

# Employee Benefit Plan Review

## Ninth Circuit Opens the Door to Arbitration in ERISA Fiduciary Breach Claims

BY MOLLY RAMSDEN AND WILLIAM H. WOOLSTON

In *Dorman v. Charles Schwab Corp.*, the U.S. Court of Appeals for the Ninth Circuit recently held that a 401(k) plan's mandatory arbitration clause was enforceable in relation to a breach of fiduciary duty claim brought under ERISA § 502(a)(2).<sup>1</sup> This is the first case in which the Ninth Circuit concluded that such fiduciary breach claims could be arbitrated.

### BACKGROUND

The plaintiff, Michael Dorman, was employed by Charles Schwab & Co., Inc., and participated in the Schwab Retirement Savings and Investment Plan (the "Plan") from 2009 to the end of 2015 when he withdrew his entire account balance. In 2014, the Plan was amended to include a mandatory arbitration provision that stated in relevant part, "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration . . . [and any arbitration would be conducted] on an individual basis only, and not on a class, collective or representative basis." This provision became effective January 1, 2015.

In 2017, the plaintiff filed an amended complaint under ERISA § 502(a)(2), alleging that various fiduciaries of the Plan breached their fiduciary duties to the Plan by including Schwab-affiliated funds in the list of investment options. He further alleged that these affiliated funds underperformed in comparison to the nonaffiliated funds, and that the affiliated funds were

only included in the investment menu as a means to generate fees for Schwab.

### THE DISTRICT COURT DECISION

Schwab moved to compel arbitration pursuant to the Plan's arbitration provision. However, the district court denied the motion, stating that the plaintiff's claim was not bound by the arbitration provision, because it was added to the Plan in 2016 after the plaintiff ceased to be a participant in the Plan. This turned out to be factually incorrect. The Ninth Circuit confirmed the Plan's evidence that the provision was added to the Plan in 2014, and took effect several months before the plaintiff terminated employment with Schwab.

The district court, however, did not stop there. The district court had further held that even if the arbitration provision applied to the plaintiff, the provision could not be enforced because of the Ninth Circuit's prior decision in *Bowles v. Reade*, which held that a plan participant could not, without the plan's consent, settle a fiduciary breach claim under ERISA § 502(a)(2), because the right to settle a claim under ERISA § 502(a)(2) belongs to the plan and not to individual participants.<sup>2</sup> The district court also asserted that the Plan's fiduciaries could not insulate themselves from liability by amending the Plan's governing document to include the arbitration provision. The Plan appealed.

## THE NINTH CIRCUIT REVERSES

The Ninth Circuit reversed the district court's denial of the motion to compel arbitration in two parts: a published opinion<sup>3</sup> and an unpublished memorandum.<sup>4</sup> The published opinion, while brief, is notable because it formally overruled the Ninth Circuit's 1984 ruling in *Amaro v. Continental Can Co.*, which held that ERISA claims were not arbitrable (stating "[a]rbitrators, many of whom are not lawyers, lack the competence of courts to interpret" ERISA). The Ninth Circuit determined that *Amaro* was no longer binding precedent due to the U.S. Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*,<sup>5</sup> which held that arbitrators are competent to interpret federal statutes.<sup>6</sup> The opinion confirmed that in the Ninth Circuit, ERISA claims can be arbitrated.

The Ninth Circuit then addressed the district court's rationale for its denial in the unpublished memorandum disposition. As noted above, the Ninth Circuit determined that the district court's factual conclusion regarding the effective date of the arbitration provision was in error, and that the plaintiff was a participant in the Plan while the

arbitration provision was effective. Accordingly, the arbitration provision applied to the plaintiff's claim. Further, the Ninth Circuit was persuaded that the arbitration provision was not unenforceable under *Bowles*, because the arbitration of the claim was consented to by the Plan when the Plan was amended to include the arbitration provision. Additionally, the fiduciaries were not unlawfully insulating themselves from liability in violation of ERISA § 410, because the arbitration provision merely selected a forum in which the Plan's rights could be vindicated; it did not limit the ability of plaintiffs to bring such claims. Lastly, the Ninth Circuit held that a waiver of class-wide and collective arbitration must be enforced according to its terms, which effectively forces similarly situated participants into individual arbitrations.

## CONCLUSION

When read together, the two holdings indicate that, in the Ninth Circuit at least, a claim brought under ERISA § 502(a)(2) can be subject to arbitration under the right circumstances. The practical impact of this decision remains to be seen; however, it stands to reason that

more companies will be likely to consider adding mandatory arbitration provisions to their ERISA plans as time goes on. 🌟

## NOTES

1. No. 18-15281 (9th Cir. Aug. 20, 2019).
2. 198 F.3d 752, 760 (9th Cir. 1999).
3. <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/08/20/18-15281.pdf>.
4. <http://cdn.ca9.uscourts.gov/datastore/memoranda/2019/08/20/18-15281.pdf>.
5. [https://www.supremecourt.gov/opinions/12pdf/12-133\\_19m1.pdf](https://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf).
6. 570 U.S. 228 (2013).

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