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Ninth Circuit Upholds 401(k) Plan's Provision That Compels Arbitration and Prohibits Class or Collective Action

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Last month, the Ninth Circuit held in favor of retirement plan fiduciaries to require arbitration of a participant's claims for breach of fiduciary duty on an individual basis, rather than on a class action basis. *Dorman v. Charles Schwab Corp.*, -- F.3d --, 2019 WL 3926990 (9th Cir. 2019). In doing so, the Ninth Circuit overturned its 35-year-old opinion that had held that ERISA claims were not arbitrable (*Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984)). The *Dorman* decision relied on the U.S. Supreme Court's rulings in non-ERISA cases that upheld arbitration agreements and sought to align the Ninth Circuit with other appellate courts holding that statutory ERISA claims can be arbitrated. On September 10, 2019, the participant-plaintiff petitioned the Ninth Circuit for rehearing by the Ninth Circuit and may pursue further relief by petitioning the Supreme Court for review.

Plan Contained Arbitration Provision; Employee Participant Also Signed Arbitration Agreement as a Condition of Employment and Compensation

Michael Dorman, a former participant in the Schwab Retirement Savings and Investment Plan (the "Plan"), a 401(k) plan, brought a putative class action in federal district court alleging that the Plan fiduciaries breached duties and violated prohibited transaction rules by selecting Plan investment funds affiliated with Schwab and maintaining those funds as Plan investments despite their alleged poor performance. For himself and on behalf of a class of Plan participants, Dorman brought claims under ERISA sections 502(a)(2) and (a)(3) and sought plan-wide relief.

The Plan document contained an arbitration provision stating that "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration . . ." The provision also stated that any arbitration would be conducted "on an individual basis only, and not on

a class, collective or representative basis." While the arbitration provision was not in the Plan when Dorman began participating in the Plan in 2009, the Plan was amended in 2014 to add the provision, and the provision was present in the Plan document that governed Dorman's participation in the Plan for the last twelve months before he took a full distribution of his Plan account and exited the Plan.

During the course of his employment, in connection with a compensation plan for financial consultants, Dorman had also signed an agreement by which he agreed to arbitration of "[a]ny controversy, dispute or claim arising out of or relating to [his] employment or the termination of employment." The arbitration agreement governed claims that arise out of "federal, state or local law" and excluded "claims for benefits" under the Plan as those were subject to the claim procedures and arbitration provision prescribed by the Plan. The compensation plan contained a class action waiver requiring "any claims or disputes between [Dorman] and [Schwab] shall be brought solely on an individual basis. [Dorman] and [Schwab] agree to waive the right to commence, be a party to, or be an actual or putative class member of any class, collective, or representative action arising out of or relating to [Dorman's] employment."

The Plan fiduciaries argued that Dorman could only bring his action in arbitration and moved to compel arbitration. The district court denied the motion, and the Plan fiduciaries appealed to the Ninth Circuit. On appeal, the Ninth Circuit reversed the district court's ruling and remanded the case to the district court to order arbitration of claims for relief for Dorman's own account resulting from the alleged fiduciary breaches.

Are a Participant's ERISA Breach of Fiduciary Duty Claims Arbitrable?

The Ninth Circuit answered "yes" to that question, overturning a case it decided 35 years ago in 1984 and aligning its position with the Supreme Court's recent decisions in favor of arbitration where parties agree to arbitration as a matter of contract.

In the first of two decisions issued in *Dorman* on August 20, 2019, the Ninth Circuit overturned its ruling in *Amaro v. Continental Can Co*., a ruling which foreclosed arbitration of an ERISA section 510 discrimination (interference with protected rights) claim and stated that arbitration was not appropriate for ERISA statutory claims generally. The Ninth Circuit held that *Amaro* was no longer good law in light of Supreme Court precedent decided after *Amaro*. Although *Amaro* only concerned a section 510 claim, in that case the Ninth Circuit opined broadly that arbitration was not proper for ERISA claims and was below the "minimum standards [for] assuring the equitable character of [ERISA] plans." 724 F.2d at 752. In the eyes of the *Amaro* court, "[a]rbitrators, many of whom are not lawyers, lack the competence of courts to interpret and apply statutes as Congress intended." *Id.* at 750. According to the *Dorman* panel, this view was no longer tenable in the face of the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), holding that federal statutory claims are generally arbitrable, arbitrators are competent to interpret and apply federal statutes, and arbitration is not inherently unfair for individuals who wished to vindicate their statutory rights. In light of this intervening Supreme Court precedent, the Ninth Circuit overruled *Amaro*.

Dorman's Claims Could Only Be Brought in Individual Arbitration Action

In the second of the two decisions issued on August 20, 2019, the Ninth Circuit held that Dorman was bound by the Plan document's arbitration provision and that Dorman's ERISA section 502(a)(2) claims (for breach of fiduciary duty resulting in losses to the Plan) were subject to arbitration because the Plan expressly agreed in the Plan document that all ERISA claims should be arbitrated. The Ninth Circuit relied principally on four Supreme Court decisions since 2010 that upheld arbitration provisions and, within such provisions, waivers of class or collective actions.

The Ninth Circuit rejected the district court's holding that the addition of the arbitration provision to the Plan through a plan amendment was an effort to insulate plan fiduciaries from liability under ERISA and therefore was unenforceable under ERISA section 410, which disallows exculpation of ERISA fiduciaries for breaches of fiduciary duty. Citing the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, -- U.S. --, 128 S. Ct. 1612, 1621 (2018), the Ninth Circuit deemed the Schwab Plan's arbitration requirement merely the selection of a forum that offered quicker, more informal, and often lower cost resolutions. The agreement to arbitrate on an individual basis as opposed to a class basis, or through a representative action, did not relieve a fiduciary from responsibility or liability, nor was it a violation of the National Labor Relations Act (NLRA). The Supreme Court in *Epic Systems* held that an arbitration agreement by which an employee agrees to arbitrate claims against an employer on an individual basis (as opposed to a class or collective basis) did not violate the NLRA. The Ninth Circuit, citing decisions by the Fifth and Tenth Circuits, noted that every circuit to consider the issue of whether Congress intended to prohibit arbitration of ERISA claims has held that no such intention existed; and that, therefore, an agreement to arbitrate ERISA claims was generally enforceable on the principle — recognized by the Supreme Court in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) — that a violation of a federal statute (ERISA, in the *Dorman* case) can be arbitrated absent a contrary Congressional command prohibiting arbitration.

The Ninth Circuit then rejected the district court's holding that the Plan's arbitration provision was unenforceable because a plan participant cannot agree to arbitrate an ERISA section 502(a)(2) claim for losses to the plan without the plan's consent. The Ninth Circuit observed that the Plan had, in fact, expressly consented to such arbitration by adopting and maintaining a Plan provision that required arbitration of all ERISA claims. In addition, the Ninth Circuit commented that Dorman's individual agreement to arbitrate did not waive any rights that belonged to the Plan; an agreement by one individual did not give up any substantive rights that belonged to others.

Citing the Supreme Court decisions in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684 (2010), and *Lamps Plus, Inc. v. Varela*, -- U.S. --, 139 S.Ct. 1407 (2019), the Ninth Circuit held that Dorman could only bring an individual action in arbitration and was foreclosed from any collective or class action even in arbitration. The Ninth Circuit concluded that the arbitration agreement must be enforced according to its terms, as arbitration is a matter of contract. Because the arbitration agreement contained no agreement by the parties to class-wide or collective arbitration and expressly prohibited such class-wide or collective action, the Ninth Circuit held that Dorman could only demand an arbitration on an individual basis.

The Ninth Circuit addressed Dorman's ERISA section 502(a)(2) claim and stated that although

claims under ERISA section 502(a)(2) seek relief on behalf of a plan, the claim could be brought by an individual. Analogizing its opinion to the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), the Ninth Circuit held that its decision limiting Dorman to only individual arbitration was consistent with *LaRue*'s holding that a defined contribution plan participant can bring a 502(a)(2) claim for plan losses in his or her own individual account.

The Ninth Circuit reversed and remanded the case to the district court to order individual arbitration of claims limited to relief for the alleged impaired value of plan assets in Dorman's individual account.

What Next? Further Action in *Dorman*: Claims for Plan-Wide Relief under ERISA section 502(a)(2)

The Ninth Circuit and the Supreme Court may be grappling soon with the issue of whether ERISA section 502(a)(2) claims are arbitrable, as Dorman has recently petitioned the Ninth Circuit for rehearing of its August 20, 2019 decision and has the option to pursue a petition for Supreme Court review. Earlier this year, the Supreme Court denied the University of Southern California's petition for review of the Ninth Circuit's 2018 ruling in *Munro v. University of Southern California*, 896 F.3d 1088 (9th Cir. 2018).[1] In *Munro*, unlike *Dorman*, the USC retirement plan documents did not contain any arbitration provision, and USC sought to compel arbitration based on the participants' consent, in their employment agreements, to arbitrate claims arising from their employment. The Ninth Circuit in *Munro* affirmed the district court's denial of USC's motion to compel arbitration on the basis that an agreement to arbitrate that employees entered into in their individual capacities did not bind the plans because the plans had not consented to arbitration. In *Dorman*, the Ninth Circuit had before it a plan that expressly provided for arbitration of statutory claims.

However, the debate continues as to whether an ERISA section 502(a)(2) claim for relief on behalf of the plan can be forced into arbitration on an individual participant basis. Dorman, in his September 10, 2019 petition for rehearing, argued that the Ninth Circuit's ruling in his case conflicted with *Munro* and wrongly applied the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates* by upholding the Schwab Plan's arbitration clause (that foreclosed anything but individual arbitration) and by concluding that fiduciary breach claims regarding defined contribution plans are "inherently individualized." Dorman argued, instead, that under the Supreme Court's holding in *Massachusetts Mutual v. Russell*, 473 U.S. 134 (1985), ERISA section 502(a)(2) allows a plan participant to bring a breach of fiduciary claim only in a representative capacity and on behalf of the plan and only to recover losses suffered by the plan. Dorman argued that the Schwab Plan's bar of any representative action under 502(a)(2) violated ERISA section 410 as an exculpatory clause and that, under the Supreme Court's Federal Arbitration Act precedent, an arbitration clause that purports to waive a party's right to pursue statutory remedies is invalid on public policy grounds.

Notwithstanding Dorman's efforts to seek further review of the Ninth Circuit's decision, the *Dorman* opinion will likely encourage plan sponsors to consider amending their plans to require arbitration of ERISA statutory claims. Note, however, that *Dorman* did not involve any claims for

benefits, and therefore the Ninth Circuit did not address whether a challenge to a denied benefit claim could be limited to binding arbitration.

Should Plan Sponsors Amend Their Plans Now to Include Arbitration and a Waiver of Class, Collective, or Representative Actions?

It depends. With Dorman's petition for rehearing and potentially a later attempt to seek Supreme Court review, the Ninth Circuit's August 20, 2019 decision as to the arbitrability of Dorman's ERISA section 502(a)(2) and (a)(3) claims may be amended or even overturned. Plan sponsors might wait to see how *Dorman* proceeds.

If a plan sponsor would like to begin considering now whether arbitration is appropriate, it should consider the costs and benefits of arbitration before concluding that arbitration — and a waiver of class, collective, or representative arbitrations — is the right option. Compelling participants to bring individual arbitration actions on an issue that is common to several participants may deter certain individual participants and certain plaintiff's attorneys from pursuing individual breach of fiduciary duty actions. However, an employer might consider whether the costs of defending multiple individual actions — as opposed to a single class action — outweigh the benefits of having an arbitration provision and class action waiver.

In addition, multiple individual arbitrations on the same issue also raise interesting legal questions of issue preclusion and precedent — that is, what effect would an arbitration of one participant's individual claim have on the next participant's action on a similar claim. When considering whether arbitration is preferred to litigation in court, employers might also take into account the differences between an arbitrator and a federal district court judge. For example, an arbitrator may conduct an arbitration under rules that vary — potentially widely — from court rules, and arbitration does not provide an automatic right to appeal an arbitrator's decision. Although *Dorman* may appear to be a green light to plan sponsors to include arbitration provisions and class action waivers in their plan documents, the choice to include such provisions should not be made automatically in favor of inclusion. We encourage plan sponsors who are considering amending their plans to consult their plan legal counsel.

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[1] Our October 2018 *Benefits Report* discussed the *Munro* case, the district court's decision in *Dorman*, and the question of whether ERISA claims are subject to arbitration.

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