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The Enforceability of ERISA Forum Selection Clauses — Two Recent "Against-the-Trend" Cases and an Uncertain Future

JAHIZ NOEL AGARD

For those interested in the law of ERISA forum selection clauses, 2016 has been a year to remember. The majority of courts to address this issue have ruled in favor of enforcing forum selection clauses. However, going against the trend, two federal district courts recently determined that forum selection clauses are automatically invalid and unenforceable within the ERISA context: (a) *Dumont v. PepsiCo, Inc.*, 2016 WL 3620736 (D. Me., June 29, 2016); and (b) *Harris v. BP Corp. N. Am. Inc.*, 2016 BL 221805 (N.D. Ill., July 8, 2016). Prior to these summer cases, only two reported district court cases held that forum selection clauses in ERISA plans are inconsistent with the statute and therefore unenforceable.[1]

Significantly, at the beginning of this year, the U.S. Supreme Court declined to review a case in which the Sixth Circuit Court of Appeals had ruled in favor of enforcing a plan's forum selection clause. *See Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014), *cert denied*, 136 S.Ct. 791 (2016). It is difficult to tell whether the Supreme Court's decision not to consider *Smith* is the final word on forum selection clauses in ERISA plans. While the Solicitor General expressed its position that forum selection clauses are inconsistent with ERISA's protections in favor of participants and beneficiaries, it also argued

IN THIS ISSUE...

Trucker ✦ Huss is happy to announce...

Trucker Huss Director Charles Storke had the pleasure of introducing the Honorable Thomas Reeder, Director of the Pension Benefit Guaranty Corporation, during the National Coordinating Committee for Multiemployer Plans (NCCMP) Annual Conference on Monday, September 26.

that the Supreme Court should not consider *Smith*, because there is currently no split among the various Circuit Courts of Appeal on the subject of the enforceability of forum selection clauses in ERISA plans. Thus, the Solicitor General's position is that the Supreme Court should follow its "usual practice of allowing percolation among the courts of appeals" before deciding the issue.

Background

Plan documents will often include a forum selection clause which requires that a participant must bring any lawsuit regarding the plan in a specified federal district court. In this way, the plan sponsor and administrator can anticipate responding to participant lawsuits within a single forum instead of in any district court across the nation. (In some instances, the chosen forum is arguably inconvenient for the participant, who may reside in a state other than the plan's chosen forum.) Proponents argue that such forum selection clauses reflect a major goal of ERISA — to advance uniformity, predictability and efficiency in plan administration.

However, another (and arguably competing) goal of ERISA is, as stated in the statute, to protect the interests of participants by, among other things, "providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA section 2(b). Thus, the statute provides that a participant may bring a lawsuit in any of the three following venues: (a) where the plan is administered, (b) where the breach took place (generally interpreted as where the participant resided at the time of the alleged breach), or (c) where a defendant resides or may be found. ERISA section 502(e)(2). Typically, forum selection clauses

narrow participants' venue options for initiating lawsuits to where the plans are administered.

Two landmark Supreme Court cases — *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), describe the test for determining the enforceability of forum selection clauses. These cases hold that forum selection clauses are presumed valid and enforceable unless the party resisting enforcement "clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen*, at 15. Enforcement would be unjust, for example, if it resulted in a party being "effectively deprived of a meaningful day in court." *Id.* at 18-19.

The fact that a forum selection clause was not the subject of specific bargaining between the parties does not make the clause automatically unenforceable; however, the affected parties should have notice of the clause and such non-negotiated clauses are subject to court scrutiny for fundamental fairness. *Carnival Cruise Lines*, at 593-595. Moreover, a forum selection clause "should be held unenforceable if enforcement would contravene a strong public policy of the forum in which the suit is brought, whether by statute or judicial decision." *M/S Bremen,* at 15. This last test *(i.e.*, public policy) was the primary basis for the holdings in the recent cases which found that forum selection clauses are unenforceable.

Dumont v. PepsiCo, Inc.

Dumont sued in the District of Maine regarding a dispute in the calculation of his retirement benefits. The plan sponsor and plan administrative committee moved to enforce the plan's forum selection clause and transfer the case to the Southern District of New York. The court focused on the following facts: (a) the participant had worked at the company for decades (34 years before retiring); (b) he was fully vested in his retirement benefits; (c) he did not bargain for the terms of the plan; (d) the forum selection clause was added to the plan's terms after he had already worked for 31 years at the company; and (e) it would be very costly for him to forgo the benefits of the contract *(i.e.*, retirement benefits) because of disagreement with the addition of the forum selection clause. The Court emphasized that "[Dumont] could not have simply chosen to work for another employer, the way that plaintiffs [in other cases involving forum selection clauses] could have chosen another cruise line, a different hospital, or a new corporate business partner." *Dumont*, at 4.

The court's focus on the above facts appears to reflect a primary concern for fundamental fairness. Participants typically have no input on the terms of ERISA plans. However, a closer look at the case reveals that the court ultimately found the clause unenforceable because enforcement would contravene ERISA's strong public policy of providing participants ready access to the federal courts.

The court was not impressed with PepsiCo's arguments that as long as Dumont had access to *some* federal court, enforcement of the clause would not go against the stated public policy. The court quoted from a dictionary, emphasizing that "ready" means "'immediately available or at hand; that can be had or used at once.'" *Id.* at 8. The court then concluded that the "ready" federal court for Dumont was in the District of Maine, where he resided. (Other courts, including the *Smith* court, have been less concerned with this point, and have given more weight to the terms of the plan itself.)

In addition, the court was not persuaded that forum selection clauses promote uniformity in the way that judges interpret plan terms. The court noted that judges within a federal district are not obligated to follow the decisions made by other judges within the same district. "Binding authority comes from that district's court of appeals and the United States Supreme Court." *Id.* at 9.

Harris v. BP Corp. N. Am. Inc.

As in *Dumont*, the *Harris* court found the plan's forum selection clause unenforceable because it contravenes ERISA's strong public policy of ensuring ready access to the federal courts. Harris sued in the Northern District of Illinois over a dispute involving a life insurance policy. BP and the insurance company, pursuant to the plan's forum selection clause, moved to transfer the case to the Southern District of Texas, where BP is headquartered.

BP argued that ERISA's venue provision is plain and unambiguous: it does not expressly prohibit forum selection clauses and therefore limiting the venue to one of the

permissive options is consistent with ERISA. The court disagreed, noting that while the venue provision does not expressly prohibit forum selection clauses, it also does not expressly permit them. Thus, the court found ERISA's venue provision ambiguous with respect to the permissibility of forum selection clauses. (In this respect, *Harris* goes further than most federal courts in suggesting that an element of a plan's design that ERISA does not expressly allow might not be enforceable, even if the statute does not expressly prohibit it. By that logic, plan sponsors would have relatively little choice in how, exactly, they design their plans.)

However, the court found the overriding purpose and legislative history of ERISA is unambiguous in ensuring that participants can "pursue their rights without inordinate inconvenience." *Harris*, at 6. The court noted that ERISA explicitly grants participants ready access to the federal courts. The court also noted that legislative history reveals Congress's intent via ERISA's enforcement provisions "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary duties." *Id.* at 6. The court was not persuaded by arguments that "ready access" simply means access to any federal court. The court was of the opinion that accepting such a reading would lead to the re-emergence of obstacles ERISA was intended to remove.

The *Harris* court also discussed the careful balancing of divergent interests that ERISA represents: participants' interest in promptly enforcing their rights, and plans' interest in achieving uniformity, predictability and efficiency in their operations. Observing that employers and insurance companies, for the most part, have the resources necessary to defend lawsuits in the districts where their participants live and work, while participants are often at a financial disadvantage, the court concluded that "ERISA's dual values are best served by preserving plaintiffs' rights to sue in any of those venues set forth in [ERISA section 502(e)(2)] and permitting plans to specify the choice of law to prevent plans from being governed by numerous states' laws." *Id.* at 8.

Uncertain Future

Dumont and *Harris* represent a divergence from most of the past cases involving the enforceability of forum selection clauses. Where the law will settle remains to be seen. Both cases were sandwiched between two other 2016 cases which followed the majority: (a) *Malagoli v. AXA Equitable Life Ins. Co.*, 2016 WL 1181708 (S.D.N.Y., Mar. 24, 2016); and (b) *Mathias v. Caterpillar, Inc.*, 2016 WL 4202350 (E.D.Pa., Aug. 29, 2016).

Furthermore, the *Smith* Sixth Circuit case was decided by a divided panel, with a dissent generally reflecting the views found in *Dumont* and *Harris*. The Department of Labor (the "DOL"), without any success thus far, has consistently filed amicus briefs in support of the view that forum selection clauses in ERISA plans are invalid and unenforceable. Just recently, the Eighth Circuit Court of Appeals denied an Arizona plaintiff's request to reverse a court order forcing her to pursue her claim under ERISA in a Missouri federal court based upon the plan's forum selection clause. *In re: Lorna Clause*, 8th Cir., No. 16-2607, *petition for writ of mandamus denied* Sept. 27, 2016. Without any explanation, particularly to counter the DOL's arguments in the amicus brief, the Eighth Circuit simply stated that the plaintiff's request "has been considered by the court and is denied." *Id.* at 1.

We can expect the law to further develop in the federal courts in the months and years to come. In the meantime, plan sponsors should review their plan documents and discuss with their counsel whether a forum selection clause makes sense for their plans.

SEPTEMBER 2016

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1 *Coleman v. Supervalu, Inc. Short Term Disability Program*, 920 F.Supp.2d 901 (N.D. Ill. 2013); *Nicolas v. MCI Health & Welfare Plan No. 501*, 453 F.Supp.2d 972 (E.D. Tex. 2006). Some courts have found ERISA forum selection clauses either unenforceable on other grounds (*e.g.*, inadequate notice to the plaintiffs) or irrelevant. *Mezyk v. U.S. Bank Pension Plan*, 2009 WL 3853878 (S.D. Ill. 2009); *Wellmark, Inc. v. Deguara*, 2003 WL 21254637 (S.D. Iowa 2003).

Reasonableness Prevails: New IRS Procedure Allows Self-Certification for Late Rollovers

GISUE MEHDI

Background

In general, when a distribution from an individual retirement arrangement ("IRA") or a retirement plan is paid directly to an individual, the individual has 60 days from the date on which he or she receives the distribution to roll it over to another plan or IRA, in order to qualify for tax-free rollover treatment. The Internal Revenue Service ("IRS") may waive the 60-day rollover requirement in certain situations if an individual missed the deadline because of circumstances beyond his or her control. In the past, the IRS has provided two ways for individuals to make a late rollover contribution: (1) if they satisfied the requirements to be entitled to an automatic waiver of the 60-day rollover requirement, or (2) if they requested and received a private letter ruling from the IRS waiving the 60-day requirement.

Revenue Procedure 2016-47

On August 24, 2016, the IRS issued Revenue Procedure 2016-47, providing taxpayers with a third way to obtain a waiver of the 60-day rollover requirement. In Rev. Proc. 2016-47, the IRS provides guidance for a self-certification procedure to help taxpayers who receive distributions but inadvertently miss the 60-day limit for rolling these amounts into another retirement plan or IRA. It provides that a plan administrator, or an IRA trustee, custodian, or issuer ("IRA trustee"), may rely on the taxpayer's self-certification for the following eleven (11) reasons for making a late contribution:

- The financial institution making the distribution or receiving the contribution made an error;
- The distribution, having been made in the form of a check, was misplaced and never cashed;
- The distribution was deposited into an account that the taxpayer mistakenly thought was a retirement plan or IRA;
- The taxpayer's principal residence was severely damaged;
- A member of the taxpayer's family died;
- The taxpayer or a member of the taxpayer's family was seriously ill;
- The taxpayer was incarcerated;
- A foreign country imposed restrictions;
- The post office made an error;
- The distribution was made on account of a levy under Sec. 6331, and the proceeds of the levy have been returned to the taxpayer; or
- The party making the distribution delayed providing information that the receiving plan or IRA required to complete the rollover, despite the taxpayer's reasonable efforts to obtain the information.

Self-Certification

To self-certify that he or she qualifies for a waiver, the individual must complete the Model Letter in the appendix to Revenue Procedure 2016-47 on a "word-for-word basis or by using a letter that is substantially similar in all material respects" and present it to the plan administrator or financial institution receiving the late rollover contribution. (See the Model Letter at the end of this article.) The individual will be entitled to a waiver if *all* of the following requirements are met:

- The rollover contribution satisfies all of the other requirements for a valid rollover (excluding the 60-day rollover requirement).

- The individual can show (if challenged) that one or more of the eleven (11) reasons listed above (from the Model Letter in Rev. Proc. 2016-47) prevented him or her from completing a rollover during the 60-day period.
- The distribution came from the individual's IRA or retirement plan.
- The IRS has not previously denied the individual's request for a waiver.
- The rollover contribution is made to the plan or IRA as soon as practicable after the reason or reasons for the delay no longer prevent the individual from making the contribution (completing the rollover within 30 days satisfies this requirement).
- The representations made by the individual in the Model Letter are true.

Self-certification is easier than requesting a private letter ruling for a waiver, because the taxpayer does not have to file a request with the IRS, pay a fee to the IRS, or wait to receive a letter ruling from the IRS before making the late rollover contribution.

It is important to note that submitting a completed Model Letter (or similar letter) to a plan administrator or financial institution does not, in itself, constitute a waiver by the IRS of the 60-day rollover requirement. The taxpayer should keep a copy of the certification, in case it is requested on audit. If the IRS later audits the individual's income tax return, the IRS may determine upon examination that the taxpayer does not qualify for a waiver, in which case he or she may be subject to taxes and penalties.

Next Steps for Plan Administrators

For purposes of accepting and reporting a rollover contribution into a plan or IRA, a plan administrator or IRA trustee may rely on a taxpayer's self-certification in determining whether the taxpayer has satisfied the conditions for a waiver of the 60-day rollover requirement. However, a plan administrator or an IRA trustee may not rely on the self-certification for any other purposes or if the administrator has *actual knowledge* that the information in the self-certification is not true. Currently, the IRS has not elaborated on what constitutes "actual knowledge" that the self-certification is not true, or how a plan administrator would obtain or rely on such information. This could require the implementation of a new administrative process or monitoring by plan administrators.

In light of the changes made by Revenue Procedure 2016-47, plan administrators should also consider revising their 402(f) notices. The model notices under section 402(f) that can be provided to participants with an eligible rollover distribution are located at the end of IRS Notice 2009-68. The section on "If you miss the 60-day rollover deadline," only discusses applying for a waiver by filing a private letter ruling request with the IRS. This should be updated to reflect the possibility of self-certification.

Conclusion

Rev. Proc. 2016-47 continues the IRS trend to reduce the burden on IRS resources as evidenced by the IRS's decision to eliminate the determination letter application program, previously discussed in an article in the August issue of our newsletter, titled "Internal Revenue Service Provides Guidance on the Scope of the New Determination Letter Program for Individually Designed Plans."

Further, Rev. Proc. 2016-47 is consistent with the movement toward liberalizing the acceptance of rollovers from another plan or IRA, discussed in greater detail in Revenue Ruling 2014-9. Rev. Rul. 2014-9 provides guidance on rollovers to qualified plans and examples of "due diligence" procedures plan administrators may rely on when accepting rollovers into the plan.

Rev. Proc. 2016-47 is effective as of August 24, 2016. The impact of the revenue procedure may remain unclear for some time, as plan administrators and IRA custodians are not required to accept the self-certification. Although self-certification is a less burdensome and less costly option than obtaining a private letter ruling, taxpayers should weigh the amount at stake, the specific circumstances surrounding the failure to complete the 60-day rollover, whether the administrator will accept self-certification, and the fact that the IRS can still reject the self-certification upon audit.

Finally, we suggest plans accept self-certifications because it gives plans a welcome opportunity to be flexible (*i.e.*, lenient) in situations beyond a participant's control and because Rev. Proc. 2016-47 provides that a plan administrator may rely on the taxpayer's certification in accepting and reporting receipt of a rollover contribution.

If you have questions or need assistance, please contact the author of this article or the Trucker Huss attorney with whom you normally work.

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Model Letter (from Appendix to Rev. Proc. 2016-47)

Certification for Late Rollover Contribution

Name
Address
City, State, ZIP Code
Date: _____

Plan Administrator / Financial Institution
Address
City, State, ZIP Code

Dear Sir or Madam:

Pursuant to Internal Revenue Service Revenue Procedure 2016-47, I certify that my contribution of $ [*ENTER AMOUNT*] missed the 60-day rollover deadline for the reason(s) listed below under Reasons for Late Contribution. I am making this contribution as soon as practicable after the reason or reasons listed below no longer prevent me from making the contribution. I understand that this certification concerns only the 60-day requirement for a rollover and that, to complete the rollover, I must comply with all other tax law requirements for a valid rollover and with your rollover procedures.

Pursuant to Revenue Procedure 2016-47, unless you have actual knowledge to the contrary, you may rely on this certification to show that I have satisfied the conditions for a waiver of the 60-day rollover requirement for the amount identified above. You may not rely on this certification in determining whether the contribution satisfies other requirements for a valid rollover.

Reasons for Late Contribution

I intended to make the rollover within 60 days after receiving the distribution but was unable to do so for the following reason(s) (check all that apply):

___ An error was committed by the financial institution making the distribution or receiving the contribution.
___ The distribution was in the form of a check and the check was misplaced and never cashed.
___ The distribution was deposited into and remained in an account that I mistakenly thought was a retirement plan or IRA.
___ My principal residence was severely damaged.
___ One of my family members died.
___ I or one of my family members was seriously ill.
___ I was incarcerated.
___ Restrictions were imposed by a foreign country.
___ A postal error occurred.
___ The distribution was made on account of an IRS levy and the proceeds of the levy have been returned to me.
___ The party making the distribution delayed providing information that the receiving plan or IRA required to complete the rollover despite my reasonable efforts to obtain the information.

Signature

I declare that the representations made in this document are true and that the IRS has not previously denied a request for a waiver of the 60-day rollover requirement with respect to a rollover of all or part of the distribution to which this contribution relates. I understand that in the event I am audited and the IRS does not grant a waiver for this contribution, I may be subject to income and excise taxes, interest, and penalties. If the contribution is made to an IRA, I understand you will be required to report the contribution to the IRS. I also understand that I should retain a copy of this signed certification with my tax records.

Signature: _____

FIRM NEWS

An article by **Joe Faucher,** entitled *The Evolution of the Pleading Standard in ERISA Stock Drop Cases*, has been published in the August 22, 2016 issue of the Bloomberg BNA *Tax Management Memorandum*.

On September 15, **Tiffany Santos** moderated the webinar "Open Enrollment is Coming — Is Your Health Plan Up to Date?" on behalf of the ABA's Joint Committee on Employee Benefits. She also gave a presentation entitled *The Affordable Care Act: Compliance and Other Hot Topics* at the Mid-Sized Retirement and Healthcare Plan Management Conference in Las Vegas, Nevada on September 26.

The American Society of Pension Professionals & Actuaries (ASPPA) will hold its four-day Annual Conference in National Harbor, Maryland beginning October 23, 2016. **Brad Huss** will participate in a panel discussion on ERISA case law that will provide insight into recent ERISA litigation and how the courts have interpreted the law. **Nick White** will give a presentation focusing on the latest trends plan sponsors are experiencing in recent Department of Labor investigations, and how best to aproach them. **Robert Gower** will moderate a workshop entitled *The Globalization of US Companies and their Workforce and the Impact on US Retirement Plans.*

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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