KeyCite Yellow Flag - Negative Treatment
Distinguished by Wise v. Maximus Federal Services, Inc., N.D.Cal., August 5, 2019

896 F.3d 1088
United States Court of Appeals, Ninth Circuit.

Allen L. MUNRO, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; Daniel C. Wheeler, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; Edward E. Vaynman, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; Jane A. Singleton, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; Sarah Gleason, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; Rebecca A. Snyder, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; Dion Dickman; Corey Clark; Steven L. Olson, Plaintiffs-Appellees,
v.
UNIVERSITY OF SOUTHERN CALIFORNIA; USC Retirement Plan Oversight Committee; Lisa Mazzocco, Defendants-Appellants.

No. 17-55550
|
Argued and Submitted May 15, 2018—San Francisco, California
|
Filed July 24, 2018

Synopsis
Background: Participants in university's retirement plan filed action against plan administrator and others, alleging claims for violation of fiduciary duties under the Employee Retirement Income Security Act (ERISA). The United States District Court for the Central District of California, Virginia A. Phillips, Chief Judge, No. 2:16-cv-06191-VAP-E, 2017 WL 1654075 and 2017 WL 5592904, denied university's motion to compel arbitration and to stay case pending appeal. University appealed.

[Holding:] The Court of Appeals, Thomas, Chief Circuit Judge, held that claims were outside scope of arbitration agreements.

Affirmed.

West Headnotes (8)

[1] **Alternative Dispute Resolution**
Constitutional and statutory provisions and rules of court

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 Constitutional and statutory provisions and rules of court

The Federal Arbitration Act (FAA) reflects both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. 9 U.S.C.A. § 2.

1 Cases that cite this headnote

[2] **Alternative Dispute Resolution**
Evidence

25T Alternative Dispute Resolution
25TII Arbitration

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25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence

A party resisting arbitration bears the burdens of proving that the claims at issue are unsuitable for arbitration. 9 U.S.C.A. § 2.

3 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Construction in favor of arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 Construction in favor of arbitration

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. 9 U.S.C.A. § 2.

1 Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Existence and validity of agreement
Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and validity of agreement
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

Where there is no conflict between the Federal Arbitration Act (FAA) and a substantive statutory provision, the FAA limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue; if the response is affirmative on both counts, then the FAA requires the court to enforce the arbitration agreement in accordance with its terms. 9 U.S.C.A. § 2.

[5] **Alternative Dispute Resolution**
Right to Enforcement and Defenses in General

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk178 In general

There is no room for discretion, as the Federal Arbitration Act (FAA) mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.

2 Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Employment disputes

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk146 Employment disputes

Claims by participants in university's retirement plan against, among others, plan administrators, alleging claims for violation of fiduciary duties under ERISA, were outside the scope of arbitration agreements, and therefore, participants could not be compelled to arbitrate pursuant to the Federal Arbitration Act (FAA); parties consented only to arbitrate claims brought on their own behalf, but participants' claims were brought on behalf of ERISA plans. 9 U.S.C.A. § 2; Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C.A. § 1132(e)(1).

2 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Contractual or consensual basis

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding

25Tk112 Contractual or consensual basis
A court cannot, of course, compel arbitration under the Federal Arbitration Act (FAA) in the absence of an agreement to arbitrate; to do so would be to defeat the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. 9 U.S.C.A. § 2.

4 Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Contractual or consensual basis
25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 Contractual or consensual basis
The Federal Arbitration Act (FAA) imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion. 9 U.S.C.A. § 2.

1 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, Virginia A. Phillips, Chief Judge, Presiding, D.C. No. 2:16-cv-06191-VAP-E

Before: Sidney R. Thomas, Chief Circuit Judge, Michelle T. Friedland, Circuit Judge, and Thomas S. Zilly,* District Judge.

OPINION

THOMAS, Chief Judge:

We consider in this appeal whether current and former employees of the University of Southern California may be compelled to arbitrate their collective claims for breach of fiduciary responsibility against the Defendants (collectively, "USC") for the administration of two ERISA plans. Under the circumstances presented by this case, we conclude that the district court properly denied USC's motion to compel arbitration.

I

Allen Munro and eight other current and former USC employees ("Employees") participate in both the USC Retirement Savings Program and the USC Tax-Deferred Annuity Plan (collectively, the "Plans"). In this putative class action lawsuit, they allege multiple breaches of fiduciary duty in administration of the Plans.

Each of the individual Employees was required to sign an arbitration agreement as part of her employment contract. The nine Employees signed five different iterations of USC's arbitration agreement. Consistent among the various agreements is an agreement to arbitrate all claims that either the Employee or USC has against the other party to the agreement. The agreements expressly cover claims for violations of federal law.

In their putative class action lawsuit, the Employees sought financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries, including but not limited to: a determination as to the method of calculating losses; removal of breaching fiduciaries; a full accounting of Plan losses; reformation of the Plans; and an order regarding appropriate future investments.

USC moved to compel arbitration, arguing that the Employees' agreements bar ***1091** the Employees from litigating their claims on behalf of the Plan. It also requested

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the district court to compel arbitration on an individual, rather than class, basis because the parties did not specifically agree to class arbitration. The district court denied USC's motion, determining that the arbitration agreements, which the Employees entered into in their individual capacities, do not bind the Plans because the Plans did not themselves consent to arbitration of the claims. USC timely appealed.

The district court had jurisdiction under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and 28 U.S.C. § 1331. We have jurisdiction under 9 U.S.C. § 16(a)(1)(C), which authorizes the immediate appeal from an order denying an application to compel arbitration. We review the issues presented de novo. *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1207 (9th Cir. 2016) (denial of a motion to compel arbitration); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016) ("district court decisions about the arbitrability of claims" and "the interpretation and meaning of contract provisions" (citation and alteration omitted)); *Cmty. Bank of Ariz. v. G.V.M. Trust*, 366 F.3d 982, 984 (9th Cir. 2004) (a "district court's interpretation and construction of ... federal law").

II

[1] The Federal Arbitration Act ("FAA") "was enacted ... in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). It "reflect[s] both a 'liberal federal policy favoring arbitration,' " *id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)), "and the 'fundamental principle that arbitration is a matter of contract,' " *id.* (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010)). By the FAA's terms, "a written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

[2] **[3]** "[T]he party resisting arbitration bears the burden[s] of proving that the claims at issue are unsuitable for arbitration ...." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ...." *Moses H. Cone*, 460 U.S. at 24–25, 103 S.Ct. 927.

[4] **[5]** Where there is no conflict between the FAA and the substantive statutory provision, "the FAA limits courts' involvement to 'determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.' " *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). "If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp.*, 207 F.3d at 1130. There is no room for discretion, as the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)).

III

[6] Turning to the particular arbitration agreements entered into between the ***1092** Employees and USC, we must decide "whether the agreement encompasses the dispute at issue." *Cox*, 533 F.3d at 1119 (citation omitted). Because the parties consented only to arbitrate claims brought on their own behalf, and because the Employees' present claims are brought on behalf of the Plans, we conclude that the present dispute falls outside the scope of the agreements.

A

[7] **[8]** We cannot, of course, compel arbitration in the absence of an agreement to arbitrate; to do so would be to defeat "the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). "[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.' " *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (quoting *Volt Info.*, 489 U.S. at 479, 109 S.Ct. 1248).

B

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To determine whether the agreements extend to the present controversy, we look first to the text of the agreements. *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 796 (9th Cir. 2017).

We recently considered a similar issue in another legal context—whether a standard employment arbitration agreement covered *qui tam* claims brought by the employee on behalf of the United States under the False Claims Act ("FCA"). *Welch*, 871 F.3d 791. In *Welch*, the arbitration agreement extended to any claims "either [the employee] may have against the Company ... or the Company may have against [the employee]." *Id.* at 794. Because "the underlying fraud claims asserted in a FCA case belong to the government and not to the relator," we held that the claims were not claims that the employee had against the employer and therefore not within the scope of the arbitration agreements. *Id.* at 800 & n.3.

Here, too, the parties agreed to arbitrate "all claims ... that Employee may have against the University or any of its related entities ... and all claims that the University may have against Employee." As in *Welch*, this language does not extend to claims that other entities have against the University. As in *Welch*, we cannot interpret the catch-all clause agreeing to arbitrate "[a]ny claim that otherwise would have been decidable in a court ... for violation of any federal ... statute" to cover claims belonging to other entities. *See Welch*, 871 F.3d at 797–98 (interpreting agreement to arbitrate "all disputes" based on "any ... federal law" as limited to disputes between the employee and the employer).

The language of the arbitration agreements here is not meaningfully distinguishable from that considered in *Welch*. The issue, then, is whether claims for breach of fiduciary duty brought under ERISA must be treated the same as *qui tam* claims brought under the FCA.

C

There is no shortage of similarities between *qui tam* suits under the FCA and suits for breach of fiduciary duty under ERISA. Most importantly, both *qui tam* relators and ERISA § 502(a)(2) plaintiffs are not seeking relief for themselves. A party filing a *qui tam* suit under the FCA seeks recovery only for injury done to the government, *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771–72, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), and a plaintiff bringing a suit for breach of ***1093** fiduciary duty similarly seeks recovery only for injury done to the plan. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008); *accord id.* at 261, 128 S.Ct. 1020 (Thomas, J., concurring).

Out of this basic similarity arises a related principle—neither the *qui tam* relator nor the ERISA § 502(a)(2) plaintiff may alone settle a claim because that claim does not exist for the individual relator or plaintiff's primary benefit. In *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999), we held that a plaintiff seeking relief under ERISA § 409(a) may not settle a claim on behalf of a plan, but rather can only settle if the plan consents to the settlement. Unsurprisingly, given the similarities between FCA and ERISA fiduciary breach claims, we reached a similar conclusion in a *qui tam* action brought under the FCA where the government had initially declined to intervene, leaving the relator to conduct the action himself. *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994). But there, unlike here, the government had only a right to be heard on the validity of the settlement, not "an absolute right to block the settlement." *Id.* at 720–23.

Significantly, these principles laid the foundation for our holding in *Welch*, where we held a *qui tam* FCA claim to be outside the scope of an arbitration agreement because the claim was not one that the employee "may have against [the employer]." 871 F.3d at 800. Our holding was compelled by our recognition that the government, rather than the relator, stands to benefit most from the litigation. *Id.* And we reached our conclusion even though the relator is entitled to more than a nominal share of the government's recovery. *Id.* Moreover, we were unconcerned that the FCA provides that the relator brings suit not only "for the United States Government" but also "for the person." 31 U.S.C. § 3730(b). And even though in a breach-of-fiduciary duty suit under ERISA, "the cause of action belong[s] to the individual plaintiff," *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103 (9th Cir. 2006), the same is true of a *qui tam* suit under the FCA where the government declines to intervene, *see* 31 U.S.C. § 3730(b)(4)(B) (providing that, in such circumstances, the "right to conduct the action" lies with the relator). *See also Landwehr v. DuPree*, 72 F.3d 726, 732 (9th Cir. 1995) (holding in ERISA context that the statute of limitations begins to run when the individual plaintiff learns of the alleged violations); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217–18 (9th Cir. 1996) (holding similarly in the FCA context).

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Relying on *LaRue*, USC argues that individuals may seek individual recovery in the context of defined contribution plans, such as the Plans here, because defined contribution plans comprise individual accounts. However, *LaRue* cannot bear the weight USC places on it. In *LaRue*, the Supreme Court held that an individual may bring an ERISA claim alleging breach of fiduciary duty even if the claim pertains only to her own account and seeks relief for losses limited to that account. 552 U.S. at 256, 128 S.Ct. 1020. In doing so, the Court made clear that it had not reconsidered its longstanding recognition that it is the plan, and not the individual beneficiaries and participants, that benefit from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan. *Id.* ("[A]lthough § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.").

Even if *LaRue* held the meaning USC attributes to it, it would not control this ***1094** case. The claims brought by the Employees arise from alleged fiduciary misconduct as to the Plans in their entireties and are not, as in *LaRue*, limited to mismanagement of individual accounts. *Id.* at 250–51, 128 S.Ct. 1020 (explaining that the lawsuit arose from the fiduciary's alleged failure to carry out the participant-plaintiff's directions). As we have noted, the Employees seek financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries, including a determination as to the method of calculating losses, removal of breaching fiduciaries, a full accounting of Plan losses, reformation of the Plans, and an order regarding appropriate future investments. The relief sought demonstrates that the Employees are bringing their claims to benefit their respective Plans across the board, not just to benefit their own accounts as in *LaRue*.

In short, there is no principled distinction to be drawn between this case and *Welch*. If anything, because recovery under ERISA § 409(a) is recovery singularly for the plan, *compare* 29 U.S.C. § 1109(a), *with* 31 U.S.C. § 3730(b), the *qui tam* relator has a stronger stake in the outcome of an FCA case than does a § 502(a)(2) plaintiff in an ERISA claim. The ERISA § 409(a) claims in this suit are not claims an "Employee may have against the University or any of its related entities," and the arbitration agreements cannot be stretched to apply to them. [1]

IV

In sum, the claims asserted on behalf of the Plans in this case fall outside the scope of the arbitration clauses in individual Employees' general employment contracts. Therefore, the district court properly denied the motion to compel arbitration. We need not—and do not—reach any other issues urged by the parties.

AFFIRMED.

All Citations

896 F.3d 1088, 356 Ed. Law Rep. 908, 2018 Employee Benefits Cas. 261,639, 18 Cal. Daily Op. Serv. 7362, 2018 Daily Journal D.A.R. 7179

Footnotes

* The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

1 The Employees also argue that claims for breach of fiduciary duty seeking a remedy under ERISA 409(a) are inarbitrable as a matter of law, citing our decision in *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). In *Amaro*, we held that ERISA's mandated "minimum standards [for] assuring the equitable character of [ERISA] plans" could not be satisfied in an arbitral proceeding. 724 F.2d at 752. As a three-judge panel, *Amaro* binds us unless we conclude that the case is "clearly irreconcilable" with intervening binding authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). USC contends that *Amaro* is "clearly irreconcilable" with intervening Supreme Court case law and, therefore, we should overrule it. Although the Supreme Court has never expressly held that ERISA claims are arbitrable, there is considerable force to USC's position. *See, e.g.*, *Comer v. Micor, Inc.*, 436 F.3d 1098, 1100–01 (9th Cir. 2006) (discussing the issue in dicta). However, given our decision that the claims asserted in this case fall outside the arbitration clauses in the employee agreements, it is unnecessary to decide that question here. Therefore, we leave the issue of *Amaro*'s viability for another day.

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Negative Treatment

Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by	1. Wise v. Maximus Federal Services, Inc. MOST NEGATIVE 2019 WL 3554376 , N.D.Cal. Plaintiff Benjamin Wise brings suit against MVI Administrators Insurance Solutions, Inc., Monterey County Hospitality Association Health and Welfare Plan, United HealthCare...	Aug. 05, 2019	Case		5 6 7 F.3d

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History (9)

Direct History (4)

1. Munro v. University of Southern California
2017 WL 1654075 , C.D.Cal. , Mar. 23, 2017

Stay Pending Appeal Denied by

2. Munro v. University of Southern California
2017 WL 5592904 , C.D.Cal. , July 07, 2017

AND Affirmed by

3. Munro v. University of Southern California
896 F.3d 1088 , 9th Cir.(Cal.) , July 24, 2018

Certiorari Denied by

4. University of Southern California v. Munro
139 S.Ct. 1239 , U.S. , Feb. 19, 2019

Related References (5)

5. Munro v. University of Southern California
2016 WL 11185428 , C.D.Cal. , Dec. 02, 2016

6. Munro v. University of Southern California
2018 WL 2584611 , C.D.Cal. , May 11, 2018

7. Munro v. University of Southern California
2019 WL 4544427 , C.D.Cal. , July 02, 2019

8. Munro v. University of Southern California
2019 WL 4575844 , C.D.Cal. , July 02, 2019

9. Munro v. University of Southern California
2019 WL 4543115 , C.D.Cal. , Aug. 27, 2019

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