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Arbitration of ERISA Claims: What's the Deal?

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Litigation under the Employee Retirement Income Security Act of 1974, as amended, (ERISA) has steadily continued in recent years. Employers and plan sponsors are surely considering ways to minimize costs and publicity, should they get sued. Arbitration—dispute resolution before an arbitrator or group of arbitrators instead of a judge—may seem attractive. It can certainly be less expensive, and more private, than going to federal court.

The Ninth Circuit recently opined however, that an arbitration agreement, signed by participants at the start of their employment—not signed by anyone with authority to bind an ERISA plan and not part of the plan documents—cannot require participants who file a breach of fiduciary duty claim "on behalf of the plan" to submit those claims to arbitration.[1] This article will recap the reasoning of that decision, and what questions remain unanswered.

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ARE MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS ENFORCEABLE?

The Federal Arbitration Act (FAA) governs arbitration agreements in contracts involving transactions in interstate commerce, including employment contracts.[2] The FAA "was enacted in . . . response to widespread judicial hostility to arbitration agreements."[3] In short, the FAA states that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[4]

Early Supreme Court decisions expressed reluctance to enforce arbitration clauses within contracts of adhesion—those formed between parties with uneven bargaining power, as is often the case with employers and employees.[5] Furthermore, the Supreme Court was similarly reluctant to enforce the FAA where federal statutory rights were implicated.[6] However, in a series of cases throughout the 1980s, the Supreme Court modified its approach toward arbitration. In particular, in 1983 the Court noted its (frequently cited) edict that the FAA embodies a "liberal federal policy favoring arbitration agreements," one which should presumably color judicial decision making "notwithstanding any state substantive or procedural policies to the contrary."[7] Thereafter, "the Supreme Court abandoned its prior skepticism regarding arbitration of federal claims and held that arbitration agreements could be enforced with respect to a broad range of federal statutes: against consumers seeking to vindicate federal antitrust laws, investors seeking to vindicate the securities laws, and employees seeking to vindicate federal anti-discrimination laws."[8] In the intervening years, the Supreme Court has continued to broaden the scope of the FAA, holding that nearly all federal statutory claims are arbitrable unless Congress expressly provides otherwise.[9]

In a significant 1991 decision—*Gilmer v. Interstate/Johnson Lane*, the Supreme Court upheld the enforceability of mandatory employment arbitration agreements.[10] Since then, American employers are increasingly requiring employees to sign mandatory arbitration agreements. According to a 2017 study by the Economic Policy Institute,[11] since the early 2000s, the percentage of employees subject to mandatory arbitration clauses has more than doubled and now exceeds 55 percent. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration agreements. And, of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures.

Because the FAA mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed, "the FAA limits courts' involvement to determining: (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue."[12] "If the response is affirmative on both counts, then the [FAA] *requires* the court to enforce the arbitration agreement in accordance with its terms."[13] Notably, the party opposing arbitration—usually the employee—bears the "burden of proving that the claims at issue are unsuitable for arbitration."[14]

CAN EMPLOYEE-PARTICIPANTS BE FORCED TO ARBITRATE ERISA CLAIMS?

There are generally two types of claims that may be brought under ERISA. First, a participant can bring a claim under ERISA Section 502(a)(1)(B) "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[15] Such claims are most often individualized claims, regarding health, disability, or other types of insurance benefits. Second, a participant can bring a claim under ERISA Section 502(a)(2) for breach of fiduciary duty.[16] Such claims are brought on behalf of the plan itself, requiring the fiduciary to "make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan."[17]

The plain language of ERISA itself does not explicitly permit, or prohibit, arbitration for either type of ERISA claim. As such, courts have generally held that Congress "did not intend to prohibit arbitration of statutory ERISA claims."[18] This seems to make sense for individual claims for benefits brought under Section 502(a)(1)(B). But what about claims for breach of fiduciary duty brought "on behalf of" a plan under Section 502(a)(2)?

This issue was recently brought to light in *Munro v. University of Southern California*.[19] In *Munro*, participants in the University of Southern California retirement plan filed an action against the university and others, alleging violations of fiduciary duties under ERISA Section 502(a)(2) regarding the fees in the university's retirement plan. This case was one of a wave of class action lawsuits filed since 2016 against over a dozen private universities alleging mismanagement of their Section 403(b) plans.[20]

In response, the university filed a motion to compel arbitration, based upon arbitration agreements that the named plaintiffs signed upon beginning their employment. Plaintiffs argued that their ERISA claims were not arbitrable because "[o]ne of the purposes of Congress in enacting ERISA was to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'"[21] Even though Plaintiffs signed arbitration agreements, Plaintiffs argued they were not required to arbitrate their fiduciary duty claims under 29 U.S.C. Sections 1132(a)(2) and 1109 because claims under 29 U.S.C. Sections 1132(a)(2) and 1109 are brought on behalf of the plans themselves, and plaintiffs' individual arbitration agreements cannot bind the plans. Although the university agreed that plaintiffs' arbitration agreements cannot bind the plans, the university argued that the agreements still bind plaintiffs—and since it was plaintiffs bringing the claim on behalf of the plans, plaintiffs were required to arbitrate.

Citing ample case law from within the Ninth Circuit, the *Munro* district court held that, in general, ERISA claims *are* potentially subject to arbitration when the parties have executed a valid arbitration agreement.[22] The district court nevertheless rejected the university's motion to compel arbitration of plaintiffs' breach of fiduciary duty claims. Specifically, the district court noted that numerous courts have held that "waivers" and "releases" signed by individual participants cannot bar claims made by the same participants on behalf of a retirement plan under ERISA Section 502(a)(2) because "Section 502(a)(2) claims are, by their nature, plan claims."[23] The court was persuaded that the same rule should apply to participants' agreements to arbitrate. In short, "[j]ust as a participant suing on behalf of a plan under Section 502(a)(2) cannot waive a plan's right to pursue claims, a participant cannot waive a plan's right to file its claims in court."[24]

The district court rejected the university's attempt to draw a line between: (1) a participants' ability to release their right to pursue a plan's claims, and (2) a participants' ability to release their right to pursue a plan's claims in court.[25] The district court noted that—much like the instances where the plans have not consented to "release" their right to pursue claims, here, the plans have not consented to release their rights to proceed in court.[26] The district court went on to reason that, when a suit is brought on behalf of a plan under Section 502(a)(2), the lawyer bringing the suit is litigating the *plan's* claims. [27] Because the claims belong to *the plan*, *the plan* occupies the position of a client, and is the one vested with the right to decide when to settle or submit to arbitration.[28]

In so holding, the district court noted how its opinion "makes practical sense and is closely aligned with the goals of ERISA."[29] Specifically, one of ERISA's main purposes is "[t]o protect pension plans from looting by unscrupulous employers and their agents."[30] So, the court reasoned that:

> If the Court were to hold participants' arbitration agreements controlled their Section 502(a)(2) claims, fiduciaries could mitigate their ERISA obligations to their plans and erect barriers to ERISA enforcement on behalf of plans by requiring employees to

> sign arbitration agreements—including provisions requiring confidentiality, expedited arbitration procedures, limited discovery, required splitting of arbitrators' fees, and mandatory payment of the prevailing party's attorneys' fees—as a condition of employment. Given that Section 502(a)(2) actions are almost exclusively brought by participants, this would (1) guarantee fiduciaries would essentially never be held to account for their potential wrongdoings in court and (2) give fiduciaries many procedural advantages at the outset of any Section 502(a)(2) action that they would not be entitled to in a court proceeding. Allowing fiduciaries to limit their ERISA obligations in this manner would directly conflict with the Supreme Court's holding that "Congress enacted ERISA to 'protect ... the interests of participants in employee benefit plans and their beneficiaries' [and] 'provid [e] for appropriate remedies, sanctions, and ready access to the Federal courts.'" *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Indeed allowing such arbitration agreements to control participants' Section 502(a)(2) claims would, in a sense, be allowing the fox to guard the henhouse.[31]

In sum, the district court held that participants cannot sign an arbitration agreement, without the consent of a plan, that prevents the participants from bringing a Section 502(a)(2) claim on behalf of the plan.[32] The Ninth Circuit affirmed.[33]

WHAT ABOUT CLASS ACTIONS?

As *Munro* highlights, there is a distinction between ERISA claims brought on behalf of an individual participant, and claims brought on behalf of the "plan." There is also a notable distinction between claims brought on an individual versus a class-wide basis.

The Supreme Court recently settled a dispute among the Circuits regarding the enforceability of class action waivers in employment contracts in *Epiq Sys. Corp. v. Lewis*.[34] In short, the Supreme Court considered:

> Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?[35]

Although this may be a "debatable" question as a matter of policy, the Supreme Court held that the law is clear: the FAA mandates enforcement of arbitration agreements according to their terms—including terms providing for individualized (i.e., nonclass) proceedings.[36] Therefore, arbitration agreements containing class and collective action waivers are enforceable.

What this decision means for ERISA breach of fiduciary duty claims under Section 502(a)(2) remains less clear. Even though the Supreme Court held that an employee could bargain away his or her right to sue on a classwide basis, the decision did not address situations where claims are brought "on behalf of" an ERISA plan, or whether an employee-participant could bargain away a plan's right to sue on a classwide basis. Notably, nothing in ERISA requires breach of fiduciary duty claims to be brought as a class actions (although as a practical matter, they generally are).

WHAT'S THE DEAL?

Courts are likely to grapple with the intersection of *Munro* and *Epiq*—specifically, whether and to what extent fiduciary breach claims brought "on behalf of a plan" can be forced to arbitration, and whether that can be done on a classwide basis. While *Munro* and *Epiq* leave several unanswered questions regarding whether employer/plan sponsors *may* compel employee-participants to arbitrate claims for ERISA breach of fiduciary duty—should they *want* to?

As a general matter, arbitration *tends* to be faster than traditional litigation. Arbitrations can take place in as little as 60 days.[37] In contrast, the median time from filing to trial in a civil case in federal court is *more than two years*.[38] Further, there is typically no discovery, or far more limited discovery, in arbitration.[39] As a practical matter, the faster track and limited discovery can translate into a reduction in costs. Further, certain arbitrators already have specific subject matter expertise in ERISA—a shortcut which (again) could save both time and money.

In addition, arbitration is confidential. Unlike federal court, arbitration filings are not publicly available on Westlaw or PACER. This greater level of privacy, however, comes with a hefty price tag. There is no process to appeal an unfavorable arbitration decision. Nor does individual arbitration buy a defendant any relief or finality on a classwide basis. Thus, even if permissible, employers/plan sponsors should think carefully before going down that path.

NOTES

1. *Munro v. University of S.Cal.*, No. CV 16-6191, 2017 WL 1654075 (C.D. Cal. Mar. 23, 2017).

2. 9 U.S.C. § 1.

3. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 338 (2011).

4. 9 U.S.C. § 2 (2012).

5. *See* Maria J Glover, *Arbitration, Transparency and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015).

6. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 437–438 (1953) (reversing a lower court order to stay proceedings after finding that an arbitration provision was void under the Securities Act of 1933).

7. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983).

8. *See* Glover, *supra n.*5.

9. *Id.*

10. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

11. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Sept. 27, 2017), *https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.*

12. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (citation and internal quotation marks omitted).

13. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (emphasis added).

14. *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79. 91–92 (2000).

15. 29 U.S.C. § 1132(a)(1)(B).

16. 29 U.S.C. § 1132(a)(2).

17. 29 U.S.C. § 1109.

18. *See Williams v. Imhoff,* 203 F.3d 758, 760 (10th Cir. 2000); *see also Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1119 (3d Cir. 1993); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 119-20 (2d Cir. 1991); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478 (8th Cir. 1988).

19. *Munro, supra* n.1.

20. Other universities include: Brown University, Columbia University, Cornell University, Duke University, Emory University, Johns Hopkins University, the Massachusetts Institute of Technology, New York University, Northwestern University, Princeton University, Vanderbilt University, Washington University in St. Louis, Yale University, the University of Chicago, and the University of Pennsylvania.

21. *Id.*

22. *Id.* at *2.

23. *Id.* at *4.

24. *Id.* at *5.

25. *Id.* at *5.

26. *Id.*

27. *Id*.

28. *Id*.

29. *Id*. at *6.

30. *Id*.

31. *Id*.

32. *Id*. at *7.

33. *Munro v. University of S.Cal.*, No. 17-55550, 2018 WL 333417 (9th Cir. July 24, 2018).

34. *Epiq Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

35. *Id*. at 1619.

36. *Id*.

37. Under the rules of the American Arbitration Association (AAA), arbitrations over matters concerning less than $75,000 can be handled as "fast track" proceedings, a designation which requires that an arbitration hearing take place within 60 to 90 days of the arbitration's filing. American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures*, R-1(b) (rules amended and effective Oct. 1, 2013), *https://adr.org/sites/default/files/Commercial%20Rules.pdf*.

38. United States Courts, *Federal Court Management Statistics, March 2018*, (Mar. 2018), *http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2018.pdf*.

39. American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures*, R-22 (rules amended and effective Oct. 1, 2013), *https://adr.org/sites/default/files/Commercial%20Rules.pdf*. (setting forth the simplified rules for pre-trial document production under the AAA).