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9th Circuit paves way for more arbitration agreements in ERISA plan docs, BenefitsPro, ft. Tad Devlin

Tad Devlin, partner in the San Francisco office of Kaufman Dolowich & Voluck, LLP, was quoted in an article written by Nick Thorton published in BenefitsPro on August 28, 2019.

The ruling may lead to arbitration agreements more commonly written into plan documents, but not necessarily overnight.

Arbitration agreements in retirement plan documents may become more common after a landmark ruling in the Ninth Circuit Court of Appeals.

Last week, a three-judge panel overturned decades-old case law that effectively said lawsuits brought under ERISA were not arbitrable.

The case, Dorman v. Charles Schwab Corp., was brought by a former broker with the firm, who alleged fiduciaries to the plan mismanaged assets by offering under-performing proprietary investments.

The plan included arbitration clauses, and a waiver to arbitrate claims as a class. A lower court ruled that the agreements were not binding.

But on appeal, the Ninth Circuit said the 1984 case law that had been the circuit's precedent on arbitration agreements in ERISA plans—Amaro v. Continental Can Co.—"is no longer good law."

The Circuit decision relied on three Supreme Court cases that found arbitration agreements in ERISA plans are enforceable.

Courts in other circuits have found that arbitration agreements are enforceable in ERISA plans.

But what should not be expected is the use of arbitration agreements to insulate sponsors from their fiduciary obligations under the law, said Tad Devlin, a partner with Kaufman Dolowich Voluck.

"The Ninth Circuit hinted that an arbitration provision made in an effort to insulate fiduciaries from ERISA liability would not have the same outcome," said Devlin. "The panel said an agreement to conduct arbitration on an individual basis does not 'relieve a fiduciary from responsibility or liability'."

The ruling may lead to arbitration agreements more commonly written into plan documents, but not necessarily overnight.

"I think you will see some of that, but I don't think it will be a swift change where you get a new summary plan document saying any and all claims go to arbitration," said Devlin.

"One of the biggest deterrents to arbitration forum provisions is the limited right of review of arbitration awards," explained Devlin. "The level of deference to an arbitrated decision is very high."

Plan sponsors have had their share of victories appealing lower court rulings—Dorman v. Schwab not the least of them.

Beyond that, arbitration can still be expensive for sponsors, who often are required to foot the entire bill for arbitrators and expert witnesses. The initial cost can be north of $5,000, said Devlin.

“Its pay-to-play,” he said. “You get some insulation from a public filing, and in theory protection from runaway verdicts. But there are costs. Arbitration is becoming more like court proceedings, with more discovery and more depositions. If employers are paying the expense of an arbitration throughout the process to an award, the cost can be significant.”

Sponsors will also have to weigh the possibility of an arbitration agreement, depending on the wording and parameters, inviting claims, noted Devlin.

“The calculus is high-level with arbitration agreements,” said Devlin. “The agreement can determine where a claim is heard, but that may not be where an employer would want to go—the practical decision may not produce the desired result.”

If it’s decided that an arbitration agreement is advisable, employers should require each participants’ signature to the provision itself, and not just to a larger plan document with a baked-in clause.

And if there is a class waiver written, the language will have to be very specific, says Devlin.

“If the language is bilateral, between the employer and the individual participant, pronouns should be accurate. I would avoid using ‘they’ or anything that suggests a plurality.” That latter language could be used to suggest the agreements are not bilateral, but for the entire plan, explained Devlin.

“It’s the arbitration-versus-litigation Rubik’s Cube—any way you turn it there’s a new obstacle or issue to confront,” said Devlin, who nevertheless recommends writing class waivers into the agreements.

While the Ninth Circuit decision “should stand strong,” Devlin expects there will be continued claims that challenge whether an arbitration agreement can be enforced by a claim brought on behalf of an ERISA plan, or whether the agreements are made on an individual basis with each plan participant.

“It’s a semantic pretzel,” he said. “There’s a battle there, and it will continue even with the Ninth Circuit’s decision in the Schwab case.”