Arbitration: What’s Different About ERISA

ABA EBC 2019 MIDWINTER MEETING
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Arbitration Clauses

- How did we get here?
- Types of benefit claims that can be arbitrated
- Where are we now?
- Considerations for fiduciaries and plan sponsors
- Hypotheticals
To date, the Supreme Court has upheld every arbitration clause it has reviewed which required arbitration of statutory claims.

How did we get to this point and why does it matter in the ERISA context?

Historically, the Federal (and State) Courts were hostile to arbitration and routinely refused to enforce arbitration awards.
During the first half of the 20th century, two trends gave rise to the reversal of judicial hostility to arbitration:

1. Court backlogs caused companies to turn to arbitration for resolution of commercial disputes.

How Did We Get Here?


- Courts began to view labor arbitration more favorably since it was the quid pro quo for a no-strike clause in collective bargaining agreements.

- *Textile Workers v. Lincoln Mills*, 353 U.S. 547 (1957)—union may enforce a contractual agreement to arbitrate under section 301 of the NLRA.
How Did We Get Here?

The Steelworkers Trilogy and deference to labor arbitration—the presumption of arbitrability of labor disputes:

How Did We Get Here?

- “An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *Warrior & Gulf* at 582-583.

- Neither *Lincoln Mills* or the *Steelworkers Trilogy* mention, let alone rely, on the FAA.
How Did We Get Here?

Characteristics of labor arbitration at the time of *Lincoln Mills/Steelworkers Trilogy*:

- Informal and, accordingly, fast and inexpensive.
- Involved an on-going relationship between the parties to the arbitration agreement.
- Grievance belonged to the union, not the employee, binding the employer, the union and the affected union member(s) to the result.
- The grievant was to be afforded a fair hearing, which did not necessarily involve all rights associated with due process.
How Did We Get Here?

- Ultimate goal was to avoid labor strife—arbitration was an alternative to a strike, not litigation.
- Early commercial arbitration was also informal and involved only the contracting parties but was an alternative to litigation.
How Did We Get Here?

- While both commercial and labor arbitration procedures became more formal over time, it was not until the late 1980's that the concept of deference to arbitration was expanded from contractual to statutory claims.

- In the mid-1980s the United States Supreme Court held, for the first time, that the FAA required enforcement of agreements to arbitrate statutory claims. See, cases cited by Justice Ginsberg in her dissent in Epic Systems v. Lewis, 138 S.Ct. 1612 (2018) at 1644.
How Did We Get Here?

Question: Do the reasons supporting the federal policy favoring labor and commercial arbitration, as articulated by the Supreme Court, apply to arbitration of statutory claims and/or class actions?
Categories of Employee Benefit Claims Which Might Be Arbitrated

- Multiemployer plans must already arbitrate:
  - Trustee deadlock disputes
  - Withdrawal liability disputes
- Plan versus participant:
  - Benefit claims
  - Breach of fiduciary duty claims under 502(a)(2) or 502(a)(3)
Categories of Employee Benefit Claims Which Might Be Arbitrated

- Plan versus service provider:
  - Breach of contract
  - Breach of fiduciary duty
ERISA section 502(a)(2) allows a participant, beneficiary, fiduciary or the Secretary of Labor to bring an action under ERISA section 409.

Section 409(a) provides: a breaching fiduciary shall be liable “to make good to such plan any losses to the plan resulting from each such breach.”
Where Are We Now?

- The Supreme Court has interpreted ERISA §§ 409(a) and 502(a)(2) as requiring plan participants to seek relief in a “representative” capacity “on behalf of” the plan to recover losses suffered “by the plan.” Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 n.9 (1985).

- Some courts hold that ERISA §§ 502(a)(2) and 409(a) enable plan participants to bring fiduciary breach actions for plan-wide relief. E.g., Perez v. Bruister, 823 F.3d 250, 258 (5th Cir. 2016).
Where Are We Now?

Issue: If an arbitration agreement contains a class action waiver, can the participant be limited to individual relief (and not plan-wide relief) under 502(a)(2)?

In *Epic Systems Corp v. Lewis*, 138 S. Ct. 1612 (2018), Court ruled that a class action waiver contained in an employee’s arbitration agreement is enforceable under the FAA and does not constitute a violation of the NLRA.
Where Are We Now?

Where Are We Now?

- In *Munro v. University of Southern California*, 896 F.3d 1088 (9th Cir. 2018), Ninth Circuit held that “because the parties consented only to arbitrate claims brought on their own behalf, and because the Employees’ present claims are brought on behalf of the Plans, we conclude that the present dispute falls outside the scope of the agreements.” *Id.* at 1091-92.
  - Cert Petition filed on November 29, 2018.
  - Distributed for Conference of February 15, 2019.
Where Are We Now?

- Court has heard three arbitration cases already this term:
  - Henry Schein v. Archer & White Sales
  - New Prime Inc. v. Oliveira
  - Lamps Plus Inc. v. Varela
Where Are We Now?

- Do plan-wide claims under 502(a)(2) have to be brought as a class action?
  - Coan v. Kaufman, 457 F.3d 250 (2d Cir. 2006), dismissed a claim under ERISA § 502(a)(2) because the plaintiff participant did not proceed as a class action or take any other action to safeguard the interest of other plan participants.
  - Perez v. Bruister, 54 F. Supp. 3d 629 (S.D. Miss. 2014), aff’d as modified, 823 F.3d 250 (5th Cir. 2016), held that individual participants who sought plan wide relief and proved up damages for the whole plan sufficiently represented interests of absent participants, no class procedure was required.
Considerations for Fiduciaries and Plan Sponsors

- Should you limit arbitration to certain types of claims?
- Arbitration may eliminate class litigation risks but at what cost?
- May be able to ensure more reasonable discovery, or not.
- Arbitration may improve confidentiality, but does not result in binding precedent.
- What about appeal rights?
Considerations for Fiduciaries and Plan Sponsors

- Should you/can you limit remedies to those available in litigation?
- Is arbitration really less costly?
- What about fee/cost shifting?
- What about judicial discomfort with ERISA claims (balanced against arbitrators' tendencies to compromise)?
- Who is more familiar with the law—judge or arbitrator?
- Risk of multiple individual matters if class action waiver holds up?
- Where to place the arbitration agreement (who is bound by it may change)?
- Who decides arbitrability?
- What forum/rules to use?
Hypotheticals

- DC plan offers investment funds sponsored by the plan’s trustee/record keeper. The funds are alleged to have expenses that are twice those of comparable funds and result in significant revenue for plan service providers while delivering only so-so returns. The plan specifies that claims shall be filed in US District Court in Dallas, Texas. A class action is filed in New York alleging breach of fiduciary duties and prohibited transactions. It is brought against the fiduciaries (committee and employer as plan administrator) and the trustee/record keeper.

- It turns out the plaintiff executed employment agreement with a broad arbitration agreement when becoming employed five years before filing suit. It states that all claims against the employer and its managers/executives shall be brought in arbitration on an individual basis. It does not mention the plan specifically, but states that all claims regarding terms, conditions, compensation, and benefits of employment are subject to arbitration. The agreement states that all claims properly subject to arbitration shall be subject to arbitration before the AAA.
Hypotheticals

- Who is bound by the arbitration agreement?
- What kind of claim is it? Are 1132(a)(3) claims and 1132(a)(2) claims subject to arbitration?
- Who decides if the claim is subject to arbitration?
- Would it make a difference if the Plan provided for arbitration? Would that address arbitrability of claims against the provider?
- What about the question of who decides arbitrability? And where?
- Wait—what about the class action waiver!
Employee who sought wilderness therapy and was denied by the TPA. The plan is a self-funded welfare plan. The plaintiff files a class action against the TPA for denial of benefits and breach of fiduciary duty in failing to properly investigate claims and evaluate them in light of the plan terms (which are at best ambiguous on whether such treatment is covered). The employee signed an employment agreement that contains an arbitration provision that states all claims against the employer and against any other employee or any agent, contractor, or service provider of the employer are subject to arbitration. There is a clear class action waiver. The agreement specifies that it applies to all claims for benefits under the company’s employee benefit plans and all claims for any violation of the law with respect to terms, conditions, and benefits of employment. The employee also accepted the terms of an electronic disclosure in connection with open enrollment that stated, among other things, “you agree that all claims relating to any employee benefit matters are subject to arbitration under the terms of your individual arbitration agreement.” EOBs contain a similar statement in the description of the claim and appeal rights.
Hypotheticals

- Is there a way to avoid arbitration?
- This seems pretty comprehensive—what's missing from a drafting perspective?
- What happens if the health benefit (or other benefit) is insured?
- Is this a good strategy from an employee relations perspective?
- Do you really want to arbitrate this kind of claim?
Questions?