Can a Retiree's Mere Participation In a Plan With a Plan Document Arbitration Clause Subject Them To Binding Arbitration of 502(a)(2) Claims?

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In August of this year, the Ninth Circuit ruled in Dorman v. The Charles Schwab Corporation, that a plan document arbitration provision could bar class action allegations of breach of fiduciary duty—brought on behalf of the plan under ERISA § 502(a)(2). ERISA § 502(a)(2) authorizes the Secretary of Labor, fiduciaries, and plan participants (like Dorman) to seek relief for their plans under ERISA § 409(a). The decision raises two very interesting questions. First, can a plan administrator's unilateral amendment of a plan document bind a participant's claims—brought on behalf of the plan—to binding arbitration, and second, is it legally possible to arbitrate claims of breach of fiduciary duty brought under ERISA § 502(a)(2) by an individual on behalf of the plan? Mr. Mamorsky takes us behind the curtain in this important case and answers these questions and more.

In August of this year, the Ninth Circuit ruled in *Dorman v. The Charles Schwab Corporation*[1] that a plan document arbitration provision could bar class action allegations of breach of fiduciary duty—brought on behalf of the plan under ERISA § 502(a)(2). ERISA § 502(a)(2) authorizes the Secretary of Labor, fiduciaries, and plan participants (like Dorman) to seek relief for their plans under ERISA § 409(a).

The Ninth Circuit reached this conclusion even though the arbitration provision was deep within the Schwab Plan Retirement Savings and Investment plan document (Section 15) and accordingly, not every plan participant may have studied it let alone read it. Section 15 of the Schwab Plan document stated: "Any claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration." According to the court, this provision was

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enforceable on the plan and its participants who brought claims under ERISA § 502(a)(2) on behalf of the Plan.

What's more, the court found the arbitration provision to be binding against the plaintiff, Dorman, even though he began participating in the 401(k) plan in 2009 and the plan document was only amended in December 2014 to include the subject arbitration provision. The arbitration provision was not in effect at the beginning of Dorman's participation in the plan. Even so, the court concluded that, through the amendment, the plan on the whole consented in the plan document to arbitrate all ERISA claims and Dorman, therefore, could not waive any rights that do not belong to him, but instead, those rights belonged to the plan.

The decision raises two very interesting questions. First, can a plan administrator's unilateral amendment of a plan document bind a participant's claims—brought on behalf of the plan—to binding arbitration, and second, is it legally possible to arbitrate claims of breach of fiduciary duty brought under ERISA § 502(a)(2) by an individual on behalf of the plan?

To answer the first question, a starting point is the basic principle that arbitration "is a matter of consent, not coercion."[2] The Federal Arbitration Act (FAA) states that a "written provision [in a contract providing for settlement] by arbitration of a controversy . . . arising out of that contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation." 9 U.S.C.A. § 2. Therefore, under the FAA, two consenting parties can agree to arbitration in a written contract.

But in the ERISA context is a plan document a contract the FAA meant to cover? ERISA § 402(A)(1) provides the requirement for a plan document. It states that "every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." In layman's terms, the plan document sets forth what benefits are available, who is eligible, how benefits are funded, who is the named fiduciary, the rights of participants and beneficiaries, how the plan can be amended, and the procedures for allocating plan responsibilities.

Typically, in deciding whether a dispute is arbitrable under federal law, a court must answer two questions: (1) whether the parties agreed to arbitrate; and, if so, (2) whether the scope of that agreement to arbitrate encompasses the claims at issue.[3] But, nowhere, in the statutory definition of a plan document or in its practical implementation, does the participant and the plan expressly agree to its terms like they would in a typical contract.

The Department of Labor (DOL) even recognizes that the plan document is esoteric document written in legalease and instead has traditionally focused on the summary plan description (SPD) as a document geared to be understood and read by plan participants. The DOL states: "The plan administrator is legally obligated to provide to participants, free of charge, the SPD. The summary plan description is an important document that tells participants what the plan provides and how it operates. It provides information on when an employee can begin to participate in the plan and how to file a claim for benefits. If a plan is changed, participants must be informed, either through a revised summary plan description, or in a separate document, called a summary of material modifications, which also must be given to participants free of charge."[4]

Curiously, the Ninth Circuit panel, in *Dorman,* glossed over this fact. It only stated in conclusory terms that because '' 'arbitration is a matter of contract,' the [plan] Provision's waiver of class-wide and collective arbitration must be enforced according to its terms, and the arbitration must be conducted on an individualized basis.' " Whether an individual, acting on behalf of an ERISA plan, can waive rights to a judicial proceeding for claims of breach of fiduciary duty, through a plan document is an open item in the aftermath of *Dorman* and potentially ripe for appeal to the complete Ninth Circuit.

Moreover, even if a court were to find that a plan document fell within the scope of the FAA, amending a plan, as the Schwab plan administrator did here, to include an arbitration provision is a "settlor" function by the plan's sponsor, and therefore, might not be considered an act by the plan as a whole.

Second, although the *Dorman* court came to this conclusion, it is questionable whether it is legally possible to arbitrate claims of breach of fiduciary duty brought under ERISA § 502(a)(2) by an individual on behalf of the plan. The Ninth Circuit panel applied the reasoning of *Lamps Plus* and other recent Supreme Court pro-employer arbitration cases, like *Epic Systems Corp. v. Lewis*[5] to reach a similar result for ERISA § 502(a)(2) claims.

ERISA, however, is its own unique animal. As a starting point, in the ERISA arena, typically participants bring two types of actions under ERISA § 502(a). First, a participant can recover health, disability, or other types of promised plan benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under Section 502(a)(1)(b). Second, a participant can bring a claim under Section 502(a)(2) for breach of fiduciary duty on behalf of the plan to "make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan." Sometimes too, a participant might bring a cause of action for equitable relief under Section 502(a)(3) as a tag-along cause of action or its own discrete claim.

Because Section 502(a)(2) claims are brought by an individual on behalf of the plan—not the individual himself—the availability of arbitration to those claims, has been at best, unclear. Indeed, the court, in reaching the result in *Dorman*, was tasked with reconciling its own very recent decision in *Munro v. University of Southern California*[6] that came to the opposite conclusion. The form of the arbitration agreement, and who agreed to arbitration—the plan versus the individual participant—proved to be the determinative factor to the *Dorman* three-judge panel. The court emphasized that "the relevant question is whether the Plan agreed to arbitrate the § 502(a)(2) claims. Here, the Plan expressly agreed in the Plan document that all ERISA claims should be arbitrated."

Critically, in *Munro*, the individual employees who sued were required to sign an arbitration agreement as part of their individual employment contractual agreements. The arbitration provision at issue in *Dorman*, in contrast, was in the plan document, and according to the Ninth Circuit, was, therefore, binding on the plan and its participants. As mentioned above, this would be more of a typical contractual agreement that the FAA covers.

The difference between having the arbitration provision in an individual agreement and in the plan document was distinguishing fact that persuaded the *Dorman* court to rule opposite to *Munro*.

The Ninth Circuit's holding,

however, that the "parties here should be ordered into individual arbitration" and that "the arbitration must be conducted on an individualized basis" could pose a problem in allowing for the relief called for in ERISA § 409 that provides expressly for relief "to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan." The court did not reference or explain how the restoration of plan-wide relief called for in ERISA § 409 could be provided in an arbitration limited to the damages owed to one participant. Instead, the court focused on the fact that the plan and participants acting on behalf of the plan could waive their litigation rights in the plan document through the arbitration provision.

To arrive at this outcome legally, the heart of the Ninth Circuit's three-judge panel opinion rested on its of interpretation of *LaRue v. DeWolff, Boberg & Assocs., Inc*.[7] The panel stated, in reliance on *LaRue* that "although § 502(a)(2) claims seek relief on behalf of a plan, the Supreme Court has recognized that such claims are inherently individualized when brought in the context of a defined contribution plan."

But in *Munro*, Ninth Circuit Chief Circuit Judge Sidney R. Thomas rejected this interpretation of *LaRue*. Judge Thomas specifically said that the Supreme Court, in *LaRue*, "made clear that it had not reconsidered its longstanding recognition that it is the plan, and not the individual beneficiaries and participants, that benefit from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan."

What's more, in *Munro*, Judge Thomas found *LaRue* ***not to be controlling*** on the issue of arbitration because "the claims brought by the Employees arise from alleged fiduciary misconduct as to the Plans in their entireties and are not, as in *LaRue*, limited to mismanagement of individual accounts." And, in such instances "the relief sought demonstrates that the Employees are bringing their claims to benefit their respective Plans across the board, not just to benefit their own accounts as in *LaRue*."

In this respect, no distinction can be drawn between the core of the plan-wide claims in *Dorman*—that the plan offered proprietary Schwab investment options that charged higher fees and performed more poorly than other investment options on the market to the detriment of the plan and its participants—and *Munro*, where the plaintiffs alleged that the plans' fiduciaries breached their fiduciary duties to the plans' participants by offering a high number of investment options that were excessive in cost, thereby harming the plans and all affected participants and beneficiaries.

The court's findings in *Munro* are supported by other courts that have examined the importance of individuals acting on behalf of plan to enforce their rights and the rights of other participants. As the Eighth Circuit explained in *Braden v. Wal-Mart Stores, Inc.*,[8] "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties—duties which have been described as 'the highest known to the law.' "

The counterpoint is that *LaRue* stands for the fact that when a participant in a defined contribution plan brings a fiduciary-breach claim—even under ERISA § 502(a)(2) the participant is typically not seeking to protect the plan as a whole; instead, he is seeking to recover losses to his own individual account and potentially the individual accounts of whichever other participants also suffered from the breach. This was the defendants' winning argument in *Dorman*. The defendants in *Dorman* stated

in their brief to the Ninth Circuit that:

> Defined-contribution plans are completely different. In those plans, each participant has an individual account holding Plan assets, invested as each participant sees fit. Id. at 255–56; see also 29 U.S.C.A. § 1002(34) (defining "defined contribution plan"). In that arrangement, a breach of fiduciary duty typically causes individualized harm. LaRue, 552 U.S. at 255–56. For instance, a fiduciary may breach a duty by including an imprudent investment fund among the menu of plan investment options. If only two participants allocate contributions to that fund, however, only those two participants would be harmed by the breach . . . LaRue held that a participant in a defined-contribution plan need not demonstrate harm to the entire plan to bring an ERISA § 502(a)(2) claim. 552 U.S. at 256 . . . Instead, the participant need only show that the fiduciary breaches "impair the value of plan assets in a participant's individual account."

Courts' considerations of these differing interpretation of *LaRue* and the form of arbitration agreements (plan documents versus employee contracts) will forge the future viability of arbitration of ERISA § 502(a)(2) class claims. The three-judge panel decision and its differences with *Munro* might create the grounds for an appeal to the Ninth Circuit en banc for a streamlined approach to the issue. Also, if other Circuits disagree with the Ninth Circuit's conclusion that damages can be limited to individualized damages under *LaRue*, it will create a path to a likely appeal to the U.S. Supreme Court because of the prejudice to participants residing in the Ninth Circuit. The only Circuit to provide any guidance on the controversy as of yet was the Third Circuit in *In Re Schering Plough Corp. ERISA Litigation*,[9] which reached a very similar result to *Munro* in finding that Section 502(a)(2) claims belong to the plan and could not be signed away in a release signed by a participant.

Whether such a releases or agreements to arbitrate in plan documents will be enforceable remains an open question. However, whichever way future courts might rule, plan sponsors should recognize that ERISA arbitration might have its own pitfalls—the decision can generally not be appealed, an arbitrator might not have ERISA expertise, and there is often a tendency for an arbitrator to just find middle ground between a participant and fiduciaries. Even with this win for the defendants in *Dorman*, whether the industry as a whole adopts mandatory arbitration remains to be seen—even if the courts say it can be done.

NOTES:

[1]Dorman v. Charles Schwab Corporation, 934 F.3d 1107, 2019 Employee Benefits Cas. (BNA) 309765 (9th Cir. 2019), for additional opinion, see, 2019 WL 3939644 (9th Cir. 2019).

[2]Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488, 51 Ed. Law Rep. 725 (1989).

[3]See Brennan v. Opus Bank, 796 F.3d 1125, 1130, 40 I.E.R. Cas. (BNA) 824, 165 Lab. Cas. (CCH) P 61622 (9th Cir. 2015).

[4]See https://www.dol.gov/general/topic/retirement/planinformation.

[5]Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 200 L. Ed. 2d 889, 211 L.R.R.M. (BNA) 3061, 27 Wage & Hour Cas. 2d (BNA) 1197, 168 Lab. Cas. (CCH) P 11091 (2018).

[6]Munro v. University of Southern California, 896 F.3d 1088, 2018 Employee Benefits Cas. (BNA) 261639, 356 Ed. Law Rep. 908 (9th Cir. 2018), cert. denied, 139 S. Ct. 1239, 203 L. Ed. 2d 199 (2019).

[7]LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 128 S. Ct. 1020, 169 L. Ed. 2d 847, 42 Employee Benefits Cas. (BNA) 2857 (2008).

[8]Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 48 Employee Benefits Cas. (BNA) 1097 (8th Cir. 2009).

[9]In re Schering Plough Corp. ERISA Litigation, 589 F.3d 585, 48 Employee Benefits Cas. (BNA) 1385 (3d Cir. 2009).