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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3 Questions After The 9th Circ. Greenlights ERISA Arbitration

By **Emily Brill**

Law360 (August 21, 2019, 10:47 PM EDT) -- The Ninth Circuit's decision allowing Charles Schwab Corp. to send a 401(k) plan mismanagement lawsuit to arbitration broke new ground in Employee Retirement Income Security Act law.

The ruling on Tuesday marked the first time an appellate court has said that suits accusing plan managers of failing to properly steward benefit plans can be resolved through arbitration, according to Schlichter Bogard & Denton LLPfounding partner Jerry Schlichter, who has watched these suits closely.

But the opinion's impact is uncertain, in part because the court released a key portion as an unpublished, and thus nonprecedential, memorandum. The decision will also likely be appealed, attorneys said.

Here, experts identify three key questions lawyers are asking in the wake of the blockbuster ruling.

Will This Go to the U.S. Supreme Court?

Earlier this year, the U.S. Supreme Court rejected the University of Southern California's request for the justices to consider whether workers can sign away their right to bring ERISA 502(a)(2) claims in court.

The high court's rejection of the petition left standing a Ninth Circuit ruling that USC's arbitration agreement didn't apply to 502(a)(2) claims — which accuse plan managers of breaching their fiduciary duty by mismanaging the plan — because those claims are brought on behalf of benefit plans, not individuals. USC's plan hadn't signed the arbitration agreement, so litigation brought on the plan's behalf should proceed in court, the Ninth Circuit reasoned in Munro et al. v. the University of Southern California.

Schwab's 401(k) plan was subject to different conditions. The plan's governing document stated that 502(a)(2) claims must be resolved through individual arbitration.

Seeing this, the Ninth Circuit ruled that the plan had consented to arbitration, so Dorman v. Schwab should be resolved outside of open court.

Now that a circuit court has ruled that fiduciary-breach claims can be sent to arbitration, attorneys think the issue might make its way up to the Supreme Court once other circuits have weighed in.

"It is an issue that seems appropriate for the court to address at some point, particularly because it requires statutory interpretation, among other considerations," said Nancy Ross, the co-chair of Mayer Brown LLP's ERISA litigation practice. "The court will need to decide if precluding participants from litigating their rights in a courtroom runs afoul of [ERISA's] statutory intent."

R. Bradford Huss, a director at the benefits law firm Trucker Huss APC, said he hopes the Supreme Court takes up the issue down the line.

"This is an important gatekeeper issue, and a uniform rule, however it may come out, would be helpful to plan sponsors," Huss said. "Of course, it may take a split of rulings among the circuit courts before the Supreme Court agrees to take up the issue."

Can Arbitration Pacts Preclude Planwide Claims?

ERISA states that when workers sue their employers over benefit plan mismanagement, they are suing on behalf of the benefit plan.

Courts have generally interpreted this to mean that workers are seeking judicial relief for the entire plan, not just for their own accounts within the plan, when they file these lawsuits.

But in Dorman v. Schwab, the court held that Michael Dorman, who had sought to represent a class of Schwab 401(k) plan participants suing on the plan's behalf, can only recover losses to his own account in arbitration.

"Although § 502(a)(2) claims seek relief on behalf of a plan, the Supreme Court has recognized that such claims are inherently individualized when brought in the context of a defined contribution plan like that at issue," the Ninth Circuit wrote, citing the high court's 2008 case LaRue v. DeWolff Boberg & Assocs. Inc.

Bailey & Glasser LLP partner Gregory Porter, who represents workers in ERISA cases, said he thinks the Ninth Circuit misinterpreted LaRue.

"The court's application of LaRue is wrong and conflicts with the published decision in Munro," Porter said. "Munro, and every other circuit to address the issue, has held that a 502(a)(2) claim is not an individualized claim, but a claim on behalf of the plan for the losses to the plan arising from the breach of ERISA."

The Dorman ruling's conflict with the Munro decision on the LaRue interpretation issue "is enough to reverse the panel decision en banc," Porter said.

Will Plans Start Adding Arbitration Provisions?

The Dorman v. Schwab ruling lays out a road map for corporations interested in keeping fiduciary-breach claims out of court. Whether companies follow that map will depend on how much they can limit their liability by adding a forced arbitration component to the plan, Porter said.

In other words, if the Ninth Circuit's interpretation of LaRue is found to be wrong, corporations probably won't write consent-to-arbitration language into their 401(k) plans.

"Employers won't put in arbitration agreements unless they can limit the damage to individual accounts," Porter said.

If companies can't limit the damage to individual accounts, the court is likely the best venue for a 502(a)(2) claim, because the ruling will be binding, attorneys said.

"The advantage of a class action to the fiduciary is that you bind the entire class to the result. With arbitration, what if 50 different plan participants challenged the same fiduciary activity and obtain 50 different decisions?" said Karen Handorf, the chair of Cohen Milstein Sellers & Toll PLLC's employee benefits practice group. "Seems like a nightmare for a plan fiduciary."

Litigating a 502(a)(2) claim in court also gives employers the ability to appeal rulings, whereas decisions of arbitrators are sometimes final.

"Employers would be vulnerable to the arbitrator deciding the entire plan's damages and attorney fees without any ability to appeal that decision," Schlichter said.

Dorman's attorneys said Tuesday they were examining the ruling and deciding whether to appeal.

--Editing by Jill Coffey and Michael Watanabe.