

Ninth Circuit Approves ERISA Forum Selection Clauses

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The United States Court of Appeals for the Ninth Circuit, in the recent case of *In re Becker*, No. 20-72805, 2021 WL 1219745 (9th Cir. Apr. 1, 2021), upheld the use of forum selection clauses in Employee Retirement Income Security Act of 1974 (ERISA) governed plans as valid and enforceable. A forum selection clause is a provision in a contractual agreement that designates the court and location where the parties have agreed to have their legal disputes litigated.

The plaintiff in *Becker* is a retired participant in the Wells Fargo 401(k) plan. The plaintiff filed suit, alleging ERISA fiduciary violations, in the Northern District of California, where the plaintiff had worked. The 401(k) plan document contained a forum selection clause for the District of Minnesota, where the plan is administered. Wells Fargo filed a motion to transfer the venue of the case to the District of Minnesota, which the district court granted. The plaintiff then requested a writ of mandamus asking the Ninth Circuit to rescind the transfer of venue. The Ninth Circuit denied the petition.

In deciding the case, the Ninth Circuit started with one of the many goals of ERISA: to provide “ready access to the Federal courts.” 29 U.S.C. § 1001(b). Under ERISA § 502(e), a suit “may be” filed in three different venues: (1) where the plan is administered; (2) where the breach took place; or (3) where the defendant resides or may be found. 29 U.S.C. § 1132. The Ninth Circuit held that while ERISA suits may be brought in all three of these venues, it is not required under ERISA that all three venue options always be available. Here, according to the court, the plaintiff and Wells Fargo, through the plan document, simply agreed to bring all suits in one of the valid venues under ERISA (in this case, where the plan is administered).



The Ninth Circuit reasoned that forum selection clauses in ERISA plans do not undermine ERISA's goal of providing access to the federal courts; the clause actually guarantees access to a federal court and predictability. *In re Becker* at 2. "By funneling all Plan oversight through one federal court, it 'encourages uniformity in the decisions interpreting that plan'." *In re Becker* at 2 (quoting *Rodriguez v. PepsiCo Long Term Disability Plan*, 716 F.Supp.2d 855, 861 (N.D. Cal. 2010)). This leads to decreased costs for plan participants, another goal of ERISA.

In its opinion, the Ninth Circuit also cited its recent decision in *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1109 (9th Cir. 2019), in which the court held that access to federal court is not always required in an ERISA claim concerning a 401(k) plan. Wells Fargo could have foreclosed access to any federal court by including an arbitration clause in its plan document. *In re Becker* at 2.

Lastly, the Ninth Circuit acknowledged that its decision is in line with other circuits that have ruled on ERISA forum selection clauses. In *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, (6th Cir. 2014), the Sixth Circuit declined to adopt the Department of Labor's position opposing forum selection clauses. Further, that court held that forum selection clauses added after retirement are enforceable. In *George W. Mathias, Petitioner v. United States District Court for the Central District of Illinois, et al.*, 867 F.3d 727 (7th Cir. 2016), the Seventh Circuit held that nothing in ERISA "precludes the parties from contractually channeling litigation to a particular federal district. Nor is contractual forum selection incompatible with ERISA's policy goals more generally."

While the Sixth, Seventh and Ninth Circuit Courts of Appeals have upheld forum selection clauses in ERISA plans, some district courts have not in certain situations. For example, in *Dumont v. PepsiCo., Inc.*, 2016 WL 3620736 (D. Me. June 29, 2016), the court declined to transfer venue out of fundamental fairness to the participant. In *Dumont*, a forum selection clause was added to the plan document after the participant was fully vested and had already worked 31 years at the company. The court held that enforcing the forum selection clause would mean that the participant could not sue for benefits in the district where the participant lives — their most ready federal court. *Dumont* at 220. The court acknowledged that although there are many competing policy considerations, "enforcement of the forum selection clause would run afoul of the strong ERISA public policy in favor of ready access to the federal courts." *Id.*

As can be seen from the cases above, forum selection clauses in ERISA plans have both pros and cons for participants and plan sponsors. While they help create efficiencies for plan sponsors and predictability in the courts, they can be perceived as unfair to participants. Plan sponsors should review all of these issues prior to implementing forum selection clauses in their plans.

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