

Sixth Circuit Finds Individual Arbitration Provision in 401(k) Plan Unenforceable

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Parker v. Tenneco, Inc., 2024 WL 3873409 (6th Cir. 2024)

Available at <https://www.opn.ca6.uscourts.gov/opinions.pdf/24a0186p-06.pdf>

The Sixth Circuit has held that 401(k) plan provisions mandating individual arbitration are invalid as a prospective waiver of rights and remedies guaranteed under ERISA. Participants filed a potential class action against the fiduciaries of two (now merged) 401(k) plans, alleging a breach of the fiduciary duty of loyalty, and seeking losses accruing to the plans, disgorgement of profits, and other remedies. The participants alleged that the fiduciaries did not use a prudent process for selecting, monitoring, and removing plan investment options, and that excessive fees for managed account services, recordkeeping, and account administration resulted in reduced retirement savings. The fiduciaries sought to compel arbitration, arguing that the plans contained individual arbitration provisions that required participants to arbitrate their claims on an individual basis rather than suing on behalf of the plans or in a representative capacity (such as in a class action). The trial court sided with the participants, however, ruling that the individual arbitration provision impermissibly limited participants' substantive rights under ERISA.

On appeal, the Sixth Circuit affirmed the trial court's decision. The court first noted that ERISA clearly allows participants to sue on behalf of a plan for remedies that accrue to a plan. Therefore, the court had to determine whether the individual arbitration clause, which limited relief to the participants' own accounts rather than also providing relief to others, prevented participants from effectively vindicating their ERISA rights in the arbitration forum created by the plans. While acknowledging that the participants were bringing ERISA claims that provided a remedy for "plan injuries," and not individual ones, the Sixth Circuit first relied on Supreme Court precedent providing that a fiduciary claim may be brought on behalf of a defined contribution plan, such as a 401(k) plan, even if the ultimate relief is individualized. Due to the nature of a defined contribution plan, an individual account can be the victim of a fiduciary breach that reduces plan assets, even if the plan as a whole remained secure. Examining precedent in its own circuit, the Sixth Circuit concluded that if ERISA claims are properly brought for plan-wide injuries (such as excessive recordkeeping and administrative fees that harmed the plans as a whole), a suit is authorized even if the harm is inherently individualized. Therefore, participants in defined contribution plans may sue on a plan's behalf for all losses resulting from fiduciary breach, and relevant case law does not bar plan-wide recovery.

Because the individual arbitration provision prohibited participants from recuperating all losses to the plans and restoring profits resulting from the fiduciary breaches, the court concluded that it functioned as a prospective waiver of the participants' substantive statutory remedies and, under the effective vindication doctrine, was unenforceable. Furthermore, the individual arbitration provision was non-severable from the arbitration procedure, rendering the entire procedure unenforceable. The court cautioned that nothing in its opinion should imply that the claims were incompatible with the arbitral

forum—the problem here lay with the individual arbitration provision, which was non-severable and limited statutory remedies that barred effective vindication of ERISA rights.

EBIA Comment: The Sixth Circuit now joins the Second, Third, Seventh, and Tenth Circuits in concluding that an arbitration agreement may not prospectively waive participant rights under ERISA to seek plan-wide relief. While courts still appear to be in broad agreement that ERISA cases are generally arbitrable, whether a particular arbitration provision is enforceable may depend on subtle differences in the facts, the claims made, the remedies sought, and the wording of the arbitration provision (including, in this case, whether offending language is severable). For more information, see EBIA’s 401(k) Plans manual at Sections XXXVII.H (“Claims for Breach of Fiduciary Duty”) and XXXVII.M (“Arbitration”). See also EBIA’s ERISA Compliance manual at Section XXVIII.I (“Fiduciary Liability and Litigation”).

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