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Employee Benefit Plan Review

Is Mandatory Individual Arbitration Another Tool for the Plan Design Toolbox?

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Recent decisions by the U.S. Court of Appeals for the Ninth Circuit have reinvigorated the debate over whether mandatory individual arbitration provisions are enforceable with respect to claims under the Employee Retirement Income Security Act of 1974 ("ERISA") and, if so, whether these provisions are worth including in your ERISA plan document.

Can Your Plan Require Individual Arbitration?

Last August, a three-judge panel of the Ninth Circuit decided *Dorman v. Charles Schwab Corp., et al* (*Dorman v. Schwab*).[1] In this case, the Ninth Circuit:

(1) Expressly overruled prior precedent holding that ERISA claims were not arbitrable;
(2) Held that under U.S. Supreme Court precedent ERISA claims are arbitrable; and
(3) Further held that the Schwab Retirement Savings and Investment Plan (the "Plan") document at issue contained a valid, enforceable mandatory individual arbitration provision.

The Ninth Circuit subsequently denied former Schwab employee Michael Dorman's motion to have this case reheard *en banc*, ensuring that, for now, *Dorman v. Schwab* is the law of the land within the Ninth Circuit (pending a potential U.S. Supreme Court review).

In this case, Mr. Dorman, a participant in the Plan, brought a putative class action lawsuit under ERISA Sections 502(a)(2) and (3) alleging that the defendants (collectively, "Schwab") breached their fiduciary duties by including and retaining poorly performing Schwab-affiliated investment funds in the Plan in order to generate fees for Schwab.

Schwab filed a motion to compel arbitration and asserted that Mr. Dorman was prohibited from bringing this class action lawsuit by virtue of a mandatory arbitration/class action waiver provision in the Plan document. This provision (the "Arbitration Provision") provided that:

(1) "Any claim, dispute or breach arising out of or in any way related to the plan shall be settled by binding arbitration;"
(2) Any arbitration would be conducted "on an individual basis only, and not on a class, collective or representative basis;" and
(3) If the class action waiver were held to be unenforceable, then "any claim on a class, collective or representative basis shall be filed and adjudicated in a court of

competent jurisdiction, and not in arbitration."

The district court denied Schwab's motion to compel individual arbitration for a variety of reasons, including that the Ninth Circuit had previously held that ERISA claims were not arbitrable.

The Ninth Circuit reversed the district court and expressly overturned its prior precedent as fundamentally inconsistent with intervening Supreme Court decisions. The Ninth Circuit explained that Supreme Court precedent held that federal statutory claims are generally arbitrable and that arbitrators can competently interpret and apply federal statutes. Thus, the Ninth Circuit concluded that claims under ERISA may be arbitrated.

Turning to the language in the Plan, the Ninth Circuit further held (in a separate memorandum opinion that is described as "not appropriate for publication and . . . not precedent") that the Arbitration Provision was valid and enforceable. In addressing the validity and enforceability of arbitration clauses generally, the Ninth Circuit explained that under the Federal Arbitration Act, claims alleging a violation of a federal statute are arbitrable absent a "contrary congressional command" and that ERISA has no such command. With respect to the Arbitration Provision, the Ninth Circuit concluded that it was not designed to insulate fiduciaries from liability (which would be prohibited under ERISA). Further, because the Arbitration Provision was included in the Plan document, the Plan as a whole and any individuals who participate in the Plan (including Mr. Dorman) agreed to individual arbitration.

In contrast, in *Munro v. University of Southern California*,[2] another Ninth Circuit decision addressing the arbitrability of ERISA claims, the Ninth Circuit affirmed a district court decision that an ERISA claim was *not* arbitrable. The primary basis for concluding that the claim was not arbitrable was that the plan as a whole had not consented to arbitration. More specifically, because the class action was brought on behalf of the plan as whole under ERISA Section 502(a)(2), and because the mandatory arbitration language was only included in participants' employment agreements and not the plan, the plan as a whole did not consent to arbitration. In addition, the mandatory arbitration language only applied to individual claims and not those made on behalf of others, such as the plan.

Therefore, if a plan sponsor intends to enforce mandatory arbitration or class action waivers with respect to ERISA 502 claims, the plan sponsor should ensure that the arbitration provision/class action waiver is included in the plan document itself. Further, any individual consent that an employee may sign should be expansive and include claims for benefits brought by the individual on behalf of any benefit plans in which the employee is a participant.

Do You Really Want To Require Individual Arbitration?

Recognizing that a plan can require individual arbitration under Ninth Circuit precedent, the next question is whether the plan sponsor really wants to amend the plan document to include such a provision.

On the one hand, arbitration is generally less expensive than litigation.

On the other hand, arbitrators are likely to be less familiar with ERISA's nuances and an errant arbitration decision could raise a number of difficult compliance questions for the plan's fiduciaries. For example, if an arbitrator determines that plan fiduciaries breached their duty with respect to one participant, it is not clear what obligation there would be to correct this issue for other participants.

Further, it is not clear whether prior arbitration decisions would have any preclusive or precedential effect on the plan's fiduciaries or its participants, so that if the plan prevails in an arbitration proceeding, that result may not preclude other participants from bringing similar claims. In addition, while federal courts may bind federal agencies, it appears that an arbitration decision may not have the same binding effect on an agency auditing the plan.

Finally, it may be to the plan's advantage to be able to settle a claim common to the plan's participants in a federal court class-action lawsuit binding on all the participants; it is not clear how such a class-wide settlement could be obtained where individual arbitration is the prescribed method of resolving claims.

The Bottom Line

Mandatory individual arbitration provisions may be a useful plan design tool to mitigate litigation risk and to ensure that disputes are resolved in the most efficient manner available, but these provisions are not necessarily a one-size-fits-all tool for benefit plans. Plan sponsors should carefully consider the pros and cons of including such provisions in their plans and discuss them with their employee benefits counsel before proceeding.

Notes

1. *See* No. 18-15281, 2019 WL 3926990 (9th Cir. Aug. 20, 2019) (slip op.) and *Dorman v. Charles Schwab Corp., et al,* No. 18-15281, 2019 WL 3939644 (9th Cir. Aug. 20, 2019) (slip op.).
2. *Munro v. University of Southern California*, No. 17-55550 (9th Cir. July 24, 2018).

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