ERISA:

Personal Jurisdiction, Venue and Forum Selection Clauses

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I. Personal Jurisdiction

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. Fed. R. Civ. P. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). In turn, the Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant. *Shaffer* v. *Heitner*, 433 U.S. 186, 207 (1977). For more than half a century, the United States Supreme Court held that a tribunal's jurisdiction over persons stopped at the state's geographic boundaries. *Pennoyer* v. *Neff*, 95 U. S. 714, 723-724 (1878). Thus, to be subject to personal jurisdiction, a defendant had to be physically present within the state's borders. However, in recognition of changes in technology, transportation, communication and interstate commerce, this rigid, territorial focus ultimately gave way to a less stringent application in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (U.S. 1945).

In *International Shoe*, the Supreme Court held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.,*. 326 U. S. at 316. *International Shoe* "presaged the development of two categories of personal jurisdiction," which would come to be known as "specific" jurisdiction and "general" jurisdiction. *Daimler A.G. v. Bauman,* 571 U.S. 117, 127-28(2014). Specific jurisdiction applies in cases in which the defendant's contacts "have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given." *Int'l Shoe*, 326 U.S. at 317. General jurisdiction exists when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id*. at 318.

After *International Shoe*, "specific jurisdiction [became] the centerpiece of modern jurisdiction theory." *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U. S. 915, 925 (2011). In contrast, the Supreme Court's general jurisdiction opinions were few. *Daimler*, 571 U.S. at 1229-31(2014) citing *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437 (1951), *Helicopteros Nacionales De Colombia v. Hall*, 466 U. S. 408 (1984)). Accordingly, the long-standing "minimum contacts" standard for determining personal jurisdiction remained undisturbed for another half-century.

However, in *Goodyear*, the Supreme Court had the opportunity to reexamine the bounds of general jurisdiction. In doing so, the Supreme Court held that a court may assert general jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." 564 U.S. at 919. The Court identified two locations in which a corporation will meet this test – the corporation's place of incorporation *and* the corporation's principal place of business. *Goodyear* left us wondering what remained of *International Shoe.*

Fortunately, the Supreme Court did not wait another 50 years to speak again on the issue. Just three years after issuing the *Goodyear* decision, the Supreme Court decided *Daimler*,. In its *Daimler* opinion, the Court noted, "The canonical opinion in this area remains *International Shoe . . . .*" *Id.* at 126.Yet, the Court

went on to apply the *Goodyear* "essentially at home" test to determine whether a foreign corporation may be subject to a court's general jurisdiction based on the contacts of an in-state subsidiary. The Supreme Court concluded that even if it were to assume that the in-state subsidiary's state contacts were "imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there." *Id.* at 136. The Court noted:

> *Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.

Id. at 137, citing *Goodyear*, 564 U.S. at 924. The Court then went on to state that *Goodyear* "did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums." *Id.*. Accordingly, the Supreme Court in *Daimler* left open the possibility that the limited number of forums for general jurisdiction could be enlarged in exceptional circumstances beyond the corporation's place of incorporation and principal place of business where the "corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State." *Id.* at 139.

II. ERISA's Venue Provision

So what effect do the *Goodyear* and *Daimler* decisions and the "essentially at home" test for personal jurisdiction have in ERISA litigation? The answer lies in an understanding of ERISA's venue and personal service provisions and will depend on terms of the plan that you are defending.

ERISA's venue provision states that when an action 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 and process may be served in any other district where a defendant resides or may be found." ERISA §502(e)(2), 29 U.S.C. §1132(e)(2). As has been explained by various federal courts:

> The ERISA provision allowing for service of process anywhere within the nation has been interpreted for purposes of personal jurisdiction as a "national contacts test." "When a federal court attempts to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States' as opposed to the state in which suit is brought."

Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d 822, 825 (5th Cir. 1996). *See also* ***NGS American, Inc. v. Jefferson,*** 218 F.3d 519, 524 n.5 (6th Cir. 2000); *ESAB Group, Inc. v. Centricut, Inc.*, **126 F.3d 617, 626-27 (4th Cir. 1997),** *cert. denied*, **523 U.S. 1048, 118 S. Ct. 1364 (1998) (citations omitted).** *But see Richard T.B. v. United Healthcare Ins. Co.*, 2019 U.S. Dist. LEXIS 4816 (D. Utah Jan. 9, 2019) (holding that the relevant standard when there is a federal statute that provides for nationwide service of process whether "the plaintiff's choice of forum [is] fair and reasonable to the defendant").

However, ERISA's venue statute identifies only three locations in which suit may be filed. Stated differently, in these states it has been statutorily determined that the defendant has minimum contacts with the United States. These are – (1) where the plan is administered, (2) where the breach took place, and (3) where a defendant resides *or may be found*. ERISA §502(e)(2), 29 U.S.C. §1132(e)(2) (emphasis added).

The three potential venues have been the subject of varying degrees of litigation. There is generally no debate about where an ERISA-governed plan is administered. There is sometimes disagreement regarding where the breach took place. For example, some courts hold that the breach took place in the location where

the decision to deny benefits occurred. *See, e.g. University Spine Center v. Anthem Blue Cross and Blue Shield, 2018 Emp. Bens. Cas. 206, 920 (Slip Copy)* quoting *Schwartz v. Emp. Benefit Mgmt. Sys.*, 2017 WL 2119446, at *2 (D.N.J. May 16, 2017). Other courts hold that the location where the "breach took place" permits an ERISA participant or beneficiary to sue for benefits in the district where they would be received, *i.e.* where the plaintiff resides. *Sherman v. Life Ins. Co.*, 2018 U.S. Dist. LEXIS 132104 at *2 (M.D. Ga. 2018). However, it is the third category – where a defendant resides *or may be found* – which historically creates the greatest amount of debate.

Determining where a defendant "may be found" implicates the minimum contacts analysis. *Id. at* *2-3. This analysis should now bring into play the "essentially at home" test. Stated differently, a defendant in an ERISA case "may be found" where it has such sufficient contacts with the state to be *essentially at home* in the forum. And this could extend beyond the plan sponsor or insurer's place of incorporation and principal place of business according to the Supreme Court's *Daimler* decision.

III. Forum Selection Clauses and ERISA

So how does one avoid what can be a tangled and confusing web of personal jurisdiction and venue questions if you represent ERISA plans or insurers offering ERISA plans? It has become abundantly clear over the last several years that the answer lies in adopting a mandatory, binding forum selection clause. The forum selection clause should choose one mandatory forum where disputes "relating to or arising under the Plan" must be brought. It should likewise provide that that forum's law applies to all disputes.

Although there has been a significant amount of litigation over the enforceability of forum selection clauses over the last decade, "a clear consensus has emerged among the federal courts" that forum selection clauses in ERISA plans are enforceable. *See Feather v. SSM Health Care*, 216 F. Supp. 3d 934, 941 (S.D. Ill. 2016). And, despite three opportunities to disturb this clear consensus in the last three years, the United States Supreme Court ("Supreme Court") has declined to do so each time. *Mathias v. U.S. Dist. Court for Cent. Dist. of Illinois*, 138 S. Ct. 756, 199 L. Ed. 2d 617 (2018) (denying a petition for writ of certiorari filed by a participant in Caterpillar, Inc.'s health plan); *Clause v. U.S. Dist. Court for East. Dist. of Missouri*, 137 S. Ct. 825, 196 L. Ed. 2d 608 (2017) (denying a petition for writ of certiorari filed by a participant in Ascension Health Alliance's disability plan); *Smith v. Aegon Cos. Pension Plan*, , 136 S. Ct. 791, 193 L. Ed. 2d 708 (2016) (denying a petition for writ of certiorari after calling for the views of the Solicitor General).

Forum selection clauses in ERISA documents are not new. *See, e.g., Frontier Airlines, Inc. Retirement Plan for Pilots v. Security Pacific Nat. Bank, N.A.*, 696 F. Supp. 1403, 1405 (D. Colo., 1988) (finding forum selection clause did not contravene ERISA). In the past decade, however, more plaintiffs have begun challenging whether these clauses can be enforced under ERISA. Plaintiffs primarily argue that forum selection clauses contravene ERISA's venue provision. In the more than 30 years since a district court first held that forum selection clauses are enforceable, the presumption in favor of the enforceability of forum selection clauses has only grown and district courts have been largely unpersuaded by this argument.

A. Enforcing Forum Selection Clauses

The Supreme Court reaffirmed its favor of forum selection clauses in *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 60-61 (2013). This decision has only made it harder for plaintiffs to defeat transfer.

Section 1404(a) "provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district." *Id.* at 59. That Section provides that "[f]or the convenience of parties and wit-

nesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. §1404(a). Where there is no forum selection clause, a district court considering a Section 1404 transfer motion must conduct a "flexible and individualized analysis" that considers and balances the plaintiff's choice of forum and private interest factors, such as convenience to the parties and witnesses, with public interest factors, such as efficient administration of the court system and the relationship of each community to the controversy. *Atl. Marine*, 571 U.S. 62-63. "The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which 'represents the parties' agreement as to the most proper forum.'" *Id.* at 63 citing *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 108 S. Ct. 2239 (1988).

A valid forum selection clause changes the Section 1404 analysis in three ways. "First, the plaintiff's choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Atl. Marine*, 571 U.S. at 63. Second, the court does not consider private interest factors; rather a court "must deem the private interest factors to weigh entirely in favor of the preselected forum." *Id*. at 64. The court considers only public interest factors. Public interest factors include: (1) administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law. *Id.* at 62, n.6. "Because those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Id.* at 64. Third, the court does not take into consideration the original forum's choice of law provisions. *Id.* at 64-65.

B. Challenges to Enforcement of Forum Selection Clauses

Recognizing the uphill battle that they face in defeating a Section 1404 motion, parties seeking to avoid enforcement have turned to arguments that *Atlantic Marine* applies only to a *valid* forum selection clause. So the argument goes, a forum selection clause that narrows ERISA's venue options violates public policy and renders the clause *invalid*. But these arguments have been persuasive only to a handful of courts. This is because more than 40 years ago, the Supreme Court held that mandatory forum selection clauses are *presumptively valid* and enforceable absent a strong showing that they should be set aside. *M/S Bremen v. Zapata Off-Shore, Co*., 407 U.S. 1, 15 (1972). Likewise, the Supreme Court held more than two decades ago that forum selection clauses in form contracts are *valid and enforceable* unless they are fundamentally unfair or unreasonable. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 592-93 (1991).

Three circuit courts and more than 40 district court decisions have now upheld the enforcement of forum selection clauses in ERISA plans. *See Greater Mich. Plumbing and Mechanical Contractors Assoc., Inc. v. Precision Power and Gas,* 2018 U.S. Dist. LEXIS 215741 (E.D. Mich. Dec. 20, 2018); *Robertson v. Pfizer Retirement Committee, et al.,* 2018 U.S. Dist. LEXIS 126427 (E.D. Penn. July 27, 2018); *University Spine Center v. Anthem BCBS*, 2018 WL 2947858 (D.N.J. June 12, 2018); *Phillips v. Charter Communications, Inc. Welfare Benefit Plan,* 2018 WL 2015829 (W.D. Texas April 30, 2018); *University Spine Center v. 1199 SEIU National Benefit Fund,* 2018 WL 1327109 (D.N.J. March 15, 2018); *Kelly v. Liberty Life Assur. Co.*, 2018 WL 558643 (E.D.K.Y. Jan. 25, 2018); *Williams v. Ascension Health LTD Plan*, 2017 U.S. Dist. LEXIS (D. Kan. April 28, 2017); *Shah v. Wellmark BCBS*, 2017 WL 1186341 (D.N.J. March 30, 2017); *Collins v. Academic Partnerships, LLC,* 2016 WL 6772790 (N.D. Miss. Nov. 15, 2016); *Davidson v. Ascension Health LTD Plan et al.,* 6:16-cv-193-RP (W.D.T.X. March 20, 2017); *Mathias v. Caterpillar, Inc.* (C.D. Ill. Oct. 27, 2016) (denying retransfer); *Feather*, 216 F. Supp. 3d 934; *Mathias v. Caterpillar, Inc.,* 203 F. Supp. 3d 570 (E.D. Pa. Aug. 29, 2016); *Clause v. Sedgwick Claims Mgmt Servs.*, 2016 U.S. LEXIS 193384 (May 17, 2016) (denying retransfer); *Clause v. Sedgwick Claims Mgmt.*

Servs., 2016 U.S. Dist. LEXIS 5933 (D. Ariz. Jan. 15, 2016); *Malagoli v. AXA Equitable Life Ins. Co.*, No., 2016 U.S. Dist. LEXIS 61049 (S.D.N.Y. Mar. 24, 2016), *reconsideration denied*, 2016 U.S. Dist. LEXIS 61049 (S.D.N.Y. May 9, 2016); *Keever v. NCR Pension Plan,* 2015 U.S. Dist. LEXIS 169019 (S.D. Ohio Dec. 15, 2015); *Turner v. Sedgwick Claims Mgmt. Servs.,* 2014 U.S. Dist. LEXIS 180506 (N.D. Ala. Jan. 16, 2015); *Mroch v. Sedgwick Claims Mgmt. Servs., Inc.*, 2014 U.S. Dist. LEXIS 171140 (N.D. Ill. Dec. 10, 2014); *Loeffelholz v. Ascension Health, Inc*., 34 F. Supp. 3d 1187 (M.D. Fla. 2014); *Haughton v. Plan Adm'r of Xerox Corp. Ret. Income Guar. Plan,* 2 F. Supp. 3d 928 (W.D. La. 2014); *Grayden v. Texas Windstorm Ins. Ass'n,* 2013 WL 12077505, at *2–3 (W.D. Tex. June 24, 2013); *Price v. PBG Hourly Pension Plan*, 2013 U.S. Dist. LEXIS 54436 (E.D. Mich. Apr. 15, 2013); *Vega v. Carondelet Health Network*, 2013 WL 784365, at *3 (D. Ariz. Feb. 5, 2013), *report and recommendation adopted*, 2013 WL 782865 (D. Ariz. Mar. 1, 2013); *Marin v. Xerox Corp*., 935 F. Supp. 2d 943, 946-47 (N.D. Cal. 2013); *Scaglione v. Pepsi-Cola Metropolitan Bottling Co. Inc*., 884 F. Supp. 2d 642 (N.D. Ohio 2012); *Conte v. Ascension Health*, No. 2011 WL 4506623, at *4 (E.D. Mich. Sept. 28, 2011); *Drapeau v. Airpax Holdings, Inc.*, 2011 U.S. Dist. LEXIS 82992 (D. Minn. Aug. 9, 2011); *Williams v. CIGNA Corp*., 2010 U.S. Dist. LEXIS 131686 (W.D. Ky. Dec. 13, 2010); *Testa v. Becker*, 2010 U.S. Dist. LEXIS 47130, (C.D. Cal. Apr. 22, 2010); *Angel Jet Servs., L.L.C. v. Red Dot Bldg. Sys.' Emple. Ben. Plan,* 2010 U.S. Dist. LEXIS 16345 (D. Ariz. Feb. 8, 2010); *Rodriguez v. PepsiCo LTD Plan*, 716 F. Supp. 2d 855 (N.D. Cal. 2010); *William D. v. Wellmark Blue Cross & Blue Shield of Iowa,* 2008 U.S. Dist. LEXIS 36382 (E.D. Tenn. Apr. 30, 2008)*; Laasko v. Xerox Corp.,* 566 F. Supp. 2d 1018 (C.D. Cal. 2008); *Gipson v. Wells Fargo & Co.*, 563 F. Supp. 2d 149 (D.C. 2008); *Klotz v. Xerox Corp.,* 519 F. Supp. 2d 430 (S.D. N.Y. 2007); *Bernikow v. Xerox Corp. LTDI Plan*, 2006 WL 2536590, at *2 (C.D. Cal. 2006); *Rogal v. Skilstaf, Inc.,* 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); *Frontier Airlines, Inc. Retirement Plan for Pilots v. Security Pacific Nat. Bank, N.A.*, 696 F.Supp. 1403, 1405 (D. Colo.1988).

In *Smith v. Aegon Cos. Pension Plan*, the Sixth Circuit found ERISA forum selection clauses are enforceable and declined to give deference to an amicus brief filed by the United States Department of Labor ("DOL") arguing otherwise. 769 F.3d 922 (6th Cir. 2014). The Eighth Circuit similarly upheld a forum selection clause in an ERISA plan document despite an amicus brief filed by the DOL. *In re Clause, 2016 U. S. App. LEXIS 19360 (Oct. 26, 2016)*. The Eighth Circuit unanimously denied a petition for writ of mandamus that sought to overturn the United States District Court for the Eastern District of Missouri's denial of retransfer to the District of Arizona where the case was originally filed. *Id.* The Eighth Circuit subsequently unanimously denied plaintiff's motion for rehearing *en banc.* The Seventh Circuit followed suit in *In re Mathias*, 867 F.3d 727, 734 (7th Cir. 2017). In that case, the plaintiff originally filed suit in Pennsylvania. *Id.* at 729. The United States District Court for the Eastern District of Pennsylvania transferred the case to the United States District Court for the Central District of Illinois pursuant to the plan's forum selection clause. *Id.* Plaintiff moved for retransfer to the Eastern District of Pennsylvania, and the Central District of Illinois denied the motion. *Id.* The Seventh Circuit denied mandamus, holding forum selection clauses are enforceable in ERISA plans. *Id.* at 734.

Only a handful of district court opinions have diverged from the majority view and declined to enforce forum selection clauses contained in ERISA plans. These courts have concluded either that the clauses are per se invalid or invalid due to a lack of participant notice. *See Harris v. BP Corp. N.A., Inc.*, 2016 U.S. Dist. LEXIS 89593 (N.D. Ill. July 8, 2016) (forum selection clause contravenes the public policy of ERISA); *Dumont v. PepsiCo, Inc.*, No. 192 F. Supp. 3d 209 (D. Me. June 29, 2016) (declining to apply presumption that forum selection clause are valid because Plaintiff did not consent to the clause, but also opining that enforcement of forum selection clause would violate public policy); *Coleman v. Supervalu, Inc.*, 920 F. Supp. 2d 901 (N.D. Ill. 2013) (deeming the forum selection clause to be unreasonable as contrary to public policy and thus unen-

forceable under *Bremen*); *Mezyk v. U.S. Bank Pension Plan et al.*, 2009 U.S. Dist. LEXIS 107574 (S.D. Ill. 2009) (declining to enforce forum selection clause that was not "negotiated with or reasonably communicated to the plaintiffs"); *Nicolas v. MCI Health and Welfare Plan No. 501*, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006) (finding ERISA's statutory framework supersedes general policy of enforcing forum selection clauses). However, the foregoing cases are "outliers that other courts have declined to follow." *Feather*, 216 F. Supp. 3d at 940; *Grayden v. Texas Windstorm Ins. Ass'n,* 2013 WL 12077505, at *2–3 (W.D. Tex. June 24, 2013).

C. The Case for Enforcing Forum Selection Clauses

In enforcing forum clauses, some consistent themes have emerged among the federal courts.

1. ERISA's Venue Provision Does Not Create a Strong Public Policy Sufficient to Invalidate Forum-Selection Clauses

The Seventh Circuit noted that, nothing in the text of ERISA's venue provision "*expressly* invalidates forum-selection clauses in employee-benefits plans." *In re Mathias*, 867 F.3d at 732. And the courts have widely rejected plaintiffs' arguments that ERISA's venue provision grants them a right to select a forum. "The Sixth Circuit rejected that view, noting that the statute is not phrased in rights-granting terms: it states only that when a civil action is brought in federal court, '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.'" In re Mathias, 867 F.3d at 732. The overwhelming majority of courts have found this language to be permissive, rather than mandatory. "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." *Price v. PBG Hourly Pension Plan*, 2013 WL 1563573, at *2 (E.D. Mich. Apr. 15, 2013) (emphasis original). "[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." *Klotz v. Xerox Corp.,* 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007). Furthermore, in *Smith*, the Sixth Circuit explained, "But even if the venue selection clause laid venue outside of the three options provided by §1132, the venue selection clause would still control." *Smith,* 769 F.3d at 932.

Notably, when Congress intended to take away a party's freedom to contract under ERISA, it did so with mandatory language. *See, e.g.*, ERISA §203(a), 29 U.S.C. §1053(a) (setting forth minimum vesting standards: "Each pension plan shall provide . . ."); ERISA §204(a), 29 U.S.C. §1054(a) (setting forth benefit accrual requirements: "Each pension plan shall satisfy. . .").

Unlike the mandatory language used elsewhere in ERISA, ERISA's permissive venue provision does not purport to bar transfer pursuant to a forum-selection clause or Section 1404(a). The statute merely recites where an action "may be brought." Section 1404(a) would have little or no meaning if the mere identification of multiple places where a suit "may be brought" removed the power of district courts to transfer the case to another district where the case "might have been brought." Indeed, ERISA cases that do not involve forum-selection clauses are routinely transferred to the site of plan administration "for the convenience of the parties and witnesses." See, *e.g.*, *Kaufmann v. Prudential Ins. Co. of Am.*, 667 F. Supp. 2d 205, 207-08 (D. Mass. 2009) (quoting Jorden, Pflepsen & Goldberg, Handbook on ERISA Litigation §1.05[A][1] (Supp. 2006) *208 ("The venue provisions of [ERISA] also do not displace the broad power of district courts to transfer cases for the convenience of parties and witnesses, in the interest of justice....")).

2. Forum Selection Clauses Advance ERISA's Goals of uniformity and Promoting Low Cost Litigation

The decisions enforcing forum selection clauses in ERISA plans heavily relied upon the policy goals underlying ERISA. Specifically, in enacting ERISA, Congress sought "to create a system that is [not] so com-

plex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (*quoting Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)). The United States Supreme Court has found that "the interest of uniformity" includes avoiding "a patchwork of different interpretations of a plan … that covers employees in different jurisdictions." *Conkright*, 559 U.S. at 517. If courts adopt varied interpretations of individual plan provisions, plan participants could be entitled to different benefits depending on where they brought their claims. *Id.* at 520. Such a result is contrary to the goals of ERISA, which prioritize the "uniformity of treatment among beneficiaries." *Berger v. AXA Network LLC*, 459 F.3d 804, 814 (7th Cir. 2006). The enforcement of forum selection clauses, serves the purposes of ERISA by promoting uniform interpretation of plan provisions. *Rodriguez v. PepsiCo. Long Term Disability Plan*, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010).

Forum selection clauses in benefit plans also promote low-cost litigation—another goal of ERISA, *Conkright*, 599 U.S. at 517—by removing any question about where a case should be filed and by selecting the most cost-effective location for litigation for the plan, a savings that can then be passed on to participants. *See Feather,* 216 F. Supp. 3d at 941; *Conte*, 2011 WL 4506623, at *4; *Cent. States, Southeast and Southwest Areas Pension Fund v. O'Brien & Nye Cartage Co*., No. 06-4988, 2007 WL 625430, at *3 (N.D. Ill. Feb. 22, 2007).

3. ERISA's Policy of Providing Ready Access to Federal Courts Does Not Invalidate Forum-Selection Clauses

As the Sixth Circuit noted in *Smith*, it is difficult to imagine how a forum selection clause which designates a federal court as the venue for litigation concerning the plan does not provide ready access to the federal courts. 769 F.3d at 931. Subsequent district court opinions are in accord. *See Feather*, 216 F. Supp. 3d at 941. The Seventh Circuit explained that *Smith*'s "analysis is faithful to the statutory text and not inconsistent with the broader statutory policy of maintaining access to federal court." *In re Mathias*, 867 F.3d at 732.

ERISA's enforcement provisions were designed "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants." H.R. Rep. No. 93-533, at 17 (1973), as reprinted in 1974 U.S.C.C.A.N. 4639, 4655 (emphasis added). A few district courts have read this sentence in isolation and inferred forum-selection clauses are obstacles. *See, e.g., Coleman*, 920 F. Supp. 2d at 906. But the full report, particularly the section titled "Fiduciary Responsibility," makes clear that the obstacles Congress was referring to were problems under state trust law, such as "exculpatory clauses under which the trustee is relieved from liability for certain actions." H.R. Rep. No. 93-533, as reprinted in 1974 U.S.C.C.A.N. 4639, 4650 (emphasis added).

4. Forum Selection Clauses Do Not Deprive Plan Participants of Their Day in Court

The courts enforcing forum selection clauses have rejected the argument that plan Participants will be deprived of their day in court if a forum selection clause is enforced for several reasons: (1) federal courts have liberal admission and *pro hac vice* admission rules, (2) neither counsel nor participants are likely to appear in court, and (3) successful participants are entitled to attorneys' fees under the statute. *See Loeffelholz v. Ascension Health, Inc.*, 34 F. Supp. 3d 1187, 1192 (M.D. Fla. 2014) ("Plaintiffs general argument that enforcement of the forum selection clause would . . . discourage legitimate claims based on the 'possibility' of Plaintiff's chosen local counsel not being admitted in the forum designated in the forum selection clause is not well taken.")

5. Enforcement of a Forum Selection Clause in an ERISA Plan Does Not Breach Any Fiduciary Duty

Parties seeking to avoid enforcement of an ERISA plan's forum selection clause sometimes argue that such a clause is inconsistent with Section 502(e) and, therefore, a fiduciary cannot enforce it under Section 404(a)(1)(D). ERISA Section 404(a)(1)(D) states that a "fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents are consistent with" ERISA. 29 U.S.C. §1104(a)(1). However, ERISA's venue provision does not create a fiduciary duty and, thus, waiver of the provision cannot be a breach of fiduciary duty. *See Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.,* 847 F.2d 475, 478 (8th Cir. 1988). Indeed, the United States Supreme Court has found that similar venue provisions in other federal statutes are procedural rather than substantive and can be waived despite other provisions requiring compliance with the act. *See Vimar Seguros y Reseguors, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 535 (1995) (finding that while statute prohibited agreements relieving party of substantive obligations under the act, statute did not prevent parties from agreeing to enforce those obligations in specified forum); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.,* 490 U.S. 477, 481-82 (1989) (referring to the venue provision in the Securities Act of 1933 as procedural rather than substantive).

Plaintiffs making this argument often rely on *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263, (1949) (per curiam), in which the Supreme Court invalidated a contractual forum-selection clause as inconsistent with the Federal Employers' Liability Act, which contains a provision prohibiting any contract or device designed to exempt the carrier from liability under the act. The Seventh Circuit characterized *Boyd* as "a bit of a relic" and noted that it "was decided in an era of marked judicial suspicion of contractual forum selection." *In re Mathias*, 867 F.3d at 733 (refusing to extend *Boyd* to ERISA forum selection clauses). Likewise, the Eastern District of Texas rejected a similar argument noting, "The Sixth Circuit in *Smith* additionally rejected a fiduciary duty argument substantially similar to Plaintiff's, stating that 'a forum or venue selection clause does not attempt to free a fiduciary from its substantive obligations under ERISA." *Davidson*, 6:16-cv-193-RP , at p. 2, citing *Smith*, 769 F.3d at 933.

6. Forum Selection Clauses Are Enforceable Regardless of Participants' Inability to Negotiate Them

A final argument relied upon by parties seeking to avoid transfer is that the clauses are invalid either because they lacked notice or the ability to negotiate them. In other words, plan participants have frequently argued that *Atlantic Marine* is premised on an "agreement" between the parties, and in the context of a forum selection clause contained in an ERISA plan, there has been no such agreement.

In *Smith*, the court noted that forum selection clauses are "presumptively valid and enforceable" even when they are "not the product of an arms-length transaction." 769 F.3d at 930. Likewise, in *Feather*, the court noted that because a participant does not generally have the right to negotiate or reject the terms of an ERISA plan, whether a participant has notice of a forum selection clause is irrelevant. 216 F. Supp. 3d at 942. The court declined to follow, *Mezyk,* 2009 U.S. Dist. LEXIS 107574, in which a court in the same district had declined to enforce a forum selection clause based on lack of notice of the clause. In *Feather*, the court explained:

> This Court is unpersuaded by *Mezyk* and does not believe that the lack of notice makes the forum selection clause fundamentally unfair under the circumstances. To begin with, unlike the short time-frame *Mezyk*, the forum selection clauses here were initially added to the pension plans in January 2009 . . . , meaning Feather had more than seven years to read the pension plans before filing suit. There is no indication that the documents were withheld from Feather or that she was

> otherwise unable to obtain them. The Court also does not see why advance notice of the forum selection clauses was needed when Feather did not have any bargaining power to negotiate the terms or the exclusion of the clause. Instead, the plans provided that the administrator was free to unilaterally amend the plans at any time it deemed advisable . . . .

216 F. Supp. 3d at 942. (internal docket citations omitted).

Likewise, in *Conte*, 2011 U.S. Dist. LEXIS 111657, at *7, the court observed, "In this Court's view, where Plaintiff did not have bargaining power to negotiate the inclusion or exclusion of the forum selection clause, notice is not relevant to determining whether the provision was freely negotiated and enforceable." *See also Rodriguez,* 716 F. Supp. at 860 (enforcing clause despite lack of notice); *Testa,* 2010 U.S. Dist. LEXIS 47130 (same); *Angel Jet Servs., L.L.C.*, 2010 U.S. Dist. LEXIS 16345, at *5 (same); *Laasko,* 566 F. Supp. 2d at 1024 (enforcing forum selection clause in ERISA plan despite lack of advance notice to participants because "even though the beneficiaries of the plan may not have had notice of the forum selection clause, the employer, who negotiated the plan, did have notice of the clause and the ability to reject the contract").

Furthermore, in *Robertson v. Pfizer Retirement Committee,* 2018 WL 3618248 (E.D. Penn. July 27, 2017), the Court rejected the argument that ERISA required proper notice of the addition of the forum selection clause must be provided within 60 days of the date in which the change was adopted *See* 29 U.S.C. Section 1024(b)(1)(b). In *Robertson*, the Court explained:

> [T]he addition of the forum-selection clause was not a material modification of the Plan. The adoption of a forum selection clause is not a plan modification or change that eliminates benefits of an ERISA plan, reduces benefits payable under an ERISA plan, increases premiums, deductibles, coinsurance, copayments, or other amounts to be paid under an ERISA plan. Additionally, a forum-selection clause does not reduce the service area by a health organization, nor does it establish new conditions or requirements to obtain benefits under the plan. Thus, the addition of a forum-selection clauses does not constitute a material reduction in plan-benefits, and is not subject to the 60-day notice requirement.

Id. at *7-8.

D. Emerging Issues in Forum Selection Clause Litigation

Although it is now well-established that forum selection clauses in ERISA plans are enforceable, plaintiffs continue to come up with new theories as to why they should not be enforced. In *Robertson*, the plan participant argued, among other things, that his breach of fiduciary duty claim fell outside the scope of the forum selection clause. *Id.* at *3. Specifically, he contended that the forum selection clause only applied to benefit claims and not to claims for breach of fiduciary duty. *Id.* The Court applied general principles of contract law to interpret the scope of the forum selection clause. *Id.* The Court observed that the forum selection clause at issue appeared in the section of the plan outlining the process by which a plan beneficiary could appeal the denial of a benefits claim. *Id.* at *4. The provision explained that at the conclusion of the appeal process the beneficiary could pursue legal action. *Id.* The provision then stated, "the venue for such legal action shall be the Southern District of New York . . . ." *Id.* The Court found that the provision required any legal action with regard to any claim submitted through the administrative claims and appeals process to be filed in the selected venue. *Id.* Because the claim was submitted by the beneficiary through the claims and appeals procedure, the Court found that the claim was subject to the forum selection clause and ordered transfer to the Southern District of New York. *Id.*.

IV. Conclusion

In summary, interesting legal developments have changed the general analysis for determining whether personal jurisdiction exists in a given lawsuit. In the context of an ERISA case, these developments have a lesser impact than in general federal court practice. However, if you are defending an ERISA claim in a situation where there is no forum selection clause, you should consider whether the venue is one proscribed by the venue statute. If the lawsuit is filed outside of the state where the Plan is administered, the breach took place, or your client resides, and you are dealing with an analysis of where your client "may be found" ask yourself whether your client has such contacts with the forum state to be "essentially at home."

On the other hand, if you are fortunate enough to advise your clients regarding plan design, avoid the procedural gymnastics by recommending that your clients adopt a mandatory, binding forum selection clause that selects one of the three venues available under ERISA's venue statute as the forum for filing litigation. Take care in drafting the forum selection clause to ensure that it is broadly worded to capture all litigation "relating to" and "arising under" the plan. Include the forum selection clause in its own section to as to avoid arguments that the clause is limited in scope to only certain claims. Finally, proactively state that the law of the district chosen as the forum will apply.