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Can ERISA Plans Require That Fiduciary Claims Be Arbitrated? Should They?

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INTRODUCTION

The Supreme Court has for years sung the praises of arbitration. The Court's opinions have said that "[a]rbitration agreements allow parties to avoid the costs of litigation,"[1] that arbitration carries "the promise of quicker, more informal, and often cheaper resolutions for everyone involved,"[2] and that "arbitration's advantages would often seem helpful to individuals."[3] More generally, it has found in the Federal Arbitration Act (FAA) a "liberal federal policy favoring arbitration agreements,"[4] and has consequently rejected a range of challenges to arbitration agreements, including arguments that the FAA cannot require parties to arbitrate statutory claims and that federal labor law trumps the FAA with respect to collective action waivers in arbitration agreements.[5]

In light of the supposed benefits, the question arises why **more** claims aren't sent to arbitration. The ERISA sphere, where the Employee Retirement Income Security Act in fact mandates arbitration for a whole category of disputes (those involving multiemployer pension plans) and where another category (benefits disputes) has long been found arbitrable, provides a particularly interesting context for this question.[6] Despite ERISA's endorsement of arbitration for certain issues, breach of fiduciary duty claims, which tend to involve greater damages and tend to attract the most media attention, are not arbitrated. One possible reason is that it has not been clear that courts would require parties to arbitrate such disputes, but that may change. Another possible answer is that arbitration is not all it is chalked up to be—for sophisticated fiduciary disputes, arbitration may in fact be just as time consuming, just as expensive, and less likely to lead to a just outcome.

The U.S. Court of Appeals for the Ninth Circuit's recent decision in *Munro v. University of Southern California*,[7] brings these questions to the forefront. The court held that a plan sponsor could not compel arbitration because the arbitration clause in the named plaintiffs' employment agreement did not extend to their claims. Plaintiffs sued for fiduciary breaches on behalf of the plans in which they were participants, and the court reasoned that the claims belonged to the plans, which had not agreed to arbitration, rather than to the plaintiffs. However, the opinion also recognized that an earlier Ninth Circuit decision holding that ERISA claims are not arbitrable may be tenuous in light of intervening Supreme Court authority.[8] Moreover, a number of other courts of appeal have ex-

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[1] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

[2] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

[3] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

[4] *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[5] *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Epic Sys.*, 138 S. Ct. at 1632.

[6] ERISA §4221(a).

[7] 896 F.3d 1088 (9th Cir. 2018).

[8] *Id.* at 1094 n.1 (citing *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1100

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pressly held that ERISA claims **are** arbitrable.[9] The trend, therefore, appears to be that courts will find in favor of compelling arbitration, but plan decision-makers must be aware of practical and logistical concerns related to arbitration.

This article focuses on ERISA fiduciary claims—those brought under ERISA §502(a)(2) or §502(a)(3) alleging breaches of the duties of prudence or loyalty as well as prohibited transaction claims. ERISA fiduciary claims are frequently in the news—a recent wave of lawsuits against university 403(b) plans, of which *Munro* is a part, made headlines across the popular media.[10] These claims are often brought as class actions and may involve large claimed damages. The article first discusses the developing legal background regarding the arbitrability of fiduciary suits. It next reviews practical considerations that plan decision-makers should weigh in deciding whether to direct future claims to arbitration. The article concludes by briefly discussing suggested practices for those plans that decide to incorporate an arbitration provision.

LEGAL BACKGROUND

As *Munro* shows, the arbitrability of ERISA fiduciary claims has been the subject of heated dispute. Courts have reached different conclusions on whether to compel arbitration (see discussion below). In *Munro*, the defendant USC moved to compel arbitration of a lawsuit alleging a range of fiduciary claims, including allegations that the sponsor allowed imprudent investments to remain as choices for participants, and that the sponsor caused participants to pay excessive fees. Plaintiffs were USC employees who had executed employment agreements each of which included a clause requiring ''resolution by arbitration of all claims, whether or not arising out of Employee's University employment, remuneration or termination, that Employee may have against the University or any of its related entities . . . includ[ing], but . . . not limited to, . . . claims for violation of any federal, state or other governmental law.''[11] The court concluded that because the plaintiffs' claims were on behalf of the plans and the plans were not parties to the agreements to arbitrate, the claims fell outside of the scope of the arbitration clauses. Under Ninth Circuit precedent, a single participant cannot bind his or her plan to settlement.[12] The *Munro* court concluded that, under the same reasoning, a participant cannot bind his or her plan to a specific forum either.[13]

The U.S. District Court for the Northern District of California in *Dorman v. Charles Schwab & Co. Inc.*,[14] went one step further. There, the plan **had** consented to arbitration, through an arbitration clause in the plan itself. The court found the arbitration provision inapplicable because it was added after the plaintiff cashed out his account balance and ceased participating in the plan. It concluded that even if the sponsor had added the provision while plaintiff were a participant, the outcome would be the same, reasoning that ''the Plan Document was executed unilaterally by the plan sponsor . . . [and] a plan document drafted by fiduciaries—the very people whose actions have been called into question by the lawsuit—should not prevent plan participants and beneficiaries form vindicating their rights in court.''[15] The case is currently on appeal in the Ninth Circuit.

On the other side of the country, the U.S. District Court for the Southern District of New York held that a plaintiff suing his plan's investment manager had to proceed in arbitration. *In Cooper ex rel. DST Sys., Inc. v. Ruane Cunniff & Goldfarb Inc.*,[16] the plaintiff sued both his employer, which sponsored his benefit plan, as well as the plan's investment manager, but voluntarily dismissed the employer. The manager moved to compel arbitration on the basis of an arbitration clause in the plaintiff's employment agreement, arguing that plaintiff had dismissed the sponsor precisely to avoid the clause. The court held that the plaintiff had to arbitrate his claim, even though he had no contract with the manager. In contrast to *Munro*, it held that the claim came within the scope of the clause, which reached ''all legal claims arising out of or relating to employment, application for employment, or termination of employment'' because claims relating to plaintiff's ERISA plan arose out of his employment. The court reached this conclusion notwithstanding the arbitration provision's specific carve-out for ''ERISA-related benefits provided under a Company sponsored

(9th Cir. 2006)).

[9] *See, e.g., Williams v. Imhoff*, 203 F.3d 758 (10th Cir. 2000); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *see also* Appellants' Petition for Rehearing or Rehearing En Banc at 14-15, *Munro v. Univ. of S. Cal.*, No. 17-55550 (9th Cir. Aug. 7, 2018) (citing *Williams*, *Kramer*, and cases from the Second, Third, and Eighth Circuits).

[10] *See* Jacklyn Wille, *Coordinated ERISA Lawsuits Hit Yale, NYU, Duke, Others*, Bloomberg Law (Aug. 12, 2016); Tara Siegel Bernard, *Employees Sue Four More Universities Over Retirement Plan Fees*, N.Y. Times (Aug. 11, 2016).

[11] *Munro v. Univ. of S. California*, No. CV 16-6191-VAP (CFEx), 2017 BL 359168 (C.D. Cal. Mar. 23, 2017).

[12] *See Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999).

[13] *See* 896 F.3d at 1093.

[14] No. 17-cv-00285-CW, 2018 BL 18676 (N.D. Cal. Jan. 18, 2018).

[15] *Id.* at *6.

[16] No. 16cv1900, 2017 BL 285246 (S.D.N.Y. Aug. 15, 2017).

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benefit plan.''[17] This case too is on appeal, before the Second Circuit.

Finally, in *Brown v. Wilmington Tr., N.A.*,[18] the U.S. District Court for the Southern District of Ohio reached an outcome similar to *Munro* and contrary to *Cooper*. There, the court held that a claim did not fall within the scope of an arbitration clause because it was brought by a participant who, like the plaintiff in *Dorman*, had cashed out before filing suit and before the arbitration provision was added. As in *Dorman*, the court held that the arbitration provision would not cover the claim because it extended only to lawsuits bought by a ''claimant,'' defined to mean an employee, participant, or beneficiary. Because the plaintiff had cashed out before filing suit, the district court concluded, she did not satisfy the definition of claimant.

Despite these divergent outcomes, there is a likelihood that courts will increasingly hold that ERISA fiduciary claims are arbitrable. As noted above, courts of appeal other than the Ninth Circuit have held that ERISA claims are arbitrable. In addition, the defendants in *Munro* have indicated they plan to petition for certiorari.[19] Though the chances the Supreme Court will grant the petition are likely low, as noted above, the Court's arbitration jurisprudence has left little doubt about its views of arbitration, and defendants have argued to the Ninth Circuit that there is an existing circuit split.[20]

Additional development will come from the Second Circuit, which is considering the *Cooper* case on appeal. As that case and *Brown* show, legal developments in this area will come down to the scope of particular arbitration clauses. Even if the Second Circuit reverses in *Cooper*, future cases will likely involve more clauses like the one at issue in *Dorman* and *Brown*—provisions in benefit plans themselves rather than in individual participants' employment agreements. In that realm, *Dorman*'s conclusion that such clauses are impermissible may not stand. Courts have held that plans can include provisions limiting the time that participants may bring suit even though such provisions arguably allow plan fiduciaries to limit a category of claims that may be brought against the fiduciaries themselves.[21]

Finally, courts outside the Ninth Circuit may reach a contrary result to *Munro* even if faced with the same fact pattern—that is, a party relying on an arbitration provision in a participant's individual contract. Other courts have reached an outcome contrary to the Ninth Circuit on the question of whether an individual participant's agreement to settle claims can bind a plan.[22] Consequently, they may reach a different result on the question of whether a participant may agree to arbitrate a plan's claims.

PRACTICAL CONSIDERATIONS

In light of the legal developments signaling that courts will likely enforce arbitration provisions, the key issue for plans will turn on whether arbitration is in fact superior to federal court litigation. Decisionmakers who wish to incorporate arbitration provisions into their plans should be aware of practical considerations, which taken together paint a mixed picture. This section discusses the main practical factors that should be relevant to most plans. Ultimately, most ERISA plans can likely expect that arbitration's advantages will not be so clear cut, and that each plan will have to weigh the drawbacks against the benefits.

Cost

Perhaps the biggest advantage arbitration proponents point to is cost. Arbitration is supposed to be quicker, simpler, and less attorney-intensive than federal court litigation. Empirical work on this question appears to bear this out, however, studies have focused on the field of consumer arbitration or other discrete areas.[23] ERISA fiduciary claims are different. The cost advantage for arbitration may evaporate

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[17] *Id.* at *3.

[18] No. 3:17-cv-250, 2018 BL 262035 (S.D. Ohio July 23, 2018).

[19] *See* Carmen Castro-Pagan, *USC to Ask Justices if Retirement Fee Case Can Go to Arbitration*, Bloomberg Law (Oct. 17, 2018) (citing Second Amended Joint Report of Meeting Under Rule 26(f) at 2, *Munro v. Univ. of S. Cal.*, No. 2:16-cv-06191-VAP-E (C.D. Cal. Oct. 15, 2018)).

[20] *See* Appellants' Rehearing Petition, at 14-15, n. 9, above.

[21] *See Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604 (2013).

[22] *See Howell v. Motorola, Inc.*, 633 F.3d 552, 561 (7th Cir. 2011) (reading ERISA §410 broadly ''would make it impossible, as a practical matter, to settle any ERISA case'').

[23] *See* Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association – Preliminary Report* 6-7 (March 2009) (summarizing prior empirical work). The Searle report concludes that consumers with claims under $10,000 on average paid $95 in arbitrator's fees, while consumer with claims above $75,000 paid on average $1256. Searle Report at 57; *see also* Brief of Amicus Curiae Chamber of Commerce of the United States of America In Support of Defendants at 6-7, *Munro*, 896 F.3d 1088.

Other studies have concluded that arbitration is **more** expensive, however. *See* Searle Report at 6 (discussing a 2000 report published by Public Citizen). Moreover, a CFPB study pointed out that prior empirical work has focused primarily on employment disputes or securities cases, which may not be representative. *See*

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where cases are decided on the papers, as many fiduciary claims are, and where parties are likely to devote the same amount of attorney time as they would to a case litigated in federal court, which is likely to be the case given the high stakes involved in ERISA fiduciary cases. Once the costs for the arbitrator (or arbitrators), the hearing location, and the arbitration fees themselves are tallied up, parties may find that they have spent much more than they would have had they proceeded in federal court, particularly if parties are required to spend the same or more on discovery, as discussed below.

Preclusion

Arbitration decisions can only bind the parties and arbitrators generally are not bound by other arbitrators' decisions.[24] Thus, fiduciaries may be required to litigate the same issue repeatedly, reducing any cost savings, and imposing corresponding costs on participants as well. These features are likely to be pronounced where arbitration clauses contain a collective action waiver, as was the case in the Supreme Court's recent *Epic Systems* decision, because parties will be unable to resolve in one arbitration the claims of multiple participants. It is not yet clear how such a clause would operate in ERISA fiduciary breach claims, however, as the *Munro* court noted, §ERISA 502(a)(2) claims are brought on behalf of plans.[25] The lack of preclusion is a major drawback from plaintiffs' perspective, who argue that this feature gives defendants multiple bites at the apple. In addition, all parties will have to tackle complexities in attempting to settle claims, because settlement of an individual participant's claim will not bind other participants, and the result will be the lack of a full release of the defendant.

Lack of Appellate Review

Under the FAA, court review of arbitration decisions is extremely curtailed and there is practically no appellate review of legal conclusions. Essentially, a party seeking to overturn an arbitration decision must show that some corruption, fraud, or other misconduct infected the proceedings or that the decision was so flawed as to establish that the arbitrators exceeded their powers.[26] This feature drastically reduces the possibility of error correction, raising the stakes for each individual claim. This may prove to be beneficial, however, ensuring that claims can be fully resolved relatively quickly.

Discovery

Discovery in arbitration can be a roll of the dice. Traditionally, one hallmark of arbitration has been the lack formal discovery. However, the ultimate decision on how much discovery to allow rests with the specific arbitrator or panel. Organizations like the American Arbitration Association have rules for discovery, and the Pension Benefit Guaranty Corporation regulations govern discovery in withdrawal liability cases.[27] The lack of a guarantee that an arbitrator will limit discovery magnifies cost concerns.

Substantive Outcomes

One criticism of arbitration is the tendency of arbitrators to make substantive decisions that compromise between parties' positions rather than award full relief to one side.[28] Arbitrators are selected by the parties and their counsel, and they want to maintain a reputation for fairness in order to be selected again. This feature is not always a downside; the fact that arbitrators are unlikely to award complete victory to one side or another may encourage settlement, and may influence parties' behavior before disputes even arise. The complexity of ERISA fiduciary breach claims makes it less likely that an arbitrator will be able to reach an outcome that makes all parties somewhat happy while faithfully applying the substantive law. Moreover, if potential claimants can expect that arbitrators will award them at least **some** relief, even those with frivolous claims may be encouraged to proceed. That said, a key advantage of arbitration is the power it grants parties to select their adjudicators, allowing

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Consumer Fin. Prot. Bureau, *Arbitration Study—Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act §1028(a)* at 15 and n.24 (March 2015).

[24] Arbitrators do typically adhere to existing case law, however, and in some cases to other arbitration decisions, even if they are not required to do so.

[25] Even in §502(a)(2) lawsuits, a participant may seek what is effectively individual recovery, that is payment of money into his or her own plan account alone. *See generally LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 261 (2008).

[26] 9 U.S.C. §10. Courts have held that, under the FAA, they may vacate awards based on the arbitrators' legal conclusions, but only after finding ''manifest disregard of law,'' which provides an extremely narrow window for review of legal conclusions. *See generally Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 268-69 (7th Cir. 2006) .

[27] *See* 29 C.F.R. §4221.5. The AAA also has rules for withdrawal liability cases. However, the rule provides little guidance and few restrictions, mostly leaving the issue to the arbitrator(s) and the parties. *See* Am. Arbitration Ass'n, *Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes* §16 (Prehearing Discovery).

[28] *See* Am. Arbitration Ass'n, *AAA/ICDR Awards Do Not Split the Baby* (noting perception among corporate counsel that awards are frequently split but citing empirical data undermining this criticism).

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them to choose knowledgeable, experienced arbitrators or panels, which provides value to all sides.

System Effects

Finally, decision-makers should be aware of the additional effects that widespread adoption of arbitration may have on the system of ERISA jurisprudence. Arbitrations are generally confidential. This, coupled with the lack of meaningful appellate review, hampers the development of ERISA fiduciary law. The result is a system that advantages repeat players—participants may lack access to information about arbitrators or outcomes in similar cases. The same is true for companies that do not sponsor large plans and rarely face claims. Attorneys who frequently litigate such claims will have an informational advantage. Indeed, a CFPB study found precisely this effect in the consumer arbitration field—on the consumer/claimant side alone, attorneys who frequently arbitrated such cases constituted over 45% of all filings and a ''significant majority'' of filings where consumers were represented by attorneys. The effect was even more pronounced for companies that were repeat players, though this may be skewed by the types of claims involved (consumer debt owed to large lenders).[29] While a particular decision-maker may not focus on these larger system effects in deciding what makes sense for their own plan, the effects are real and worth considering.

SUGGESTED PRACTICES FOR PLANS IMPLEMENTING ARBITRATION CLAUSES

What should decision-makers do if they decide that an arbitration clause may make sense for their plans? First and foremost, legal counsel is critical both for deciding whether to amend a plan to add an arbitration provision and deciding on the design of such a clause. Plans' circumstances of course vary. In general, however, decision-makers should consider the steps below.

Analyze the potential for claims, to the extent possible. Decision-makers should weigh the types of claims the plan and its fiduciaries may expect and what the costs may be. This consideration should include the question of whether there will be any benefit from having a specialized adjudicator instead of a generalist judge.

Analyze where claims may be brought. Decision-makers should consider where claims are likely to be filed. Plans may have forum selection clauses requiring that suit be filed in a specific court. Decision-makers likely have thought about the merits of litigating in a particular court (e.g., the state of the court's docket and the likelihood of delay, whether the circuit has clearly spoken on ERISA issues likely to be litigated, or whether attorney and court time will have to be spent on forging new ground). This may not be the case for plans that lack such clauses. More generally, decision-makers should keep in mind where participants are located, though this may be a challenge because participants may retire and receive benefits in an entirely different jurisdiction.

Ensure the arbitration clause is structured correctly. After deciding that an arbitration provision would be appropriate, decision-makers should consult legal counsel for assistance in drafting the language. As the opinions in *Munro*, *Brown*, and *Cooper* show, the wording of a provision is critical to ensuring that it is actually enforced, and enforced fairly.

Communicate changes to participants. Finally, as a matter of participant relations if nothing else, plan decision-makers and fiduciaries should ensure that changes to procedure are appropriately communicated to participants.

CONCLUSION

The question of whether ERISA fiduciary claims are arbitrable continues to develop, sometimes in surprising ways. Decision-makers considering whether to incorporate arbitration into their plans should keep apprised of the legal developments but, just as importantly, must be aware of the very real trade-offs involved in requiring arbitration for their plans and participants.

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[29] Consumer Fin. Prot. Bureau, at 59-60, n. 23, above.

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