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Second Circuit bypasses the "construe ambiguities in favor of arbitration" rule in reversing order compelling arbitration

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Takeaway: Parties seeking to compel arbitration often rely on the rule announced by the U.S. Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), providing that where an arbitration agreement contains broad language, any ambiguity about whether a claim must be arbitrated should be resolved in favor of arbitration. The panel majority in *Cooper v. Ruane Cunniff & Goldfarb Inc.*, --- F.3d ---, No. 17-2805, 2021 WL 821390 (2d Cir. Mar. 4, 2021), however, arguably disregarded that rule when it held that an ERISA breach of fiduciary claim concerning an employee profit-sharing account did *not* "relate to" the plaintiff-employee's employment. Indeed, while the dissent relied on the *Moses H. Cone* rule, the panel majority did not even cite it. It remains to be seen whether *Cooper* will be limited to its ERISA context or have a broader impact on cases involving the broad "related to" language commonly featured in arbitration agreements.

In *Cooper*, a software development engineer had been enrolled in a profit-sharing account (PSA) when he began employment with DST Systems, Inc. (DST). Ruane Cunniff & Goldfarb Inc. (Ruane), a third-party investment advisor, managed the funds in the PSA. In this role, Ruane served as a plan fiduciary under the Employee Retirement Income Security Act (ERISA).

Under Ruane's management, almost 30% of the PSA's total assets were invested in a single pharmaceutical company. That company's share price dropped dramatically, however, causing the value of the PSA's overall holdings to drop from a high of over $400 million to under $100 million.

Cooper filed a putative class action lawsuit against DST, Ruane, and others, asserting violations of ERISA. After a private mediation, however, Cooper dismissed his claims against all defendants except Ruane, leaving only his breach of fiduciary duty claims against Ruane.

When DST hired Cooper, they agreed to arbitrate "all legal claims arising out of or relating to employment." 2021 WL 821390, at *3. Although Ruane did not sign this arbitration agreement, Ruane moved to compel arbitration under the equitable estoppel doctrine. Ruane argued equitable estoppel applied based on Ruane's close relationship with DST as its third-party investment advisor over many years and the close overlap between the claims alleged by Cooper against DST (the signatory) and Ruane (the non-signatory).

The district court concluded that Cooper's breach of fiduciary duty claims "related to" his employment at DST, given that his claims concerned his compensation as a DST employee. The district court further concluded that non-signatory Ruane was entitled to an order compelling arbitration, given that Cooper's claims and the subject matter of the arbitration agreement (Cooper's employment at DST) were sufficiently intertwined.

Cooper appealed and the Second Circuit – in a 2-1 decision – reversed. The thrust of the Second Circuit's decision was that Cooper's breach of fiduciary duty claims against Ruane were *not* related to his employment. The majority ruled: "we weigh heavily the consideration that none of the facts relevant to the merits of Cooper's claims against Ruane relates to his employment. Cooper's claims hinge entirely on the investment decisions made by Ruane; the substance of his claims has no connection to his own work performance, his evaluations, his treatment by supervisors, the amount of his compensation, the condition of his workplace, or any other fact particular to Cooper's individual experience at DST." *Id*. at *7.

The majority also sought to cabin the broad "related to" language in the arbitration agreement. Quoting out-of-circuit authority, the majority observed that "the Eleventh Circuit held that the phrase 'related to' 'marks a boundary by indicating some direct relationship; otherwise, the term would stretch to the horizon and beyond.'" *Id*. (quoting *Doe v. Princess Cruise Lines*, *Ltd*., 657 F.3d 1204, 1218 (11th Cir. 2011) (emphasis in original)).

Judge Richard Sullivan, in dissent, concluded that the district court's order compelling arbitration should have been affirmed under the *Moses H. Cone* rule, explaining that he was not persuaded the arbitration agreement "clearly and unambiguously excludes Cooper's breach of fiduciary duty claims from arbitration." *Id*. at *9 (Sullivan, J., dissenting). Although "a closer call," Judge Sullivan also concluded that the equitable estoppel doctrine applied: "because of Cooper's knowledge about Ruane's role in managing the [PSA] and his characterization of DST and Ruane as closely intertwined throughout this litigation, I would also affirm the district court's equitable estoppel holding." *Id*. at *9.

Ruane did not petition for rehearing en banc, but it remains to be seen whether Ruane will rely on Judge Sullivan's dissent to support a certiorari petition to the U.S. Supreme Court.