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No Consensus in Sight: Enforceability of ERISA Plan Arbitration Provisions at the Close of 2023

This column discusses the need for the Supreme Court to deliberate the issue of the enforceability of arbitration provisions in ERISA Plans.

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The enforceability of arbitration provisions in Employee Retirement Income Security Act (ERISA) plan documents remains uncertain at the close of 2023. Following denial of motions to enforce arbitration provisions, defendants in cases pending in the Tenth and Third Circuits petitioned for review by the Supreme Court in 2023. The Supreme Court declined to certify either petition, leaving enforceability in flux.

Focus on Remedies, Not Representation

The Ninth Circuit Court of Appeals held that arbitration provisions in plan documents can be enforceable for the arbitration of ERISA claims. In *Dorman v. Charles Schwab Corp*. [780 Fed.Appx. 510 (9th

Cir. 2019) (Dorman)], the Ninth Circuit held that ERISA claims can be arbitrable because "arbitrators are competent to interpret and apply federal statutes." The Ninth Circuit further held that inclusion of the arbitration provisions in the ERISA plan document rendered the plaintiff's claims subject to arbitration, that plaintiff's continued participation in the plan meant that he was bound by these provisions, and that the plaintiff did not waive any rights belonging to the plan by agreeing to arbitrate. [*Id*. at 514]

Interpreting a different arbitration provision, the Seventh Circuit in *Smith v. Board of Directors of Triad Mfg., Inc.* [13 F.4th 613, 621 (7th Cir. 2021) (Smith)], held that, while ERISA claims are generally arbitrable, because the specific arbitration provision at issue in that case eliminated the plaintiffs' access to statutorily granted rights to plan-wide remedies under ERISA Sections 502(a)(2) and 409, the provision was unenforceable. The Seventh Circuit explained that compelling arbitration under the terms of the plan would have constituted an impermissible "prospective waiver of a party's right to pursue statutory remedies" under the circumstances, but did not conclude that ERISA claims are inherently not arbitrable. [*Id.*] The court further clarified that it was the "prohibition on certain plan-wide remedies, not plan-wide representation" that rendered the provision unenforceable, and that a prohibition on plan-wide remedies would not have voided the provision. [*Id.* at 622]

The Tenth Circuit also has focused on the availability of remedies when evaluating arbitration provisions. In *Harrison v. Envision Mgmt. Holding Inc. Board of Directors, et al.* [59 F.4th 1090, 1106 (10th Cir. 2023) (Harrison)], the Tenth Circuit affirmed the district court's denial of the defendants' motion to compel arbitration, concluding that enforcing the arbitration provision present in the ESOP plan document would prevent the plaintiff from "effectively vindicating the statutory remedies sought in his complaint" under ERISA Section 502(a)(2). The court explained that the arbitration provision prohibiting class actions was not problematic—rather it was the prohibition "on any form of relief that would benefit anyone other than [plaintiff] that directly conflicts with the statutory remedies available under ERISA Sections 29 U.S.C. §§ 409 and 502(a)(2), (a)(3)." [*Id.* at 1109]

Similarly, in *Henry on behalf of BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, [72 F.4th 499, 507 (3d Cir. 2023), *cert. denied sub nom. Wilmington Tr., N.A. v. Marlow*, No. 23-122, 2023 WL 6797729 (U.S. Oct. 16, 2023) (Henry)] the Third Circuit considered an arbitration provision prohibiting plan participants from seeking or receiving any remedy that had "the purpose or effect of providing additional benefits or monetary or other relief to any third party." As in *Harrison,* the *Henry* court held that "because the class action waiver purports to prohibit statutorily authorized remedies, the class action waiver and the statute cannot be reconciled." [*Id*.]

The focus of the Tenth Circuit in *Harrison*, the Seventh Circuit in *Smith*, and the Third Circuit in *Henry* was on whether ERISA plan participants have the ability to seek plan-wide relief in individual arbitration proceedings. [*See Harrison*, 59 F.4th at 1108-09; *Smith*, 13 F.4th at 621-22; *Henry*, 2023 WL 4281813, at *4] The availability of the remedy, rather than the ability to represent a class, determined the outcome in each of these cases.

Recent District Court Opinions

Recent district court opinions have not clarified whether courts will consistently enforce (or decline to enforce) arbitration provisions. In *Robertson v. Argent Trust Company* [No. 21-cv-01711-PHX-DWL, 2022 WL 2967710 (D. Ariz. July 27, 2022 at *7) (Robertson)], the court deemed enforceable an arbitration provision with a specific carve out for claimants seeking relief that may have an "incidental impact on other employees, participants, or beneficiaries" as long as that relief was sought on an individual basis. The court concluded that the provision did not bar plan participants from effectively vindicating statutory rights available to them under ERISA because their individualized remedy was still available. [*Id.* at *10] (Note that the carve-out language was not added to the provision until one week after the plaintiff filed her lawsuit.) [*Id.* at *2]

In *Merrow v. Horizon Bank* [No. CV 22-123-DLB-CJS, 2023 WL 7003231, at *5-6 (E.D. Ky. Oct. 24, 2023)], the court held that an arbitration provision within the ESOP plan document requiring arbitration of all claims, whether individual claims "for benefits or other relief on behalf of the Plan as a whole," was enforceable despite the plaintiff's argument that the arbitration clause operated as a "prospective waiver" of statutory remedies. The court quoted *Viking River Cruises, Inc. v. Moriana* when holding "[a]n arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will

be processed." The court found that the arbitration provision within the plan was binding and enforceable. [*Id*. at *6-7, quoting 596 U.S. ---, 142 S.Ct. 1906, 1919, 213 L. Ed. 2d 179 (2022). *See also Holmes v. Baptist Health S. Fla., Inc.,* No. 21-22986-CIV, 2022 WL 180638, at *3 (S.D. Fla. Jan. 20, 2022) (holding that the arbitration provision at issue did not preclude plaintiffs from pursuing relief available under ERISA and was thus enforceable)]

Other recent district court decisions have held arbitration provisions in ESOP plans are unenforceable under the "effective vindication" reasoning set forth in *Smith, Harrison,* and *Henry*. [*See Burnett v. Prudent Fiduciary Servs. LLC*, No. CV 22-270-RGA-JLH, 2023 WL 387586, at *8 (D. Del. Jan. 25, 2023), *report and recommendation adopted sub nom. Burnett v. Prudent Fiduciary Serv., LLC*, No. CV 22-270-RGA, 2023 WL 2401707 (D. Del. Mar. 8, 2023) (holding that because the arbitration provision contained in the plan document contained a provision that barred a beneficiary from pursuing plan-wide relief, a remedy that ERISA provides, the provision conflicted with ERISA and was thus unenforceable) *affirmed Burnett v. Prudent Fiduciary Servs. LLC,* No. 23-1527, 2023 WL 6374192 (3d Cir. Aug. 15, 2023); *Lloyd v. Argent Tr. Co*., No. 22CV4129 (DLC), 2022 WL 17542071, *5 (S.D.N.Y. Dec. 6, 2022) (declining to enforce arbitration provision that prevented claimants from asserting rights and pursuing remedies that ERISA provides); *Parker v. Tenneco Inc*., No. 23-10816, 2023 WL 5350565, at *6 (E.D. Mich. Aug. 21, 2023) (same); *Coleman v. Brozen*, No. 3:20-CV-01358-E, 2023 WL 4498506, at *18 (N.D. Tex. July 12, 2023) (same)]

Takeaways

Until the Supreme Court weighs in, the piecemeal enforcement of arbitration provisions in ERISA plans will continue. Decisions are expected out of the US Courts of Appeals for the following Circuits in 2024: Second—*Cedeno v. Argent Trust Company*, 21-2891 (2d Cir. Nov. 22, 2021); Fifth—*Coleman v. Brozen*, No. 23-10832 (5th Cir. Nov. 16, 2023); and Sixth—*Parker v. Tenneco, Inc., et al.*, No. 2:23-cv-10816 (6th Cir. Sept. 20, 2023). The cases in which defendants have found success when seeking to enforce arbitration provisions in ERISA plan documents involve narrowly tailored provisions that do not waive statutory remedies, they merely curtail claimants from proceeding with their claims on a class-wide basis. So, despite the lack of consensus, designing language that allows potential claimants to pursue remedies available under ERISA may provide the clearest avenue to enforceability. ■