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Supreme Court asked to weigh in on arbitration, again

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The U.S. Supreme Court.

For the third time in less than five years, the Supreme Court is being asked to decide when an ERISA complaint can be settled via arbitration.

For the third time in less than five years, the Supreme Court is being asked to decide under what circumstances an ERISA complaint should be heard in court or settled via arbitration.

The justices have scheduled a Sept. 26 conference to determine if they will take the case — four justices must give the OK — in a dispute that pits the rules of ERISA vs. the rules of the Federal Arbitration Act in a legal arena where different courts keep issuing different opinions. There is no timetable for the justices announcing if they will accept the case for oral argument.

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"I keep hoping the court will take this case," said Carol I. Buckmann, New York-based founding partner of Cohen & Buckmann PC, who isn't involved in the case, Argent Trust Co., Envision Management Holding et al. vs. Robert Harrison. "Hopefully the justices will take it to get the law clarified."

The Supreme Court declined without comment to review petitions about arbitration in ERISA disputes in February 2019 from the University of Southern California over two 403(b) plans and in January 2023 from a Cintas Corp. 401(k) plan.

In both instances, employers sought to overturn pro-plaintiff rulings by federal appeals courts that said arbitration provisions in individual employment contracts didn't apply to class-action complaints under ERISA.

In February 2023, USC, denying any wrongdoing, said it would pay $13.05 million to settle the complaint alleging high record-keeping costs and investment fees.

The Argent case is different because the arbitration agreement is inserted in Envision's employee stock ownership plan, an ERISA-protected defined contribution plan. Argent is the trustee.

No court has ruled that ERISA prohibits arbitration, and the Department of Labor supports the right of ERISA-covered plans to contain arbitration agreements. However, some courts have rejected these in-plan arbitration agreements, saying they are invalid because their terms don't protect participants' rights in class-action lawsuits. That was the theme in the Argent Trust-Envision Management case.

Harrison, a former Envision employee, sued in January 2021 challenging the fairness of an ESOP stock sale by privately held Envision, alleging that the deal violated ERISA by harming

participants financially. His class-action complaint also said Argent should be replaced as trustee. Envision, its fiduciaries and Argent responded that Harrison's complaint belongs before an arbitrator — not in court.

A U.S. District Court in Denver ruled for Harrison in March 2022, saying the arbitration agreement was unenforceable because it "disallows a litigant from seeking plan-wide remedies."

The 10th U.S. Circuit Court of Appeals in Denver in February 2023 upheld the District Court decision, saying that the arbitration policy was inadequately written to protect the rights of Harrison and other participants.

Seeking clarity

Envision, Argent and Envision fiduciaries sought a Supreme Court review, saying the Denver appeals court, and several other appeals courts, are in conflict with another appeals court.

The 9th U.S. Circuit Court of Appeals, San Francisco, ruled in August 2019 that an employer could enforce arbitration in an ERISA complaint filed by an employee. The arbitration clause in the company's 401(k) plan document contains a class-action waiver, according to the ruling in Dorman et al. vs. The Charles Schwab Corp. et al.

However, appeals courts in Denver, Chicago and Philadelphia have ruled that arbitration agreements in retirement plan documents didn't protect all participants' rights under ERISA. Each pro-participant decision involved a class-action complaint.

The Denver court's ruling "subjugates" the Federal Arbitration Act to ERISA, creating a conflict with previous Supreme Court decisions regarding these two laws "that, read properly, exist in harmony," attorneys for Argent and Envision wrote in their July petition to the Supreme Court.

If the Denver court prevails, "ERISA claims will stand alone as an exception to this court's commitment to enforcing individual arbitration provisions," their petition said.

Attorneys representing Harrison, the former Envision employee, petitioned the Supreme Court in August, saying there was no circuit split because all federal appeals courts agree that ERISA claims are subject to individual arbitration, if the arbitration agreements' terms protect participants' ERISA rights.

Harrison's attorneys said the Envision plan's arbitration language was faulty. "What an arbitration clause cannot do is what this one does — prevent claimants from pursuing in

arbitration the remedies afforded to them by ERISA," the attorneys wrote in their petition to the Supreme Court.

Uncertain fate

Some ERISA attorneys not directly involved in the case said they aren't sure if the Supreme Court will take the case.

The Argent case "is not a split over the law; it's a split over facts," said Jordan Mamorsky, referring to the Denver appeals courts comments about the terms of the Envision arbitration agreement.

Mamorsky, of counsel for the Wagner Law Group, represents sponsors in ERISA cases. He doubted the court will address the dispute.

Courts look at these disputes on a case-by-case basis, said Mamorsky, who is based in Chicago. They make the distinction between an employment agreement and a plan document, and they look at plan documents' wording to make sure participants' rights are protected, he said.

The key issue in Argent and other lawsuits is "effective vindication," a term cited by the Supreme Court in a 2013 ruling in a non-ERISA case. The 5-3 decision said, in part, that an arbitration clause "will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result."

In ERISA lawsuits, the "effective vindication" exemption means that an arbitration agreement is unenforceable if it prevents plaintiffs for benefiting from all ERISA legal remedies, including removing a fiduciary and receiving payments to the class of participants harmed by ERISA violations.

Several courts have cited "effective vindication" to declare arbitration agreements invalid even though the agreements are contained in ERISA-covered retirement plans. "These cases relate to stripping plaintiffs of remedies as opposed to stripping plaintiffs of representation," Mamorsky said.

"This is really a big issue in cases where arbitration was denied," added Buckmann, who represents sponsors in ERISA cases.

DOL opinion sought

When Supreme Court justices contemplate taking a case, they periodically ask federal agencies — including the Department of Labor — for their opinions, which are filed by the

office of the solicitor general, which conducts all Supreme Court litigation on behalf of the federal government.

If asked, the DOL response most likely won't be a surprise. In September 2022, It filed an amicus brief supporting Harrison with the Denver appeals court when it was reviewing the Argent/Envision case.

The arbitration provision was written in such a way that it "precludes plaintiff from obtaining the very relief that ERISA expressly allows him to seek," the DOL wrote.

Because ERISA complaints can be class-action complaints, "defendants sought to force plaintiff to abandon those statutory remedies by moving to compel arbitration under an agreement that restricts him to obtaining only individualized relief," the DOL wrote. "In contrast, provisions that do not limit a statutory remedy but merely affect the manner of arbitration will generally stand."

Justices don't have to follow federal agency comments, but these views carry a lot of weight.

"The court rarely goes in a different direction than the solicitor general," said Nancy Ross, a Chicago-based partner in Mayer Brown LLP, who represents sponsors in ERISA cases. Ross and her firm filed an amicus brief on behalf of the U.S. Chamber of Commerce supporting Envision and Argent when the case was considered by the 10th Circuit Court of Appeals.

"I would be surprised" if the Supreme Court accepted the case, she said.

If clients ask about putting an arbitration clause in a retirement plan document, Ross said they should be careful about the terminology. For ERISA-covered retirement plans, restricting arbitration to an individual and preventing planwide relief "likely won't be enforced" by courts in class-action complaints, she said.

When clients ask Joseph J. Torres about installing an arbitration provision in their retirement plan documents, he alerts them to the uncertainty, tells them to evaluate pros and cons, and advises them to be careful with the terms of the provisions. Torres, a Chicago-based partner at Jenner & Block who represents sponsors in ERISA cases, isn't involved in the Argent case.

He noted that recent Supreme Court rulings have given strong support to permitting arbitration in non-ERISA litigation, but he isn't sure if the court will take the Argent case. The justices might believe "it could be an issue on the language" rather than a legal dispute,

he said. "Even if this is not the right vehicle, there are other cases" pending in different appeals courts that might come to the justices' attention soon, he added.

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