UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JACQUELINE SYRSTAD and
NATALIE WENNINGER,
Plaintiffs,

v. **Case No. 22-C-0333**

NECA-IBEW WELFARE TRUST FUND,
Defendant.

DECISION AND ORDER

Plaintiffs Jacqueline Syrstad and Natalie Wenninger allege that the NECA-IBEW Welfare Trust Fund (the "Plan") violated their rights under the Employee Retirement Income Security Act of 1974 ("ERISA"). Before me now are two motions filed by the Plan. The first is a motion to transfer venue to the United States District Court for the Central District of Illinois pursuant to a forum selection clause. The second is a motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

I. BACKGROUND

The Plan is a self-insured employee welfare benefit plan established by the National Electrical Contractors Association ("NECA") and the International Brotherhood of Electrical Workers ("IBEW") to provide medical benefits to NECA-IBEW employees and members and their beneficiaries. The Plan is administered in Decatur, Illinois, which is within the Central District of Illinois. Plaintiffs are Plan beneficiaries who reside in Wisconsin.

This suit arises out of medical services that plaintiffs received from Neurosurgery and Endovascular Associates, S.C. ("NEA"), in Wisconsin. NEA is an out-of-network

provider, meaning that it does not have a contract with the Plan or its third-party administrator. Plaintiff Wenninger received treatment from NEA between February 2, 2017 and April 22, 2021. (Am. Compl. ¶ 25.) Plaintiff Syrstad received treatment from NEA between January 16, 2017 and August 16, 2021. (*Id.* ¶ 26.) The plaintiffs allege that the services rendered by NEA were medically necessary and covered by the terms of the Plan, and that plaintiffs timely submitted their respective claims for payment.

Plaintiffs' claims focus on Plan terms that govern the payment of claims involving out-of-network providers. The Plan covers out-of-network services. However, if a participant receives treatment from an out-of-network provider, the participant is responsible for paying the part of the provider's charge that exceeds the Plan's "Allowable Charge." In health-insurance parlance, this means that the provider is allowed to "balance bill" the participant for the difference between the billed charges and the amount the Plan pays.

Plaintiffs allege that the Plan has not followed the governing Plan terms relating to determining the Allowable Charge. They contend that the Plan's failure to follow such terms resulted in payment of an Allowable Charge to NEA that is less than it should be for each submitted claim, with the result that plaintiffs' portion of each claim is higher than it should be. Plaintiffs bring claims for the recovery of benefits due under the Plan, *see* 29 U.S.C. § 1132(a)(1)(B), which they claim is the difference between the Allowable Charge determined by the Plan and what the Allowable Charge should have been. (Am. Compl. ¶¶ 43–55.)

Plaintiffs also bring claims for appropriate equitable relief to redress violations of ERISA and to enforce the terms of the Plan. *See* 29 U.S.C. § 1132(a)(3). These claims

raise several issues relating to the Plan's disclosure of information regarding the Allowable Charge. For example, plaintiffs allege that the Plan violated ERISA provisions that, they say, required the Plan to provide a summary plan description ("SPD") that contained "a detailed description of the cost-sharing provisions applicable to out-of-network benefits." (Am. Compl. ¶¶ 57–58 (citing 29 U.S.C. § 1022 & 29 C.F.R. § 2520.102-3(j).) Here, plaintiffs contend that the SPD was defective because it did not provide sufficient detail about how the Plan would determine the Allowable Charge for out-of-network services. Plaintiffs also contend that the Plan violated a provision of ERISA that requires a plan to provide a summary of any material modifications to the plan. (Am. Compl. ¶ 60 (citing 29 U.S.C. § 1024(b) & 29 C.F.R. § 2520.104b-3).) Here, plaintiffs contend that the Plan must have modified its approach to calculating the Allowable Charge prior to the earliest dates of service at issue in this case. That is so, say plaintiffs, because prior to those dates the Plan had been calculating more favorable Allowable Charges for similar treatment. (Am. Compl. ¶¶ 60–61.) Plaintiffs contend that the Plan did not disclose this modification within the time required by ERISA.

In prior proceedings, I decided a motion to dismiss and a motion to transfer venue that had been filed by the Plan. The motion to transfer venue sought a transfer to the United States District Court for the Central District of Illinois based on a forum selection clause. The motion to dismiss sought dismissal of certain of plaintiffs' claims for various reasons. The primary reason was that the claims were untimely under Plan provisions that allegedly provided that lawsuits had to be brought within three years of the date of service. I decided both motions based on procedural defects. I denied the motion to transfer venue because the Plan had not submitted evidence showing that the applicable

plan document contained a forum selection clause. I also identified issues relating to enforcement of the forum selection clause that the parties had not adequately addressed. As for the motion to dismiss, I determined that plaintiffs had failed to plead sufficient information to give the Plan fair notice of the claims at issue in this suit. I noted that plaintiffs had alleged facts relating to dates of service spanning approximately five years but had not specified which dates of service formed the basis of their claims. After dismissing the complaint, I granted plaintiffs leave to file an amended complaint. I also stated that the Plan could renew its motion to dismiss and motion to transfer venue if plaintiffs filed an amended complaint.

Plaintiffs have filed an amended complaint, and the Plan has renewed its motion to dismiss and motion to transfer venue. For the reasons discussed below, I will grant the motion to transfer venue and allow the transferee court to decide the motion to dismiss.

II. DISCUSSION

The Plan's motion to transfer venue is based on a forum selection clause that requires litigation in the United States District Court for the Central District of Illinois. The proper mechanism for enforcing a forum selection clause that points to another federal district court is a motion to transfer venue under 28 U.S.C. § 1404(a). *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S.49, 59–60 (2013). When 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. *Id.* at 62. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied. *Id.* In the Seventh Circuit, a forum selection clause in an ERISA plan is

enforceable so long as the clause picks one of the venue options in ERISA's venue provision, 29 U.S.C. § 1132(e)(2). *In re Mathias*, 867 F.3d 727, 733–34 (7th Cir. 2017).

The forum selection clause at issue in this case became part of the Plan in 2018.[1] However, the clause was not added to the Summary Plan Description ("SPD") until July 1, 2020, when the Plan adopted a combined SPD and Plan Document.[2] (Cope Decl. ¶ 6 & Ex. C.) The Plan submits evidence that it mailed a copy of the 2020 SPD to all Plan participants in April 2021. (Cope Decl. ¶ 7.) The Plan also submits evidence that the 2018 Plan Document has been available on its website since approximately the end of December 2017, and that the 2020 SPD has been available on the website since April 2021. (*Id.* ¶¶ 8–9.) Plaintiffs submit declarations in which they state that they did not see either the 2018 Plan Document or the 2020 SPD until the Plan filed copies of those documents in this lawsuit. (Decl. of Jaqueline Syrstad ¶¶ 1–4, ECF No. 18; Decl. of Natalie Wenninger ¶¶ 1–4, ECF No. 19.) However, counsel for the Plan sent a letter to counsel for plaintiffs on October 7, 2020, in which counsel excerpted the 2018 Plan Document's provisions governing litigation against the Plan. (Decl. of Jacob Blickhan ¶ 4, Ex. 2B; ECF No. 32-2 at 10 of 12.) The letter was sent to plaintiffs' counsel in his capacity as counsel for NEA. However, at that time, NEA was itself acting as the authorized representative of Syrstad and Wenninger. (Blickhan Decl. ¶ 3 & Ex. 2A; ECF No. 32-2 at

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[1] The clause in the 2018 Plan Document provides that "Any action in court must be brought in the United States District Court for the Central District of Illinois, where the Plan is administered." (Decl. of Kevin Cope ¶ 5, Ex. B, § 19.18, ECF No. 32-1 at 297 of 483.)

[2] The language of the forum selection clause in the 2020 SPD is identical to the language in the 2018 Plan Document. (Cope Decl. ¶ 6, Ex. C, p. 130, ECF No. 32-1 at 472 of 483.)

3–8 of 12.) The letter's excerpt from the 2018 Plan Document included the forum selection clause at issue now.

Plaintiffs contend that the forum selection clause is not enforceable for two overarching reasons. First, they contend that the clause is not valid under Wisconsin contract law. However, the forum selection clause appears in Plan documents governed by ERISA. Under ERISA, "the relevant principles of contract interpretation are not those of any particular state's contract law, but rather are a body of federal common law tailored to the policies of ERISA." *Mathews v. Sears Pension Plan*, 144 F.3d 461, 465 (7th Cir. 1998); *accord Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 911 (7th Cir. 2013) (an ERISA claim "is governed by a federal common law of contract keyed to the policies codified in ERISA"). Thus, Wisconsin contract law pertaining to the enforceability of forum selection clauses does not apply to the Plan. *See In re Mathias*, 867 F.3d at 731 (recognizing that validity of forum selection clause in ERISA plan is controlled by federal common law of contract).

Second, plaintiffs contend that the forum selection clause is fundamentally unfair and, therefore, unenforceable under ERISA. Plaintiffs make two arguments in support of their contention that the clause is fundamentally unfair. First, they contend that the Plan enacted the clause in bad faith to "discourage individuals from pursuing legitimate claims." (Br. in Opp. at 8–9, ECF No. 34.) That is so, plaintiffs contend, because "there is no point in having a forum-selection clause other than to make it more difficult and expensive for Plan participants to pursue legitimate claims against the Fund." (*Id.*) However, the Seventh Circuit does not share this view. According to that court, "forum-selection clauses promote uniformity in plan administration and reduce administrative costs and in that

sense are consistent with the broader statutory goals of ERISA." *In re Mathias*, 867 F.3d at 733 (citing *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 931–32 (6th Cir. 2014)). In light of these legitimate reasons for including a forum selection clause in an ERISA plan, I cannot find that the Plan adopted the clause in bad faith for the purpose of discouraging legitimate claims.

Plaintiffs' second fairness argument is based on an alleged lack of adequate notice of the forum selection clause. This argument relies on district-court cases that have evaluated forum selection clauses under standards applied by the Supreme Court of the United States in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). *See, e.g., Feather v. SSM Health Care*, 216 F. Supp. 3d 934, 941 (S.D. Ill. 2016); *Mezyk v. U.S. Bank Pension Plan*, No. 3:09-cv-384-JPG, 2009 WL 3853878, *4 (S.D. Ill. Nov. 18, 2009). In *Carnival*, the Supreme Court upheld a forum selection clause printed on a cruise-ship ticket under circumstances in which the forum selection clause was "reasonably communicated" to plaintiffs and plaintiffs "presumably retained the option of rejecting the contract with impunity." 499 U.S. at 590, 595. At least one district court has applied this "reasonably communicated" requirement to a forum selection clause in an ERISA plan. *See Mezyk*, 2009 WL 3853878, at *4 ("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 § 1404(a) or § 1406(a).").

However, although the reasonable-notice factor from *Carnival* may be relevant in ordinary contract cases, it does not mesh well with federal standards that govern ERISA plans. Unlike an ordinary contract, an ERISA plan may be modified without the consent of plan participants. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)

("Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."). ERISA contains detailed provisions governing a plan's obligation to provide notice of plan modifications. *See, e.g.,* 29 U.S.C. §§ 1022(a) & 1024; 29 C.F.R. § 2520.104b-3. Under these provisions, a participant may not be entitled to notice of a plan modification until well after the modification was adopted. For example, many plan modifications do not need to be communicated to participants until 210 days after the end of the plan year in which the modification was adopted. *See* 29 U.S.C. § 1024(b)(1). Thus, a plan amendment adopted on January 1, 2018 might not need to be disclosed to participants until July 2019. And one federal court has held that a plan amendment adopting a forum selection clause is subject to this 210-day period. *Robertson v. Pfizer Ret. Comm.*, No. 18-0246, 2018 WL 3618248, at *7–8 (E.D. Penn. July 27, 2018). Further, ERISA identifies the penalties to be imposed on a Plan that violates disclosure requirements. *See* 29 U.S.C. § 1132(c). Invalidation of the portion of the Plan that was not properly disclosed is not an available penalty. *See Rapp v. Henkel of Am., Inc.*, No. 8:18-cv-01128-JLS-E, 2018 WL 6307904, at *4 n.4 (C.D. Cal. Oct. 3, 2018) (recognizing that remedy for Plan's violation of ERISA disclosure requirements would not include invalidation of forum selection clause).

Because ERISA contains detailed notice provisions that allow plan modifications to take effect without advance notice to participants and prescribes its own penalties for violations, I conclude that *Carnival*'s reasonable-notice language does not apply to forum selection clauses in ERISA plans. My conclusion aligns with other district courts that have recognized that ERISA plans are materially different from ordinary contracts and have determined that advance notice of a forum selection clause is not a prerequisite to

enforcement. *See Pedersen v. Kinder Morgan, Inc.*, No. 21-CV-10388, 2021 WL 5757189, at *5–6 (E.D. Mich. Nov. 1, 2021); *Feather*, 216 F. Supp. 3d at 941–42; *Almont Ambulatory Surgery Center, LLC v. UnitedHealth Group, Inc.*, No. CV–14–02139–MWF, 2015 WL 12733443, at *13–15 (C.D. Cal. April 10, 2015); *Grayden v. Tex. Windstorm Ins. Ass'n*, No. A–13–CV–184–LY, 2013 WL 12077505, at *3–4 (W.D. Tex. June 24, 2013); *Laasko v. Xerox Corp.*, 566 F. Supp. 2d 1018, 1024 (C.D. Cal. 2008).

I recognize that the above differences between ERISA plans and ordinary contracts, including the fact that plans may be amended without advance notice to participants and beneficiaries, also serve as arguments in favor of deeming *all* forum selection clauses in ERISA plans invalid. However, the federal appellate courts that have addressed the question—including the Seventh Circuit—have determined that forum selection clauses in ERISA plans are enforceable so long as the clause points to one of the venue options in ERISA's venue provision, 29 U.S.C. § 1132(e)(2). *In re Becker*, 993 F.3d 731, 733 (9th Cir. 2021); *In re Mathias*, 867 F.3d 727, 733–34 (7th Cir. 2017); *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 935 (6th Cir. 2014). Two of those cases generated dissents, and the dissenting judges stressed that ERISA plans are different from ordinary contracts in ways that make enforcement of forum selection clauses in ERISA plans more problematic. *See In re Mathias*, 867 F.3d at 736 (Ripple, J., dissenting) ("an ERISA beneficiary is, as a practical matter, simply a *beneficiary* of an agreement that other parties have negotiated and accepted"); *Smith*, 769 F.3d at 935 (Clay, J., dissenting) (noting that "the restrictive venue selection clause was unilaterally added to the Plan seven years after Plaintiff agreed to its terms"). Nonetheless, these views did not carry the day, and I conclude that, if forum selection clauses in ERISA plans are

enforceable at all, then they are enforceable to the same extent that other plan terms are enforceable. *Cf. Schoemann ex rel. Schoemann v. Excellus Health Plan, Inc.*, 447 F. Supp. 2d 1000, 1006–07 (D. Minn. 2006) (noting that although plan beneficiaries typically do not negotiate or receive notice of forum selection clauses, the same is true of other plan terms, and beneficiaries "must take the bad with the good"). In other words, a judicially created notice requirement that conflicts with ERISA's detailed notice and disclosure requirements should not be applied to forum selection clauses.

For the above reasons, I conclude that the Plan's forum selection clause is enforceable. This means that I must transfer the claims subject to the clause under § 1404(a) "unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." *Atl. Marine*, 571 U.S. at 52. Here, I may consider what are commonly known as the "public-interest factors." *Id.* at 64. Those factors include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Id.* at 63 n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6 (1981)). None of these factors weighs against a transfer here. Court congestion is not an issue in the Central District of Illinois. Further, this case does not involve a "localized controversy," as it involves a dispute governed by federal law and litigants from different states. Similarly, because this case is brought under ERISA, the factor relating to the trial of a diversity suit in a forum that is at home with the law does not apply. Accordingly, this is not one of those "unusual cases" in which the public-interest factors defeat transfer under § 1404(a). *Id.* at 64.

The remaining issue is how to handle the claims arising out of the treatment that plaintiffs received from NEA prior to the Plan's adoption of the forum selection clause in 2018. The Plan does not contend that the modification adding the forum selection clause has retroactive effect, and so I assume that the claims arising out of services provided in 2017 are not subject to the clause. However, I may still transfer the earlier claims under § 1404(a) if I weigh the relevant factors and decide that, on balance, a transfer will serve "the convenience of parties and witnesses" and otherwise promote "the interest of justice." *Atl. Marine*, 571 U.S. at 62–63.

I have already considered the public-interest factors. That leaves factors relating to the parties' private interests, which include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 63 n.6 (quoting *Piper Aircraft*, 454 U.S. at 241 n.6). Because the claims arising out of services rendered in 2018 and later must be transferred pursuant to the forum selection clause, these factors clearly favor transferring the earlier claims. Plaintiffs' claims are all based on the same underlying issues: whether the Plan improperly determined NEA's Allowable Charge and failed to make required disclosures concerning the method for determining the Allowable Charge. All claims will involve substantially the same facts, evidence, witnesses, and legal arguments. Splitting the claims between two courts would duplicate litigation efforts and threaten to create inconsistent rulings. Under these circumstances, a transfer of the entire case is warranted. *See Ind. Fin. Grp., LLC v. Quest Trust Co.*, No. 3:21-cv-00537-WHO, 2021

WL 2550397, at *5–7 (N.D. Cal. June 22, 2021) (finding that because claims subject to forum selection clause were "inextricably intertwined" with those that were not, the private-interest factors favored transferring the entire case).

Accordingly, I will grant the Plan's motion to transfer venue and allow the transferee court to decide the motion to dismiss for failure to state a claim.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that the Plan's motion to transfer venue (ECF No. 31) is **GRANTED**. The Clerk of Court shall **TRANSFER** the case to the United States District Court for the Central District of Illinois, Urbana Division

Dated at Milwaukee, Wisconsin, this 11th day of April, 2023.

/s/Lynn Adelman
LYNN ADELMAN
United States District Judge