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ERISA Arbitrability Battles May Require High Court Guidance

By **Kellie Mejdrich**

Law360 (July 21, 2023, 6:48 PM EDT) -- The Third Circuit recently ruled that a proposed Employee Retirement Income Security Act class action brought by workers at payroll firm ADP could be kicked to arbitration, a little more than two weeks after saying an ERISA case against Wilmington Trust should stay in court.

Meanwhile, the Tenth Circuit's refusal to compel arbitration in a federal benefits lawsuit triggered a U.S. Supreme Court petition.

Attorneys are keeping a close eye on how circuit courts handle ERISA arbitration, particularly regarding whether employers can force workers to bring their claims individually — as opposed to a class action, for example — using language in plan documents. Already the **Tenth**, **Third**, and **Seventh** Circuits have backed workers on that question, but numerous other cases raising similar questions are pending.

All the activity has some observers saying that whether or when businesses and plan administrators can make workers give up their right to pursue ERISA representative or class actions, and arbitrate individually instead, is likely to make its way up to the U.S. Supreme Court — and the stakes are high.

"I would suspect that there's going to be one of these arbitration cases that winds up in the Supreme Court," said Charles Field, partner and chair of the financial services litigation practice at plaintiffs firm Sanford Heisler Sharp LLP.

"If the Supreme Court agrees that plans can agree to not only arbitrate, but to waive class actions, that will effectively put an end to ERISA lawsuits," Field said.

Here's an overview of how courts are handling an issue experts say may ascend to the nation's highest court.

Recent Decisions

The Third Circuit's July 17 decision **requiring** ADP retirees to arbitrate their ERISA claims against a plan service provider provided a clear example of how plans could use arbitration agreements in contract language to force ERISA class actions into alternative dispute resolution, benefits attorneys say.

The arbitration provision in the ADP case was included in a contract between ADP and the plan's administrator, NFP Retirement Inc. A proposed class of workers bringing claims against NFP — individually, on behalf of other retirement plan participants, as well on behalf of the plan — had argued they never consented to the provision. But a three-judge panel reasoned the plan's consent to arbitrate with NFP was what mattered, not the workers'.

The decision stands in contrast to a June 30 Third Circuit ruling handing the plaintiff side a win in Marlow Henry v. Wilmington Trust NA et al. In that case, a different Third Circuit panel held that a participant in an envelope manufacturer's employee stock ownership plan couldn't be forced to individually arbitrate his investment mismanagement claims against Wilmington Trust and two executives at the company he worked for, BSC Ventures Holdings Inc.

While the ADP arbitration language was in a contract, the provision at issue in the case the Third Circuit decided in late June was tucked in ESOP plan documents, making its application much more sweeping. The language required all disputes be brought out of court solely in an individual capacity "and not in a representative capacity or on a class, collective, or group basis."

The panel in the Wilmington Trust case found by requiring ex-worker and lead plaintiff Marlow Henry to bring claims individually in arbitration, and by specifying that the waiver was expressly nonseverable from the rest of the provision, it was in violation of the Federal Arbitration Act. That's because it blocked Henry from "pursuing the full range of statutory remedies created by ERISA," the Third Circuit panel said.

Already, parties in other ERISA class actions in the circuit are arguing over which Third Circuit ERISA arbitration decision applies to their case. For example, Sodexo told a California federal court Wednesday **to disregard** a notice from ex-workers arguing the Third Circuit's June decision in Henry helped their bid to keep the suit in court, with Sodexo citing the Third Circuit's ADP decision instead.

"The Third Circuit issued another ruling more recently than Henry in Berkelhammer v. ADP Totalsource Grp., Inc., where it expressly held that a participant's consent is irrelevant to the determination of whether an arbitration provision is enforceable," Sodexo said.

Andrew Oringer, partner at Wagner Law Group, compared the two decisions as being like "night and day" with respect to their contexts. He described the ADP decision as "on the outer edges of the big debate regarding whether arbitration provisions in a plan are enforceable."

Oringer said he believed the ADP case was "factually distinguishable" from the Henry case: "It's just a very, very different decision than whether you're going to enforce an arbitration provision in a plan that stops participants from suing plan fiduciaries up and down," Oringer said.

Mark Boyko, a partner at Bailey & Glasser LLP who represents plaintiffs in ERISA class actions, said there were distinctions between the two cases on arbitration.

"The Third Circuit got it right in Henry — a plan can't restrict relief in arbitration to losses to an individual plaintiff's plan account," Boyko said.

Boyko said the ADP case "deals with an entirely different issue, namely assent to arbitrate,'' he said. "It addressed a contract with a service provider to a plan, not with a plan document."

The Third Circuit decisions followed a considerable plaintiff-side victory in the Tenth Circuit in February, when a three-judge panel **invalidated a waiver** with the same type of restrictive language at play in the Henry case. In both the Third and Tenth Circuit cases affirming arbitration denials, panel judges cited a 2022 Seventh Circuit panel decision in James Smith v. Board of Directors of Triad Manufacturing Inc. et al. as backup for their decisions.

Argent Trust Co., Envision Management Holding Inc. and other management-side defendants in the case filed a petition for certiorari July 7 with the U.S. Supreme Court seeking to overturn the Tenth Circuit's decision.

Cases to Watch

Given differences between the ADP and Henry decisions, some attorneys speculate the Third Circuit might clarify its stance. Jeff Dubner, acting legal co-director at Democracy Forward, said he's watching for some kind of action from the appellate court to clear up the differences between the two arbitration rulings from June and July.

"There may well be distinctions in the facts of the claims here and the facts of the arbitration agreement that make Henry and Berkelhammer reconcilable,'' Dubner said. "But it's not clear from the opinion, and that's something the Third Circuit may need to clean up, either on rehearing or in a subsequent case."

"Because parties will certainly be arguing about how the two cases do or don't work together," he

added.

A newly filed Third Circuit appeal presents one such opportunity, where management seeks to reverse a Delaware federal judge's decision from March **refusing to force** an ERISA class action into individual arbitration, in Burnett et al. v. Prudent Fiduciary Services LLC et al.

Attorneys are also looking out for an ERISA arbitration decision pending in the Second Circuit following **oral arguments** before a three-judge panel in February in another management-side appeal seeking to overturn a New York district court's decision refusing to shoehorn an ERISA class action into individual arbitration.

As for the petition for certiorari out of the Tenth Circuit, the Supreme Court already has scheduled a case management conference for September.

Several attorneys told Law360 they were skeptical the Tenth Circuit case will get picked up by the high court. Some pointed out how the Supreme Court in January **rejected a petition** out of the Sixth Circuit after an appellate panel in **April 2022** refused to force an ERISA class action into individual arbitration in Hawkins et al. v. Cintas Corp. et al.

In their petition, management-side defendants seeking to force a proposed class of ex-workers' ERISA claims alleging mismanagement of the Envision ESOP into individual arbitration argued that recent appellate courts declining to enforce arbitration created a circuit split. They said the Third, Tenth and Seventh Circuits had split with the Ninth Circuit, which **enforced individual arbitration** of ERISA claims in a 2019 decision in Dorman v. Charles Schwab Corp.

Field, with Sanford Heisler Sharp, was skeptical of the petitioners' reference to the Ninth Circuit case. He and other attorneys pointed out how the decision was partially unpublished, among other issues that could prevent its broader application.

"The precedential value of the Dorman decision has been roundly questioned," Field said.

Leah Nicholls, attorney at Public Justice, a pro-worker legal advocacy organization that has filed numerous amicus briefs in support of workers resisting sweeping ERISA arbitration provisions, also was skeptical of the Ninth Circuit case and its precedential value.

Public Justice represented the plaintiffs in the Dorman case in seeking rehearing following the Ninth Circuit panels' decision in 2019. Public Justice also filed amicus briefs in support of workers in Harrison and Smith out of the Seventh and Tenth Circuits.

"That's not going to get a lot of traction with the court," Nicholls said of the petition.

But she said given the high court's interest in arbitration generally she's still keeping a close eye: "I think the court has also been willing to take arbitration cases, even without a split."

--Editing by Amy Rowe and Roy LeBlanc.
