WINSTON & STRAWN LLP

BLOG

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District Court Allows Arbitration in Attempted ERISA Class Action Fee Lawsuit

The U.S. District Court for the Southern District of Florida recently granted a 403(b) defined contribution plan's motion to compel arbitration in *Holmes et al v. Baptist Health South Florida, Inc. et al*. The plaintiffs filed an ERISA class action suit claiming breach of fiduciary duty related to an alleged failure to monitor and contain plan investment expenses. However, in 2020, the plan was amended to require arbitration of "[a]ny claim … which arises out of, relates to, or concerns" the plan and forbids litigation on a representative or class basis.

The plaintiffs raised two challenges to the arbitration clause.

1. First, the plaintiffs asserted that the arbitration language prevented plaintiffs from seeking plan-wide relief in violation of the "effective vindication" doctrine — a rare exception to the Federal Arbitration Act that allows a court to invalidate an arbitration agreement if it "operates as a prospective waiver of a party's right to pursue statutory remedies." The plaintiffs cited a recent ERISA decision by the U.S. Court of Appeals for the Seventh Circuit, *Smith v. Board of Directors of Triad Manufacturing, Inc., et al.*, which invoked the effective vindication doctrine. However, the court in this case noted that the Eleventh Circuit has never applied the effective vindication doctrine and distinguished the narrower arbitration clause at issue in this case, from the broader arbitration clause at issue in Specifically, the court stated, "while the arbitration clause in *Smith* completely denied some types of statute-authorized relief to the Plan, the clause here does not, as individual claimants can each recover the harm to their defined contribution accounts, and they can recover Plan-wide relief that does not provide additional benefits or monetary relief to others."
2. Second, the plaintiffs challenged the plan's unilateral adoption of the arbitration clause. However, the court determined that breach of fiduciary duty claims belong to the plan and that "the relevant inquiry is not whether individual participants agreed to the arbitration agreement but whether the Plan agreed to arbitrate." The plan document expressly permits amendment by the plan sponsor. (For this same reason, the court concluded that binding arbitration could apply even to participants who were active in the plan prior to the time the arbitration clause was added in 2020.)

Winston Takeaway — In general, courts have determined that ERISA clams are arbitrable. However, as courts analyze whether *specific* arbitration clauses are legally enforceable, two key questions continue to arise as they did in this case:

- Was there a valid agreement to arbitrate?
- Does the arbitration clause at issue impermissibly infringe on a substantive right or remedy under ERISA?

This case provides additional data points to include in this analysis, which may take on greater significance following the U.S. Supreme Court's recent decision in *Hughes v. Northwestern University* to apply a context-specific inquiry to claims that fiduciaries breached their continuing duty to monitor plan investments. That said, whether to add a mandatory arbitration clause to a retirement plan raises sophisticated legal and administrative issues and depends on the facts and circumstances facing the plan.

Supreme Court Issues Surprise, Short, Unanimous Decision in the Northwestern ERISA Case; More to Come?

The Supreme Court has issued its decision in Hughes et al. v. Northwestern University et al. Arguments in the case occurred in December, so the release of a ruling this soon was a surprise. That the decision was unanimous was also a bit of a surprise to those who had listened to the oral arguments, where there was much discussion about the pleading standards and the high cost of litigation as plaintiffs' firms repeatedly file "cut and paste" ERISA class action lawsuits against defendant after defendant. And while plaintiffs' firms are no doubt gleefully seeing dollar signs, more seems certain to follow in this case.

The case involves two defined contribution retirement plans offered by Northwestern University. Plan participants sued the respondents, alleging plaintiff law firms' typical violations of the ERISA fiduciary duty of prudence for actions such as failing to monitor recordkeeping fees, offering higher-cost "retail" investment options, having more than one record-keeper, and offering "confusing" investment options.

The Seventh Circuit Court of Appeals found that, because the plans provided participants with a choice of over 400 diverse investment options (including low-cost index funds), that the fiduciaries acted prudently. However, the U.S. Supreme Court held that participants' ability to choose between *many* diverse options did not relieve the fiduciaries of their duty to monitor *all* of the plan investments and eliminate the imprudent ones.

As a result, the Supreme Court, in a surprisingly short decision, remanded the case back to the Seventh Circuit:

> . . . .so that the court may reevaluate the allegations as a whole. On remand, the Seventh Circuit should consider whether petitioners have plausibly alleged a violation of the duty of prudence as articulated in *Tibble*, applying the pleading standard discussed in *Ashcroft* v. *Iqbal*, 556 U. S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007). "Because the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts, §1104(a)(1)(B), the appropriate inquiry will necessarily be context specific." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U. S. 409, 425 (2014). At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise.

Winston Takeaway — ERISA aficionados will appreciate that the reference to the Court's decision in *Dudenhoeffer* (a stock drop case) harkens to the heightened pleading standards the Court directed lower courts to use in such ERISA cases. And, the references to "tradeoffs" and "reasonable judgments a fiduciary may make based on her experience and expertise" seem to provide an avenue for the Seventh Circuit to fully consider the complaint and find a way to avoid costly litigation/settlement demands by requiring these plaintiffs to allege more specific violations before the litigation can survive a motion to dismiss. Either way, as plans wait to see how courts, including the Seventh Circuit, will apply the applicable pleading standard to excessive fee cases, the decision in this case may put

more pressure on employers to consider adopting a mandatory arbitration clause, as described in our companion briefing above.

Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice Group or your Winston relationship attorney for further information.

Winston & Strawn Paralegal Kristine Lofquist also contributed to this blog post.

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