

Courts Split on Class Action Waivers, Arbitration Provisions in ERISA Litigation

A Practical Guidance® Article by Todd D. Wozniak, Lindsey R. Camp, Chelsea Ashbrook McCarthy, and Megan C. Eckel, Holland & Knight LLP



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Courts have struggled through the years when considering the enforceability of mandatory class action waivers and arbitration provisions contained within Employee Retirement Income Security Act of 1974 (ERISA) plans and other employment-related agreements. Courts have taken various approaches in determining whether class action waivers and arbitration provisions are enforceable in ERISA-based litigation. These approaches are discussed below.

General Contract Principles

Recent district court decisions out of the Sixth and Seventh Circuits have considered the issue as one of general contract enforcement, engaging in an individualized state law analysis to determine whether a plan participant can be compelled to arbitrate his or her ERISA breach of fiduciary duty claims.

Lack of Consideration

The U.S. District Court for the Southern District of Illinois recently denied a motion to compel arbitration of former plan participants' breach of fiduciary duty claims when it determined that the plan amendment adding a mandatory arbitration provision was invalid because it lacked necessary consideration.

In *Hensiek v. Bd. of Dirs. of Casino Queen Holding Co.*, 2021 U.S. Dist. LEXIS 17954 (S.D. Ill. 2021), several former employees and participants in the company's Employee Stock Ownership Plan (ESOP) filed a putative class action alleging breach of fiduciary duty claims centered around two transactions:

- The ESOP's alleged overpayment when it purchased company stock from selling shareholders –and–
- The alleged sale of “virtually all of” the company's real property to pay off debt owed to the selling shareholders

Defendants moved to compel individual arbitration based on an arbitration and class action waiver provision contained in the plan document. In their motion to compel, the defendants argued three main points:

- The arbitration amendment was validly adopted pursuant to the terms of the plan that expressly reserved to the company the right to amend or terminate the plan.
- Plaintiffs' breach of fiduciary duties claims fall within the scope of the plan's arbitration provisions. –and–
- Plaintiffs must bring their arbitration claims on an individual basis given the class action waiver contained in the plan amendment.

Plaintiffs opposed the motion by arguing: a) the defendants cannot compel arbitration of the ERISA claims because Plaintiffs did not enter into a valid agreement to arbitrate, and b) even if the parties agreed to arbitrate Plaintiffs' claims, the arbitration amendment is unenforceable.

In considering the motion to compel arbitration, the court's analysis largely focused on "whether the agreement to arbitrate reflected in the amendment is enforceable under basic principles of contract law." The district court applied principles of Illinois contract law and determined that, because the plan amendment containing the arbitration provision lacked 'necessary consideration,' it was not a valid and enforceable contract provision for the purposes of the Federal Arbitration Act." The district court's decision is on appeal to the U.S. Court of Appeals for the Seventh Circuit.

Lack of Agreement between the ESOP and the Company

Two days after the U.S. District Court for the Southern District of Illinois' decision in *Hensiek*, the U.S. District Court for the Southern District of Ohio denied a motion to compel arbitration because it found that there was no agreement between the ESOP and the company to arbitrate plan disputes.

In *Hawkins v. Cintas Corp.*, plaintiffs, former employees and participants in the company's defined contribution retirement plan brought claims individually and on behalf of other similarly situated participants in the plan. *Hawkins v. Cintas Corp.*, 2021 U.S. Dist. LEXIS 14766 (S.D. Oh. 2021). They contended that the company "breached fiduciary duties of loyalty and prudence by mismanaging and failing to investigate and select better cost options for the plan." Plaintiffs also alleged that the company "failed to monitor the decision-making of the plan's committee groups and/

or individual fiduciaries." Based on an arbitration provision contained in the plaintiffs' employment agreements, defendants filed a motion to compel arbitration.

Plaintiffs argued that the motion to compel arbitration should be denied because the action was filed on behalf of the plan, and there is no arbitration agreement between the plan and the company. In response, the company argued that because the plan is a defined contribution plan with individual accounts, plaintiffs' claims are inherently individualized. Because the claims are inherently individualized, defendants argued that plaintiffs' employment agreements mandating arbitration govern the dispute and, as such, plaintiffs should be compelled to individually arbitrate their claims.

Finding that the relief sought by plaintiffs was to benefit the entire plan, and not their individual plan accounts, the court analyzed whether there was a valid agreement to arbitrate between the plan and the company. Because the company presented "no evidence that a Plan document existed binding the Plan to arbitration[,] the court held that there was "no valid agreement between the Plan and the [company] consenting to an arbitrable forum." Based on this analysis, the court denied defendants' motion to compel.

Plan Consent

Other courts have relied on the language of the plan documents and other employment-related documents to determine whether or not a class action waiver and/or arbitration provision can be enforced against a plan participant. Under this quasi-unilateral contract theory approach, if the plan contains an arbitration provision and/or class action waiver, some courts have concluded that plaintiffs must arbitrate their ERISA claims on an individual basis because the plan has consented to arbitration of ERISA claims.

Recently, in 2019, the U.S. Court of Appeals for the Ninth Circuit concluded in *Dorman v. Charles Schwab Corp.* that both the participant and the plan were bound by the plan's arbitration provision requiring that all ERISA fiduciary claims be arbitrated on an individual basis. *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019). The Ninth Circuit reasoned that because the plan terms require individual arbitration, the plan had consented to arbitration. The Ninth Circuit did not view the issue as one requiring additional consideration or negotiation, and instead found that "[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."

Consistent with that approach, the U.S. District Court for Eastern District of Texas recently rejected the plaintiffs' argument that the plan amendment at issue, which added venue and arbitration provisions, required consideration. *Coleman v. Brozen*, U.S. Dist. LEXIS 79367, at *9 (E.D. Tex. May 6, 2020). In *Coleman v. Brozen*, the court noted that "[n]ot only do Plaintiffs fail to acknowledge that the Plan allows [the plan sponsor] to amend or terminate it any time, but as a general rule, ERISA plan administrators, including employers or other plan sponsors, have the right at any time to freely adopt, modify, or terminate pension benefit plans[.]" Because of this, the court stated that "[the plan sponsor] was therefore free to amend or modify the Plan at any time, and it was not obligated to seek Plaintiffs' assent, negotiate with Plaintiffs, or furnish Plaintiffs consideration for the same[.]" Accordingly, the court enforced the venue provision against the plan participants.

Consistent with ERISA

In *dicta*, courts also have questioned whether plan arbitration provisions that include class action waivers are fully consistent with ERISA. For instance, in *Hensiek*, the court noted that cases cited by defendants in their motion to compel arbitration "reflect an evolution of thought towards allowing contracted-for alternatives to dispute resolution." The court went on to identify two reasons for this shift:

1. "the recognition that arbitration is not necessarily inadequate to protect substantive rights of the parties to the agreement to arbitrate [;]" –and–
2. "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute."

The court, however, stopped "short of making the declaration that the statutory ERISA claims raised in Plaintiffs' Complaint are arbitrable[.]" As discussed above, the court concentrated its enforceability analysis on basic principles of contract law.

More recently, the U.S. Court of Appeals for the Second Circuit concluded that ERISA fiduciary claims did not fall within the scope of an arbitration provision contained in an employee handbook. In *Cooper v. Ruane Cunniff & Goldfarb, Inc.*, a divided Court held that an arbitration agreement contained in the employee handbook of the individual's employer and plan sponsor did not encompass the ERISA breach of fiduciary duty claims at issue in the lawsuit.

Cooper v. Ruane Cunniff & Goldfarb Inc., 2021 U.S. App. LEXIS 6357 (2nd Cir. 2021). The arbitration provision in the employee handbook that the plaintiff signed mandated arbitration of "all legal claims arising out of or relating to employment, application for employment, or termination of employment." The dispute in the case largely focused on whether the "relating to employment" language was broad enough to include the ERISA fiduciary claims at issue. Ultimately, the Second Circuit concluded that it was not. To support its conclusion, the majority stated, in *dicta*, that reading the arbitration agreement to encompass the ERISA fiduciary duty claims could be in tension with the Second Circuit's 2006 precedent requiring parties suing on behalf of an ERISA plan under 29 U.S.C. § 1132(a)(2) to demonstrate their adequacy as a plan representative. The Court reasoned that requiring individual arbitration may not be consistent with this plan representative requirement.

The Court's *dicta* discussion, however, failed to address the intervening 2008 U.S. Supreme Court decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, which concluded that in the context of a defined contribution plan, participants can sue for breach of fiduciary solely on behalf of their individual plan account. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008). As such, it is unlikely that the *dicta* will gain traction in future disputes involving the propriety of compelling individual arbitration of ERISA claims.

A current appeal pending in the Seventh Circuit from a decision issued by the U.S. District Court for the Northern District of Illinois also tees up the issue as to whether compelling individual arbitration is consistent with ERISA. The appeal follows the district court's denial of defendants' motion to compel arbitration in a case involving the Triad Manufacturing ESOP. In the appeal, Triad Manufacturing Co.'s Board of Directors (the Board) argued, among other things, that "[a]s federal statutes 'touching on the same topic,' ERISA and the FAA can and should be read in concert," and thus allow arbitration clauses in retirement plan documents. The issue of whether an arbitration provision and class action waiver is consistent with ERISA was the focus of the oral argument at the end of March. During oral argument in front of the Seventh Circuit panel, counsel for the Board argued that it is the plan's consent to the arbitration provision and class action waiver that is relevant – not the individual participant's consent. Additionally, in response to questioning by the Seventh Circuit panel, counsel for the Board argued that compelling individual arbitration would not preclude a plan participant from obtaining any equitable relief that would be available under ERISA, including removal of a plan fiduciary. A ruling on the appeal is expected later in 2021.

Key Considerations

Without clear direction from the Supreme Court or legislative action, district courts and circuit courts of appeal will continue to create uncertainty around the enforceability of class action waivers and/or arbitration provisions in plan and other employment-related documents in ERISA-based litigation. The decisions discussed above, however, do provide a roadmap of critical issues for plan sponsors to consider and to discuss with ERISA counsel.

Holland & Knight's ERISA litigators have significant experience advising plan sponsors regarding the pros and cons of including arbitration provisions and class action waivers in plan documents and other employment-related documents. They can help identify best practices to increase the likelihood that those provisions will be enforceable.

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