



Full 9th Circuit Passes on Review of Schwab Arbitration Ruling, PlanSponsor, ft. Tad Devlin

Tad Devlin, partner with Kaufman Dolowich & Voluck in San Francisco, was quoted in an article written by John Manganaro for PlanSponsor published November 11, 2019.

Experts wondered whether the full 9th Circuit would reconsider a potentially influential pro-arbitration ruling issued recently by a three-judge panel. Now, it appears the full court has passed on conducting such a review.

Back in August, a three-judge panel of the 9th United States Circuit Court of Appeals issued a major decision that was taken to have shifted the standing of mandatory arbitration provisions used in the operation of retirement plans governed by the Employee Retirement Income Security Act (ERISA).

In short, the panel concluded that a previous, precedent-setting 9th Circuit decision which had held that ERISA claims are generally not subject to arbitration provisions is "no longer good law" in light of interim Supreme Court rulings. The underlying case, Dorman vs. Charles Schwab, was initially filed in 2017. Subsequently, in January 2018, a district court judge denied a motion by Charles Schwab that sought to mandate the lawsuit proceed via individual arbitration, rather than as an ERISA class action in federal court. This denial kicked off the appeals process which led to the three-judge panel's pro-arbitration ruling earlier this year.

While generally speaking plan sponsors prefer arbitration to going to court, there are some downsides to forcing ERISA claims into the arbitration route, warns Tad Devlin, a partner with Kaufman Dolowich & Voluck in San Francisco.

"For non-experienced practitioners, the ERISA statute can be a labyrinth, so this would weigh some plan sponsors in favor of going before a federal judge who has heard these types of claims," he says. "Another disadvantage to arbitration is that it is confined to a limited review, and the arbitration award likely would be final and binding and can be very difficult to challenge or overturn. It can be almost impossible to challenge at the judicial level on a petition to vacate the award. To do so, the sponsor would essentially have to show the award decision was fraudulent or corrupt. On the other hand, in a judicial setting, you have at your disposal the district court, the court of appeals and the highest court in the land."