How 2nd Circ. Ruane ERISA Suit Reversal Affects Arbitration

By **Jeffrey Mamorsky** (March 25, 2021)


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The U.S. Court of Appeals for the Second Circuit, in a significant decision, recently ruled that Employee Retirement Income Security Act breach of fiduciary duty claims are not subject to arbitration under an arbitration agreement with the employer plan sponsor.[1]

The decision in Cooper v. Ruane Cuniff & Goldfarb Inc. reverses a New York district court's order to compel arbitration.

The appellate court emphasized that the arbitration agreement the employee, Clive Cooper, 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, said the Second Circuit, 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

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 component to which only DST contributes.

All DST employees are enrolled in the plan as participants when they begin working for DST; they are not allowed to decline participation. Employees are also required to keep their plan assets in the fund throughout their employment with DST; they can withdraw from their account only at the end of their employment.

Ruane was engaged by DST as a third-party investment adviser in 1973 to manage the investment of the plan's funds. DST maintained an advisory committee to monitor Ruane's performance. Ruane reported periodically to the committee. Ruane was still managing the funds over two decades later, in 1999, when DST hired Cooper.

The plan entered into a series of investment management agreements with Ruane that defined Ruane's duties and responsibilities. The discretion accorded Ruane in these agreements made Ruane a plan fiduciary under ERISA, a conclusion that was undisputed.

These agreements contained no arbitration clause.

Throughout Cooper's employment at DST, the plan provided summary plan descriptions to its participants, including Cooper. Those summary plan descriptions, 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.

Cooper also received an association handbook which included an arbitration agreement that 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 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.

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.

In particular, Cooper alleged that under Ruane's management shares in Valeant Pharmaceuticals International Inc., which represented almost 30% of the plan's total assets of more than $1.4 billion, dropped dramatically, causing the value of the plan's overall holdings to decline from $414.7 million to $97 million.

Cooper claimed that this over-allocation of plan assets to Valeant shares is a breach of Ruane's fiduciary duty to plan participants and, accordingly, Ruane is liable under ERISA for the participants' losses.

Cooper brought a 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.

Ruane moved for an order compelling Cooper to arbitrate his claims which was granted by the district court. The district court concluded that Cooper's claims were covered by the arbitration agreement since they "related 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."

Also, the district court concluded that Ruane, although a nonsignatory, was entitled to enforce the agreement against Cooper[2] 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.[3]

Cooper then appealed the district court's ruling to the Second Circuit.

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.

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 also "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 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

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 significant that, aside from a catchall 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 exclusions 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 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.

Limits of the Phrase "Relating to Employment" in the Context of an Arbitration Agreement

According to the Second Circuit, decisions of other circuits provide helpful insight in interpreting the phrase "relating to employment" in the context of an employment-based arbitration agreement.

For example, take U.S. ex rel. Welch v. My Left Foot Children's Therapy LLC. In 2017, the U.S. Court of Appeals for 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 Mary Kaye Welch's suit under the False Claims Act.[6]

The Ninth Circuit rejected the argument that Welch'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 False Claims Act claim does not implicate any facts particular to the plaintiff's employment.

For example, an identical False Claims Act claim could be brought against the defendant employer had she been a nonemployee who simply stumbled into similar potentially inculpatory information about the company.

Similarly, the Second Circuit put heavy emphasis on the fact that none of the facts relevant to the merits of Cooper's claims against Ruane relates to his employment.

For example, said the Second Circuit, 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,[7] 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.[8]

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 that claim involve facts particular to an individual plaintiff's own employment.[9] Here, the merits of Cooper's claims do not involve such facts, said the Second Circuit.

Impact of Decision

It is interesting that the Second Circuit arrived at its conclusion through the analysis of other circuit court decisions relating to employment law and not ERISA.

The only reference to ERISA, which is obtuse at best, is its mention of the ERISA rights statement in the summary plan description that the people operating the plan are fiduciaries who must act prudently and, if not, participants have the right to file suit in a federal court.

In its summary of the facts, the court mentioned the summary plan description ERISA rights statement prior to discussing the arbitration agreement provisions. In so doing, the court

appears to be indicating that this ERISA rights statement trumps the arbitration agreement provisions even though it did not specifically say so.

Also, the court did not emphasize that the ERISA rights statement is required by DOL Regulation Section 2520.102-3(t)(1) and (2).

However, the decision is significant in deciding that an employment arbitration agreement is unlikely to be effective in requiring arbitration of ERISA fiduciary breaches.

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[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.

[2] See, e.g., Ross v. Am. Express Co., 547 F.3d 137, 143-44 (2d Cir. 2008).

[3] Cooper v. Ruane Cunniff & Goldfarb Inc., No. 16-CV-1900, 2017 WL 3524682, at 4 (S.D.N.Y. Aug. 15, 2017).

[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).

[6] United States ex rel. v. My Left Foot Children's Therapy, LLC, 871 F.3d 791 (9th Cir. 2017).

[7] Welch, 871 F.3d at 799.

[8] 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).

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