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How Courts Are Ruling On The Arbitrability Of ERISA Claims

By **Heather Richardson, Jennafer Tryck and Tessa Gellerson**
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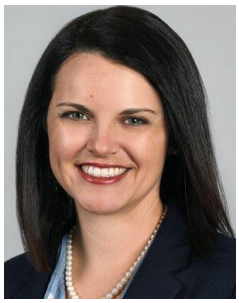

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The U.S. Court of Appeals for the Ninth Circuit's 2019 decision in Dorman v. Charles Schwab Corp. held that fiduciary breach claims brought on behalf of a plan under the Employee Retirement Income Security Act, Section 502(a)(2) could be arbitrated, overturning decades of case law holding that ERISA claims were not arbitrable.[1]

The Dorman decision prompted many plan sponsors to write new arbitration language into their ERISA plans, the enforceability of which is now playing out in hotly contested litigation around the country.

This article provides an overview of recent decisions in this space from the U.S. Court of Appeals for the Seventh Circuit and district courts in New York, Florida, Ohio and Delaware, along with takeaways for plan sponsors considering adding or amending arbitration provisions in their ERISA plans.

Several courts have ruled that arbitration provisions purporting to waive rights to pursue all planwide equitable or remedial relief are unenforceable.

In September 2021, the Seventh Circuit decided Smith v. Board of Directors of Triad Manufacturing Inc., a putative class action alleging fiduciary breach claims, and seeking, among other things, removal of the plan's fiduciaries.[2]

The plaintiffs suit ran headlong into his plan's arbitration provision, which provided that the plaintiff could not "seek or receive any remedy which has the purpose or effect of providing additional benefits or other relief to any Eligible, Employee, Participant or Beneficiary other than the Claimant."[3]

The U.S. District Court for the Northern District of Illinois denied the defendants' motion to compel arbitration, and the Seventh Circuit affirmed, concluding that the arbitration provision at issue ran afoul of the effective vindication doctrine, which provides that an arbitration provision may be held unenforceable on public policy grounds when it "operate[s] … as a prospective waiver of a party's right to pursue statutory remedies."[4]

Deploying this doctrine, the Seventh Circuit reasoned that the plan's arbitration provision precluded certain remedies that ERISA expressly permits.[5] Specifically, the provision prevented the plaintiff from seeking other relief that extended beyond himself, even though ERISA expressly contemplates in Section 409(a) that plaintiffs may pursue "such other equitable or remedial relief as the court may deem appropriate."[6]

Because the arbitration provision would limit the plaintiff from seeking such other relief as removal of the plan fiduciary, which the Seventh Circuit concluded "would go beyond just [the plaintiff] and extend to the entire plan," it operated as a waiver of statutory remedies and could not be enforced.[7]

Notably, however, the court was careful to explain that "the problem with the plan's arbitration provision is its prohibition on certain planwide remedies, not planwide representation," signaling that the court took no issue with a class action waiver in the provision.[8]

Two recent district court decisions have interpreted Smith, one relying upon it to invalidate an arbitration provision, and the other finding it distinguishable and granting a motion to compel arbitration.

In November 2021 in Cedeno v. Argent Trust Co., the U.S. District Court for the Southern District of New York found the Seventh Circuit's reasoning in Smith persuasive, and relied upon it to find an arbitration provision in the plaintiff's retirement plan invalid and unenforceable.[9]

The plaintiffs' complaint alleged breach of fiduciary duty under ERISA and sought relief under ERISA Section 409(a) — specifically, an order that defendants make good any losses to the plan resulting from the alleged fiduciary breaches, and restore any lost profits defendants made through use of plan assets.[10]

The plaintiffs' plan included a binding arbitration clause, which limited the remedial or equitable relief that an arbitrator could award under ERISA Section 409 to that which did not result in additional benefits or monetary relief to any plan participant or beneficiary other than the claimant.[11]

The district court held that this language impermissibly limited plan participants from seeking relief for the plan as a whole, which the court ruled was permitted under ERISA.[12] However, as in Smith, the court found no fault with the class action waiver.[13] The defendants have appealed this decision to the U.S. Court of Appeals for the Second Circuit.

In January 2022, the U.S. District Court for the Southern District of Florida interpreted nearly identical plan language but reached the opposite conclusion, distinguishing Smith and granting a motion to compel arbitration.[14]

In Holmes v. Baptist Health South Florida Inc., the plaintiffs brought a putative class action alleging ERISA fiduciary breach claims. The defendant moved to compel arbitration because the plaintiffs' plan contained an arbitration clause, which precluded plan members from receiving remedial or equitable relief that provides additional benefits or monetary relief to any participant or beneficiary besides the claimant.[15]

Relying on Smith, the plaintiffs argued that the provision was unenforceable under the effective vindication doctrine because it forbade planwide relief available under Section 409(a), such as removing or appointing plan fiduciaries.[16]

The district court disagreed and declined to follow the Smith rationale, pointing to the absence of any U.S. Court of Appeals for the Eleventh Circuit authority applying the effective vindication doctrine to void an arbitration clause, and reasoning that although the arbitration provision precluded recovery of some planwide monetary relief, such relief is only available under ERISA Section 409(a) if a plan participant brings a representative or class action.

Because the Eleventh Circuit had already held that a waiver of the right to bring a class action in arbitration is permissible, any waiver of remedies associated with class actions would also be permissible.[17]

The court also explained that even if it were to follow Smith, the provision at issue was narrower than that in Smith because it did not prohibit other relief.[18]

Thus, unlike the provision held unenforceable in Smith, the arbitration clause at issue did not deny any form of relief authorized by Section 409(a) because individual claimants could still recover for harm to their individual accounts, and could also recover planwide relief so long as it did not result in additional benefits or monetary relief to other plan participants or beneficiaries.[19]

The decisions in Smith, Cedeno and Holmes reiterate that class action waivers are permissible in arbitration agreements covering ERISA claims.

These cases also suggest that, at least for now, courts are divided on the enforceability of plan language that precludes claimants in arbitration from seeking additional benefits or monetary relief for plan participants besides the claimant.

Plan sponsors may argue that such language does not conflict with ERISA Section 409(a) because it permits a participant to recover for harm to that participant's individual account in a defined contribution plan. They may also argue that it permits a participant to pursue equitable or remedial relief on behalf of the plan — such as removal and appointment of plan fiduciaries or other plan reforms — so long as the relief does not take the form of benefits or monetary relief to plan participants other than the claimant.

Additionally, courts seem willing to permit a plan to sever a disputed provision concerning the scope of relief under Section 409(a) without invalidating an entire arbitration clause, so long as the plan does not expressly state that the provision is a material and nonseverable term.[20]

Thus, where a plan does not include such language, severance of the challenged provision may help preserve a broader arbitration clause.

To compel arbitration of ERISA 502(a)(2) claims, courts consider whether arbitration provisions bind the plan itself.

This year, the U.S. Court of Appeals for the Sixth Circuit will decide an appeal from the U.S. District Court for the Northern District of Ohio in Hawkins v. Cintas Corp., which confronts the issue of whether a plaintiff can be compelled to arbitrate claims brought on behalf of a plan where the plan itself does not include an arbitration clause.[21]

In Hawkins, the district court declined to compel arbitration of fiduciary breach claims brought by

plaintiffs on behalf of their plan, reasoning that the claims were not arbitrable because there was no agreement between the plan and the defendant to arbitrate plan disputes.[22]

While the plaintiffs' participant agreements stated that "'the rights and claims of Employee' will be arbitrated," the court concluded that this language bound only the individual employees, not the plan itself.[23]

The court explicitly distinguished Dorman — in which the Ninth Circuit found that the plan document at issue included an arbitration provision, which bound the plan to arbitration — emphasizing that the defendant in Hawkins had provided no evidence that any document bound the plan to arbitration.[24]

The Dorman and Hawkins decisions suggest that courts find whether the plan itself has agreed to arbitration relevant when analyzing motions to compel arbitration of ERISA Section 502(a)(2) claims brought on behalf of a plan.

A Delaware district court found arbitration provisions unenforceable where the plaintiff did not affirmatively consent to arbitrate.

Finally, in September 2021 in Henry v. Wilmington Trust NA, the U.S. District Court for the District of Delaware found an arbitration provision added to an employee stock ownership plan could not be enforced against a participant who allegedly never gave voluntary and knowing consent to arbitration.[25]

The plaintiff started working for the defendant before the plan adopted the arbitration provision, and asserted that he was never asked to sign an agreement concerning arbitration, and that he never received any notice about the arbitration clause at the time it was added to the plan.[26]

The defendants relied on Dorman to argue that the plaintiff consented to arbitration by participating in the plan. In Dorman, the Ninth Circuit stated 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."[27]

The district court rejected this argument, finding that Dorman lacked reasoning for this part of the decision, and that Dorman potentially conflicted with Virginia state law — which governed the plan — requiring a manifestation of mutual assent by words or conduct to form a contract.[28]

The court held that, at least at the early stage of the proceeding, the plaintiff had plausibly alleged that he "did not have notice and therefore did not have the necessary intent to manifest assent" to arbitration.[29]

A fair reading of Dorman is that participation in a plan, alone, is sufficient to manifest assent to be bound by a plan arbitration clause. However, as suggested by Henry, plan sponsors may also consider providing notice to participants when arbitration provisions are added to a plan, and requiring participants to affirmatively agree to arbitrate plan claims when they join a plan.

Plan sponsors should expect to see more litigation over the arbitrability of Section 502(a)(2) fiduciary breach claims as courts continue to flesh out the validity and enforceability of plan arbitration provisions.

For now, courts appear willing to enforce arbitration provisions, including those with class action

waivers, that do not preclude claimants from seeking in arbitration the specific equitable and remedial relief authorized under Section 409(a), and where the plan and plaintiffs have both consented to arbitrate their claims.

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[1] Dorman v. Charles Schwab Corp., 934 F.3d 1107, 1111–12 (9th Cir. 2019); see also Dorman v. Charles Schwab Corp., 780 F. App'x 510 (9th Cir. 2019).

[2] Smith v. Board of Directors of Triad Manufacturing, Inc., 13 F.4th 613, 617 (7th Cir. 2021).

[3] Id. at 616.

[4] Id. at 621 (citing Am. Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228, 235 (2013)).

[5] Id. at 623.

[6] Id. at 621 (quoting 29 U.S.C. § 1109(a)) (emphasis added).

[7] Id. at 621–23.

[8] Id. at 622.

[9] Cedeno v. Argent Trust Co., No. 20-9987, 2021 WL 5087898, at *1 (S.D.N.Y. Nov. 2, 2021).

[10] Id.

[11] Id. at *2.

[12] Id. at *1.

[13] Id. at *6.

[14] See Holmes, et al. v. Baptist Health So. Fla., No. 21-22986, 2022 WL 180638, at *1 (S.D. Fla. Jan. 20, 2022).

[15] Id.

[16] Id. at *2.

[17] Id. at *3.

[18] Id.

[19] Id.

[20] See Smith, 13 F.4th at 616 (finding plan language rendered provision non-severable); Cedeno, 2021 WL 5087898, at *3 (same).

[21] See Hawkins v. Cintas Corp., No. 19-1062, 2021 WL 274341 (S.D. Ohio Jan. 27, 2021), appeal docketed Hawkins v. Cintas Corp., No. 21-3156 (6th Cir. Feb 19, 2021).

[22] Id. at *6.

[23] Id.

[24] Id. (citing Dorman, 780 F. App'x at 513–14).

[25] See Henry ex. rel. BCS Ventures Holdings Inc. ESOP v. Wilm. Trust, No. 19-1925, 2021 WL 4133622, at *1 (D. Del. Sept. 10, 2021).

[26] Id. at *5–*6.

[27] 780 F. App'x at 513.

[28] See Henry, 2021 WL 4133622 at *5.

[29] Id. at *6.