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Individual Arbitration of ERISA Breach of Fiduciary Duty Claims – Is it Possible and, if So, Is It Worth It?

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As plan sponsors and fiduciaries cope with the increased volume of class action Employee Retirement Income Security Act (ERISA) lawsuits, some have considered the prospects of reducing their exposure through arbitration agreements that preclude class and collective actions. Outside of ERISA, defendants have made effective use of this device and have capitalized on a string of Supreme Court rulings that have enforced agreements requiring plaintiffs to bring individual claims, notwithstanding the financial disincentive to do so. But in the ERISA arena, several rulings have created uncertainty as to whether and under what circumstances arbitration clauses can effectively be deployed to avoid class action breach of fiduciary duty lawsuits. As a result, plan sponsors and fiduciaries, together with their attorneys, may need to reset their expectations and objectives.

In this article, we will explore the unique features of ERISA that have given rise to the current legal uncertainty regarding the enforceability of individual arbitration clauses in the face of ERISA breach of fiduciary duty claims. We will also consider some of the practical considerations impacting the decision whether to seek arbitration of ERISA claims.

Legal Underpinning for Arbitration of ERISA Claims

The Federal Arbitration Act (FAA), enacted in 1925, "establishes 'a liberal federal policy favoring arbitration agreements'" and "requires courts to enforce agreements to arbitrate according to their terms."[1] Statutory claims are arbitrable under the FAA unless the plaintiff can show that Congress intended to preclude arbitration, *i.e.*, that there is a contrary congressional command "in the text of the [statute], its legislative history or an 'inherent conflict' between arbitration and the [statute's] underlying purposes."[2]

Several federal appellate courts have concluded that ERISA claims are arbitrable under the FAA.[3] However, these rulings have not addressed the arbitrability of ERISA breach of fiduciary duty claims seeking plan-wide relief. Recent rulings from the 7th and 10th Circuits have called into question whether the general trend favoring arbitrability of statutory claims applies with respect to these claims.

Issues Unique to the Question of Whether Individual Arbitration Clauses Are Enforceable for ERISA Breach of Fiduciary Duty Claims

ERISA Section 502(a)(2) authorizes participants to bring fiduciary breach claims and seek plan-wide remedies under Section 409(a). In turn, Section 409(a) provides that any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by ERISA shall: (i) be personally liable to make good to such plan any losses to the plan resulting from each such breach; (ii) restore to the plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary; and (iii) be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Until recently, there were many ERISA plan sponsors and defense attorneys who believed that ERISA Section 502(a)(2) claims were susceptible to class and collective action waivers in the same way as other causes of actions. This belief was based in large part on the Supreme Court's 2008 decision in *LaRue v. DeWolff, Boberg & Assocs., Inc*.[4] *LaRue* held ERISA Section 502(a)(2) claims involving defined contribution plans, like 401(k) plans, allow for individual relief for fiduciary breaches even though the Supreme Court has previously said such claims are brought on behalf of the plan. The belief that ERISA breach of fiduciary duty claims were arbitrable was reinforced when, in 2019, the 9th Circuit, in an unpublished decision, compelled individual arbitration of Section 502(a)(2) claims and limited any relief awarded in such arbitration to losses from the plaintiff's individual 401(k) account. In so ruling, the Court explained that "*LaRue* 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."[5]

Notwithstanding these encouraging developments, and the theoretical basis for individual arbitration clauses, defendants have confronted a number of legal challenges in trying to enforce them, with mixed results.

These challenges have included arguments that:

- arbitration of an ERISA claim is beyond the scope of general arbitration clauses in an employment agreement because the claim is based on facts and circumstances unrelated to the participant's employment;[6] and
- because Section 502(a)(2) claims are brought on behalf of the plan, plan consent is required.[7]

A number of rulings suggested that these challenges could be avoided through careful draftsmanship, including broadly worded arbitration clauses that extend explicitly to ERISA fiduciary breach claims and the insertion of such clauses in plan documents in order to remove the issue of plan consent. In recent years, however, an independent obstacle has surfaced, in the form of what is known as the "effective vindication" doctrine, which threatens to remove entirely the ability of defendants to draft individual arbitration clauses that are enforceable with respect to ERISA fiduciary breach claims.

The Supreme Court first introduced the "effective vindication" doctrine in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* as a narrow exception to the FAA for arbitration provisions that operate "as a prospective waiver of a party's right to pursue statutory remedies."[8] Notably, the Court has never applied the exception to invalidate an arbitration agreement, including in *Mitsubishi* itself. In *Gilmer v. Interstate/Johnson Lane Corp.*,[9] the Court refused to apply the doctrine to Age Discrimination in Employment Act claims even though the ADEA expressly authorizes collective actions.[10] The *Gilmer* Court explained that "even if the arbitration could not go forward as a class action, or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."[11] Since *Gilmer*, the Supreme Court has upheld arbitration clauses even where plaintiffs argued that enforcing the class waiver would violate the effective vindication doctrine because it would remove the "economic incentive" to arbitrate individually.[12]

Recently, however, federal circuit and district courts have applied the effective vindication exception to invalidate arbitration agreements that foreclosed ERISA Section 502(a)(2) claims seeking plan-wide relief.[13] These courts have generally acknowledged *LaRue's* holding and accepted that plaintiffs bringing Section 502(a)(2) claims can waive their right to proceed with class or collective actions because the Supreme Court has "blessed that arbitration maneuver many times."[14] Nonetheless, these courts have held that arbitration clauses violate the effective vindication doctrine where they preclude plan-wide relief contemplated by Sections 502(a)(2) and 409, such as recovery of plan-wide losses or removal of fiduciaries or imprudent investment funds. As the 10th Circuit explained in one such case: "the effective vindication exception applies only where an arbitration agreement alters or effectively eliminates substantive forms of relief that are afforded to a claimant by statute. And that is precisely what occurred here [with respect to Section 502(a)(2) and 409(a)]."[15]

Practical and Strategic Considerations Impacting the Decision Whether to Seek Arbitration of Section 502(a)(2) Claims

Even if the effective vindication doctrine does not result in the wholesale invalidation of individual arbitration clauses for ERISA fiduciary breach claims, it does give rise to a number of troublesome, unresolved issues. These issues may ultimately deter plans and plan sponsors from seeking individual arbitration of ERISA Section 502(a)(2) claims, no matter how the caselaw lands on the issue of enforceability.

First, even if an arbitration clause can limit damages to individual monetary losses, the individual arbitration claimant may still be able to seek plan-wide non-monetary relief that could have a significant bearing on the operation of the plan. For example, an arbitrator might require the removal of investment options that are found to have been imprudently selected or retained. This could result in substantial expenses related to conducting a request for proposal for a replacement fund, mapping participants to new funds and providing notice to all plan participants of the changes. Plan fiduciaries may not want to risk this onerous outcome in an individual arbitration proceeding.

Second, ERISA authorizes attorney's fees for a prevailing party. The risk of having to pay to a prevailing litigant the cost of her attorneys' fees, which could well dwarf the monetary award itself, could very well deter defendants from seeking to arbitrate individual claims.

Third, the outcome of individual arbitrations could give rise to complex collateral estoppel issues. Consider, for example, a series of individual arbitrations that challenge the same fiduciary decision. If the plan were to lose one or more of those arbitrations, the plaintiffs in subsequent proceedings may claim that they should prevail under principles of collateral estoppel, which could open the floodgates to successive individual arbitration claims. Even if that were not the case, a plan fiduciary committee that was found to have breached its fiduciary obligations in an individual proceeding may feel obliged to consider implementing plan-wide changes for fear that its failure to do so could constitute an independent fiduciary breach.

These issues all suggest that the seemingly instinctive desire to pursue individual arbitration in lieu of class litigation may need to be reevaluated. But that does not mean that the prospects of arbitration need to be abandoned altogether. Arbitration can have many benefits even if conducted on a class-wide basis. These benefits can include: quicker resolutions, the advantage of a less formal setting, the ability to designate a pool of potential arbitrators with experience in the field, and the ability to control the scope of discovery. In short, arbitration of ERISA fiduciary breach claims may still emerge as a useful tool to the defense bar, but the focus may need to shift away from arbitration as a means to avoid altogether the prospects of class action litigation, and in favor of crafting arbitration agreements that will make such litigation more manageable.

Conclusion

The debate over the enforceability of individual arbitration clauses for ERISA breach of fiduciary duty claims may linger on for some time until perhaps the Supreme Court takes hold of the issue. In the meantime, defendants may be well advised to adjust their expectations and focus on more achievable goals when considering and crafting arbitration agreements.

[1]*CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012).

[2]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

[3]*See Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 620 (7th Cir. 2021) (joining the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits in finding ERISA claims are arbitrable).

[4] 552 U.S. 248 (2008).

[5]*Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019).

[6] *Cooper v. Ruane Cunniff & Goldfarb, Inc.*, 990 F.3d 173 (2d Cir. 2021).

[7] *Munro v. Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018).

[8] 473 U.S. 614, 637 n.19 (1985).

[9] 500 U.S. 20 (1991).

[10]*See* 29 U.S.C. § 216(b) ("An action to recover the liability prescribed in the preceding sentences may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.").

[11]*Gilmer*, 500 U.S. at 32.

[12]*See e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (holding that antitrust claims under Sherman Act were subject to individual arbitration and noting "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy").

[13] *See, e.g.*, *Smith*; *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090 (10th Cir. 2023); *Cedeno v. Argent Tr. Co.*, No. 20-cv-9987, 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021) (appeal pending).

[14]*Smith*, 13 F.4th at 622.

[15]*Harrison*, 59 F.4th at 111011.

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