Employee Relations
LAW JOURNAL

ERISA Litigation

Arbitration of ERISA Claims: Courts Grapple with Competing Considerations

Joseph J. Torres and Margaret M. Hlousek

Among the many purposes underlying Congress' enactment of the Employee Retirement Income Security Act ("ERISA") was giving employers flexibility in plan design.[1] This discretion should encourage employers to offer benefits by giving them the ability to decide which benefits to offer and, relatedly, the ability to control the costs and administrative burdens they are willing to assume.[2]

In a related vein, the Federal Arbitration Act's[3] "liberal federal policy favoring arbitration agreements" can provide employees and employers "quicker, more informal, and often cheaper resolutions" of workplace-related disputes.[4]

These two statutes appear to present complementary frameworks. Therefore, one might think the ability of employers to require arbitration of disputes arising under ERISA would be a straightforward proposition. However, as with so many other legal principles, there may be competing considerations that call into question even a seemingly simple premise.

This column will review two decisions, one from the U.S. Court of Appeals for the Ninth Circuit and one pending before the U.S. Court of Appeals for the Seventh Circuit, that have reached opposite conclusions regarding whether ERISA claims may be subject to arbitration where the arbitration clause is contained in the governing plan document. This column also will review the respective arguments that may determine whether or not arbitration of ERISA disputes remains a viable avenue for plans sponsors.

Joseph J. Torres is a partner in Jenner & Block's Chicago office, and is chair of the firm's ERISA litigation practice. Margaret M. Hlousek in an associate in the firm's Litigation Department. They can be reached at *jtorres@jenner.com* and *mhlousek@jenner.com,* respectively.

ERISA Claims May Be Arbitrated

The plaintiff in *Dorman v. Charles Schwab Corp.*[5] worked at Schwab from February 2009 until October 2015.[6] During his employment, he participated in Schwab's 401(k) plan.[7] In December 2014, the plan was amended to include an arbitration provision, effective January 2015.[8] The provision required binding arbitration of any "claim, dispute or breach arising out of or in any way related" to the plan.[9] The amendment further included a class or collective action waiver, even if a party could have otherwise represented other plan participants' interests.[10] During 2014, the plaintiff also enrolled in a compensation plan that required arbitration of any "controversy, dispute or claim arising out of or relating to [his] employment. . . ."[11]

Several years after leaving Schwab, the plaintiff filed an ERISA class action alleging various claims for breach of fiduciary duty and violations of ERISA's prohibited transactions rules.[12] In response, the defendants moved to compel arbitration, pointing to the arbitration provisions described above.[13] The lower court denied defendants' motion, ruling, *inter alia*, that even if plaintiff's claims were covered by the arbitration clauses, prior Ninth Circuit precedent precluded arbitration because class action waivers were deemed unenforceable.[14]

The Ninth Circuit in *Dorman I* addressed the threshold question of whether ERISA claims could be subject to mandatory arbitration.[15] The Ninth Circuit acknowledged that it had previously held in *Amaro v. Continental Can Co.*[16] that "ERISA mandated 'minimum standards [for] assuring the equitable character of [ERISA] plans' that could not be satisfied by arbitral proceedings."[17] According to *Amaro*, this was the case because "[a]rbitrators, many of whom are not lawyers, lack the competence of courts to interpret and apply statutes as Congress intended."[18]

Despite this holding, the Ninth Circuit in *Dorman I* recognized that its prior skepticism had been addressed by subsequent Supreme Court decisions that held "arbitrators are competent to interpret and apply federal statutes."[19] Accordingly, the Ninth Circuit held *Amaro* was no longer binding precedent.[20]

Having resolved that threshold question in *Dorman I*, the Ninth Circuit in *Dorman v. Charles Schwab Corp.* ("*Dorman II*")[21] turned to the question of whether arbitration should be compelled. The Ninth Circuit held the district court erred in denying defendants' motion to compel arbitration for several reasons.

First, the Ninth Circuit held the district court incorrectly concluded that the plaintiff was not bound by the Plan's arbitration provision.[22] Contrary to the district court's findings, the Ninth Circuit noted that the plaintiff participated in the plan for almost a year after the arbitration provision was enacted.[23] And "[a] plan participant agrees to be bound by a provision in the plan document when he participates in the plan while the provision is in effect."[24]

Second, the Ninth Circuit held the district court erred in holding that the plaintiff did not agree to arbitrate his ERISA § 502(a) claims.[25] This was incorrect because such claims belong to the plan, not the individual.[26] Accordingly, the relevant inquiry was whether the plan agreed to arbitrate such claims, and it clearly had by including such a requirement in the plan document.[27] The Ninth Circuit found there was no question that the plaintiff's claims fell within the scope of the plan's arbitration provision.[28] And furthermore, the Ninth Circuit held the plaintiff's agreement to arbitrate did not "give up any substantive rights that belongs to other Plan participants."[29]

Third, the Ninth Circuit rejected the district court's conclusion that inclusion of an arbitration provision was an effort by the plan to insulate fiduciaries from liability.[30] Rather, the provision merely selected a forum "that offered 'quicker, more informal, and often cheaper resolutions for everyone involved."[31] Because the arbitration provision did not "relieve a fiduciary from responsibility or liability," it did not violate 29 U.S.C. § 1110(a), which renders provisions that attempt to do so, void as against public policy."[32]

Fourth, the Ninth Circuit found the district court's conclusion that the arbitration provision violated the National Labor Relations Act was foreclosed by the Supreme Court's decision in *Epic Sys. Corp. v. Lewis*.[33] And because ERISA contained no congressional command against arbitration, "an agreement to arbitrate ERISA is generally enforceable."[34]

Fifth, the Ninth Circuit held that although ERISA Section 502(a)(2) claims seek relief on behalf of the plan, "such claims are inherently individualized when brought in the context of a defined contribution plan like that at issue."[35] And since the plaintiff and the plan agreed to arbitration on an individualized basis, the plan's "waiver of class-wide and collective arbitration must be enforced according to its terms."[36]

Dorman II, therefore, rested its conclusion that arbitration should be required on three primary principles:

- Participation in a plan after an arbitration provision is added constitutes consent to be bound by the arbitration requirement;
- Individual agreements to arbitrate Section 502(a)(2) claims did not impact any rights to recovery that the plan or any other individual may possess; and
- There was no statutory basis to exclude ERISA from the federal policy favoring arbitration.

ERISA Claims May Not Be Arbitrated

In contrast to *Dorman*, the court in *Smith v. Greatbanc Tr. Co.*[37] found that the plaintiff's claims were not subject to arbitration. The

plaintiff in *Smith* participated in the defendant's employee stock ownership plan ("ESOP") while he was employed, and for several years after he terminated his employment.[38] While the plaintiff was still a participant, the plan added an arbitration provision that required arbitration of any claim "which arises out of, relates to, or concerns" the plan.[39] The provision also prohibited any group, class or representative arbitrations.[40]

Plaintiff filed suit alleging defendants breached their fiduciary duties and also engaged in prohibited transactions.[41] In response, the defendants moved to compel arbitration, citing the provision that had been added while plaintiff was still a participant.[42] In response, plaintiff argued that the arbitration provision could not be enforced because he:

- Was never notified of the plan amendment;
- Never agreed to the arbitration provision; and
- Did not receive consideration in exchange for accepting the provision.[43]

Plaintiff additionally argued the arbitration provision was unenforceable under the Federal Arbitration Act because it prevented him from pursuing plan-wide remedies under ERISA Section 502(a)(2).[44]

The *Smith* court began its analysis by "assuming arguendo that ERISA claims are generally arbitrable."[45] However, the court then proceeded to hold that whether the parties agreed to arbitrate was "governed by state-law principles of contract formation."[46]

Applying those principles,[47] the court noted that the defendants did not attempt to show the presence of any contract formation elements; namely, offer, acceptance or consideration.[48] Rather, citing *Dorman II*, the *Smith* defendants argued that "plaintiff agreed to be bound by the [arbitration] amendment by merely participating in the Plan while the provision was in effect."[49]

The *Smith* court, however, declined to apply *Dorman II*.[50] In addition to being an unpublished, non-binding decision from another circuit, the court stated it was not clear that *Dorman II* "was applying any state's law to the question of whether there was an agreement to arbitrate."[51] The *Smith* court further suggested that the Ninth Circuit "gave no reasoning for its determination that continued participation in a plan is the equivalent of any agreement to any plan amendments."[52] Thus, even if the plan consented to arbitration, as was the case in *Dorman II*, the *Smith* court held defendants' argument would have more force if there was evidence plaintiff had been notified of the amendment that added the arbitration provision.[53]

Thus, absent any controlling Seventh Circuit precedent, the *Smith* court was "unwilling to conclude that the traditional contract analysis that governs the issue of the existence of an arbitration agreement is

displaced in the context of ERISA plans."[54] Instead, the *Smith* court cited with approval the district court's opinion in *Dorman*, which held an arbitration provision "executed unilaterally by the plan sponsor" "should not prevent plan participants and beneficiaries from vindicating their rights in court."[55]

Additionally, the *Smith* court found that the arbitration provision was unenforceable because it restricted plaintiff to only pursuing individualized relief, notwithstanding the fact that ERISA Section 502(a)(2) allowed individuals to sue for plan-wide relief.[56] In so holding, the *Smith* court disagreed with the Ninth Circuit's conclusion in *Dorman II* that such an outcome was aligned with the Supreme Court's decision in *LaRue*.[57]

According to the *Smith* court, *LaRue* did not "suggest that an individual plan participant's claim can somehow be split from a claim seeking plan-wide relief."[58] The *Smith* court, therefore, did "not see how plan-wide relief could be achieved in individual arbitration . . . which . . . limits claimants to 'individual relief.'"[59]

Thus, in contrast to *Dorman II*, the *Smith* court's refusal to compel arbitration turned on the following points:

- A failure to show the participant's agreement to arbitrate under state-law contract formation principles;
- Refusal to allow participation in the plan itself to provide the necessary evidence of the participant's consent to arbitrate, where the provision was "unilaterally" included by the plan sponsor;
- A determination that the arbitration provision was inconsistent with ERISA's Section 502(a)(2) provision allowing individual participants to pursue claims for plan-wide relief.

Which Analysis Gets Its Right?

The *Smith* case is now pending before the Seventh Circuit.[60] Therefore, we should see some additional guidance as to which court properly answered the following key questions.

Can Consent Be Established by Continued Plan Participation?

The competing approaches taken by *Dorman II* and the lower court in *Smith* present a clear divergence of views – does a participant's continued plan participation after an arbitration provision is included provide sufficient evidence of consent? Or must there be evidence that the

participant individually agreed to arbitrate his or her claim as part of a bilateral contract formation?

There are several features of ERISA-governed plans that would strongly suggest the Ninth Circuit in *Dorman II* has the better of this argument.

First, the *Smith* court's contract formation approach ignores the fact that ERISA gives plan sponsors broad discretion to decide when, and under what circumstances, it wishes to establish, amend or eliminate the employee benefits it elects to offer plan participants.[61]

Given this framework, it is incongruous with the rights ERISA has given plan sponsors administering unilaterally-established benefits to impose a requirement that arbitration provisions only be allowed where their inclusion turns on a bilateral negotiation between the sponsor and plan participants.

Second, the reliance on state-law contract formation principles to determine whether an agreement to arbitrate exists runs counter to ERISA's broad preemptive effect.[62] It is wholly inconsistent with Congress' directives in that regard to allow state-law principles to supplant ERISA's own rules regarding a plan sponsor's ability to unilaterally determine the terms on which it will provide employee benefits to participants.[63]

Finally, a requirement that individual consent to arbitrate must be established conflicts with ERISA's existing rules regarding how plan amendments are implemented and communicated. As discussed above, plan sponsor may generally amend benefit plans without participant consent. And ERISA contains rules regarding when such changes must be communicated.[64] There is no indication that ERISA contains different notification provisions for plan amendments addressing arbitration. And courts may not infer such requirements.[65]

In light of the foregoing, it would appear the Ninth Circuit in *Dorman II* correctly concluded that continued participation in a plan after an arbitration provision is added constitutes sufficient consent to be bound by that provision.

Does Section 502(a)(2)'s Allowance for Plan-Wide Relief Prevent Enforcement of Arbitration Provisions That Only Allow Arbitration of Individualized Claims?

The other key divergence between *Dorman II* and the lower court in *Smith* relates to whether prohibition of class-wide arbitration claims runs counter to ERISA Section 502(a)(2)'s allowance for participants to pursue plan-wide relief. As discussed above, the Ninth Circuit in *Dorman II* found no issue in the case before it, given the Supreme Court's holding in *LaRue* that such claims are individualized, at least where the claims relate to defined contribution plans. In contrast, the lower court in *Smith* found the inability to seek plan-wide relief inconsistent with the rights granted by ERISA to participants to seek such relief.

Resolution on this issue would therefore appear to turn on whether a plan's prohibition on class-wide arbitration can be reconciled with the rights allowed under Section 502(a)(2). In other similar contexts, the Supreme Court has held that a prohibition on class arbitration did not violate an individual's substantive statutory rights.[66] And the fact that one individual may not pursue plan-wide relief in no way limits other participants, or the Department of Labor, from pursuing other claims for relief. Indeed, in the case of the Department of Labor, that would include pursuing class-wide claims for relief.

Despite the foregoing logic, there are some Section 502(a)(2) claims, such as those involving defined benefit plans, that may not fit as neatly within the Ninth Circuit's "individualized claim" rationale. Thus, whether the allowance for seeking plan-wide relief under Section 502(a)(2) is in fact incompatible with individual arbitration of ERISA claims may end up being the issue upon which the conflict between *Dorman II* and *Smith* is resolved.

Conclusion

The Supreme Court has clearly put to bed the question of whether employment-related statutory claims may be subject to arbitration. The Supreme Court has also resolved the question of whether waiver of class arbitration claims should be upheld. Both of those developments, along with the broad rights granted plan sponsors in unilaterally establishing benefit plans, would strongly argue in favor of similarly allowing arbitration of ERISA claims. But whether such claims will be allowed may turn on how courts reconcile the foregoing with ERISA's specific remedial scheme.

Notes

1. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013).

2. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

3. 9 U.S.C. §§1-16.

4. *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018).

5. *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019).

6. *Id.* at 1109.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1009-10.

11. *Id.* at 1010.

12. *Id.*

13. *Id.*

14. The Ninth Circuit found the lower court erroneously held the arbitration provision was unenforceable because it had been enacted after the plaintiffs ceased participating in the plan, and/or that the provision had been added after the plaintiff filed suit. *Id.* at 1110, 1111 (citing *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *reversed by Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)).

15. *Id.* at 1109.

16. *Amaro v. Continental Can Co.*, 724 F.3d 747 (9th Cir. 1984).

17. *Dorman I* at 1111 (quoting *Amaro*, 724 F.2d at 752).

18. *Amaro* at 750.

19. *Dorman I* at 1111 (citing *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013)).

20. *Id.* at 1112.

21. *Dorman v. Charles Schwab Corp.*, 780 Fed. Appx. 510 (9th Cir. 2019).

22. *Id.* at 512-13.

23. *Id.*

24. *Id.* at 513 (citing *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723-24 (9th Cir. 2000)). The cited portion of *Chappel* does not expressly address whether consent arises from a participant's continued participation in the plan. Rather, the case proceeds from the premise that a participant must comply with all applicable plan provisions, including, in that case, the requirement that any disputes be arbitrated. *Chappel*, at 734 (citing *Graphic Communications Union v. GCIU-Employer Retirement Benefit Plan*, 917 F.2d 1184, 1187-88 (9th Cir. 1990)).

25. *Dorman II* at 513. Section 502(a)(2) allows a participant, among others, to bring a claim for breach of fiduciary duty under 29 U.S.C. § 1109. Such a claim requires a fiduciary who violates that provision to "make good to such plan any losses to the plan." *Id.*

26. *Id.* (citing *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1092 (9th Cir. 2018)).

27. *Dorman II* at 513.

28. *Id.*

29. *Id.* at 514.

30. *Id.* at 513.

31. *Id.* (quoting *Lewis*, 138 S. Ct. at 1621).

32. *Dorman II* at 513.

33. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). *Dorman II*, 780 F. App'x at 513.

34. *Dorman II* at 513-14 (citing *Williams v. Imhoff*, 203 F.3d at 758, 767 (10th Cir. 2000) and *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996)).

35. *Id.* at 514 (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008)).

36. *Id.* (quoting *Italian Colors* 570 U.S. at 233).

37. *Smith v. Greatbanc Tr. Co.*, No. 20 C 2350, 2020 WL 4926560 (N.D. Ill. Aug. 21, 2020).

38. *Id.* at *1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at *2. (citing, *inter alia*, *Dorman I*).

46. *Smith* at *2 (citing *Wis. Local Gov't Prop. Ins. Fund v. Lexington Ins Co.*, 840 F.3d 411, 414 (7th Cir. 2016)).

47. The parties agreed Missouri law would control if state law principles applied. *Id.*

48. *Smith* at *2.

49. *Smith* at *3.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (quoting *Dorman v. Charles Schwab & Co.*, No. 17-CV-00285-CW, 2018 WL 467357, *5 (N.D. Cal. Jan 18, 2018), *rev'd sub nom. Dorman II*, 780 F. App'x 510).

56. *Smith* at *4.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See Smith v. Board of Directors of Triad Manufacturing Inc.*, No. 20-2708 (7th Cir.).

61. *Heimeshoff*, 571 U.S. 108 (recognizing that employers have "large leeway" to determine the contours of employee benefit plans "as they see fit"). *See, also, Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (ERISA does not "mandate what kind of benefits employer must provide *if they choose* to have such a plan.") (emphasis added).

62. *See* 29 U.S.C. § 1144(a).

63. *Heimeshoff*, 571 U.S. 108; *Lockheed*, 517 U.S. at 887.

64. *See, e.g.*, 29 C.F.R. § 2520.104b-3 (discussing deadline for issuing of summaries of material modifications following a plan amendment).

65. *Dorman II* at 513-14.

66. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (involving claims under ADEA which also allow individuals to bring collective suits).