

LEGAL UPDATE

Forum Selection Clauses

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A former executive of Pfizer recently filed a writ of certiorari with the United States Supreme Court, requesting that the Supreme Court rule that a forum selection clause in a Pfizer employee benefit plan governed by ERISA is unenforceable, a view which is shared by the Department of Labor (DOL), but to date a position the validity of which has been unsuccessful in persuading a Federal Court of Appeals. This will also be the fourth time that a writ of certiorari has been filed with the Supreme Court on this issue. The most recent occasion was in 2017, and in January 2018 the Supreme Court denied the petition. When the first of these cases, *Smith v. Aegon Companies Pension Plan* came before the Court, it requested the view of the Solicitor General, usually an indication that the Supreme Court finds the case of interest. While the Solicitor General agreed with the position of the DOL that forum selection provisions in ERISA plans are unenforceable, it recommended that the Supreme Court not grant certiorari until the issue had been further developed at the Circuit level. Perhaps, if a Circuit Court takes a position contrary to that of the Sixth, Seventh, and Eighth Circuits, the Supreme Court will hear the case, but absent a Circuit split, it is unlikely that the Supreme Court will grant certiorari.

Currently, therefore, a plan sponsor can, with a relatively high degree of confidence, include such a provision in a plan and assume that a District Court will enforce it, although a minority of District Courts have accepted the DOL position in this area. The issue, however, is a close one, as evidenced by the fact that in the Sixth and Seventh Circuit cases in which the Supreme Court granted certiorari, dissenting opinions were filed, so it is entirely possible that a Circuit split on this issue might arise; such an occurrence would be more likely to occur if the DOL were to issue regulations setting forth its position on this issue.

There are two (2) competing policy interests at stake with respect to venue selection clauses. On the one hand, as the Supreme Court stated in *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568, 581 (2013), where “the parties have agreed to a valid forum selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a [transfer] motion be denied.” This view is also reflected in the Restatement (Second) of Conflict of laws, which states that “the parties agreement as

to the place of the action will be given effect unless it is unfair or unreasonable.” On the proverbial other hand, ERISA’s venue provision provides that a participant may bring suit in any district “where the plan is administered, where the breach took place, or where the defendant resides or may be found,” a provision which has been described as a “liberal venue provision designed to provide easy and ready access to the Federal Courts,” and consistent with the language of Section 2(b) of ERISA “by providing... ready access to the Federal Courts.” Unfortunately, as drafted, the language of ERISA’s venue provision is ambiguous: is it intended to be a statement of a participant’s rights, or does it merely set forth the range of venues in which an ERISA civil litigation can be brought?

As in most litigation contexts, there are persuasive arguments that can be advanced by both sides. Proponents of enforcing venue clauses focus on Congressional intent by arguing that Congress did not specifically prohibit forum selection clauses, although at the time of ERISA’s passage, forum selection clauses were not looked upon by the Courts as favorably as they are today. It was only commencing with the middle of the last decade that forum selection clauses in ERISA benefit plans became prevalent. Opponents of forum selection clauses point out that Congress intended to protect participants by providing them with three forum options, and Congress could also have added language to ERISA’s venue provision stating that forum selection clauses are permissible. Opponents of forum selection clauses also argue that enforcing these forum selection clauses violates public policy, which even under the favorable Supreme Court decisions in this area would be a basis for nonenforcement. Proponents of the forum selection clauses focus more upon contract law and previous court decisions with respect to forum selection clauses more generally.

Takeaway. If your plan is administered in a Circuit which has not yet decided the forum selection issue, and the plan’s forum selection venue is far from plaintiff’s choice of venue, there is a reasonable likelihood that such provision will be challenged, and therefore subject to the hazards of litigation.

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