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BENEFITS & COMPENSATION UNIVERSITY

ERISA Title I Developments: Litigation & Governance Trends

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In her appellate practice, she regularly represents clients and briefs cases in the federal courts of appeals and the US Supreme Court. She has argued appeals in the Fourth, Seventh and DC Circuits.

HUGHES V. NORTHWESTERN UNIV.,
142 S. Ct. 737 (JAN. 24, 2022)

Hughes v. Northwestern Univ. (2022)

On January 24, 2022, the Supreme Court issued a unanimous opinion in *Hughes* that sent a shock wave through the ERISA litigation landscape.

- Plaintiffs alleged that the defendants offered too many investment options, provided overly expensive investment options and high-cost retail share classes for certain investment options, and paid excessive recordkeeping fees.
- The district court dismissed the case and the Seventh Circuit affirmed, ruling that the plan sponsor did not violate its ERISA fiduciary duties because the plan also included prudent low-cost investment options.
- The Supreme Court read the Seventh Circuit's opinion as repeatedly relying on participants' "ultimate choice over their investments" in finding no plausible breach of fiduciary duty.

Hughes v. Northwestern Univ. (cont'd)

- The six-page decision in *Hughes* settled few of the disputes between the parties and provided little concrete guidance for future cases.
- The Supreme Court rejected the Seventh Circuit's "ultimate choice" rationale because it failed to take into account a plan fiduciary's duty "to monitor all plan investments and remove any imprudent ones."
- The duty of prudence, the Court reasoned, applied to all investments, so the fact that participants had the opportunity to choose some prudent investments did not mean that the defendants had satisfied their fiduciary duties with respect to the investments and services the plaintiffs challenged.
- The Supreme Court vacated and remanded to the Seventh Circuit for it to reconsider whether the plaintiffs had plausibly alleged a violation of the duty of prudence. *Hughes* is still pending on remand with the Seventh Circuit.

POST-*HUGHES*: SHIFTING TIDES

IN THE YEAR SINCE *HUGHES*, MANY COURTS OF APPEAL HAVE STARTED RULING IN FAVOR OF PLAN FIDUCIARIES AGAIN AT THE MOTION TO DISMISS LEVEL.

Albert v. Oshkosh Corp. (7th Cir. 2022)

The Seventh Circuit ruled in favor of Oshkosh, affirming the dismissal of plaintiff's claims challenging the fees charged under Oshkosh's 401(k) plan, and, in doing so, clarified and cabined the impact of *Hughes* on Seventh Circuit precedent.

- Plaintiff alleged, among other things, that the defendants breached their fiduciary duties by (1) authorizing the Plan to pay unreasonably high recordkeeping fees, and (2) failing to ensure that each investment option was prudent.
- The Seventh Circuit held that Albert failed to state a claim on the recordkeeping fees because the complaint did not allege that the recordkeeping fees were excessive relative to the services rendered.
- The Seventh Circuit also reiterated that merely charging higher fees for actively managed funds than for passively managed funds is ordinarily not enough to state a claim. Simply stating "Defendants failed to consider materially similar and less expensive alternatives to the Plan's investment options" without more detailed allegations providing a "sound basis for comparison" was not sufficient.

Smith v. CommonSpirit Health (6th Cir. 2022) & *Forman v. TriHealth, Inc.* (6th Cir. 2022)

In both *CommonSpirit* and *Forman*, the Sixth Circuit addressed pleading requirements of an ERISA breach of fiduciary duty claim post-*Hughes*

- In *CommonSpirit*, the Sixth Circuit affirmed the dismissal of the plaintiff's recordkeeping fees claims, finding that the complaint did not allege that the fees were excessive relative to the services rendered. The complaint lacked facts regarding other factors that could have been relevant to determining whether a fee was excessive under the circumstances.
- The Sixth Circuit additionally rejected plaintiffs' attempts to compare actively and passively managed funds as apples to oranges.
- *Forman* followed *CommonSpirit* and largely relied on it to reject the plaintiffs' claims that plan expenses were excessive, and that the plan should have included alternative investments with lower fees and higher performance.
- However, the Sixth Circuit did reverse the dismissal of claims that TriHealth violated the duty of prudence by failing to offer share classes that were less expensive.

Matousek v. MidAmerican Energy Co. (8th Cir. 2022)

The Eighth Circuit affirmed the district court's grant of MidAmerican's motion to dismiss after finding plaintiffs had failed to plead meaningful benchmarks for "assessing the performance of the challenged funds."

- The Eighth Circuit found that the plaintiffs had not identified meaningful benchmarks for either recordkeeping fees or investment offerings necessary to demonstrate an imprudent process.
- For the recordkeeping fees claim, specifically, the panel said the Eighth Circuit had been clear that "the key to stating a plausible excessive-fees claim is to make a like-for-like comparison."
- The Eighth Circuit also found that the comparator peer group funds lacked sufficient information on the funds involved to know whether they were meaningfully similar to the challenged investments (e.g., lacked information about whether the two groups held similar securities, had similar investment strategies, or similar risk profiles).

Davis v. Salesforce.com (9th Cir. 2022) & *Kong v. Trader Joe's Co.* (9th Cir. 2022)

The Ninth Circuit partially reversed the dismissal of two proposed class actions in *Salesforce* and *Trader Joe's* where plaintiffs alleged mismanagement of the respective 401(k) plans.

- In *Salesforce*, the Ninth Circuit reversed the dismissal of plaintiffs' claim that defendants imprudently failed to select lower-cost share classes; the duty to monitor claim; and plaintiffs' claim that defendants imprudently failed to investigate and timely switch to available collective investment trusts.
- The Ninth Circuit found that plaintiffs' allegations regarding lower-cost share classes that were viable and that the question of whether the regulatory regimes governing mutual funds and CITs justified retaining higher-cost mutual funds should be left to summary judgment.
- A different Ninth Circuit panel employed similar reasoning to resurrect comparable claims involving Trader Joe's 401(k) plan. In *Trader Joe's*, the Ninth Circuit found that the complaint plausibly alleged a failure to provide cost-effective investments with reasonable fees where plaintiffs alleged defendants offered mutual funds with retail share classes that carried higher fees than institutional share classes of the same investments.

Olin, Wesco, and Other Leading District Court Cases

- *Riley v. Olin Corp., et al.*, 2022 WL 2208953 (E.D. Mo. June 21, 2022) (**MTD Granted**)- Plaintiffs alleged that Olin failed to adequately monitor and control the plan's recordkeeping costs and failed to objectively and adequately review the plan's investment portfolio with due care. Olin argued that the plaintiffs did not allege "meaningful benchmarks" against which to evaluate the defendants' fiduciary process and did not allege facts supporting an inference that they had breached their fiduciary duties. The Court threw out the case.
  - The court's ruling pointed out that courts throughout the country have routinely rejected the 2019 NEPC survey cited by plaintiffs as a sound basis for comparison because it lacks detail.
- *Mator v. Wesco Distribution, Inc. et al.*, 2022 WL 1046439 (W.D. Pa. Apr. 7, 2022) (**MTD Granted**)- Court rejected for the third time plaintiffs' complaint contending plan fiduciaries allowed excessive record-keeping fees and failed to substitute lower-priced mutual fund share classes.

Olin, *Westco*, and Other Leading District Court Cases (cont'd)

- *Baumeister v. Exelon Corp.*, 2022 WL 4477916 (N.D. Ill. Sept. 22, 2022) (**MTD Granted**)- Court dismissed plaintiffs' excessive recordkeeping and investment management fee claims, rejecting plaintiffs' reliance on charts comparing recordkeeping and investment management fees of the plan to fees of other allegedly comparable plans.
- *Coyer v. Univar Sols. USA Inc.*, 2022 WL 4534791 (N.D. Ill. Sept. 28, 2022) (**MTD Granted in Part**)- Court dismissed claims that certain actively managed investment options offered were imprudent, holding that a fund's underperformance does not necessarily imply imprudence. The court did hold that plaintiffs did not need to plead that comparator plans received the same services in the same years to establish an inference of imprudence and allowed plaintiffs' recordkeeping fees claim to continue.
  - *Exelon* and *Univar* became the first cases in the Seventh Circuit to rule on motions to dismiss fee and investment claims following *Oshkosh*. The rulings suggest that *Oshkosh* has started a trend in favor of dismissing claims that might have otherwise survived—by applying more context-specific scrutiny of alleged comparators.
- *Nohara v. Prevea Clinic, Inc., et al.*, (E.D. Wis.) (**Mot. for Reconsideration pending following *Oshkosh***).

Plaintiffs React—Recordkeeping Fees

- Plaintiffs continue to claim that one clear indication of a plan's failure is an imprudent fee monitoring process that results in excessive recordkeeping fees.
- The argument raised by plaintiffs is that recordkeeping services are generic and that (to survive a motion to dismiss) it is sufficient to allege that fiduciaries paid too much in comparison to other similar, large plans.
- According to plaintiffs, prudent fiduciaries implement three related processes to prudently manage and control a plan's recordkeeping costs:
  - Tracking expenses by demanding documents that summarize and contextualize the recordkeeper's compensation;
  - Identifying all fees, including direct compensation and revenue sharing;
  - Remaining informed about overall trends in the marketplace regarding fees being paid by other plans, as well as the rates that are available.

Plaintiffs React—Managed Account Fees

- Plaintiffs increasingly focus on “managed account fees” – alleging that plan sponsors failed to regularly monitor the amount of managed account service fees the plan is paying.
- In these challenges, plaintiffs allege the most effective way to ensure a plan’s managed account service fees are reasonable (and what defendant plans allegedly fail to do) is to periodically solicit bids from other managed account service providers and/or negotiate more favorable rates with managed account service providers.
- Plaintiffs have also alleged that managed account services add no material value to plan participants to warrant any additional fees. Asset allocations created by the managed account services are not materially different than the asset allocations provided by age-appropriate target date options available in the market; and that offering TDFs is a best practice and less expensive.

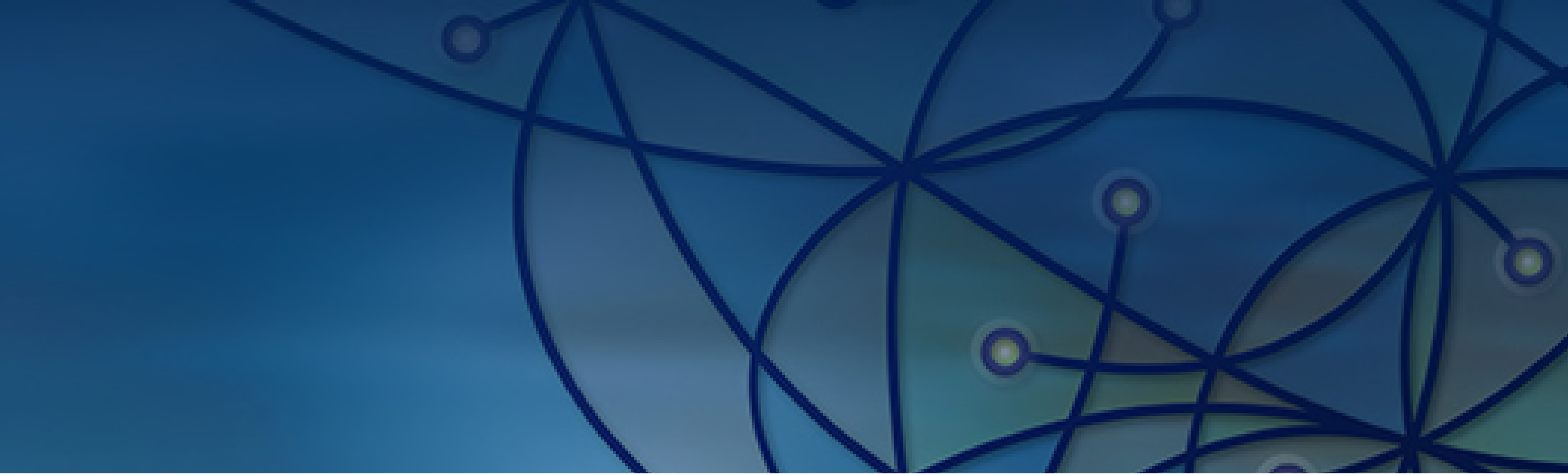
Plaintiffs React—Share Class Litigation

- Share class fees are easy targets for plaintiffs because the underlying investment option can be identical between share classes while expenses and fees vary.
- This results in lower returns for the same underlying investment option. Thus, plaintiffs believe they have a plausible claim if a plan is simply not offering a less expensive share class.
- Like other fee-related claims, plaintiffs often contend that the plan sponsors failed to negotiate as a "large plan" for lower-priced share classes or to "just ask" their investment provider for lower share classes.

Recent Summary Judgment Development: *Pizarro v. The Home Depot, Inc.*, (N.D. Ga. Sept. 30, 2022)

The court considered Home Depot's motion for summary judgment and how FRCP 56's focus on *material* factual disputes maps onto ERISA's duty of prudence.

- Plaintiffs alleged that Home Depot offered imprudent investment options for its retirement plans and failed to monitor their performance. Home Depot filed a motion to dismiss, which the court denied. The court ruled that plaintiffs could rely on circumstantial evidence of an imprudent selection and monitoring process since they were unaware of the process.
- On September 30, 2022, the court granted Home Depot's motion for summary judgment rejecting plaintiffs' proffered comparator funds and finding that plaintiffs did not prove that they suffered any loss. The court explained, "plaintiffs mistake competitors for comparators."
- The court ruled that even though Home Depot did not monitor its options closely, they were still those that a prudent fiduciary would have kept. Even though some funds underperformed comparators briefly, keeping them as part of a long-term strategy was not imprudent—ERISA requires "prudence not prescience."



NOTEWORTHY TRENDS IN THE INDUSTRY

Current Trends: Collective Investment Trusts

- A collective investment trust or "CIT" is a grantor trust that is established and maintained by a bank or trust company for commingling the assets of pension clients for investment
- Many offer daily valuation and standardized transaction processing through the same systems used by mutual funds (typically NSCC)
- Investment vehicle of choice for retirement investors
  - Lower fees than mutual funds
  - Flexible investment options
- The market share of CITs has doubled over the past five years
  - According to the Cerulli Report "*US Defined Contribution Distribution 2021,*" by 2020, $4.5 trillion or 62% of the total amount of 401(k) money was held in CITs

Current Trends: Collective Investment Trusts—Key Features

Governance	Must be "maintained by a bank" and trustee must have "exclusive management" subject to "prudent delegation" of investment authority to subadvisors
Tax	501(a) tax-exempt group trust; bad income blocker; generally seek IRS determination letter
ERISA	ERISA plan assets
'33 Act Exemption	Exempt securities under 3(a)(2) if "maintained by a bank" and participation in fund limited to certain investors
'40 Act Exemption	Exempt under 3(c)(11) if "maintained by a bank" and limited to certain investors
'34 Act Exemption	Exempted securities under 3(a)(12)
Bank Regulation	OCC Reg 9 (12 CFR § 9.18) or state trust law
FINRA	Only if broker-dealer used to market CIT interests
CFTC	If CIT invests in future, swaps or other commodity interests

Current Trends: Collective Investment Trusts—Key Features

Investor Eligibility	• US tax qualified retirement plans, including pension, defined contribution, IRC 403(b)(9) church plans • US government retirement and welfare plans • CITs • Insurance company separate accounts NOT ELIGIBLE: IRAs, corporate VEBAs, IRC 403(b) (other than 403(b)(9) church plans), foreign plans
Investment Limitations	ERISA prudence and prohibited transaction limits
Other Considerations	• OCC requires quarterly valuation (annual for illiquid funds) • Units not transferrable, but redeemable • Fees must be reasonable • No pass through of organizational expenses • Inexpensive and easy to establish • OCC generally mandates redemption payout within one year, but some flexibility for illiquid funds

Current Trends: BlackRock LifePath TDF Litigation

- Since late July, approximately a dozen lawsuits have been filed against large plan sponsors that offer BlackRock LifePath Target-Date Funds. Plaintiffs allege that by selecting BlackRock's low-cost TDFs, the plan sponsors breached their fiduciary duties when those funds underperformed.
- Plaintiffs argue plan fiduciaries failed to monitor the BlackRock TDFs’ performance and instead only “chased the low fees” charged by the funds.
- To illustrate underperformance, plaintiffs compare the BlackRock TDFs’ returns with the returns of four other TDF suites, including actively managed TDFs offered by Vanguard, T. Rowe Price, and American Funds.

FIDUCIARY GOVERNANCE BEST PRACTICES

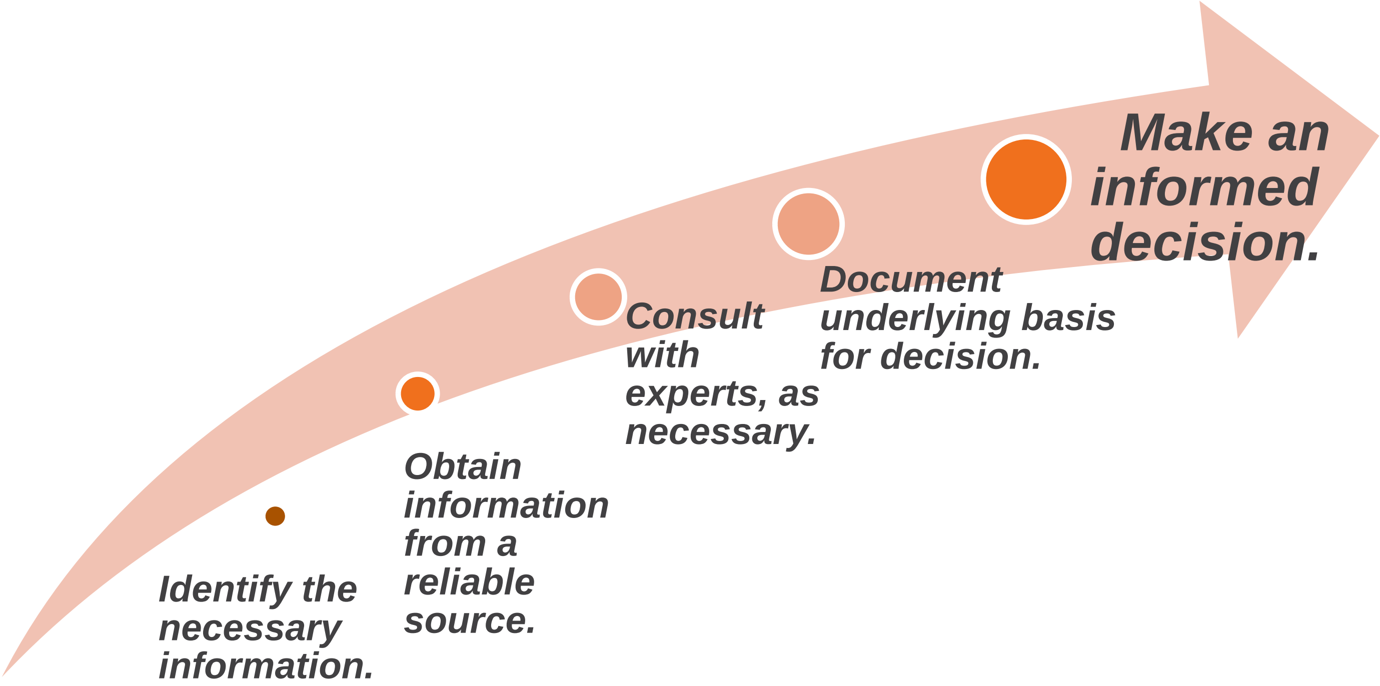
Takeaways

- Plaintiffs are essentially claiming through these lawsuits that basically every major TDF series is imprudent.
  - If markets are currently up, the less aggressive glidepaths were imprudent.
  - If markets are currently down, the more aggressive glidepaths were imprudent.
- In the midst of this litigation climate, what practices should plan fiduciaries adopt?

Takeaways (cont'd)

- **Process, process, process . . .**
  - Fiduciaries are not required to guarantee successful results—rather, they must employ a prudent decision-making process.
    - A prudent procedure, not "prescience," is required, but
    - "A pure heart and an empty head" will not suffice.
  - "Prudent Expert" standard – **not** a "prudent layman" standard.
  - It is necessary to document procedural prudence.

Fiduciary Duties—Prudence



Fiduciary Duties—Prudence (cont'd)

- Fiduciaries often work with internal experts and employ consultants, investment advisors, and other experts to help satisfy the duty of prudence.
- Courts have approved of this approach, but cautioned against unthinking deference. Rather:
  - Investigate the expert's qualifications
  - Provide the expert with complete and accurate information
  - Make sure that reliance on the expert's advice is justified under the circumstances
  - Meaningfully probe advice
- ***Document, document, document***

Fiduciary Duties—Prudence (cont'd)

- "During the trial, certain witnesses testified that they – in effect – assumed that on financial issues (which constituted a significant portion of the Committee's mandate), they could defer virtually entirely to [the Investment Consultant] for expertise and information and rely on its recommendations. This is incorrect."

Sacerdote v. New York Univ. 328 F. Supp. 3d 273, 286 (S.D.N.Y. 2018).

Fiduciary Duties—Prudence (cont’d)

- Does ERISA require the lowest-cost approach?
  - “Because a number of factors will necessarily be considered by a fiduciary when selecting a service provider, a fiduciary need not necessarily select the lowest bidder when soliciting bids, although the compensation paid to the service provider by the plan must be reasonable in light of the services provided. The fiduciary should not consider one factor, such as the lowest fee bid for services, to the exclusion of any other factor, such as the quality of the work product. Rather, the decision regarding which service provider to select should be based on an assessment of all the relevant factors, including both the quality and cost of the services.” DOL Info. Ltr. To T. Konkshank (Dec. 1, 1997).

Fiduciary Duties—Prudence (cont'd)

- May a plan fiduciary select a new recordkeeper / investment provider if the change may result in higher overall costs to plan participants?
- Considerations:
  - Participant relations and communication
  - Litigation risk and mitigation factors
  - DOL investigation risk

How to Meet Loyalty

- Plan fiduciaries must act solely in the interest of participants and beneficiaries.
  - May not “balance” interests of sponsor vs. interests of plan.
- Plan assets may be used ***only*** for two purposes:
  - Paying benefits; or
  - Reasonable expenses of administering the plan.

Settlor v. Fiduciary Activities

- ***Importantly***, ERISA's fiduciary standards do not apply to settlor activities.
- "Settlor" activities include: establishing, amending and terminating a plan & considering plan design changes.
- Plan assets should not be used to pay for "settlor" activities – risk breach of duty of loyalty, loss of privilege.
- "Fiduciary" activities include:
  - Selecting & monitoring plan service providers and funds
  - Adopting & monitoring investment policies, investment objectives and asset allocation

ARBITRATION AND CLASS ACTION WAIVERS

Arbitration and Class Action Waivers: Recent Decisions

- In the ERISA context, the enforcement of arbitration clauses with class action waivers was the subject of two seemingly conflicting Ninth Circuit decisions:
  - ***Munro v. Univ. of Southern Calif.***, 896 F.3d 1088 (9th Cir. 2018) (declining to enforce an arbitration provision with a class action waiver in several employee agreements); and
  - ***Dorman v. Charles Schwab Corp***., 934 F.3d 1107 (9th Cir. 2019) (upholding an arbitration clause with a class action waiver in an ERISA plan document).

Munro v. USC

The plaintiff and eight other employees participated in two USC retirement plans. Each of the individual employees signed an employment contract containing a provision requiring individualized arbitrations. Munro filed a class action lawsuit, but USC moved to compel arbitration, arguing that the employees' agreements barred the employees from litigating their claims on behalf of the Plan.

- The court held that because the plaintiffs' claims were brought on behalf of the plans, and the plans were not parties to the agreements to arbitrate, the claims fell outside of the scope of the arbitration clauses.

Dorman v. Charles Schwab Corp.

Charles Schwab employee, Michael Dorman, filed a class action suit alleging that Schwab breached its fiduciary duties by adding poorly performing in-house investment funds to its 401(k) plan investment lineup. While Dorman was still employed with Schwab, Schwab amended its 401(k) plan document to include an arbitration clause. Dorman also joined a separate plan with an arbitration clause when he was promoted. Schwab filed a motion to compel individual arbitration. The district court denied the motion.

- The Ninth Circuit reversed the lower court and held that the plans' arbitration provisions were enforceable and that Schwab could compel the individual arbitration of Dorman's fiduciary duty claims.
- The Ninth Circuit held that the claims were arbitrable because the plans had expressly agreed in the governing documents that all ERISA claims should be arbitrated.
- The decision overturned decades of case law holding that ERISA claims were not arbitrable (*Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984).

Reconciling *Munro* and *Dorman*

- The major difference is that in *Dorman*, unlike in *Munro*, the arbitration and class waiver provisions were located in the **governing plan documents**. Indeed, in *Dorman*, the court noted, "the plan expressly agreed in the plan document that all ERISA claims should be arbitrated."
- However, in *Munro*, the arbitration provision was located in the **employee agreements**, to which the plan was not a party. It seems then, that courts may be more willing to hold that a plan has consented to arbitration where an arbitration provision is in the plan's governing documents.

Arbitration and Class Action Waivers: Recent Decisions

- The *Dorman* decision and the wave of class actions prompted many plan sponsors to write new arbitration language and class action waivers into their plan documents.
- Courts are currently addressing whether mandatory arbitration clauses and class action waivers incorporated into a plan document are enforceable and may preclude ERISA class action litigation.
  - Courts split on whether class action waivers are enforceable for fiduciary breach claims under ERISA 502(a)(2), which are brought on behalf of the plan.
  - Key issues: (1) whether the participant "agreed" to arbitrate; (2) whether the class action waiver improperly precludes the plaintiff from obtaining plan-wide relief (e.g., removal of fiduciary).

Smith v. Brd. of Dirs. of Triad Mfg. Inc., (7th Cir. 2021)

In September 2021, the Seventh Circuit decided *Triad*, a putative class action focusing on fiduciary breach claims that ran into the plan's arbitration provision, which provided that the plaintiff could not "seek or receive any remedy which has the purpose or effect of providing additional benefits or other relief to any Eligible, Employee, Participant or Beneficiary other than the Claimant."

- The Seventh Circuit affirmed the dismissal of Triad's motion to compel concluding that the arbitration provision at issue ran afoul of the Effective Vindication Doctrine, which provides that an arbitration provision may be held unenforceable on public policy grounds when it "operate[s] … as a prospective waiver of a party's right to pursue statutory remedies."
- Deploying this doctrine, the Seventh Circuit reasoned that the plan's arbitration provision precluded certain remedies that ERISA expressly permits. Specifically, the provision prevented the plaintiff from seeking other relief that extended beyond himself and to the entire plan.
- The court was careful to explain that "the problem with the plan's arbitration provision is its prohibition on certain planwide remedies, not planwide representation," signaling that the court took no issue with a class action waiver in the provision.

Arbitration and Class Action Waivers: Recent Decisions

- Following *Triad*, additional courts have struck down plan arbitration clauses because they precluded plan-wide relief (i.e., “effective vindication” doctrine).
  - *Harrison v. Envision Mgmt.*, 2022 WL 909394 (D. Colo., Mar. 24, 2022) (on appeal)
  - *Cedeno v. Argent Trust Co.*, 2021 WL 5087898 (S.D.N.Y., Nov. 2, 2021) (on appeal)
  - *Cooper v. Ruane*, 990 F.3d 173 (2d Cir. 2021) (individual arbitration “make[s] it impossible to bring an ERISA fiduciary action” under 1132(a)(2), which “potentially render[s] at least this part of the Agreement unenforceable.”
- But see *Holmes v. Baptist Health*, 2022 WL 180638 (S.D. Fla., Jan. 20, 2022), which upheld an arbitration clause that waived plan-wide remedies.

Cert. Petition Pending in *Hawkins v. Cintas Corp.*, (6th Cir. 2022)

In *Cintas,* the Sixth Circuit ruled that an arbitration clause contained in certain individual employment agreements was insufficient to compel arbitration of putative class action claims under ERISA 502(a)(2) for similar reasons as in *Triad.*

- The Sixth Circuit reasoned that "Ultimately, the Plaintiffs are seeking Plan-wide relief through a statutory mechanism that is designed for representative actions on behalf of the Plan. The weight of authority suggests that these claims should be thought of as Plan claims, not Plaintiffs' claims."
- Cintas has attacked the Sixth Circuit's opinion in its petition as "wrong" and argued that the plan "included in its contracts with its employees an agreement to arbitrate any disputes," including claims arising under ERISA.
- Cintas contrasts the Sixth Circuit's holding with the Second, Fifth, and Tenth Circuit's holdings in *Bird v. Shearson Lehman/American Express, Inc*., 926 F.2d 116 (2d Cir. 1991), *Kramer v. Smith Barney*, 80 F.3d 1080 (5th Cir. 1996), *Williams v. Imhoff,* 203 F.3d 758 (10th Cir. 2000).
  - However, these three decisions did not discuss whether the plan had consented to the arbitration agreement or not in a case where a participant brings an ERISA claim to seek relief on behalf of the plan.

Designing Arbitration Clauses for ERISA Plans: Factors to Consider

- Putting an arbitration agreement in an employee handbook leads to a greater risk of it not being enforced in an ERISA complaint, given recent court rulings.
- Plan sponsors generally have two options:
  - **OPTION I: EMPLOYEE AGREEMENTS**
    - mandatory arbitration provision (with a representative waiver) **in employee agreements**.
    - **Advantages:** The class action waiver could apply to non-ERISA claims; the representative waiver may be binding even if the plan has not consented; secure record of individual assent more easily.
  - **OPTION II: PLAN DOCUMENTS**
    - Include a mandatory arbitration provision (with a class action waiver) in **plan documents, including in disclosures to participants (e.g., SPD)**.
    - **Advantages:** Provides contractual basis for Plan's consent to arbitration and plan's waiver of participation in individual's claim.

Designing Arbitration Clauses for ERISA Plans: Factors to Consider (cont'd)

- Include arbitration provisions in **both** plan documents and employee agreements.
  - Plan documents provide basis for plan's consent to arbitration on an individualized basis.
  - Plan documents provide basis for the waiver of plan participants to join in any class action.
    - *See, e.g.*, *Dorman*, 934 F.3d at 1109.
  - Employee agreement will document the individual's representative waiver and consent.

Designing Arbitration Clauses for ERISA Plans: Factors to Consider (cont'd)

- Plan sponsors need to be careful not to require waiver of statutory remedies afforded under ERISA.
- Typically Challenged Arbitration Clause Language:

  (b) No Group, Class, or Representative Arbitrations. All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to Claimant's Covered Claims, and that Claimant may not seek or receive any remedy that has the purpose or effect of providing additional benefits or monetary **<u>or other relief</u>** to any Eligible Employee, Participant, or Beneficiary other than the Claimant.

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