are, “in effect, a specialized kind of forum-selection clause.”<sup>36</sup> In *Smith v. Aegon Companies Pension Plan*, the US Court of Appeals for the Sixth Circuit stated that, “It is illogical to say that under ERISA, a plan may preclude venue in federal courts entirely, but a plan may not channel venue to a particular Federal Court. Smith tries to distinguish Simon by arguing that arbitration affects only forum, not venue. But an arbitration clause may prescribe the geographic location of the proceedings as well as the forum.”<sup>37</sup>

Fourth, a forum selection clause is consistent with and may further other policies of ERISA. For example, in *Schoemann ex. rel. Schoemann v. Excellus Health Plan, Inc.*,<sup>38</sup> the district court indicated that “A plan administrator and employer may have legitimate reasons to agree to a forum selection clause. A plan administrator... may propose a forum selection clause in order to conserve its resources and assure some predictability in the interpretation of its plans. And an employer... may agree to such a proposed clause because the cost savings enjoyed by the plan administrator will redound to the benefit of the employer and the beneficiaries.”<sup>39</sup> Other courts have emphasized the uniformity of administration as a byproduct of the forum-selection clause. Thus, in *Klotz v. Xerox Corp.*,<sup>40</sup> the district court explained that “the forum selection clause contained in Xerox’s LTD [Long-Term Disability Income] Plan allows one federal court to oversee the administration of the LTD Plan document, thus furthering ERISA’s goal of establishing a uniform administrative scheme.”<sup>41</sup>

The DOL takes a distinctly different view of forum selection clauses in ERISA employee benefit plans. In its *Mozingo v. Trend Personnel Services* brief<sup>42</sup> and the brief in *Nicolas v. MCI Health and Welfare Benefit Program*, the DOL advanced the following argument: “Forum selection clauses are incompatible with ERISA. In the ERISA context, the public policy expressed in the statute’s broadly worded venue provisions is exceptionally strong, given the express provision in

1104(a)(1)(D), which precludes modifying ERISA rights and remedies by contract.” In *Nicolas v. MCI Health and Welfare Program #501*,<sup>43</sup> the US District Court for the Eastern District of Texas refused to enforce an ERISA plan’s forum selection clause, reasoning that it “cannot allow the Plan’s forum selection clause to override a Congressionally enacted statutory framework aimed at assisting employees. If this court were to do so, it would encourage a flood of new, non-negotiated ‘plans’ containing forum selection clauses. This floodgate of new plans would severely limit many potential plaintiffs from having access to the federal courts and thus vitiate the Congressional intent of enacting ERISA.”<sup>44</sup> The court did not indicate why it thought that the other methods of challenging forum selection clauses noted previously would not be adequate to address these concerns.

In *Coleman v. Supervalu Inc. Short Term Disability Program*,<sup>45</sup> the district court stated that “Congress clearly desires open access to several venues for beneficiaries seeking to enforce their rights and it is equally clear that an employer’s unilateral restriction of that access would undermine Congress’ stated desire.”<sup>46</sup> It accepted the DOL’s contention that “the forum selection clause must be deemed unreasonable as contrary to public policy, so that it is unenforceable. Under the circumstances before this Court, the employer’s unilateral action cannot trump the minimum statutory protections established by Congress.”<sup>47</sup> The district court also noted, but did not rule upon, the DOL’s contention that ERISA Section 404(a)(1)(D) was included in ERISA for the express purpose of preventing that type of end-run around ERISA standards as would be effected by a forum selection clause, so as to ensure that the standards provide actual protection to participants and beneficiaries.<sup>48</sup>

Coleman was cited with approval in the dissenting opinion of Circuit Judge Clay in his dissent in *Smith v. Aegon Companies Pension Plan*. He looked to the specific language and legislative history of ERISA. Section 1001(b) was designed to provide “ready access to the Federal courts” so as “to protect...the interest of participants in employee benefit plans and their beneficiaries.” The legislative history of ERISA states that Congress expressly sought to eliminate “jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibility.” With that as background, a background that even those courts enforcing forum selection clauses in ERISA employee benefit plans have acknowledged, the dissent continued:

The preclusive venue selection clause for the Aegon Companies Pension Plan (the “Plan”) unilaterally added in 2007 is inconsistent with the purpose, policy, and text of ERISA, and contravenes the

“strong public policy” declared by ERISA. Therefore, the clause should be deemed unenforceable . . . . The venue selection clause that the plan seeks to enforce forbids plaintiff from bringing a suit for benefits anywhere other than Cedar Rapids, Iowa—a venue that is located more than 500 miles away from plaintiff’s home and place of work, and with which plaintiff has no connection. Such a restrictive clause not only conflicts with the broad venue provision set forth in 502(e) of ERISA but also undermines the very purpose of ERISA and contravenes the strong public policy evinced by statute. Section 502e, which provides broad jurisdiction for benefit claims, is “intended to grant an affirmative right to ERISA participants and beneficiaries. This right is indispensable for many of those individuals whose rights ERISA seeks to protect, since claimants in suits for plan benefits—retirees on limited budgets, sick or disabled workers, widows, and other dependents—are often the most vulnerable individuals in our society, and they are the least likely to have the financial or other wherewithal to litigate in a distant venue. A venue selection clause that purports to eliminate a proper statutory venue conflicts with ERISA’s venue provision as well as the strong statutory public policy against imposing obstacles to beneficiaries in pursuit of benefit claims . . . . Requiring plaintiff to litigate in a distant venue imposes a substantial increase in expenses and inconvenience<sup>49</sup> that obstructs his access to federal courts. Because the express purpose and policy of ERISA is to provide unobstructed access to a forum in which participants and beneficiaries can pursue their claims for benefits, the unilaterally added venue selection clause at issue should be deemed unenforceable.<sup>50</sup>

In addition to these larger issues with respect to which courts enforcing and invalidating forum selection clauses in ERISA employee benefit plans differed, there were also three narrower issues on which the courts or the courts and the DOL differed:

- (1) The degree of deference to be afforded to a government agency’s position expressed in an *amicus* brief;
- (2) The relevance of *Gulf Life Insurance Co. v. Arnold*;<sup>51</sup> and
- (3) The relevance of *Boyd v. Grand Truck Western R. Co.*<sup>52</sup>

A technical issue with respect to the DOL’s<sup>53</sup> position on forum selection clauses set forth in an *amicus* brief is whether it is entitled to *Skidmore* deference.<sup>54</sup> Under *Skidmore v. Swift & Co.*,<sup>55</sup> an administrative judgment may still be entitled to weight in a particular case

“depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.”<sup>56</sup>

The US Supreme Court in *United States v. Mead*<sup>57</sup> added another contextual factor for courts to consider in conducting the *Skidmore* inquiry: “The fair measure of deference to an agency administering its own statutes has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”<sup>58</sup> In *Smith*, the US Court of Appeals for the Sixth Circuit held that the Secretary’s position was not entitled to *Skidmore* deference. First, the “DOL was no more expert than this Court in determining whether a statute prescribes venue selection. Even were the Secretary more expert, the Secretary’s bare textual analysis of ERISA, without more, does not constitute a body of experience and informed judgment to which courts should defer.”<sup>59</sup> Second, the Secretary’s position had been expressed only once previously, and the DOL had taken no position on the issue for, in the court’s view, 39 years. Consequently, “the Secretary’s new interpretation is not consistent with prior acquiescence, is an about-face and lacks longevity, suggesting the interpretation does not ‘reflect careful consideration.’”<sup>60</sup> Third, the only indication that the DOL had adopted this particular provision of ERISA was the *amicus* briefs themselves: “An agency’s mood is not entitled to *Skidmore* deference. There has never been an enforcement action brought related to a venue selection clause, and only one other *amicus* brief exists that has articulated the Secretary’s current position. The Secretary has promulgated no regulation or interpretive guidance related to venue selection clauses. As we have noted, *Skidmore* deference does not apply to a line of reasoning that an agency could have but has not yet adopted.”<sup>61</sup>

In *Turner v. Sedgwick Claims Management Services, Inc.*,<sup>62</sup> the Alabama District Court, while disagreeing with the Sixth Circuit that the DOL had previously acquiesced in venue selection clauses,<sup>63</sup> nonetheless agreed “with the Sixth Circuit’s fundamental assessment that the Secretary’s interpretation amounts to a bare textual analysis of the ERISA statute and lacks persuasive force in light of the relevant controlling case law . . . . Also underwhelming is that the Secretary has expressed his view only rarely, through this *ad hoc* highly informal means of *amicus* briefs in private litigation, rather than in a regulation, enforcement setting, or even in a published statement of policy or guidance.”<sup>64</sup>

A frequently cited case in this area is *Gulf Life Ins. Co. v. Arnold*.<sup>65</sup> In *Arnold*, a former employee applied for service benefits under the ERISA plan of his former employer, Gulf Life. However, rather than denying the claim outright, Gulf Life filed an action in the federal

district court in Florida, where it had its principal place of business and which was the place where the plan was administered, seeking a declaratory judgment of non-liability.<sup>66</sup> Gulf Life then served the former employee in Tennessee where he resided and where he had worked for Gulf Life.<sup>67</sup> The district court dismissed the action for lack of personal jurisdiction over Arnold.<sup>68</sup> Gulf Life appealed,<sup>69</sup> arguing that personal jurisdiction existed pursuant to ERISA. It argued that its declaratory judgment action qualified under ERISA Section 502(a)(3)(B)(ii), which allows a plan participant, beneficiary, or fiduciary to bring a civil action to obtain appropriate equitable relief to enforce any provision of ERISA or the terms of the plan.

The US Court of Appeals for the Eleventh Circuit disagreed, concluding that Gulf Life's action sought neither equitable relief nor to enforce the terms of the plan.<sup>70</sup> Further, under ERISA Section 502(a)(1)(D), only participants and beneficiaries, not fiduciaries, can bring an action to determine their right to plan benefits.<sup>71</sup> As a result, the Eleventh Circuit held that the district court could not avail itself of nationwide service of process under ERISA Section 502(e)(2).<sup>72</sup> The Eleventh Circuit opinion "conceivably could have ended there and affirmed the District Court judgment."<sup>73</sup> Instead, after expressly acknowledging that its holding was "base[d] on the court's understanding of the words Congress chose to use in the statute,"<sup>74</sup> the court proceeded to invoke "ERISA's stated purpose and the legislative history"<sup>75</sup> to buttress its conclusion:

Were we to adopt Gulf Life's view, 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. This inconsistent result would arise from the administrative procedures that a claimant must file before he can bring suit in the federal courts. For purposes of ERISA a cause of action does not accrue until an application [for benefits under the plan] is denied. Under the employer's interpretation, a fiduciary therefore would always have an ample opportunity to defeat efforts by participants/beneficiaries to avail themselves of ERISA's broad venue provision; all the fiduciary need do in cases it intended to contest is file a declaratory judgment action in the district where the plan is administered and then, pursuant to section 1132(e)(2), serve the defendant participant/beneficiary in the district where he lives. Such a procedure would stand ERISA's unequivocal purpose on its head.<sup>76</sup>

The court then added the following comment in a footnote:

Under Gulf Life's view of section 1132, if Gulf Life were headquartered in Guam it would be able to force Arnold to litigate

his benefit plan rights in that forum. Although this states the case in its most extreme, it is not unusual for a national corporation to be headquartered in New York or in California. We believe that ERISA's legislative history unquestionably demonstrates that Congress did not intend to allow a fiduciary to force a plan participant/beneficiary who worked for a company for 30 years in Maine and who files a claim for benefits with that company, to be required to litigate his claim in Los Angeles.<sup>77</sup>

In *Loeffelholz v. Ascension Health, Inc.*,<sup>78</sup> the district court rejected an argument based upon *Arnold*, calling the plaintiff's reliance on such case "egregiously misplaced"<sup>79</sup> and summarily dismissing the idea that *Arnold* might be instructive because it was a declaratory judgment action and did not involve a forum selection clause.<sup>80</sup> The district court in *Turner v. Sedgwick Claims Management Services, Inc.* concluded that plaintiff's reliance upon *Arnold* presented a closer question, but ultimately reached the same conclusion as in *Loeffelholz*. First, *Arnold* did not involve a forum selection clause in an ERISA plan and therefore could not compel a holding that such a provision was unenforceable.<sup>81</sup> Second, *Arnold's* entire discussion of ERISA's general purpose and legislative history was *dicta* and not binding.<sup>82</sup>

*Boyd v. Grand Trunk Western RR. Co.*<sup>83</sup> is a case cited by the Supreme Court in *Bremen* as an example of a forum selection clause that may be unenforceable as against public policy.<sup>84</sup> In *Boyd*, a railroad employee had suffered injuries in the course of his duties. In the months following the accident, the railroad gave him two advances of \$50 each against his recovery under the Federal Employees' Liability Act (FELA), with each advance conditioned upon his signed agreement that if he could not settle his claim and elected to file a suit, he would file an action only in the court or district where he sustained his injuries or where he was residing at the time that he sustained them. These stipulations would have required him to file suit in Michigan, but he filed suit in Illinois. In concluding that the suit was permissibly filed in Illinois, the Supreme Court relied not only upon FELA's venue provision but also a provision of FELA that "voids any contract, rule, regulation, or device whatsoever, the purpose of which shall be to enable any common carrier to exempt itself from any liability created under this act."<sup>85</sup> Because the Supreme Court saw the right to elect the forum grant under FELA to be a "substantial right," it concluded that it would thwart the express purpose of FELA to sanction defeat of that right by the device employed by the railroad.<sup>86</sup> However, while the DOL has cited *Boyd* in its *amicus* briefs, few courts have cited *Boyd* in forum-election cases, and they have sought to distinguish it or question its ongoing vitality.<sup>87</sup>

## NOTES

1. *Heimesholl v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013).
2. Other articles on this subject are Doreen A. Mohs, “Forum Selection Clauses in Employee Benefit Plans: Are They Enforceable?” *Life, Health and Disability News*, Winter 2007. <http://www.millerjohnson.com/files/Publication/35f3c4e7-f977-46f7-8599-003c8f4a704d/Presentation/PublicationAttachment/3ae13572-3c30-4bac-8f2c-0a1a07a6d164/LHDNwinter07.pdf>, last accessed May 14, 2016.
3. DRI ERISA Report Issue 1 and Richard Poulter, “Forum Selection Clauses in ERISA Plans,” *DRI Today*, June 3, 2013. Forum-selection clauses are categorized as permissive, mandatory, or hybrid. A permissive clause authorizes jurisdiction in a designated forum but does not prohibit litigation elsewhere. A mandatory clause dictates an exclusive forum for litigation under the contract. A hybrid clause provides for permissive jurisdiction in one forum that becomes mandatory upon the party sued. *Ocwen Orlando Holding Company v. Harvard Property Trust, LLC*, 526 F.3d 1379, 1381 (11th Cir. 2008), cited in *Turner v. Sedgwick Claims Management Services, Inc.*, 2015 WL 225495 (N.D. Ala. January 16, 2015). See also *Global Satellite Communication Co. v. Starwell UK, Ltd.*, 378 F.3d 1269, 1272 (11th Cir. 2004) and *Emerald Grande, Inc. v. Junkin*, 334 Fed. App’x 973, 975 (11th Cir. 2001), both cited in *Loeffelholz v. Ascension Health, Inc.*, 2014 WL 3817289 (M.D. Fla. June 25, 2014).
4. ERISA Section 502, 29 USC 1132, provides that “where an action under this subchapter is brought in a District Court in 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.” This article does not discuss where a breach is deemed to have taken place or where a defendant may be found.
5. In the absence of a forum selection clause, defendants would have difficulty in obtaining a transfer of venue under 28 USC 1404(a). See, for example, *Shanebcbian v. Macy’s Inc.*, 251 F.R.D. 287, 292 (S.D. Ohio 2008) (“the plaintiff’s choice of venue... must be afforded a heightened level of deference, beyond the usual deference offered plaintiffs under 1404 analysis”); *Holland v. ACL Transport Services, LLC*, 815 F. Supp. 2d 46, 56 (D.D.C. 2011) (courts afford “special weight” to an ERISA plaintiff’s choice of forum in ERISA cases); *Board of Trustees, Sheet Metal Workers Nat’l Pension Fund v. Sullivan Avenue Properties, LLC*, 508 F. Supp. 2d. 473, 477 and n.2 (E.D. Va. 2007) (noting that 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”); *In re Warrick*, 70 F.3d. 736 at 740–741 (2nd Cir. 1995) (ERISA plaintiff’s choice of venue is entitled to substantial deference); *Briesch v. Auto Club of S. California*, 40 F. Supp. 2d. 1318, 1322 (D. Utah 1999) (“Congressional policy favors plaintiff’s choice of forum in ERISA actions.”) However, “when parties have agreed to a forum selection clause, the traditional analysis is altered and the clause should control absent a clear showing that it should be set aside.” *2215 Fifth Street Associates v. U-Haul International, Inc.*, 148 F. Supp 2d 50, 58 (D.D.C. 2008), quoted in *Mroch v. Sedgwick Claims Management Services, Inc.*, 2014 WL 7005003 (N.D. Ill., December 10, 2014).
6. *Manetti-Farrow, Inc. v. Gucci Amer., Inc.*, 858 F. 2d 509, 513 (9th Cir. 1988); *Haynsworth v. The Corp.*, 121 F. 3d 956, 962 (5th Cir. 1997), cited in *Haughton v. Plan Administrator of the Xerox Corp. Retirement Income Guarantee Plan*, 2 F. Supp. 3d 928 (W.D. La. 2014); *Junkin, supra* n.3, cited in *Loeffelholz, supra* n.3; *Streit v. Snap-on Farm Equipment, Inc.*, 2010 WL 5058540 (D. Kan. Dec. 6., 2010). There is also agreement that federal law governs whether to give effect to a forum selection clause in the

context of a motion to transfer under Section 1404(a). *Stewart Organization, Inc. v. Ricob Corp.*, 487 US 22, 29–32 (1988); *In re Ricob Corp.*, 870 F. 2d 570, 57–73 (11th Cir. 1989); *P & S Business Machines, Inc. v. Canon USA, Inc.*, 331 F. 3d. 804, 807 (11th Cir. 2003); *Turner v. Sedgwick Claims Management Services, Inc.*, *supra* n.3.

7. *Wong v. Party Gaming, Ltd.*, 589 F. 3d. 821, 826 (6th Cir. 2009); *Smith v. Aegon Companies Pension Plan*, 769 F. 3d. 922 (6th Cir. 2014).

8. *Atlantic Marine Construction Co. v. United States District Court of the Western District of Texas*, 134 S.Ct. 568 (2013), cited in *Turner, supra* n.3.

9. *M/S Bremen v. Zapata Offshore Co.*, 407 US 1, 10 (1972). While *Bremen* is an admiralty case, its standard has been applied to forum selection clauses in general. *Argula v. Banco Mexicano, S.A.*, 87 F. 3d 320, 325 (9th Cir. 1996), cited in *Vega v. Carondelet Health Network*, 2013 WL 784365 (D. Ariz., February 5, 2013); *Cheney v. IPD Analytics* (D.D.C. October 20, 2008); *Gipson v. Wells Fargo & Co.*, 563 F. Supp. 2d. 149, 153 (D.D.C. 2002); *Krenkel v. Kerzner Intern. Hotels, Ltd.*, 579 F. 3d 1279, 1281 (11th Cir. 2009), quoted in *Loeffelholz, supra* n.3. The Supreme Court has also stated that enforcement of a forum-selection clause does not offend due process when it has been freely negotiated and the clause is not unreasonable and unjust. *Burger King Corp. v. Rudezewich*, 471 US 462, 473, fn.14 (1985), quoted in *Mroch, supra* n.5. In the ERISA context, forum selection clauses in employee benefit plans are not negotiated by participants. However, courts have taken the position that the decision by a plan sponsor to add a forum selection clause aids not only the plan administrator but also participants and beneficiaries. *See*, for example, *Haughton, supra* n.6 at fn.7; *Loeffelholz, supra* n.3 (the “freely negotiated” requirement espoused in *M/S Bremen* does not require that plaintiff participate in the negotiations of the LTD plan).

10. *In re Penn-Mont Benefit Service, Inc.*, 2013 WL 640504 at p.11 (Bankr. M.D. Fla. December 6, 2013) cited in *Loeffelholz, supra* n.3; *Laaska v. Xerox Corp.*, 566 F. Supp. 2d. 1018, 1021 (C.D. Cal. 2008).

11. *Murphy v. Schneider Nat'l, Inc.*, 362 F. 3d 1133, 1138 (9th Cir. 2004), cited in *Testa v. Becker*; 2010 WL 1644883 (C.D. Cal. 2010).

12. The party opposing enforcement of a forum selection clause bears the burden of showing that the clause should not be enforced. *Wong v. Party Gaming, Ltd*, 589 F. 3d 821, 826 (6th Cir. 2009), cited in *Aegon Companies Pension Plan, supra* n.7; *Atlantic Marine Construction Co., supra* n.8, 582–583, fn.8 (2013), quoted in *Turner, supra* n.3; *Streit, supra* n.6.

13. *Coleman v. Supervalu, Inc. Short Term Disability Plan*, 920 F. Supp. 2d. 901 (N.D. Ill. 2013); *Haynsworth supra* n.6 at 962–963, quoted in *Nicolas v. MCI Health and Welfare Plan No. 501*, 453 F. Supp. 2d 972 (E.D. Texas 2006).

14. *M/S Bremen, supra* n.9 at 15, quoted in *Turner supra* n.3 at 58, quoted in *Mrock, supra* n.5.

15. ERISA, a federal statute, does not reflect the law of any state and, in any event, a state law cannot automatically void a forum selection clause, thereby subordinating federal law to an inconsistent state law. *Stewart Organization, Inc. v. Ricob*, 487 U.S. 22, 31 (1988), cited in *Haughton, supra* n.6 at fn.2.

16. *Gipson v. Wells Fargo & Co.*, 563 F. Supp. 2d. 149,153 (D.D.C. 2008), cited in *Mroch, supra* n.5. Other courts have described the grounds for challenging a forum-selection clause in somewhat different terms. For example, in *Bonny v. Society of Lloyds*, 3 F. 3d. 156, 160 (7th Cir. 1993), quoted in *Coleman, supra* n.13. The US Court of Appeals for the Seventh Circuit indicated that a forum selection clause might be

unenforceable for one of three reasons: (1) if its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) if the selected forum is so gravely difficult and inconvenient that the complaining party will, for all practical purposes, be deprived of its day in court; or (3) if enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision. In *Wong, supra* n.7, quoted in *Aegon Companies Pension Plan, supra* n.7, the US Court of Appeals for the Sixth Circuit indicated that there were three grounds for challenging forum selection clauses: “(1) where 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 that requiring the plaintiff to bring suit there would be unjust.” In *Liles v. Ginn-La West End, Ltd.*, 631 F. 3d. 1242, 1246 (11th Cir. 2011), cited in *Turner, supra* n.3 at p.6, the US Court of Appeals for the Eleventh Circuit indicated four grounds on which forum-selection clauses are unenforceable: (1) The formation was induced by fraud or overreaching; (2) The plaintiff would effectively be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) The fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; and (4) The enforcement of such provision would contravene a strong public policy. See also *Krenkel, supra* n.9, cited in *Loeffelholz, supra* n.3. The exception for unreasonable fraud or overreaching “does not mean that any time a dispute arises out of a transaction that is based upon an allegation of fraud the clause is unenforceable... Rather, it means that a forum selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.” *Haynsworth, supra* n.6, quoting *Scherk v. Alberto-Culver Co.*, 417 US 506, 519 n.14 (1974).

17. *P & S Bus. Machine, Inc. v. Canon USA, Inc.*, 331 F. 3d 804, 807–808 (11th Cir. 2003), cited in *Loeffelholz, supra* n.3.

18. *Id.*

19. *Estate of Mbyra v. Royal Caribbean Cruise, Ltd.*, 695 F. 3d 1233, 1241 (11th Cir. 2012), quoted in *Turner, supra* n.3.

20. *Laasko v. Xerox Corp.*, 566 F. Supp 2d. 1018, 1021 (C.D. Cal. 2008).

21. Modification of a forum selection clause is not necessarily evidence of bad faith. *Testa, supra* n.11. Designation of venue where the plan is administered for the convenience of the defendant is not evidence of bad faith. *Laasko, supra* n.20.

22. *Carnival Cruise Line v. Shute*, 499 US 585, 595 (1991); *Dempsey v. Norwegian Cruise Line*, 972 F. 2d. 998, 999 (9th Cir. 1992); *Angel Jet Services, LLC v. Red Dot Bldg. System Employee Benefit Plan*, 2010 WL 481420 (D. Ariz. February 8, 2010).

23. *Mezyk v. U.S. Bank Pension Plan*, 2009 WL 3853878 (S.D. Ill., November 18, 2009), cited in *Turner, supra* n.3. That case will in most instances be distinguishable, however. In *Mezyk*, the defendants unilaterally added a forum selection clause after the class action plaintiffs had already initiated suit, thereby preventing the class action plaintiffs from obtaining notice of the new provision.

24. *Id.* “To bind the plaintiffs to a Plan provision of which they were not reasonably notified would be manifestly unjust and would be a reason for declining to dismiss or transfer a case” under either Section 1404(a) or 1406(a).

25. See, for example, *Rodriguez v. Pepsico Long Term Disability Plan*, 716 F. Supp. 2d. 855 (N.D. Cal. 2010); *Loeffelholz, supra* n.3; *Testa, supra* n.11.

26. *Laasko, supra* n.20 at 1018.

27. *Laasko, supra* n.20 at 1018, 1024; *Angel Jet Services LLC v.*, *supra* n.22. See also *Schoemann v. Excellus Health Plan*, 447 F. Supp. 2d 1000, 1006 (D. Minn. 2006)

(upholding a forum selection clause even though the beneficiaries played no role in negotiating any terms of the contract) and *Rogal v. Skilstf, Inc.*, 446 F. Supp 2d 334, 339, n.3 (E.D. Pa. 2006) (upholding a forum selection clause and noting that insurance contracts governed by ERISA are not bilateral written contracts that would typically require execution by all parties as a prerequisite to becoming effective). A plaintiff will not successfully be able to argue that a forum selection clause is not valid because he or she was not a party to the contract, because a third-party beneficiary to an agreement is bound by a valid forum selection clause. *eBay, Inc. v. Digital Point Solutions, Inc.*, 608 F. Supp. 2d 1156, 1162 (N.D. Cal. 2009), citing *TAAG Linbas Aereas de Angelo v. Transam Airlines, Inc.*, 915 F. 2d 1351, 1354 (9th Cir. 1990), cited in *Angel Jet Service, LLC*, *supra* n.22.

28. *Bernikow v. Xerox Corp. Long-Term Disability Income Plan*, 2006 WL 2536590 (D. Cal. August 29, 2006); *Gipson*, *supra* n.9 at 430 (S.D.N.Y. 2007); *Rodriguez*, *supra* n.25; *Royal v. Skilstaf, Inc.*, 446 F. Supp. 2d. 334 (E.D. Pa. 2006); *Schoemann*, *supra* n.27 at 1000 (D. Minn. 2006); *Smith v. Aegon USA, LLC*, 770 F. Supp. 2d 809 (W.D. Va. 2011); *Sneed v. Wellmark Blue Cross & Blue Shield of Iowa*, 2008 WL 1929985 (E.D. Tenn., April 30, 2008); *Williams v. Cigna Corp.*, 2010 WL 5147257 (W.D. Ky. December 13, 2010); *Price v. PBG Hourly Pension Plan*, 2013 WL 1563573 (E.D. Mich. April 15, 2013); *Marin v. Xerox Corp.*, 2013 WL 1307537 (N.D. Cal. March 11, 2013); *Scaglione v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 2012 WL 3095342 (N.D. Ohio, July 30, 2012); *Conte v. Ascension Health*, 2011 WL 4506623 (E.D. Mich., September 28, 2011); *Drapeau v. Airpox Holdings, Inc. Severance Plan*, 2011 WL 3477082 (D. Minn. August 9, 2011); *Angel Jet Services, LLC*, *supra* n.22; *Laasko*, *supra* n.20 at 1018 (C.D. Cal. 2008); *Central States SE & SW Areas Pension Fund v. O'Brien and Nye Cartage Co.*, 2007 WL 625430 (N.D. Ill., February 22, 2007); *Turner*, *supra* n.3; *Haughton*, *supra* n.6 at 928; *Mroch*, *supra* n.5; *Loeffelholz*, *supra* n.3; *Vega*, *supra* n.9; *In re Penn-Mont Benefit Services, Inc.* 2013 WL 6405046 (Bankr. M.D. Fla. December 6, 2013); *Testa*, *supra* n.11, cited in *Rodriguez*, *supra* n.25.

29. *Aegon Companies Pension Plan*, *supra* n.7. The DOL has filed a writ of *certiorari*, and the Supreme Court has requested the Solicitor General to advise on the matter.

30. *Nicolas*, *supra* n.13; *Coleman* *supra* n.13. *See also Wellmark, Inc. v. DeGuara*, 2003 WL 21254633 at 3 (S.D. Iowa May 20, 2003) (venue is proper so long as plaintiff files in a venue authorized by ERISA and therefore a forum selection clause is only relevant in a transfer analysis). *Cf. Trustee of Washington State Plumbing and Pipefitting Industr. Pension Plan v. Tremont Partners, Inc.*, 2012 WL 3537792 (S.D.N.Y. August 16, 2012) (refusing to enforce a forum-selection clause in a financial services contract as it related to ERISA claims on the ground that the clause conflicted with ERISA Section 502(e)), quoted in *Turner*, *supra* n.3.

31. *Smith v. Aegon Companies Pension Plan*, *supra* n.7. *See also Smith v. Aegon USA, LLC*, *supra* n.28 at 805, 811 (W.D. Va. 2011) (“a contractual provision certainly does not conflict with ERISA’s provision for ready access to the federal courts.”). *Cf. In re Ricoh Corp.*, *supra* n.6 at 570, 573 (by attempting to enforce a forum selection clause, a defendant is actually “trying to enforce the forum that plaintiff has already chosen: the contractual venue”), quoted in *Loeffelholz*, *supra* n.3.

32. *Bernikow*, *supra* n.28 at \*2 (C.D. Cal. August 29, 2006), discussed in *Aegon Companies Pension Plan*, *supra* n.7.

33. *Rodriguez*, *supra* n.25.

34. *Id.*, at 860, quoted in *Marin v. Xerox Corp*, 56 EBC 2550, 935 F. Supp. 2d 943 (N.D. Cal. 2013). *See also Klotz v. Xerox Corp*, 519 F.Supp. 2d. 430, 436 (S.D.N.Y. 2007) (“[N]othing in ERISA’s statutory text or legislative history evinces any intent by

Congress to preclude private parties from limiting venue to one of the three forums permitted by the statute. If Congress had wished to prevent private parties from waiving ERISA's venue provisions by private agreement, it could have done so through an express provision in the statute.”); *Laasko, supra* n.20 at 1018, 1023 (“It is significant that 1132(e)(2) uses may and not shall in describing where actions may be brought... enforcement of the forum selection clause in this case is not inconsistent with federal policy.”); *Price, supra* n.28 at \*2 (“The “may” of 1132(e)(2) does not mean cannot. Congress provided that an action may be brought in several venues. Congress did not provide that private parties cannot narrow the options to one of these venues.); *Williams, supra* n.28 at \*4 (concluding that Congress did not intend to usurp the right of private parties to predetermine the *situs* of anticipated litigation under ERISA because ERISA's venue selection provisions are permissive). But see *Coleman, supra* n.13 at fn.5 (“While it is certainly true that in many contexts ‘may’ can connote permissiveness, as when it is contrasted with “must,” in this instance the fair reading of 1132(e)(2) is rather one of conferring a right to bring an ERISA action in one of the three alternative venues specified in the statute.”) In *Smith*, the DOL attempted to place ERISA's venue provisions in historical context: “There is no legislative history specifically concerning forum selection clauses as far as we have 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. Thus, until the Supreme Court issued its decision in *Scherk v. Alberto-Culver Co.*, 417 US 506, 518–521 (1974), the same year that ERISA was enacted, the longstanding rule disfavoring forum selection clauses as against public policy still generally prevailed in the employment context.”

35. *Simon v. Pfizer, Inc.*, 398 F.3d 765, 773 (6th Cir. 2005).

36. *Scherk v. Alberto-Culver Co.*, *supra* n.34 at 506, 519.

37. *Schoemann ex. rel. Schoemann v. Excellus Health Plan, Inc.*, 769 F.3d. 922, 932 (6th Cir. 2014). See also *Sneed, supra* n.28 at \*2 (“A forum selection clause merely requires the parties to submit their dispute to a different judge in a different courthouse who will use a substantially similar process to reach a decision. An arbitration claim will prevent a litigant from submitting the dispute to a judge or formal court proceeding at all. If arbitration clauses are enforceable, the Court sees no reason to conclude forum selection clauses are not enforceable.”); *Turner, supra* n.3 at \*14 (“As several courts have noted, it simply makes little sense to view the enforcement scheme of ERISA and similar federal statutes as manifesting a public policy that permits a plaintiff to waive her right to proceed in the first instance in any judicial forum at all, but precludes a waiver of the decidedly more limited right to select a specific federal judicial forum for the same proceeding.”) But see *Aegon Companies Pension Plan, supra* n.7 at 935–936 (Clay, J. dissenting) (rejecting the analogy to cases enforcing arbitration agreement); and *Coleman, supra* n.13 (same).

38. *Schoemann, supra* n.37 at 1000.

39. *Id.* at 1007.

40. *Klotz, supra* n.34 at 430.

41. *Id.* at 436. See also *Rodriguez, supra* n.25 at 855, 861; *Laaska, supra* n.10 at 1018, 1023; *Scaglione v. Pepsi-Cola Metro Bottling Co., Inc.*, 884 F.Supp. 2d. 642, 643 (N.D. Ohio 2012) (“Forum selection clauses in ERISA plans promote ERISA goals of uniformity of administration and reduced costs.”).

42. In *Mozingo v. Trend Personnel Services*, 504 Fed. Appx 753 at fn.2 (10th Cir. 2012), the US Court of Appeals for the Tenth Circuit held that because plaintiff's claim

was based upon a bonus agreement, which is not an ERISA plan, it need not address the DOL's *amicus* brief.

43. *Nicolas*, *supra* n.13 at 972.

44. *Id.* at 974.

45. *Coleman*, *supra* n.13.

46. *Id.*

47. *Id.*

48. *Id.*

49. Appellant did not argue that the inconvenience to him of proceeding in Cedar Rapids was unjust or unreasonable. *Aegon Companies Pension Plan*, *supra* n.7 at 922, 930.

50. *Id.* at 934–935.

51. *Gulf Life Insurance Co. v. Arnold*, 809 F.2d 1520 (11th Cir. 1987).

52. *Boyd v. Grand Truck Western R. Co.*, 338 US 263 (1949).

53. In *Aegon Companies Pension Plan*, *supra* n.7, the DOL did not request any type of deference, but appellant did. *See* fn.3.

54. *Skidmore* deference was provided to *amicus* briefs in *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000) and *Serrichio v. Wachovia Securities LLC*, 658 F.3d 169, 178 (2nd Cir. 2011). With respect to the more general question of the appropriate level of deference to give to a construction of a statute articulated by an agency only in an *amicus* brief, *see* Bradley George Hubbard, "Comment: Deference to Agency Statutory Interpretation First Addressed in Litigation? The *Chevron* Two Step and the *Skidmore* Shuffle," 80 Univ. Chi. L. Rev. 447, 459, cited in *Aegon Companies Pension Plan*, *supra* n.7. With respect more generally to the use of *amicus* briefs to establish policy, *see* Deborah Thompson Eisenberg, "Regulation by *Amici*: The Department of Labor's Policy Making in the Courts," cited in *Aegon Companies Pension Plan*, *supra* n.7.

55. *Skidmore v. Swift & Co.*, 323 US 134 (1944).

56. *Id.* at 140.

57. *United States v. Mead*, 533 US 218 (1984).

58. *Id.* at 228.

59. *Aegon Companies Pension Plan*, *supra* n.7 at 928–929.

60. *Id.* at 929.

61. *Id.*

62. *Turner*, *supra* n.3.

63. The district court noted that forum selection clauses did not come into wide use until the 2000s, and the DOL filed its initial *amicus* brief in 2009.

64. *Turner*, *supra* n.3 at \*p.21.

65. *Gulf Life Insurance Co.*, *supra* n.51. The DOL's *amicus* brief in *Aegon Companies Pension Plan*, *supra* n.7, cites *Arnold* as instructive.

66. *Gulf Life Insurance Co.*, *supra* n.51 at 1522.

67. *Id.*

68. *Id.*

69. Gulf Life did not appeal that portion of the district court decision that the employee did not have sufficient minimum connections to authorize an exercise of personal jurisdiction absent nationwide service of process. *Gulf Life Insurance Co.*, *supra* n.51 at 1522.

70. *Id.* at 1523.

71. *Id.* at 1524.

72. *Id.*

73. *Turner*, *supra* n.3.

74. *Gulf Life Insurance Co.*, *supra* n.51 at 1524.

75. *Id.*

76. *Id.* at 1524–1525.

77. *Id.* at 1525, n.7.

78. *Turner*, *supra* n.3.

79. *Id.* at \*4.

80. *Id.*

81. *Id.* At \*17.

82. *Id.*

83. *Boyd*, *supra* n.52. The DOL cited *Boyd* in its *amicus* brief in *Aegon Companies Pension Plan*, *supra* n.7.

84. *M/S Bremen*, *supra* n.9 at 15.

85. 45 USC 55.

86. *Boyd*, *supra* n.52 at 266.

87. *Frontier Airlines, Inc. Retirement Plan for Pilots v. Security Pacific Natl. Bank, N.A.*, 696 F. Supp. 1403, 1405 (D. Colo. 1988) (distinguishing *Boyd* in the course of upholding a forum selection clause in a financial services agreement between the trustee of an ERISA plan and a bank); *Turner*, *supra* n.3; *Mroch*, *supra* n.5 at fn.5.

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Number 2, pages 56–70, with permission from Wolters Kluwer,  
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