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Supreme Court declines to clarify enforceability of mandatory arbitration provisions for fiduciary breach claims

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Are mandatory arbitration provisions with class action waivers a solution to the onslaught of class action litigation against 401(k) plans in recent years? Some courts have enforced mandatory arbitration provisions in ERISA plans, finding them enforceable under the Federal Arbitration Act. *See Dorman v. Charles Schwab Corp*. 934 F.3d 1107 (9th Cir. 2019); *Holmes v. Baptist Health S. Fla., Inc.*, No. 21-22986-CIV, 2022 WL 180638 (S.D. Fla. Jan. 20, 2022); *Robertson v. Argent Trust Co.*, No. CV-21-01711-PHX-DWL, 2022 WL 2967710 (D. Ariz. July 27, 2022); *Best v. James*, No. 3:20-CV-299-RGJ, 2023 WL 145007 (W.D. Ky. Jan. 10, 2023). Three Courts of Appeals, however, have found arbitration provisions unenforceable because of limitations they imposed on plan-wide relief. *See Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, 59 F.4th 1090 (10th Cir.), *cert. denied sub nom. Argent Trust Co., et al. v. Harrison*, No. 23-30, 2023 WL 6558426 (U.S. Oct. 10, 2023); *Henry v. Wilmington Trust NA*, 72 F.4th 499 (3d Cir.), *cert. denied*, No. 23-122, 2023 WL 6797729 (U.S. Oct. 16, 2023).

In October, the Supreme Court declined to hear appeals of the Third and Tenth Circuit cases which had held arbitration provisions unenforceable, signaling that it would not clarify questions regarding the enforceability of class action waivers and mandatory arbitration agreements for fiduciary breach claims in ERISA plans any time soon.

Arbitration Background

The Federal Arbitration Act makes arbitration agreements presumptively enforceable under federal law. In 2019, the Ninth Circuit reversed a prior decision in holding that mandatory arbitration provisions with class waivers are enforceable under ERISA. *See Dorman*, 934 F.3d at 1111–12. A companion unpublished memorandum opinion directed the district court to order individual arbitration of claims. 780 Fed. Appx. 510 (9th Cir. 2019). Some courts have followed the Ninth Circuit's holding and enforced mandatory arbitration provisions. *See Holmes*, 2022 WL 180638 ; *Robertson*, 2022 WL 2967710; *Best*, 2023 WL 145007.

Although not questioning that arbitration provisions in ERISA plans may be enforceable in principle, other courts have declined to enforce arbitration provisions that are limited to individual claims for relief. *See Henry* 72 F.4th 499; *Smith*, 13 F.4th 613; *Harrison*, 59 F.4th 1090. These courts have applied an "effective vindication" exception to the enforceability of arbitration requirements. This exception holds that arbitration provisions can only specify the procedure for resolving claims but cannot limit the statutory remedies that are available to participants and beneficiaries under ERISA.

Thus, arbitration provisions that allow only for individual relief (such as only allowing monetary relief due

to the individual participant) may not be enforceable if they preclude plan-wide relief otherwise available under ERISA (such as monetary relief on behalf of the plan as a whole or an injunction to remove a breaching fiduciary). Because each of the arbitration provisions at issue in these cases automatically invalidated the entire arbitration provision if any portion of the arbitration provision was invalid, the courts struck them in their entirety.

Third Circuit and Tenth Circuit Cases

In *Harrison*, the Tenth Circuit applied the "effective vindication" exception in refusing to enforce a plan's arbitration provision that provided only for individual relief (limiting a participant to claiming only a pro-rata share of any losses to the plan that a fiduciary would be required to restore for a fiduciary breach). The court was persuaded by arguments by the Department of Labor in an amicus brief that application of the arbitration provision, which was limited to individual relief, would preclude statutory remedies under ERISA (including restoring all plan losses and removing a fiduciary). The Third Circuit applied a similar analysis in refusing to enforce a mandatory arbitration provision in *Henry*.

In petitions to the Supreme Court, the defendants argued that ERISA can be harmonized with the Federal Arbitration Act by allowing plans to require individual arbitration of claims. The petitions noted that while the Supreme Court has recognized the "effective vindication" exception in theory, it has rejected its application in every case where it has been raised. The petitions also alleged that the lower courts failed to consider the implications of the Supreme Court's holding in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022). The *Viking River Cruises* decision upheld a contractual provision that required purely individual arbitration, thereby striking down a portion of the California Private Attorney General Act (PAGA) that barred contractual provisions that mandate individual arbitration of only individual claims by plaintiffs. In *Viking River Cruises*, the arbitration agreement at issue (unlike the requirement in the *Harrison* and *Henry* cases) included a severability clause that permitted striking part of it and preserving the rest.

Because the Supreme Court declined petitions to hear the *Harrison* and *Henry* cases (and the plan did not seek certiorari review in *Smith*), these arguments will not be fully resolved in the near future.

Further Considerations

The import of the Supreme Court's declining to review the *Harrison* and *Henry* cases is ambiguous. The Supreme Court may think the issues need further development in the lower courts, or it could be waiting for a decision declining to enforce an arbitration clause that includes a severability clause like *Viking River Cruises*.

In the absence of Supreme Court resolution, uncertainty will persist regarding the enforceability of mandatory individual arbitration provisions in ERISA plans. While the relevant cases do not cast any doubt on the general principle that arbitration provisions can be enforced under ERISA, there are significant questions as to how they will be applied with respect to claims for plan-wide relief, which pose the greatest threats to 401(k) and other ERISA-covered retirement plans.

Despite the uncertainty, plan sponsors should still consider the extent to which a carefully designed mandatory arbitration provision may provide some protection from the threat of class action litigation. For example, it may be possible to require individual arbitration of all but certain specified types of claims while permitting participants to pursue excluded claims in court. In that case, including a severability clause in the arbitration requirement like *Viking River Cruises* could make a significant difference.

Plan sponsors and fiduciaries should also be cognizant of the risk of "mass arbitrations," where a large number of individual arbitration claims are initiated that create significant upfront costs for the respondent. A number of companies have been targeted by mass arbitrations in some employment cases, although there may be obstacles to filing as many claims in the ERISA plan context (for example, because of requirements to first exhaust administrative remedies). Further, unlike in the employment context, we have not seen mass arbitrations following the cases that have enforced an individual arbitration requirement.

If a mandatory arbitration provision is adopted, participants and beneficiaries should receive appropriate notice of the provision, which may be described in an updated summary plan description or a summary of material modifications.

Regardless of whether an arbitration provision will be adopted, plan sponsors should consider adopting other plan provisions, or reevaluating provisions that have already been adopted, that may be protective in cases of fiduciary claims, including comprehensive requirements for exhaustion of administrative remedies and venue selection.

Finally, plan sponsors should consider the Department of Labor's role in enforcement of the fiduciary rules. In addition to filing amicus briefs in arbitration cases, the Department of Labor has announced a program to "vigorously prosecute violations where workers are bound by mandatory arbitration." *See* Mandatory Arbitration Won't Stop Us from Enforcing the Law .

Therefore, an effective mandatory arbitration provision may not provide a clean pass from fiduciary breach claims, but it should increase the likelihood that these claims are largely or entirely resolved on an individual basis.