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Sixth Circuit Again Invalidates ERISA Plan Arbitration Clause

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The Sixth Circuit recently reversed a district court's dismissal, and order requiring arbitration of, a proposed class action alleging fiduciary breaches in connection with the Kellogg Company 401(k) plan. *Fleming v. Kellogg Co.*, 2024 WL 4534677 (6th Cir. Oct. 21, 2024). In so ruling, the Sixth Circuit added to the list of recent decisions in which, under the "effective vindication doctrine," courts have invalidated arbitration provisions that purport to apply to "representative" actions brought under Section 502(a)(2) of ERISA.

Background

Plaintiff, a former participant in Kellogg's 401(k) plan, filed suit under Section 502(a)(2) of ERISA, alleging that fiduciaries of the plan breached their fiduciary duties by permitting the plan to pay excessive recordkeeping and administrative fees. He sought monetary and equitable relief on behalf of the plan, including an order directing Kellogg to restore losses to the plan and to disgorge profits obtained as a result of the alleged breaches, removal of breaching plan fiduciaries, and appointment of an independent fiduciary to manage the plan. Defendants moved to dismiss and compel arbitration, relying on an arbitration clause in the plan document that, in relevant part: (i) mandated individual arbitration of fiduciary breach claims and included a waiver of arbitration on a class or representative basis; and (ii) stripped any arbitrator of authority to decide claims or award relief on a class or representative basis, "*provided, however, that the arbitrator may award any relief otherwise available under ERISA*." The district court granted the motion to dismiss, concluding that the arbitration clause manifested the plan's consent to arbitrate and applied to representative suits brought on behalf of the plan.

The Sixth Circuit reversed and invalidated the arbitration clause. In so doing, it joined with an earlier Sixth Circuit panel and other Circuits in applying the "effective vindication" doctrine, under which courts may invalidate clauses that "prevent parties from effectively vindicating their statutory rights" in an arbitral forum. The Court concluded that "ERISA contemplates both plan-wide remedies for certain breaches of fiduciary duties and the representative actions frequently employed to obtain those plan-wide remedies," and moreover that a claim under ERISA Section 502(a)(2) can be brought *only* as a representative action on behalf of the plan—even if the alleged breach relates to only a single participant's plan account. Because the arbitration clause prohibited a participant from pursuing arbitration on a representative basis, it eliminated the right to bring any fiduciary breach claim under Section 502(a)(2) and thus was unenforceable.

In so ruling, the Court rejected Defendants' efforts to distinguish this case from the others in which arbitration clauses were invalidated, based on the clause's inclusion of the "provided" proviso quoted above. First, the Court described as "illogical" Defendants' argument that, due to the proviso, the clause barred only class, collective, or "group," actions, since the clause elsewhere expressly barred "representative" actions – a term with technical meaning in the context of Section 502(a)(2). Second, the Court disagreed that the clause was salvaged by the proviso's allowance for any remedies permitted by ERISA because, notwithstanding this allowance, the clause limited procedural access to these remedies "by foreclosing the only avenue through which a plaintiff may assert a Section 502(a)(2) claim," *i.e.*, in a representative capacity.

Proskauer's Perspective

This is yet another Circuit-level decision in which an ERISA plan's arbitration clause was held unenforceable under the judicially-created "effective vindication" doctrine. The decision is noteworthy because the Court invalidated the clause despite its expressly permitting arbitrators to award any remedy available under ERISA – a feature of ERISA plan arbitration clauses that earlier decisions at least suggested could salvage such clauses. At the Circuit level, there is a continuing trend towards invalidating any arbitration clauses that limit a participant's ability to bring a representative action under Section 502(a)(2)—with the Ninth Circuit standing alone with a different view at this point. Unless and until the Supreme Court weighs in with contrary authority, plan sponsors and fiduciaries should be cognizant of this trend when implementing or attempting to enforce arbitration clauses.

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