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9TH CIRCUIT OKS ARBITRATION FOR ERISA FIDUCIARY BREACH CASES

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ERISA plans can require resolving fiduciary breach cases through arbitration, a three-member panel of the 9th US Circuit Court of Appeals has ruled, citing recent Supreme Court decisions as nullifying the circuit's 35 years of precedent (*Dorman v. Charles Schwab Corp.*, No. 18-15281 (9th Cir. Aug. 20, 2019)). Some observers are hailing the decision as creating a path for employers to resolve ERISA fiduciary breach claims without going to court. However, employers considering adding mandatory arbitration provisions to their plans should consult with legal counsel to better understand the potential impact of these provisions.

BACKGROUND ON THE 9TH CIRCUIT CASE

In 2017, a former 401(k) plan participant filed an ERISA class action, claiming the plan's fiduciaries had breached their duties of prudence and loyalty and committed prohibited transactions by retaining certain of the employer's proprietary funds in the plan's investment lineup. The plan sponsor asked the district court to compel individual arbitration, citing the plan document's provisions that required individual arbitration of all disputes and waived participants' rights to class or collective resolution, whether through arbitration or litigation. The district court denied the motion, citing the 9th Circuit's decision in *Amaro v. Continental Can Co.,* 724 F.2d 747 (9th Cir. 1984), which held that ERISA claims couldn't be arbitrated.

ARBITRATION OF ERISA CLAIMS

In *Amaro*, the 9th Circuit reasoned that arbitration couldn't adequately protect participants' ERISA rights because "[a]rbitrators, many of whom are not lawyers, lack the competence of courts to interpret and apply statutes as Congress intended." But in this case, the 9th Circuit found *Amaro* is no longer good law after a 2013 US Supreme Court decision said arbitration agreements in disputes arising under federal statutes must be enforced, absent an overriding direction from Congress (*American Express Co. v. Italian Colors Rest.*, 570 US 228 (2013)). *Amaro* therefore no longer serves as precedent to deny arbitration of ERISA claims, the 9th Circuit said.

In an "unpublished" companion decision (which can't be relied on as precedent), the 9th Circuit addressed the lower court's reasons for concluding the plan's arbitration provision wasn't enforceable in this case (*Dorman v. Charles Schwab Corp.*, No. 18-15281 (9th Cir. Aug. 20, 2019)). The 9th Circuit found:

- The arbitration provision isn't an attempt to insulate the fiduciaries from liability (which would violate ERISA). The provision only chooses a quicker and often cheaper forum for resolving questions of fiduciary liability.
- The National Labor Relations Act doesn't prohibit arbitration of the participant's claim.
- The participant consented to arbitration of his claim by participating in the plan after the employer added the provision to the plan document.
- Since the participant sued under ERISA Section 502(a)(2) for relief on behalf of the plan, the relevant question is whether the plan consented to arbitration. The plan did so by virtue of the plan document's arbitration provision.
- The participant's claim can be resolved through individual arbitration, even though the claim seeks relief for the plan. In *LaRue v. DeWolff, Boberg & Assocs., Inc.* (552 US 248 (2008)), the Supreme Court recognized that 502(a)(2) claims are "inherently individualized" in the context of a defined contribution plan. The *LaRue* decision "stands for the proposition that a defined contribution plan participant can bring a § 502(a)(2) claim for the plan losses in her own individual account."

ARBITRATION PROVISIONS IN EMPLOYMENT AGREEMENTS

Last year, the 9th Circuit ruled that a mandatory arbitration provision in an employment agreement did not bar an ERISA class action against the fiduciaries of two University of Southern California (USC) retirement plans (*Munro v. Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018)). In that case, however, the mandatory arbitration provision was in the employment agreements — not USC's plan documents — so the plan never consented to arbitration of claims. As a result, the court found the university couldn't compel arbitration of claims for relief that would benefit the plans and all affected participants and beneficiaries.

CONSIDERATIONS FOR ARBITRATION PROVISIONS

The potential advantages of resolving ERISA claims in arbitration — e.g., smaller awards and likely faster resolution than litigation — may appeal to many employers. But employers need to consider other factors before adding mandatory arbitration provisions to their ERISA plans. For example, individual arbitration, unlike litigation, sets no precedent for similar claims from other employees. So employers might have to arbitrate an issue multiple times with potentially different outcomes. For certain claims, employers may prefer obtaining a binding judicial opinion.

In addition, some legal experts have questioned the 9th Circuit's interpretation of *LaRue*. The lawyers for the participant in this case have said they are considering their options. So the participant could ask the 9th Circuit to review the decision *en banc* (by the full circuit) or appeal to the Supreme Court. If other circuit

courts disagree with the 9th Circuit, the Supreme Court may be willing to take up the issue. Employers considering amending their plans to require individual arbitration should consult with legal counsel.

RELATED RESOURCES

- *Dorman v. Charles Schwab Corp.*, No. 18-15281 (9th Cir. Aug. 20, 2019)
- *Dorman v. Charles Schwab Corp.*, No. 18-15281 (9th Cir. Aug. 20, 2019) (unpublished opinion)
- *Munro v. Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018)
- *American Express Co. v. Italian Colors Rest.*, 570 US 228 (2013)
- *LaRue v. DeWolff, Boberg & Assocs., Inc.,* 552 US 248 (2008)
- *Amaro v. Continental Can Co.,* 724 F.2d 747 (9th Cir. 1984)

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