Ninth Circuit Greenlights Individual Arbitration Provisions in ERISA Plan Documents

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In recent years, the proliferation of ERISA class action lawsuits has commanded the attention of retirement plan sponsors and fiduciaries. These lawsuits have raised a wide range of claims against plan fiduciaries, including allowing a plan to pay excessive fees, failing to force participants to sell company stock before the stock's market value declined, and relying on a mortality table other than that preferred by the participant bringing the suit. Plan sponsors and fiduciaries mindful of the need to minimize risk in this area may wish to consider the Ninth Circuit's recent decision in *Dorman v. Charles Schwab Corp.* affirming that provisions in plan documents requiring individual arbitration of ERISA claims can be enforceable.

The Lay of the Land Before *Dorman*

Over the decades since the Federal Arbitration Act ("FAA") took effect in 1926, the Supreme Court has repeatedly ruled in favor of arbitration in a variety of circumstances, emphasizing that the FAA "reflects … a liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). As a result, numerous courts have recognized that ERISA claims are arbitrable. Until the *Dorman* decision, however, the Ninth Circuit stood as an outlier, rejecting arbitration of ERISA claims on the grounds that "arbitrators, many of whom are not lawyers, lack the competence of courts to interpret and apply [ERISA]." *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984) (overruled).

Because ERISA allows plan participants to sue on behalf of their entire plan (which plaintiffs sometimes bring as putative class actions and sometimes do not), any discussion of arbitration in the ERISA context requires consideration of whether it is the entire plan's claim being sent to arbitration or just the individual participant's claim. Most plan sponsors and fiduciaries would prefer to avoid plan-wide arbitration, for the reasons discussed further below. As a result, arbitration agreements in many contexts, include ERISA, often include a term providing that the individual is waiving their right to

proceed on a class or representative basis (known as a "class action waiver"). Last May, the Supreme Court reaffirmed that class action waivers are effective and enforceable. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that the National Labor Relations Act does not provide a basis for overruling contracting parties' agreement to enter into class action waiver).

Dorman Addresses ERISA Plan Arbitration and Class Action Waiver

Against this backdrop, the Ninth Circuit in *Dorman* was presented an arbitration provision, including a class action waiver, that was embedded within an ERISA plan document. The court decided to enforce the provision, but to do so it had to issue two separate rulings. First, it explicitly overruled its prior precedent holding that ERISA claims are not arbitrable. *See Dorman v. Charles Schwab Corp.*, No. 18-15281, 2019 WL 3926990, at *3 (U.S. Aug. 20, 2019) ("*Dorman* I") (recognizing that "arbitrators are competent to interpret and apply federal statutes" and that the Supreme Court has held that "there is nothing unfair about arbitration – even arbitration on an individual basis"). Second, it addressed the case at hand, holding that, because the arbitration provision was included within the plan document, the plan itself had consented to arbitration. *See Dorman v. Charles Schwab Corp.*, No. 18-15281, 2019 WL 3939644, at *1 (U.S. Aug. 20, 2019) ("*Dorman* II"). At the same time, the court noted, "[a]lthough § 502(a)(2) claims seek relief on behalf of a plan, the Supreme Court has recognized that such claims are inherently individualized when brought in the context of a defined contribution plan like that at issue." *Id*. at *2 (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008)). Therefore, and in light of *Epic Systems*, the arbitration could be limited to the participant's individual claims. *Id*.

What Does The *Dorman* Decision Mean To Plan Sponsors?

Although the *Dorman* I decision did little more than catch the Ninth Circuit up to other courts in recognizing that ERISA claims are arbitrable, *Dorman* II arguably clears the way for more widespread use of individual arbitration provisions in plan documents. The arbitrability of ERISA claims was well established outside the Ninth Circuit, and individuals' ability to contract away their rights to bring class-wide litigation generally recognized. Upholding the inclusion of such provisions *in the plan document itself* rather than in a separate individually-signed contract, however, is a more remarkable ruling. Such provisions had been enforced by other courts on occasion in the past, but an unequivocal statement by an appellate court on the issue will likely have a more far-reaching effect. Those in the ERISA community will watch to see whether other courts follow *Dorman* or express concerns that the ruling conflicts with ERISA's provisions empowering participants to bring suit on behalf of their entire plans.

In light of the *Dorman* decisions, plan sponsors may wish to consider revisiting their plan documents to add mandatory arbitration provisions. A threshold question for plan sponsors is to determine whether they would prefer to resolve plan-related disputes in federal court or through arbitration, and whether through class/plan-wide or individual litigation. Although plan sponsors should consider the unique aspects of their plans and their own preferences, most plan sponsors would avoid forcing arbitration of plan-wide ERISA claims in light of the following aspects of federal court litigation versus arbitration:

ERISA Litigation in Federal Court

- Arguably more adherence to legal precedent, which may increase predictability
- Formal appeal structure
- Generates precedent that may be helpful in future cases
- Typically more expensive than arbitration
- Class action process provides structure that generates sufficient recovery for plaintiff firms to bring more marginal claims
- Class action provides final resolution for all class members

Arbitration of ERISA Claims

- Less predictable, but could draft plan document to require arbitrators with specific background or ERISA familiarity
- Very limited right to appeal
- Does not generate precedent
- Typically less expensive than federal court

Plan-wide arbitration may risk the adjudication of a significant dollar amount of total claims by an individual with potentially little ERISA experience, with practically no likelihood of appeal. For this reason, most plan sponsors who choose to include an arbitration provision in the plan document would couple it with a class-action waiver. Provisions requiring arbitration of individual claims may make the plan a far less appealing target to plaintiffs' lawyers. On the other hand, the plan could face the nuisance of repeated arbitrations of individual claims due to the lack of binding precedent.

Conclusion

The *Dorman* decision should be welcome news to plan sponsors that may be seeking to utilize arbitration as a means to avoid litigating disputes in federal courts. Employers have generally seen the use of mandatory arbitration as a means to reduce the costs and burdens of resolving matters of controversy. However, as the above discussion illustrates, the use of mandatory arbitration in the context of ERISA plan controversy should be carefully considered, and different plan sponsors may prefer different dispute mechanisms. Thus, plan sponsors should consider the pros and cons of including arbitration clauses within their plan documents before deciding whether arbitration of ERISA claims the right choice for your plan. If you have additional questions, we would be happy to discuss these issues in more detail and how they may apply to your plan's unique circumstances.