

Nos. 17A552, 17-740

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE W. MATHIAS, APPLICANT

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT
OF ILLINOIS, *ET AL.*

OPPOSITION TO APPLICATION TO STAY DISTRICT COURT
PROCEEDINGS PENDING DISPOSITION OF PETITION FOR A WRIT
OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States Court and
Chief Justice for the Seventh Circuit

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**OPPOSITION TO APPLICATION TO STAY DISTRICT COURT PROCEEDINGS
PENDING DISPOSITION OF PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit:

Caterpillar Inc., Caterpillar Inc. Group Insurance Plan A, Caterpillar Inc. Group Insurance Plan B, and Caterpillar Inc. Retiree Group Insurance Plan, (collectively “Caterpillar”) oppose applicant George W. Mathias’s Application for an order staying all district court proceedings pending the disposition of Mathias’s petition for a writ of *certiorari*. See *Mathias v. U.S. Dist. Court for the Cent. Dist. Of Ill.*, No. 17A552 (Appl. dated Nov. 16, 2017); *Mathias v. U.S. Dist. Court for the Cent. Dist. Of Ill.*, No. 17-740 (Pet. dated Nov. 14, 2017).

Mathias’s Application should be denied for three reasons. First, Mathias’s petition for a writ of *certiorari* is likely to be denied. Second, Mathias has not exhausted his lower court stay remedies, a precondition to a Supreme Court stay order. Third, there is no reason for a stay because Mathias can avoid a final judgment in this case until his petition for a writ of *certiorari* is decided.

I. A STAY SHOULD NOT ISSUE BECAUSE THE MATHIAS PETITION FOR A WRIT OF *CERTIORARI* IS LIKELY TO BE DENIED

A. There Is No Circuit Court Split On The Issue Presented By The Mathias Petition For *Certiorari*

Mathias seeks *certiorari* based on an alleged split in the lower courts on whether the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.*, prohibits ERISA plan forum selection clauses. Stay Appl. 3, 20–24.

However, no split exists among the Courts of Appeals.

The decision of the Court of Appeals for the Seventh Circuit enforcing the Caterpillar forum selection clause aligns with the only other Courts of Appeals, the Sixth and Eighth Circuits, that have considered the issue. *See In re Lorna Clause*, No. 16-2607 (8th Cir. Sept. 27, 2016), *cert. denied*, 137 S. Ct. 825 (2017) (No. 16-641); *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 932 (6th Cir. 2014). The Sixth Circuit enforced an ERISA plan forum selection clause, while the Eighth Circuit denied a mandamus petition seeking to bar enforcement. *Id.*

Three other Courts of Appeals (as well as the Eighth Circuit) have enforced ERISA plan arbitration clauses.¹ Arbitration is “in effect, a specialized kind of forum-selection clause.” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). In short, all six Courts of Appeals that have decided, directly or indirectly, the issue presented by the Mathias petition for *certiorari* have uniformly enforced contractual forum selection clauses that direct ERISA claims to a particular court or arbitration. There is no circuit split, and thus no basis for the Mathias petition for *certiorari*. A stay therefore is not warranted.

Mathias cites to a split within the federal district courts to demonstrate the alleged need for review by this Court. Stay Appl. at 13. A district court split cannot justify the granting of his petition. *See* S. Ct. R. 10(a) (stating that a petition may be granted if “a United States *court of appeals* has entered into a conflict with the decision of another United States *court of appeals* on the same important matter”)

¹ *See Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993); *Bird v. Shearson Lehman/Am. Exp., Inc.*, 926 F.2d 116, 122 (2d Cir. 1991); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 479 (8th Cir. 1988).

(emphasis added); *see also Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956, 965 n.14 (11th Cir. 2001) (explaining that district courts are not bound by the decisions of other district courts within the same circuit); *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995) (same).

In any event, the overwhelming majority of district courts have enforced ERISA plan forum selection clauses.² A “clear consensus” therefore has emerged that ERISA does not preclude contractual forum selection clauses. *Feather v. SSM Health Care*, 216 F. Supp. 3d 934, 941 (S.D. Ill. 2016). This Court is unlikely to grant *certiorari* because of a minor split in the district courts.

B. Mathias Exaggerates The Difficulties Of Appealing Transfer Orders

Mathias claims that the issue of forum selection clauses in ERISA plans is “all but immune from appellate review,” and thus professes that his petition offers the “rare opportunity” to decide this question. Stay Appl. at 20. This is not true.

Since 2014, three Courts of Appeal have ruled on this issue. Three circuit decisions in three years hardly suggests that the barriers to appeal are insurmountable.

² Compare these district court decisions upholding ERISA forum selection clauses: *Turner v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 7:14-CV-1244, 2015 WL 225495, at *6 (N.D. Ala. Jan. 16, 2015); *Mroch v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 14-CV-4087, 2014 WL 7005003, at *3 (N.D. Ill. Dec. 10, 2014); *Malagoli v. AXA Equitable Life Ins. Co.*, No. 14-CV-7180, 2016 WL 1181708, at *2 (S.D.N.Y. Mar. 24, 2016); *Clause v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 15-CV-388, 2016 WL 213008, at *4 (D. Ariz. Jan. 19, 2016); *Harley v. Bank of N.Y. Mellon*, No. 15-CV-1384, 2015 WL 6956564, at *6 (M.D. Pa. Nov. 10, 2015); *Loeffelholz v. Ascension Health, Inc.*, 34 F. Supp. 3d 1187, 1193 (M.D. Fla. 2014); *Haughton v. Plan Adm’r of Xerox Corp. Ret. Income Guarantee Plan*, 2 F. Supp. 3d 928, 934 (W.D. La. 2014); *In re Penn-Mont Benefit Servs., Inc.*, No. 3:13-BK-05986, 2013 WL 6405046, at *11 (M.D. Fla. Bankr. Dec. 6, 2013); *Marin v. Xerox Corp.*, 935 F. Supp. 2d 943, 946 (N.D. Cal. 2013); *Rodriguez v. PepsiCo Long Term Disability Plan*, 716 F. Supp. 2d 855, 860 (N.D. Cal. 2010) with these district court cases on which Mathias relies: *Dumont v. PepsiCo, Inc.*, 192 F. Supp. 3d 209, 221–22 (D. Me. 2016); *Coleman v. Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901 (N.D. Ill. 2013); *Nicolas v. MCI Health and Welfare Plan No. 501*, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006).

Mathias also exaggerates the struggles he and other litigants face to appeal transfer orders. Stay Appl. at 20. He contends that a clerk’s decision to transfer his case to Illinois “foreclos[ed] any opportunity for Mathias to seek review in the Third Circuit,” and relatedly asserts that “it is always in the transferee court that a plaintiff must litigate the issue.” Stay Appl. at 9, n. 2, 14, n.8. Mathias is mistaken again. The Third Circuit, which oversaw the transferor court in this case, states that “transfer orders are reviewable on a mandamus petition” even “after entry of final judgment.” *In re Howmedica Osteonics Corp*, 867 F.3d 390, 399 (3d Cir. 2017). Thus, “shifting papers cannot validate an otherwise invalid transfer.” *In re U.S.*, 273 F. 3d 380, 383–84 (3d Cir. 2001); *see also Kahn v. Am. Heritage Life Ins. Co.*, 233 Fed. App’x 895, 896 (11th Cir. 2007).

While Mathias professes that he is “unaware of any case raising the issue post-*Atlantic Marine*,” cited *infra* at p.5, which was “dismissed instead of transferred,” Stay Appl. 23–24, such cases exist and result in final judgments that can be directly appealed. *See e.g., Tardio v. Boston Sci. Corp.*, No. 16-CV-6740, 2017 WL 2790545, at *4 (S.D.N.Y. June 27, 2017); *Shah v. Wellmark Blue Cross Blue Shield*, No. 16-CV-23972017, WL 1186341, at *2 (D.N.J. Mar. 30, 2017), *appeal dismissed* at No. 17-1982, 2017 WL 5157741 (3d Cir. Aug. 23, 2017). In any event, this is what happened in *Smith*, one of the three cases to be decided by a Court of Appeals in the last three years. *Smith*, 769 F.3d at 925 (“Appellant Roger Smith appeals the district court’s dismissal of his claims without prejudice because of improper venue.”)

There is every reason to believe that the Courts of Appeals that have not yet specifically addressed the enforceability of ERISA forum selection clauses will have ample opportunities to do so in the near future. There is no reason for this Court to preemptively grant *certiorari* now.

C. The Mathias Petition For *Certiorari* Fails To Raise An Important Question Of Federal Law That Has Not Been Settled By This Court

Four years ago, this Court found that a contractual forum selection clause could override the general civil venue statute, notwithstanding that statute's permissive language regarding where an action "may be brought." *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 577 (2013) (quoting 29 U.S.C. § 1391(b)). The ERISA venue statute uses identical "may be brought" language. 29 U.S.C. § 1132(e)(2). Thus, as the Seventh Circuit concluded, "nothing in the text of § 1132(e)(2) precludes the parties from contractually channeling litigation to a particular federal district." *In re George W. Mathias*, 867 F.3d 727, 733 (7th Cir. 2017).

"Nor is contractual forum selection incompatible with ERISA's policy goals more generally." *Id.* Forum selection is simply a contractual choice by the parties to "settle[] on one of the various statutory options" set forth in § 1132(e)(2). *Id.* The Mathias case poses no exception to this rule. Mathias has already retained local counsel and filed papers opposing a Caterpillar motion to dismiss in the transferee court. *Mathias v. Caterpillar Inc., et al.*, 16-cv-1323 (C.D. Ill. Nov. 7 & 9, 2017) (ECF Nos. 35–37).

The nature of this lawsuit, moreover, minimizes any purported burden Mathias may face by litigating in the transferee court. This is because it is clear that ERISA benefits claims typically involve a judicial review limited to the administrative record, without discovery, followed by a decision on either summary judgment or a Fed. R. Civ. P. 52(a) “trial on the papers.” *See generally Fontaine v. Metro. Life Ins. Co.*, 800 F.3d 883, 885 (7th Cir. 2015); *Hess v. Hartford Life & Accident Insurance Co.*, 274 F.3d 456, 461 (7th Cir. 2001); *Marciniak v. Prudential Fin. Ins. Co. of Am.*, 184 Fed. App’x 266, 269 (3d Cir. 2006); *Carney v. Int’l Bhd. of Elec. Workers Local Union 98 Pension Fund*, 66 Fed. App’x 381, 386 (3d Cir. 2003). Mathias is not denied “ready access,” 29 U.S.C. § 1001(b), by having his case decided on the papers by an Illinois federal judge instead of a Pennsylvania federal judge.

II. A STAY SHOULD NOT ISSUE BECAUSE MATHIAS DID NOT EXHAUST HIS LOWER COURT STAY RIGHTS

The Mathias stay Application fails for another reason: he did not exhaust his lower court rights. This Court’s rules state that, “[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.” S. Ct. R. 23.3.

Here, Mathias sought a stay with the district court. *See Mathias v. Caterpillar Inc., et al.*, 16-cv-1323 (C.D. Ill. Nov. 2, 2017) (ECF No. 33). However, Mathias did not then seek a stay with the Court of Appeals for the Seventh Circuit - and did not do so even when he petitioned the Seventh Circuit for a rehearing *en*

banc. The Seventh Circuit thus was deprived of the opportunity to retain jurisdiction over the case pending review of his *certiorari* petition. *See* Fed. R. App. P. 21. Because Mathias has not complied with this Court's rule requiring that he exhaust his stay rights prior to moving for a stay with this Court, his request for a stay from this Court should be denied.

III. A STAY OF THE DISTRICT COURT PROCEEDINGS IS UNNECESSARY BECAUSE PLAINTIFF CAN AVOID FINAL JUDGMENT IN THIS CASE UNTIL THE PETITION FOR *CERTIORARI* IS DECIDED

A stay of the district court proceedings is unnecessary because a live claim can exist, at plaintiff's option, regardless of whether the district court grants Caterpillar's pending motion to dismiss. The Seventh Circuit would have jurisdiction over Mathias's claim if Caterpillar's motion to dismiss is granted and Mathias appeals. *See* 28 U.S.C. § 1291. If not, the case will proceed on the merits. This Court need not issue a stay because Mathias can avoid a final judgment in this case until this Court rules on his petition for *certiorari*.

CONCLUSION

The Application for a Stay should be denied.

Dated: November 29, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark Casciari, hereby certify that on this 29th day of November, 2017, a true and correct copy of the foregoing Opposition To Application To Stay District Court Proceedings Pending Disposition Of Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Seventh Circuit to be served upon the following counsel, by electronic mail and overnight mail, postage pre-paid:

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All parties required to be served therefore have been served.

Dated: November 29, 2017



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