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Compelling ERISA Arbitration No Sure Thing, 9th Circ. Shows

By **Kellie Mejdrich**

Law360 (August 6, 2025, 9:26 PM EDT) -- The Ninth Circuit aligned with several other federal appeals courts when it recently struck down a clause in a food service company's employee health plan that barred class or representative actions, marking the latest in a series of setbacks for employers looking to push federal benefits suits into solo arbitration.

A three-judge appellate panel on Monday **affirmed in part and reversed in part** a district court's July 2023 **denial of a motion to compel arbitration** from Sodexo in a proposed class action led by Sodexo employee health plan participant Robert Platt, who claimed that a health plan fee assessed against tobacco users violated the Employee Retirement Income Security Act.

Monday's decision held that a representative action waiver in an arbitration provision tucked into Sodexo's employee health plan was invalid under the Federal Arbitration Act's effective vindication doctrine, which allows judges to overrule an arbitration agreement if it blocks a party from being able to bring claims under federal law.

"What it's really saying is that the plan sponsors can't get the kind of arbitration that they want, or at least it will be very difficult for them to get what they want," plaintiff-side attorney Kai Richter, of counsel at Cohen Milstein Sellers & Toll PLLC, said of the Sodexo decision.

The Ninth Circuit's ruling follows similar findings invoking the effective vindication doctrine to thwart arbitration language in plan documents that purport to block representative relief or action by an individual plan participant. The **Sixth Circuit ruled** along those lines in October 2024, as did the **Second Circuit** in May 2024, the **Third Circuit** in June 2023, the **Tenth Circuit** in February 2023 and the **Seventh Circuit** in September 2021.

The Sodexo ruling "confirms the law that was already emerging in other circuits" on how the FAA's effective vindication doctrine dovetails with ERISA, according to Richter.

"The Representative Nature of ERISA Actions"

The panel's published decision Monday first affirmed the lower court's decision to reject Sodexo's bid to force individual arbitration of ERISA claims for benefits and equitable relief. The panel concluded that under the FAA, consent was required from individual plan participants, which Sodexo hadn't obtained when it unilaterally amended the plan to add an arbitration clause.

On Platt's ERISA fiduciary breach claim, the panel reversed the lower court's denial, finding that because the relevant consenting party for that claim was the plan and not individual participants, Sodexo had obtained consent. But the panel also found the arbitration provision's representative action waiver triggered effective vindication because it purported to block Platt, the health plan participant who sued on behalf of other participants and the plan itself, from bringing a fiduciary breach claim.

Richter, at Cohen Milstein, said that the court's finding on effective vindication was "very significant," because the holding means even when employers make a valid agreement to arbitrate with a benefit plan, "you can't force a party to litigate in a non-representative capacity."

"It preserves the representative nature of ERISA actions," Richter said.

Despite the effective vindication holding, the panel didn't rule that the entire arbitration provision was invalid, leaving the lower court to determine whether the representative action waiver that ran afoul of the FAA was severable from the rest of the agreement.

Gerald Maatman, who chairs Duane Morris LLP's class action defense practice, agreed the effective vindication holding was a win for the plaintiffs bar.

"Anything that a plaintiff-side lawyer can do to derail a motion to compel arbitration and to allow part of the class action claim to hang out in court — that's a win. It's not clean. And the practical realities of a decision like that is, it's much more expensive to deal with the issue in court as a class action than it might be as a single-plaintiff arbitration," Maatman said.

"Complete Uniformity" Still Elusive

While Monday's Sodexo holding makes clear that individuals can't be precluded from bringing claims on behalf of a plan through a representative action via arbitration provisions they have not consented to, some employer-side practitioners see daylight between the Ninth Circuit and what other federal appeals courts have said.

Rick Nowak, partner and co-chair of the ERISA litigation group at Mayer Brown LLP, said he sees "not complete uniformity" between the circuits on participants' entitlement to planwide relief.

He gave the example of how the Ninth Circuit's effective vindication holding in Sodexo cited the Seventh Circuit's 2021 decision in Smith v. Board of Directors of Triad Manufacturing Inc. In that case, an appellate panel invoked the effective vindication doctrine over arbitration language that specifically blocked planwide remedies, such as removal of a plan fiduciary.

"I don't read that [Seventh Circuit] case as going that far," Nowak said, referring to differences with the Ninth Circuit's Sodexo decision on how effective vindication was invoked and why.

"There, the court again invoked the effective vindication doctrine, but that was because it precluded a participant from seeking removal of a fiduciary, which would have planwide effect in terms of equitable relief. … But I do think there are still some open questions with respect to planwide monetary relief, as long as you don't preclude a representative action overall," Nowak said.

Attorneys also pointed to the Sodexo decision's determination that the lower court misread how federal and state law interact on what are known as unconscionability defenses to the arbitration clause.

The Ninth Circuit held that a valid arbitration agreement existed between the plan and Sodexo via the food service company's unilateral amendment to the workers' health plan documents, so reviving unconscionability defenses gives Platt another chance to argue the agreement is still unenforceable.

The Sodexo panel said that the lower court erred in concluding that defenses from Platt that the arbitration provision was unconscionable stemmed from state law, holding that defense actually stemmed from federal benefits and common law. But the panel didn't make a specific ruling on the unconscionability defenses, instead giving the lower court a chance to reconsider the issue in the first instance.

Maatman, at Duane Morris, said the decision's unconscionability ruling means that plaintiffs in the Ninth Circuit will have more chances to fight arbitration of that fiduciary breach claim: "Plaintiffs are getting more maneuvering room and more arguments that they can put on the table as a result of decisions like this," Maatman said.

Andrew Oringer, employer-side partner at the Wagner Law Group and a longtime ERISA attorney, said the unconscionability finding was one of several ways he thought the Ninth Circuit "got mired in the swamp" on ERISA arbitration. But he agreed that for plaintiffs in Sodexo, it gives them another chance to fight an arbitration push.

"Moving unconscionability up … so that it's a federal claim, and therefore not preempted, is

important, because if it were preempted, the claim is gone — it disappears," Oringer said.

Ultimately, differing interpretations of the law when it comes to ERISA and mandatory arbitration may draw the interest of the nation's highest court.

"There's a little bit of everything for everyone in this case, which says the needle is moving, the law is in flux, and [it's] probably going to end up one of these days in the Supreme Court, as more and more circuits opine on what's going on," Maatman said of the Sodexo ruling.

--Editing by Bruce Goldman and Nick Petruncio.
