



## Ninth Circuit Permits Arbitration in ERISA Fiduciary Breach Case

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On August 20, 2019, a three-judge panel of the Ninth Circuit overturned longstanding precedent and held that ERISA fiduciary breach claims can be subject to mandatory arbitration.

### **Details of the Case:**

A participant sued the Charles Schwab Corporation (Schwab) and the fiduciaries of the Schwab Retirement Savings and Investment Plan (the Plan), seeking Plan-wide relief for breach of fiduciary duties and violations of the prohibited transaction rules in connection with the selection of Plan investment funds affiliated with Schwab, the Plan sponsor. The plaintiff claimed that Schwab had replaced a low-risk Schwab-affiliated stable-value fund with other Schwab-affiliated funds in order to benefit Schwab. The defendants moved for arbitration based on a Plan provision that required individual arbitration of all claims (except claims for benefits, which continue to follow the claims procedures outlined under ERISA). The Plan stated that “any claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration.” The arbitration provision also included a waiver of class or collective action, stating that any arbitration would be conducted “on an individual basis only, and not on a class, collective or representative basis.” Defendants’ motion to compel arbitration was denied by the district court in February of this year.

On appeal, the Ninth Circuit reversed the district court and decided in favor of the defendants. The opinion focused on why the court was overturning its prior decision, stating that the precedent relied upon by the lower court is “clearly irreconcilable” with intervening Supreme Court cases. Specifically, the Ninth Circuit overturned its own 1984 finding in *Amaro v. Continental Can Co.* that arbitration was not appropriate in ERISA cases, and explained that reservations regarding the fairness of arbitration proceedings and the competency of arbitrators to review federal statutes are out of date, particularly in light of the Supreme Court’s 2013 holding in *American Express Co. v. Italian Colors Restaurant*.

In addition to the published decision, the court submitted a supplemental memorandum that addressed details related to the arbitration of the ERISA dispute. The memorandum states that plan fiduciaries, through a plan amendment, can bind a plan to mandatory arbitration of disputes arising under the plan, even if those disputes are related to actions of the same fiduciaries, and even if the plan amendment providing for arbitration is adopted after the participant has already commenced participating in the plan. In the view of the court, each participant who continues to participate in the plan after the effective date of such an amendment is agreeing to be bound by the

arbitration clause. The Ninth Circuit indicated that the consent of the participant to mandatory arbitration was irrelevant, because these breach of fiduciary claims belong to the plan, and not the individual participants.

Further, the panel of judges indicated that arbitration can be required on an individual basis, thus eliminating collective action by participants, because ERISA does not specifically prohibit the practice, and arbitration on an individual basis does not relieve plan fiduciaries of any liability. Arbitration is a matter of contract, the court stated, and since the parties did not agree to class-wide or collective arbitration, the arbitration must be conducted on an individualized basis.

#### **Winston Take-Aways:**

The decision of the Ninth Circuit is limited, focusing primarily on the court's reversal of its ban on arbitration in connection with ERISA fiduciary breach claims brought on behalf of a plan. The memorandum provides helpful insight into the panel's view that arbitration, including arbitration on an individual basis, should be permitted if the plan's sponsor or decision-maker so chooses. However, it does not delve into the nuances of all available arguments against arbitration in the ERISA context, such as the argument that arbitration on an individual basis is an elimination of the participants' explicit right to file a claim on behalf of the plan as a whole. The decision and memorandum also do not apply to individual participant benefit claims. At present, it is unclear whether the judiciary as a whole is leaning toward the positions outlined in the Ninth Circuit's decision and memorandum.

While this decision may signal that new options will be available, it is important to remember that arbitration may not be the best approach for all plans and all plan sponsors. Prior to taking any action as a result of the decision, plan sponsors should take time to weigh the pros and cons of mandatory arbitration of benefit plan disputes.

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