Professional Perspective

Using Mandatory Arbitration to Avoid ERISA Class Actions (Part 2 of 3)

Carol Buckmann, Cohen & Buckmann P.C.

COHEN & BUCKMANN

Bloomberg Law

Using Mandatory Arbitration to Avoid ERISA Class Actions (Part 2 of 3)

Contributed by Carol Buckmann, Cohen & Buckmann P.C.

Courts Make New Law

The first part of this series discussed the earlier ERISA cases in which plan sponsors sought to enforce mandatory arbitration of fiduciary breach claims, and two recent U.S. Supreme Court decisions, *Epic Systems v. Lewis*, 1385 S. Ct. 1612 (2018) and *Lamps Plus v. Varela*, 1395 S. Ct. 1407 (2019), that upheld mandatory arbitration and class action waivers in the employment context. Though the Supreme Court has still not addressed mandatory arbitration of ERISA claims, the majority's strong support of mandatory arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, in those decisions focused the attention of many plan sponsors on whether they could use arbitration as an alternative to burdensome ERISA litigation.

The Supreme Court's Analysis

The Supreme Court looked mostly to contract law principles in interpreting the arbitration agreements. However, the Court refused to apply a state contract law construing ambiguous language against the drafter (employer), holding that consent to class action arbitrations would not be inferred in ambiguous situations. Justice Roberts in his majority opinion in *Lamps Plus* specifically rejected the use of state contract principles such as presumptions to reshape class-wide arbitration procedures without the parties' consent. *Lamps Plus* at 13-14. If fiduciary breach claims are arbitrable under these general rules, employers may require covered claims to be arbitrated on a participant-by-participant basis if their documents are drafted properly.

Inconsistent Interpretations Across the Country

Following these Supreme Court decisions, lower federal courts have come to inconsistent conclusions about the arbitrability of ERISA claims and applied differing standards in reaching decisions about different types of arbitration provisions. Courts have reviewed language in employment agreements, employee handbooks and plan documents and are grappling with whether the special character of ERISA relief, which can be plan-wide, distinguishes ERISA arbitration from the situations reviewed by the Supreme Court.

Who Decides Whether Arbitration Applies?

This is a threshold issue. In *Lamps Plus*, the Supreme Court seemed to be saying that even this issue could be made the subject of mandatory arbitration. However, the appellate courts reviewing lower court decisions on motions by plan sponsors to compel arbitration did not send these cases back for an arbitrator to decide the issue.

Can General Employment Agreement or Handbook Provisions Cover ERISA Claims?

The first appellate decision issued after the new Supreme Court decisions reviewed language in an employment agreement used by the University of Southern California. *Munro v. University of Southern California*, 876 F. 3d 1088 (9th Cir. 2018). The Ninth Circuit Court of Appeals found that the language regarding individual claims wasn't broad enough because ERISA claims are raised on behalf of the whole plan. More recently, in *Cooper v. Ruane Cuniff & Goldfarb Inc.*, 990 F. 3d 173 (2d Cir. 2021), the Second Circuit Court of Appeals found that employee handbook language requiring arbitration of "all legal claims arising out of or related to employment" did not cover ERISA fiduciary claims. The court's reasoned that because fiduciary breach claims did not relate to working conditions and could be asserted by parties who had not participated in the plan, including beneficiaries, the plan sponsor and the Department of Labor, they were not employment-related. The Second Circuit seemed skeptical of mandatory arbitration generally, commenting that individual participants might not be adequate plan representatives as it requires.

Must There Be Consideration?

The Supreme Court decisions do not discuss specific consideration. However, in *Hensiek v. Board of Directors of Casino Queen Holding Co.*, 2021 WL 267655 (S.D. Ill. January 25, 2021), the court determined that a plan amendment requiring arbitration was invalid under Illinois contract law because it lacked consideration.

Of course, the benefits under the ERISA plan could be considered consideration for this purpose. This is easier to see if a new participant is joining the plan. A participant already in the plan and accruing benefits may not be viewed as receiving anything new when the arbitration clause is adopted.

Who Must Consent to Mandatory Arbitration?

Justice Gorsuch in *Epic Systems* described arbitration as an agreement between the employer and the employee. However, there need not be actual negotiation; in fact, the Court upheld a program in which participants could be fired if they failed to sign the arbitration agreement. Lower courts have nevertheless examined whether more traditional consent is required.

In its *USC* decision, the Ninth Circuit found that ERISA fiduciary breach claims were claims of the plan, and could not be arbitrated because the plan had not consented to arbitration. After that decision, the 9th Circuit was presented with a case, *Dorman v. Charles Schwab*, 934 F.3d 1107 (9th Cir. 2019), in which the plan document contained a mandatory arbitration clause. In that decision, the court upheld the arbitration clause because it determined that the plan had consented to arbitration. The *Dorman* court stated that the participants also consented to the arbitration clause when they participated in the plan.

By equating participation in the plan with consent to arbitration, the court failed to take into account that once a participant has earned and vested in benefits under the plan, the IRS does not permit participants to waive those benefits. It is difficult to see how consent could be withheld under IRS rules if the plan has nonelective benefits or frozen benefits or with respect to benefits earned before the amendment was adopted. This issue is also raised in a pending appeal before the Seventh Circuit, *Smith v. Greatbanc Trust Company and Bd. of Dirs. of Triad Manufacturing, Inc.*, 2020 BL 319742 (N.D. Ill. 8/21/2020), where the Court will consider whether a plan arbitration clause can be enforced against a participant who was not employed or actively participating in the plan when the amendment was adopted.

Is notice a prerequisite to consent? Both the Second Circuit in Cooper and the district court in *Smith v. Greatbanc* noted that the summary plan description booklet provided to participants didn't mention arbitration. They incorporated standard rights language drafted by the Department of Labor referring to the right to sue.

Can An Arbitrator Award Plan-Wide Relief?

The Supreme Court in *La Rue v. De Wolff & Boberg*, 552 U.S. 248 (2008), ruled that ERISA permits participants to sue for relief related to their individual accounts. It is unclear how this fits into the ERISA analysis when participants subject to arbitration seek plan-wide relief.

Whether arbitrators can award plan-wide relief was a focus of oral argument in the 7th Circuit appeal of the Smith decision. The district court had declined to enforce a plan arbitration clause containing the following broad language:

> Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Account resulting from the alleged breach of fiduciary duty, (ii) a pro-rated portion of any profits allegedly made by a fiduciary through the use of Plan assets where such pro-rated amount is intended to provide a remedy solely to Claimant's individual Account, and/or (iii) such other remedial or equitable relief as the arbitrator(s) deem proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any [Participant] other than the Claimant and is not binding on the Plan Administrator or Trustee with respect to any [Participant] other than the Claimant.

This broad language squarely raises the issue whether the plan-wide relief contemplated under ERISA can be denied, and, if not, how it can actually be awarded in individual arbitrations. For example, how do you remove a breaching trustee, one of the remedies clearly available under ERISA, with respect to only one account?

The Seventh Circuit's decision on this issue is eagerly awaited.

Can Arbitrators Interpret a Complicated Statute?

The Second Circuit worried that arbitration could undercut the public policy of imposing personal liability on breaching fiduciaries under ERISA § 409, but no recent decision has been based solely on the ground that ERISA is too complex to be interpreted by arbitrators. This may reflect an understanding of the increasing sophistication of arbitrators and arbitration panels, or the absence of any supporting language in the Supreme Court decisions.

The unanswered questions and inconsistency among the recent cases present challenges for any plan sponsor trying to require mandatory arbitration of fiduciary breach claims. The final installment of this series will discuss factors to consider in determining whether to pursue the mandatory arbitration option, as well as recommend best practices for implementing mandatory arbitration provisions.