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ALERTS

Mandatory Arbitration For Benefit Plan Documents – Prudent Or Problematic?

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In *Dorman v. Charles Schwab Corp.*, the Ninth Circuit held that an ERISA plan document that included a mandatory individual arbitration provision could be enforced, overruling its own prior precedent because of recent pro-arbitration decisions from the U.S. Supreme Court. In doing so, the Ninth Circuit upheld an arbitration provision that provided that any claim or dispute arising out of or related to the plan would be settled by binding arbitration and had to be conducted on an individual, not a class or collective, basis.

In recent years, plaintiffs have had higher rates of success in class certification proceedings in ERISA cases, and class certification is the threshold the plaintiffs' bar often seeks to reach settlement discussions. Given the stakes, there may be no question that a plan sponsor should amend its plan documents to provide for mandatory individual arbitration. However, the design of the arbitration provision may depend on several factors that should be weighed carefully, so that the provision will be workable and prudent and not problematic for the plan administrator and plan sponsor.

The overarching advantage of including a mandatory individual arbitration provision is its deterrent effect on class action lawsuits, i.e. particularly for breach of fiduciary duty claims that require plan sponsors to spend significant time and resources to defend. The positive economic outcome of these lawsuits, is often negligible for individual plan participants but a boon to plaintiffs' counsel in substantial legal fees.

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Requiring mandatory individual arbitration for dispute resolution of all plan-related claims seems to be more efficient and cost-effective, though the plan sponsor and plan administrator should consider a number of factors to customize the dispute resolution provision for a particular plan:

- Negative Publicity vs. Precedential Value: Arbitration would maintain the privacy of the dispute, but for administration of individual benefit claims, the plan administrator may find that federal court precedent may be more useful and ultimately dispose of similar future claims more efficiently. Therefore, the precedential value of a court decision may outweigh any negative publicity from an individual benefit claim that is filed in federal court. Accordingly, a plan sponsor may consider distinguishing dispute resolution for individual benefit claims from claims brought on behalf of a plan.

- Government Agencies: Setting precedent in a federal district court case could be valuable to a plan vis-à-vis any government agencies that oversee and enforce ERISA plan compliance. A favorable outcome for the plan sponsor in arbitration would likely not have the same binding effect on the enforcement agency as a federal district court decision.

- Appellate Review: A federal district court's decision is subject to appellate review, while an arbitrator's decision is typically not. An arbitrator's decision may be set aside in only rare instances, such as fraud or ruling beyond the authorized parameters of the case.

- Efficiency of Dispute Resolution: The plan sponsor may wish to consider instances where the plan administrator might find it more efficient to combine similar claims or file a declaratory judgment action to set precedent in a federal district court. Accordingly, the plan sponsor may wish to give the plan administrator discretion to choose the forum and method for dispute resolution.

- Comparative Experience:Federal district courts regularly deal with ERISA wrongful denial of benefit claims and can typically keep the proceedings focused on the administrative record that was before the plan administrator, curtailing extraneous discovery. An arbitrator may have little experience with these types of cases and may be less adept at limiting discovery. This might weigh in favor of continuing to litigate wrongful denial of benefit cases in federal court.

- Costs of Dispute Resolution: Arbitration is not necessarily less costly than litigation. Arbitrators are paid by the hour, and for cases that may be complex or where the arbitrator may not have the experience of the federal district court, resolution of the dispute may turn out to be more costly in arbitration than in litigation.

Plan sponsors should consider balancing a number of goals in designing a feasible arbitration provision for a particular plan. The decision on how to design a particular arbitration provision may be driven by a number of factors, including the type of plan, the number of participants and the

federal common law developed that applies to the plan, among others. Plan sponsors should carefully consider their goals, as well as the factors that may impact those goals, and should consult with employee benefits counsel before implementing a mandatory arbitration provision in their benefit plans.

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