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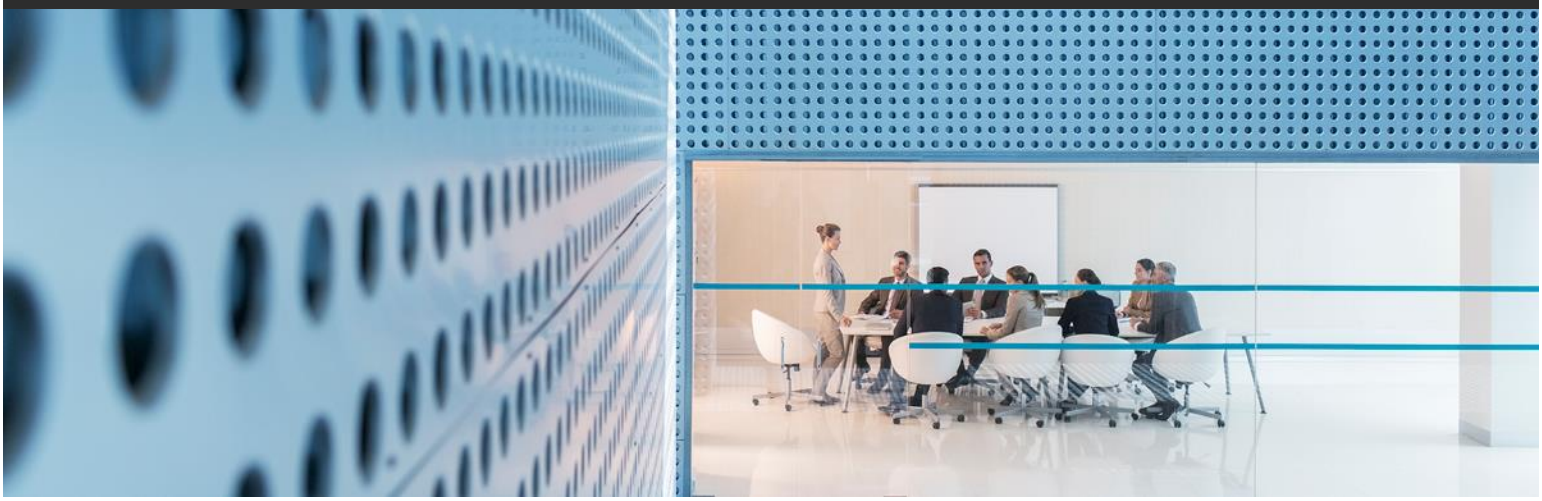

March 2021

ERISA Fiduciary Claims Not Subject to Arbitration

The Second Circuit has ruled in a significant decision that ERISA breach of fiduciary claims are not subject to arbitration under an employment arbitration agreement with the employer plan sponsor.[1]

In reversing a New York district court's order to compel arbitration, the Second Circuit emphasized that the arbitration agreement the employee signed when he was hired only banned him from filing claims in court related to his employment, not ERISA claims alleging breach of fiduciary duty which, according to the Court, are not "related to" his employment. Moreover, the Second Circuit said, Congress explicitly authorized plan beneficiaries and others to sue individual fiduciaries in federal court for breach of their duties under ERISA and seek remedies on behalf of the plan.

Background

Clive Cooper participated in the DST Systems, Inc. profit-sharing plan that includes a participant-directed 401(k) component in which DST matches employee contributions and a profit-sharing account (PSA) component to which only DST contributes. All DST employees are enrolled in the PSA as Plan participants when they begin working for DST; they are not allowed to decline participation. Employees are also required to keep their PSA assets in the fund throughout their employment with DST; they can withdraw from their account only at the end of their employment.

[1] *Cooper v. Ruane Cunniff & Goldfarb Inc. et al.*, case number 17- 2805, U.S. Court of Appeals for the Second Circuit, March 4, 2021.

According to the Court, Ruane Cunniff & Goldfarb Inc. (Ruane) was engaged by DST as a third-party investment advisor in 1973 to manage the investment of the PSA funds. DST maintained an Advisory Committee to monitor Ruane's performance. Ruane reported periodically to the Committee. Ruane was still managing the PSA funds over two decades later, in 1999, when DST hired Cooper.

The Plan entered into a series of investment management agreements (IMAs) with Ruane that established its relationship and defined Ruane's duties and responsibilities. Subject to some limitations, the IMAs provided that Ruane exercised "full authority and sole discretion" over PSA investments. The discretion accorded Ruane in the IMAs made Ruane a Plan fiduciary under ERISA, a conclusion that was undisputed. The IMAs contained no arbitration clause.

Throughout Cooper's employment at DST, the Plan provided summary plan descriptions (SPDs) to its participants, including Cooper. Those SPDs, which according to the Court do not mention arbitration, provided that:

> The people who operate your Plan, called "fiduciaries" of the Plan, have a duty to do so prudently and in the interest of you and other Plan participants and beneficiaries. If it should happen that Plan fiduciaries misuse the Plan's money you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court.

Also, as a Plan participant, Cooper received notices and communications that identified Ruane as the manager of the PSA assets. Among the notices he received were annual reports of DST's contributions on behalf of Plan participants and Ruane's latest investment performance with Plan assets. Account statements updated Cooper on the performance of stocks selected by Ruane for inclusion in the PSA portfolio and disclosed Ruane's quarterly investment management fee for managing the PSA.

Cooper alleged that DST did not subject Ruane to any investment limitations from the inception of its relationship in 1973 until November 2015, when the huge losses that eventually gave rise to Cooper's complaint had already substantially occurred. For example, Cooper alleged that under Ruane's management shares in Valeant Pharmaceuticals, which represented almost 30% of the Plan's total assets of more than $1.4 billion, were already in the midst of a steep decline by November 2015, when DST first imposed any guidance on Ruane. And by March 4, 2016, Valeant's share price had dropped dramatically, causing the value of the PSA's overall holdings to decline from a preceding 52-week high of $414.7 million to $97 million. Cooper alleged that Ruane's over-allocation of Plan assets to Valeant shares breached its fiduciary duty to Plan participants and to the Plan generally. Accordingly, Cooper claimed that Ruane is liable under ERISA to the Plan for the PSA participants' losses.

The Arbitration Agreement

According to the Court, Cooper received a copy of the company's "Associates' Handbook," which explained DST's employment-related policies, benefits, standards of conduct, and programs. The Handbook contains a section on arbitration which stated:

> For employment-related legal disputes that are not resolved through our Open Door Policy or Equal Employment Opportunity (EEO) Policy, the Company has implemented an arbitration program under the DST Output *Arbitration Program and Agreement* that is set forth in the Addendum to this Handbook.

The Arbitration Program and Agreement, in turn, mandates arbitration of "all legal claims arising out of or relating to employment, application for employment, or termination of employment, except for claims specifically excluded under the terms" of the Agreement. As claims "specifically excluded," it names four subject areas: "[1] workers' compensation benefits, [2] unemployment compensation benefits, [3] ERISA-related benefits provided under a Company sponsored benefit plan, and, [4] claims filed with the National Labor Relations Board."

According to the Court, Cooper signed the Acknowledgment and Agreement Form, which cautioned that if he did not "opt out in writing within 30 days after [he] receive[d] the [Arbitration Agreement]," then he and DST "shall be considered to have agreed" to the Arbitration Agreement "as a binding contract to waive the right to judge or jury trial and to resolve employment-related legal claims under the terms [of the Agreement]." Cooper did not opt out.

Procedural History

In March 2016, Cooper brought a proposed breach of ERISA fiduciary duty class action in a New York district court naming Ruane, DST, and other DST employees as defendants. Not long after mediating his claims with DST and others in a private forum, he voluntarily dismissed his claims against all defendants except Ruane.

In November 2016, Ruane moved for an order compelling Cooper to arbitrate his claims. The following year, the district court issued an Opinion and Order compelling arbitration.

According to the Second Circuit, the district court concluded that Cooper's claims were covered by the Arbitration Agreement since they "relat[ed] to" his employment within the meaning of the Agreement, because "the claims concern how poorly DST and Ruane managed the assets which Cooper considered to be his compensation."[2]

Having determined that the Agreement applied to Cooper's claims, the district court then concluded that Ruane, although a non-signatory, was entitled under principles of equitable estoppel to enforce the Agreement against Cooper.[3] According to the district court, this was because Ruane had a sufficiently "close" relationship with DST to enable it to assert DST's arbitration rights and that claims Cooper asserted against DST and Ruane substantially overlapped. Also, Cooper's ERISA claims and the subject matter of the Arbitration Agreement were sufficiently intertwined to justify requiring Cooper to arbitrate with Ruane.

Cooper appealed the district court's ruling on equitable estoppel as well as its determination that the Arbitration Agreement governs his claims. The Second Circuit concluded that the Agreement does not apply to Cooper's claims and that it was therefore unnecessary to address the equitable estoppel issue.

Second Circuit Opinion

According to the Second Circuit, the Agreement between Cooper and DST which provides that its arbitration requirement "covers all legal claims arising out of or relating to employment" does not encompass the claims for breach of fiduciary duty brought by Cooper on behalf of the Plan against Ruane under ERISA § 502(a)(2).

[2] *Cooper v. Ruane Cunniff & Goldfarb Inc.*, No. 16-CV-1900, 2017 WL 3524682, at 4 (S.D.N.Y. Aug. 15, 2017).
[3] *See, e.g., Ross v. Am. Express Co.*, 547 F.3d 137, 143-44 (2d Cir. 2008).

In so holding, the Second Circuit emphasized that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*."[4] and whether the scope of that agreement encompasses the claims at issue."[5]

Meaning of the Agreement's Phrase 'relating to employment'

According to the Second Circuit, the question is whether such claims for an ERISA fiduciary breach are covered by the phrase "all legal claims arising out of or relating to employment" used in the Arbitration Agreement. The district court concluded, and Ruane urged on appeal, that Cooper's fiduciary claims "relate to" Cooper's employment at DST because he would not have those claims but for his employment at DST and because Cooper's stake in the Plan is part of his overall compensation from DST, which is an attribute of his employment.

Cooper argued that his claims do not "relate to" his employment at DST in any meaningful sense. He urged that ERISA fiduciary claims are distinct from those the Arbitration Agreement identifies as subject to mandatory arbitration. This distinctness is apparent, he argued, by the simple observation that none of the facts he would have to prove to establish his ERISA fiduciary claims (that Ruane failed as fiduciary when it overconcentrated the fund's assets) have any bearing on his employment at DST.

Additional Language in the Agreement

According to the Second Circuit, both parties also asked the court to consider language in the Arbitration Agreement in addition to the "relating to employment" phrase.

Cooper argued that it is nonetheless significant that, aside from the catch-all reference to "other statutory and common law claims," all the categories that *are* listed as covered in the Agreement are personal to the employee. For example, covered claims include wrongful discharge, discrimination, harassment, retaliatory discharge, compensation, leave disputes and defamation. Also, Cooper pointed out that the listed categories of exclusions in the Agreement are similarly personal, such as claims by an Associate for workers' compensation benefits, unemployment compensation benefits, ERISA-related benefits provided under a Company-sponsored benefit plan, or claims filed with the National Labor Relations Board.

Accordingly, Cooper urged that the clause should not be read to cover his fiduciary breach claims against Ruane, which he brings not on his personal account but under ERISA, on behalf of the Plan and the Plan's other participants.

Ruane, on the other hand, argued that the Agreement's mandatory arbitration clause covers "statutory" claims in general—a term that, it insists, must include ERISA fiduciary claims. Ruane also claimed that the Agreement's express carve-out of ERISA *benefit* claims and in light of its contrasting silence regarding ERISA *fiduciary* claims, must mean that the latter are not similarly excluded.

Although both parties' arguments have "some force," the Second Circuit found Cooper's more persuasive.

[4] *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) (emphasis in original); *accord Nicosia*, 834 F.3d at 229 ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so.").
[5] *Holick v. Cellular Sales of N.Y., LLC*, 802 F.3d 391, 394 (2d Cir. 2015).

Limits of the Phrase 'relating to employment' in the Context of an Arbitration Agreement

The Second Circuit then turned its attention to the phrase "relating to employment" in the context of an employment-based arbitration agreement.

According to the Second Circuit, decisions of other circuits provide helpful insight. For example, the Ninth Circuit interpreted an employee arbitration clause that expressed coverage for "any claims"—similar to the Agreement at issue—as *not* covering an employee's suit under the False Claims Act (FCA).[6]

The Ninth Circuit rejected the argument that the employee's claims must be "related to" her employment, simply because she would not have been in a position to pursue those claims "but for" her employment by the defendants. In support of that conclusion, the Ninth Circuit reasoned (as Cooper does here) that the subject matter of an FCA claim does not implicate any facts particular to the plaintiff's employment. For example, an identical FCA claim could be brought against the defendant-employer had she been a non-employee who simply stumbled into similar potentially inculpatory information about the company.

According to the Second Circuit, the Fifth and the Eleventh Circuits have also analyzed the meaning of employment arbitration clauses with similar "relating to" language that also bears on Cooper's claims.[7] Both courts accepted that the sexual assault claims alleged in each case would not have occurred "but for" the plaintiff's employment with the defendant company, but determined nonetheless that the circumstances giving rise to the claim were outside the scope of her employment. These courts concluded that "relatedness" could not encompass everything that touched employment in any way.

To be sure, the Second Circuit said, Cooper's claims and the language in the Arbitration Agreement are not perfectly analogous to the sexual assault claims in these cases. Unlike those cases, something more than mere but-for causation connects Cooper's claims and his employment relationship with DST. His stake in the Plan is indeed part of his compensation at DST, the Second Circuit said, and it provides him the standing he needs to sue on behalf of the Plan. These considerations create a more substantial nexus to his employment at DST, the Second Circuit said, than does, as in the sexual assault cases, criminal conduct by other employees occurring outside of work hours or duties.

Nevertheless, the Second Circuit put heavy emphasis on the fact that none of the facts relevant to the merits of Cooper's claims against Ruane relate to his employment. For example, the Second Circuit stated, Cooper's claims hinge entirely on the investment decisions made by Ruane; the substance of his claims have no connection to his own work performance, his evaluations, his treatment by supervisors, the amount of his compensation, the condition of his workplace, or any other fact particular to Cooper's individual experience at DST. Moreover, as emphasized in the Ninth Circuit decision,[8] others who were never DST employees could have brought claims identical to those stated by Cooper. For example, the mismanagement claims could have been pursued by other Plan beneficiaries (such as spouses, heirs, or designees of participants); by other Plan fiduciaries, including DST itself, and by the Secretary of Labor.[9]

The Second Circuit concluded that it agrees with the approach adopted by the Ninth Circuit that, in the context of an employment arbitration agreement, a claim will "relate to" employment only if the merits of

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[6] *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791 (9th Cir. 2017).
[7] *See Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1208, 1218-20 (11th Cir. 2011); *Jones v. Halliburton Co.*, 583 F.3d 228, 230 (5th Cir. 2009).
[8] *Welch*, 871 F.3d at 799.
[9] *See* ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (authorizing plan participants and beneficiaries and the Secretary of Labor to bring a civil action for breach of fiduciary duties).

that claim involve facts particular to an individual plaintiff's own employment.[10] Here, the merits of Cooper's claims do not involve such facts, the Second Circuit found.

This decision is significant in deciding that an employment arbitration agreement is unlikely to be effective in requiring arbitration of ERISA fiduciary breaches. This is particularly so since Department of Labor regulations require that plan participants be advised in the SPD of their right to file suit in a federal district court.

Author

This GT Alert was prepared by:

- Jeffrey D. Mamorsky | +1 212.801.9336 | mamorskyj@gtlaw.com

[10] *See Welch*, 871 F.3d at 799.