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***Benefits Briefing:***  
**A New Frontier? Arbitration and Class  
Action Waivers Under ERISA**

**Thursday, July 9, 2020**  
**2 p.m. ET**

# Today's Speakers

## Moderator:



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## Guest Speakers:



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# Overview

- I. ERISA Framework**
- II. Arbitration and Class Action Waivers:  
Recent Decisions**
- III. Designing Arbitration Clauses for ERISA Plans**



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# **Part I**

## **ERISA Framework**



# ERISA Framework

**ERISA's civil enforcement provisions include three general categories:**

1. **502(a)(1)(B):** permits participants and beneficiaries to sue for benefits under the terms of the plan.
2. **502(a)(2):** permits a participant or beneficiary (or fiduciary or DOL) to sue for breaches of fiduciary duties. Often referred to as ERISA's "derivative claim," or "representative claim," since one participant can bring an action on behalf of the plan or a subset of the plan.
3. **502(a)(3):** permits a participant or beneficiary (or fiduciary) to sue for violations of the statute or the plan (known as the "catch all" provision).

# ERISA Framework

## ERISA class action lawsuits

These claims are most often brought under 502(a)(2) or 502(a)(3), but a class action can also be alleged under 502(a)(1)(B) if the benefits sought under the terms of the plan apply to all plan participants or a group of plan participants.

# ERISA Framework

**Each ERISA civil enforcement provision provides for specific remedies:**

1. **502(a)(1)(B):** remedies are limited to awarding benefits provided by plan terms and attorneys' fees in the courts' discretion.
2. **502(a)(2):** remedies include losses to the plan, profits made through the use of plan assets, and any other equitable or remedial relief, including removal of the fiduciaries (and discretionary attorneys' fees).
3. **502(a)(3):** remedies are limited to equitable relief (e.g. restitution, reformation, surcharge) (and discretionary attorneys' fees).



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## **Part II**

# **Arbitration and Class Action Waivers: Recent Decisions**

# Arbitration and Class Action Waivers: Recent Decisions

## Consumer Agreements

- In *AT&T Mobility v. Concepcion*, the Supreme Court upheld the use of class-action waivers in consumer arbitration agreements.
- The Court concluded that the Federal Arbitration Act preempts state-law rules that interfere with individual arbitration.
  - “[C]lass arbitration” is “not arbitration as envisioned by the FAA” and “lacks its benefits.”
  - “Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”
- The Court also noted the consumer-friendly aspects of AT&T’s arbitration provision

# Arbitration and Class Action Waivers: Recent Decisions

## AT&T's Consumer Friendly Clause

1. Consumer pays no arbitration costs.
2. Arbitrator can award same relief as a court.
3. AT&T waived right to obtain attorneys' fees.
4. Consumer has option of small claims court.
5. Venue in county of consumer's residence.
6. Consumer has option of telephonic hearing.
7. No confidentiality requirement.
8. Consumer waives all class action rights.

# Arbitration and Class Action Waivers: Recent Decisions

## Employment Agreements

- In *Epic Sys. Corp. v. Lewis*, the Supreme Court upheld consumer agreements containing arbitration provisions with class action waivers.
- The Supreme Court held that the National Labor Relations Act provided no basis for overruling the parties' arbitration agreement.
  - Court explains that, under *Concepcion* and subsequent cases, the parties' agreement "to use individualized rather than class or collective action procedures" is something that the FAA "seems to protect pretty absolutely."

# Arbitration and Class Action Waivers: Recent Decisions

## Notable ERISA Decisions

- In the ERISA context, the enforcement of arbitration clauses with class action waivers was the subject of two recent (and seemingly conflicting) Ninth Circuit decisions:
  - ***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); and
  - ***Munro v. Univ. of Southern Calif.***, 896 F.3d 1092 (9th Cir. 2018) (declining to enforce an arbitration provision with a class action waiver in several employee agreements).



# Arbitration and Class Action Waivers: Recent Decisions

## Notable ERISA Decisions

### *Munro v. USC*

- Allen Munro 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.

# Arbitration and Class Action Waivers: Recent Decisions

## Notable ERISA Decisions

### *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.
- Based on these agreements, Schwab filed a motion in the district court to compel individual arbitration. The district court denied the motion.

# Arbitration and Class Action Waivers: Recent Decisions

## ***Dorman v. Charles Schwab Corp.* (cont.)**

- The Ninth Circuit reversed and held that the plans' arbitration provisions were enforceable and that Schwab could compel the individual arbitration of Dorman's fiduciary duty claims.
- In so holding, the Court overturned its decades-old precedent in *Amaro v. Continental Can Co.*, 724 F.3d 747 (9th Cir. 1984), that ERISA claims are not arbitrable.
- *Amaro* was overruled because subsequent Supreme Court decisions made clear that "arbitrators can competently interpret and apply federal statutes"
- 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.

# Arbitration and Class Action Waivers: Recent Decisions

## Notable ERISA Decisions

Reconciling *Dorman* and *Munro*:

- 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.



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# **Part III**

# **Designing Arbitration Clauses for ERISA Plans**

# Several Types of ERISA Claims to Consider for Arbitration

When evaluating the pros and cons of arbitration in the ERISA context, the type of claim is an important consideration, as each has unique legal and factual aspects which come into play. Some of the more prevalent claims to consider include:

- Individual or Multi-participant Benefit Claims Under Terms of the Plan
- Excessive Fees and Imprudent Investment Options (30+ cases in 2020 alone)
- Stock Drop Fiduciary Breach (44 cases in recent years)
- Actuarial Equivalence (11 cases in recent years)
- COBRA Notice (24 cases in recent years)

# Should ERISA Plans Use Arbitration with Class Action Waivers?

## Potential Advantages

	ARBITRATION	LITIGATION
Class Action Waiver	✓	
↑Speed + ↓Costs	✓	
Scope of Discovery	✓	
Flexible Procedures	✓	
Rational Decisionmaker	✓	✓
Dispositive Motions		✓
Appellate Rights		✓

# Should ERISA Plans Use Arbitration with Class Action Waivers?

## Major Issues

- Enforceability
- Ability to Preclude Representative Claims
- Standards of Review and Elements of Proof
- Remedies Available through Arbitration
- Possible Mass Filing of Individual Arbitral Demands
- Practical Implementation of Award/Conflicting Rulings



# Designing Arbitration Clauses for ERISA Plans

## Potential Options

- **OPTION I: EMPLOYEE AGREEMENTS**

- Include a 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

## Check List: Key Elements to Consider

1. Provide for **mandatory arbitration with broad scope**.
2. Provide for arbitration on an **individualized basis only**.
3. Include these provisions in **both Plan documents and employee agreements**.
4. Specify that the arbitrator can award **all ERISA remedies** available in court for individual claims.
5. Include **participant-friendly provisions**.
6. Include **pre-arbitration settlement process**.
7. Include **non-severability clause**.

# Designing Arbitration Clauses for ERISA Plans

## Key Elements to Consider

### 1. Provide for Mandatory Arbitration with Broad Scope

- Broadly define the **claims** subject to arbitration.
  - Ensure that the provision applies to all claims relating to the Plan, including breach of fiduciary duty claims
  - **Example:** “Any claim, dispute or breach arising out of or in any way relating to the Plan shall be settled by binding arbitration.” *Dorman*, 934 F.3d at 1109.
- In case of individual employee agreements, consider using an arbitration provision that also applies to other claims arising out of the employment relationship

# Designing Arbitration Clauses for ERISA Plans

## Key Elements to Consider

### 2. Individualized Arbitration and Representative Waiver

- Provide that arbitration shall be conducted on **individualized basis only** and not on a class, collective or representative basis.
- Provide that **individual waives the right to act in a representative capacity** on behalf of the Plan.
- Provide that the **Plan participants waive any right to be part of any class action.**

# Designing Arbitration Clauses for ERISA Plans

## Key Elements to Consider

3. 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

## Key Elements to Consider

### 4. **Specify that Arbitrator Can Award all ERISA Remedies that Individual Could Recover in Court**

- Expressly state that the arbitrator can award all ERISA remedies that the individual could recover in court for claims seeking individual relief.
  - Arbitration provisions cannot waive or eliminate federal statutory remedies. *Am. Exp. Co. v. Italian Colors.*, 570 U.S. 228, 233 (2013).
- Such a provision may bar the arbitrator from awarding any plan-wide remedies, such as a plan-wide injunction or a reformation of the plan terms.

# Designing Arbitration Clauses for ERISA Plans

## Key Elements to Consider

### 5. Include Participant-Friendly Provisions to Make Arbitration Convenient and Affordable

- Agree that the company will pay for most or all of the costs of arbitration.
- Offer to conduct hearing in the county of the participant's residence.
- Offer the option of a telephonic hearing.

# Designing Arbitration Clauses for ERISA Plans

## Key Elements to Consider

### 6. Include a Pre-Arbitration Settlement Process

- Such a process could promote a resolution of individual claims on a relatively inexpensive basis.
- The process could also promote a quicker and more amicable resolution than formal arbitration or litigation.
- If the process is a required pre-condition to arbitration, it may provide businesses with a more efficient way to address the potential mass filing of individual arbitration demands.



# Designing Arbitration Clauses for ERISA Plans

## Key Elements to Consider

### 7. A Non-Severability Clause

- Voids all or part of the arbitration provision if class action prohibition is struck down.
- **Issue:** Whether to sever some or all of the claims or remedies from arbitration if a court holds that the claims cannot be arbitrated on an individualized basis.

# Designing Arbitration Clauses for ERISA Plans

## Other Issues to Consider

1. Limits on Confidentiality of Arbitration
2. Scope of Discovery
3. Administering Institution (e.g., AAA)
4. Governing Law (federal ERISA law)
5. Use of Partial Severability Clause?
6. Enforcement (including venue)