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ERISA'S New Playground

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At the ripe old age of 41, the ERISA statute finds itself at a crossroads. Although the momentum of new ERISA rules and regulations is accelerating, the actual number of high-stakes lawsuits is declining. Why is that? Are people becoming nicer, or is something more fundamental happening? In many ways, ERISA litigators are worried about the future—much like the character Benjamin in the film *The Graduate* (released in 1967):

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Benjamin: I'm just…

Mr. Braddock: …worried?

Benjamin: Well…

Mr. Braddock: About what?

Benjamin: I guess about my future.

Mr. Braddock: What about it?

Benjamin: I don't know. I want it to be…

Mr. Braddock: …to be what?

Benjamin: …Different.

Mr. McGuire: I want to say one word to you. Just one word.

Benjamin: Yes, sir.

Mr. McGuire: Are you listening?

Benjamin: Yes, I am.

Mr. McGuire: *Plastics.*

Benjamin: Exactly how do you mean?

Mr. McGuire: There's a great future in plastics. Think about it. Will you think about it?

The one word for ERISA practitioners going forward is: *Arbitration.* Employers of all stripes are increasingly mandating arbitration of employment disputes, including ERISA disputes. Not only are employers mandating that employees agree to mandatory arbitration, they are including a waiver of class action claims as part of the arbitration agreement. By including class action waivers in the employee arbitration agreement, the employer blunts the economic incentives for plaintiffs' lawyers to pursue employee plan benefit claims.

The Allure of Arbitration: Why Eliminating Class Action Lawsuits Is Important

In class action litigation, similarly situated legal claims are combined under a single lawsuit. The theory justifying the use of class actions is that they can be an efficient mechanism for resolving large numbers

of relatively low-dollar-value claims. The reality, however, is quite different. In the real world, the class action process is notoriously inefficient. Class actions are often used as a means to enrich plaintiffs' lawyers at the expense of claimants. Plaintiffs' lawyers recognize that class action lawsuits have little economic value to individual plaintiffs. Accordingly, individual plaintiffs, even when named as class representatives, have little incentive to monitor the lawyer's handling of the case. Class action lawsuits usually take years to reach a settlement. When a settlement is eventually reached, plaintiffs' lawyers have an incentive to structure the settlement to recover as much in attorney' fees as they can. This adverse economic incentive sometimes makes it difficult for class members to obtain any real substantive relief. More important, given the large expense of defending class actions, and in the absence of significant procedural protections against self-dealing settlements, plaintiffs' lawyers have an incentive to maintain a class action lawsuit until a settlement is reached, even those that have little merit. As such, the deterrent effect of class actions against bad behavior is relatively modest because innocent defendants are treated by the judicial system much like the guilty. In comparison with class action lawsuits, individual arbitration is less costly and more effective at protecting the litigants' rights. Instead of taking years, the average arbitration takes just short of seven months to complete.

More important, the adoption of mandatory arbitration language containing class action waivers will have an *in terrorem* effect on plaintiffs' lawyers. The reason complaints are framed as class actions is that plaintiffs' lawyers can receive a significant share (20–40 percent) of any "common fund" recovery. For example, attorney' fees for individual fiduciary breach claims under ERISA are subject to rigorous judicial scrutiny. The lodestar analysis applied to individual ERISA attorney fee applications multiplies the number of hours reasonably expended by a reasonable hourly rate.[1]

Can Claims for Plan Benefits and ERISA Statutory Claims Be Subject to Arbitration?

The short answer is a cautious, "yes." The US Supreme Court has consistently ruled that statutory claims in other employment law contexts may be arbitrated. For example, in *Gilmer v. Interstate/Johnson Lane, Corp.,*[2] it explained that all statutory claims may be arbitrated unless Congress, in the governing statute, expressly precluded arbitration or the use of other nonjudicial means for resolving claims. The ERISA statute[3] does not expressly preclude the arbitration of statutory (also known as fiduciary breach) claims. It indicates that although both state and federal courts have concurrent jurisdiction over claims for benefits, federal courts have "exclusive jurisdiction" over statutory claims. Nowhere, however, does ERISA state that statutory violations

cannot be arbitrated. Other parts of ERISA embrace arbitration (such as for withdrawal liability disputes).[4] Fiduciary breach or statutory violation lawsuits arise out of an alleged violation of the ERISA statute. Benefit claims disputes, on the other hand, deal with differing interpretations of the plan's terms. In most circuits, a plaintiff alleging an ERISA statutory or fiduciary violation is under no obligation to exhaust the plan's claims review process before filing suit.[5]

To have enforceable arbitration provisions, Department of Labor regulations require certain "laboratory conditions."[6] For example, benefit claimants may not be subjected to costs arising from arbitration procedures, and the mandatory arbitration procedure cannot preclude the claimant's subsequent right to challenge the arbitrator's decision in court.[7]

U.S. Supreme Court's Embrace of Arbitration

Over the last four years, the Supreme Court decided six cases favoring mandatory arbitration clauses. Taken together, these six Supreme Court rulings strengthen the case for including mandatory arbitration clauses with class action waivers in all ERISA-regulated plans and all employment agreements. So long as the arbitration clauses and class waivers are properly drafted and the elements of contract formation are properly observed, employers will be able to eliminate their exposure to the runaway costs of class action litigation.

Mandatory Arbitration Provisions Are Subject to Ordinary Contract Principles

AT&T Mobility v. Concepcion is a classic example.[8] The plaintiffs in *Concepcion* claimed that AT&T cheated them when they agreed to select AT&T as their mobile phone carrier in exchange for a free phone. Notwithstanding AT&T's promise of a "free" telephone, the Concepcions subsequently discovered that they were required to pay $30 in sales tax based on the retail value of the phone. AT&T's customer service agreement contained a consumer-friendly mandatory arbitration agreement and a class action waiver. Both the federal district court and the US Court of Appeals for the Ninth Circuit agreed with the plaintiffs, relying on the "Discover Bank Rule"—a common-law rule propounded by California's Supreme Court that found arbitration agreements prohibiting class arbitration are unconscionable. The U.S. Supreme Court reversed. It held that California's Discover Bank rule was aimed at regulating arbitration agreements and was therefore superseded by the Federal Arbitration Act (FAA). Justice Scalia, writing for the majority, noted that although the FAA's savings clause preserves generally applicable contract defenses to arbitrability, it supersedes state law rules that contravene the FAA's overriding policy favoring arbitration.

The California Supreme Court has found that mandatory arbitration agreements for employees are enforceable as long as they meet certain requirements.[9] In order to be enforceable, the mandatory arbitration agreement must: (1) provide for a neutral arbitrator; (2) provide for enough discovery to allow employees to gather necessary evidence to prove their claims; (3) provide for a written decision containing the essential findings and conclusions on which the award is based so as to allow meaningful review; (4) the employer must pay the costs of arbitration (the employee cannot be required to pay any additional costs beyond those routinely faced in court litigation); (5) the employer cannot limit the types of claims subject to arbitration such that only claims typically brought by employees are subject to arbitration; and (6) all remedies available in court must be made available in arbitration.

Hidden Danger #1: Omitting a Provision that Identifies Both the FAA and ERISA as Governing Law

The "Governing Law" provision of any mandatory arbitration agreement should state that both the FAA and ERISA govern any and all disputes arising under the agreement. Employing the FAA insures that if disputes arise, a federal forum will be invoked. This is quite important for employers that have operations in multiple states. Failing to state that the agreement is governed by the FAA can be problematic. For example, the US Court of Appeals for the Ninth Circuit has ruled that "the presence of federal questions in an underlying arbitration is insufficient to provide an independent basis for federal question jurisdiction to review an arbitration award under the FAA."[10] The Ninth Circuit explained that the arbitration provisions in the *Carter* case specifically invoked the California Arbitration Act (CAA) and that the plaintiffs had sued under the CAA to confirm the arbitration award. The court rejected the defendant's attempt to bring the case to federal court, explaining that the case was not within the federal court's jurisdiction as the dispute arose under state law. By expressly invoking the FAA, an arbitration agreement will be seen as arising under federal law, allowing the plan sponsor to rely on the many Supreme Court cases favoring arbitration.

The ERISA statute also should be invoked as part of the Governing Law provision. Invoking ERISA avoids a situation in which the arbitrator tries to eliminate his or her consideration of fiduciary breach claims.[11]

The arbitration provision itself should clearly state that the arbitrator's review of a plan administrator's denial is limited to a review of the Administrative Record as submitted to the administrator. This language freezes the record that the arbitrator can consider. In federal court, the reviewing trial court's review of an administrator's denial is generally limited to the record presented to the administrator.[12]

To prevent surprises, all ERISA plan documents, employment agreements and other employee communications should contain uniform arbitration provisions. If mandatory arbitration provisions are omitted in different employee benefit plans or other employee documents, a court may determine that the mandatory arbitration policy is ambiguous and therefore unenforceable.[13]

Hidden Danger #2: Failing to Consider What Rules Will Govern Arbitration

Employers are under no obligation to select an alternative dispute resolution (ADR) organization to manage the arbitration. However, many choose to expressly state that a particular organization will manage the case and will provide a panel of arbitrators from which the parties can select their decision-maker. Employers that seek even more procedural certainty often name a particular set of procedural rules to govern arbitration and attach a copy of those rules to the agreement.

If you decide to select an ADR organization to manage your case or implement their procedural rules, it is important to understand the implications of the differences between some of the major programs. Two popular dispute resolution programs are JAMS and the American Arbitration Association (AAA). The following is a discussion of some of the differences between these two organizations.

Filing Fees

ADR services generally charge a filing fee for each case. These fees are over and above the fees for the arbitrator's time. JAMS has a slightly lower case management fee up front. However, as arbitration progresses, a retainer will be required.

AAA Employment Rules have different fees depending on whether the arbitration arose from an employer-promulgated plan or an individually negotiated employment agreement or contract.[14] The AAA makes that determination. If a dispute arises out of an employer-promulgated plan, the filing fee for a case before a single arbitrator is $1,550. The employer is responsible for the entire fee unless the employee brings the claim. If the employee files the demand for arbitration, the employee must pay $200 of that fee and the employer must pay the remaining $1,350. If the dispute arises out of an individually negotiated employment agreement or contract, the filing fee is based on the amount of the claim. Filing fees range from $750 to more than $10,000. AAA also charges a final fee for all cases that proceed to their first hearing. The final fee, which also is based on the amount of the claim, ranges from $800 to around $12,500.

JAMS charges an initial filing fee of $400 per party. If the case continues to the arbitrator, the remaining fees are paid by the company, and those will vary depending on how far the case goes. Typically,

to get to the first case management call with the arbitrator JAMS will collect a $5,000 retainer from the company. An additional retainer would be collected if the initial retainer is exhausted or when the case is set for hearing.

Locations

Generally, arbitrators are willing to travel to where a dispute is located. If an arbitration is especially contentious, the parties may prefer to have the arbitration hosted at a third-party location. Office space can be rented or provided by one of the parties if an ADR service does not have office locations where the arbitration hearing will be conducted.

JAMS has 26 locations in 14 states (Georgia, Florida, Massachusetts, Illinois, Texas, Colorado, Maryland, California, Nevada, Minnesota, New York, Pennsylvania, Washington, and Washington, D.C.) where arbitration hearings can be held.[15]

AAA has offices in 35 locations across the United States. Many of these offices can house an arbitration.

Neutrals

Parties who select arbitration are placing the decision on the merits in the hands of this third party. Plan sponsors that choose to select a JAMS or an AAA arbitrator will be provided with an arbitrator that JAMS/AAA has determined has relevant employment expertise.

JAMS lists its roster of neutrals online. Many of JAMS' neutrals are former judges. For example, of the approximately 250 JAMS neutrals that have expertise in employment issues, about 170 of them are former judges.[16]

AAA does not publish a list of AAA neutrals on its Web site. When parties bring a claim before the AAA, the AAA will send the parties a list of arbitrators with relevant subject matter expertise. The parties will then select an arbitrator from that limited list. AAA publishes its qualification criteria for its arbitrators.[17] AAA employment arbitrators must meet or exceed the following criteria:[18]

- Attorney with a minimum of 10 years experience in employment law, with 50 percent of his or her practice devoted to this field; retired judges; or academics teaching employment law;
- Educational degree or professional license, or both, appropriate to the field of expertise;
- Honors, awards, and citations indicating leadership in the field;

- Training or experience in arbitration or other forms of dispute resolution;
- Membership in a professional association; and
- Other relevant experience or accomplishments (*e.g.,* published articles).

Hidden Danger #3: Omitting a Plan-Based Statute of Limitations

Recently, the US Supreme Court settled plan sponsors' long-outstanding question of whether an ERISA plan's self-imposed time limit for participants to bring a lawsuit alleging claims for benefits is enforceable. On December 16, 2013, a unanimous Supreme Court ruled that a statute of limitations in an ERISA plan will be enforced unless the time period specified is "'unreasonably short' or '[where] a controlling statute' prevents the limitations provision from taking effect." In *Heimeshoff v. Hartford Life & Accident Insurance Co.*,[19] a dispute arose as to the enforceability of an ERISA plan's requirement that the last date for filing lawsuits about long-term disability (LTD) benefit claims was three years from the date that proof of loss was required to be submitted under the terms of the plan. The Supreme Court enforced the provision.

Julie Heimeshoff filed a claim for plan benefits under Hartford's LTD plan on August 22, 2005. In November 2005, Hartford denied Ms. Heimeshoff's claim on the grounds that she failed to submit a satisfactory proof of loss. Hartford told Ms. Heimishoff that because her doctor had never responded to Hartford's request for additional information, it could not determine whether she was disabled. One year later, in October 2006, Ms. Heimeshoff submitted a proof of loss. In November 2006, after retaining an independent physician to review Ms. Heimeshoff's claim and speak with her doctor, Hartford determined that Ms. Heimeshoff was not eligible for LTD benefits, and she appealed. After two additional doctors reviewed her appeal, Hartford issued a final denial on November 27, 2007. Ms. Heimeshoff filed a federal lawsuit on November 18, 2010. Her lawsuit was filed almost three years after her final denial—and more than three years after her proof of loss was due.

Hartford moved to dismiss Ms. Heimeshoff's claim, arguing that Ms. Heimeshoff's lawsuit was untimely under the terms of the plan. Hartford argued that Ms. Heimeshoff's lawsuit must be dismissed because she filed it more than three years after her proof of loss had been filed with the plan. The district court granted Hartford's motion to dismiss, and the US Court of Appeals for the Second Circuit affirmed. Four Circuit Courts of Appeal had been in conflict over the

accrual time for ERISA statutes of limitations, with some circuits prohibiting limitations periods that begin running before a legal claim has accrued, and other circuits upholding such limitation periods.

On October 15, 2013, the parties argued their case before the Supreme Court. On December 16, 2013, the Court issued its opinion. The Supreme Court considered when a statute of limitations should accrue for judicial review of an ERISA disability adverse benefit determination. Hartford's LTD plan's three-year statute of limitations was enforced. Writing for the Court, Justice Thomas cited to the Supreme Court's long-standing views on the contractual enforceability of ERISA plan language:

> The principle that contractual limitations provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA plan. "The plan, in short, is at the center of ERISA." *US Airways Inc. v. McCutchen*, 569 U.S. ___, ___ (2013) (slip op., at 11). "[E]mployers have large leeway to design disability and other welfare plans as they see fit." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003). And once a plan is established, the administrator's duty is to see that the plan is "maintained pursuant to [that] written instrument." 29 U.S.C. §1102(a)(1). This focus on the written terms of the plan is the linchpin of "a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Ms. Heimeshoff's cause of action for benefits was bound up with the written instrument of the LTD plan. ERISA Section 502(a)(1)(B) authorizes a plan participant to bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[20] That "statutory language speaks of 'enforc[ing]' the 'terms of the plan,' not of changing them."[21]

In considering whether the three-year limitations period in Hartford's plan was not unreasonably short, the Supreme Court noted that applicable regulations indicate most claims should be resolved within a one-year time period. With respect to Ms. Heimeshoff, the plan's administrative review process took more time than usual; however, Ms. Heimeshoff was still left with approximately one year to file suit, which the justices found to be a "reasonable" period of time.

Plan sponsors may wish to limit their liability for benefits claims by imposing a contractual time limit by which claims for plan benefits must be brought in federal court. Plan sponsors should be careful to include any limitations period in the plan and the summary plan description as well as all relevant communications with plan

participants. Plan sponsors should be careful, however, not to draft a sweeping statute of limitations that encompasses all ERISA-based claims. The U.S. Supreme Court's decision applies to claims for plan benefits under ERISA Section 502(a)(1)(B). It does not apply to breach of fiduciary duty claims, for which ERISA provides a statute of limitations.

Hidden Danger #4: Overlooking Who Decides Arbitrability

Arbitration agreements are voluntary undertakings. The US Supreme Court has declared: "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[22] It makes sense, then, that a court has the sole authority to decide issues of arbitrability unless the parties have granted that power to the arbitrator. "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[23]

If a contract containing an arbitration provision is silent as to who determines whether a dispute is arbitrable only a judge has the authority to decide the issue.[24] Keeping this default rule in mind, plan sponsors and ERISA fiduciaries should decide who they want to decide arbitrability and then include clear language in their plan either delegating that authority to the arbitrator or leaving the power to the court. One of the desired outcomes of the arbitration process is speedy resolution of disputes. A happy byproduct of that expediency is often lower litigation costs. If an arbitration proceeding is put on hold while a civil lawsuit to determine arbitrability is filed and litigated, the time benefit of arbitration can be lost entirely. The parties also will incur additional costs and attorney' fees associated with a civil lawsuit that often exceed the price one would pay to pursue the same issue in arbitration.

The determination of arbitrability is often a matter of simple contract interpretation. If a plan sponsor seeks expeditious resolution of the dispute, the sponsor may wish to grant the arbitrator the authority to determine arbitrability. Failure to include language designating the arbitrator with authority to determine arbitrability means that a court will decide the issue.

Hidden Danger # 5: Unintentionally Using Permissive Arbitration Language

Because arbitration is a matter of consent, the general presumption in favor of arbitrability "does not apply to the [threshold] determination of whether there is a valid agreement to arbitrate between the parties; instead '[o]rdinary contract principles determine who is

bound.' "[25] If a dispute arises about whether a disagreement is governed by arbitration, the party seeking arbitration bears the burden of proving the existence of a valid arbitration agreement.[26] Only after the court concludes that a binding agreement to arbitrate exists does the presumption in favor of arbitrability come into effect.[27]

Parties that use permissive language in their arbitration agreements are not clearly binding themselves to arbitration in all circumstances. Courts have held that use of permissive words, like "may," creates the option of arbitration, but in no way makes it compulsory. As a general matter of contract law, the word "may" is viewed as a permissive, rather than as a mandatory term, particularly when used in juxtaposition to the word "shall."[28] Indeed, courts have held that the use of the word "may" in an arbitration clause between private parties evinces the parties' intent not to be bound to invoke the arbitration machinery to settle their disputes.[29] The arbitration clause in *PCH Mut. Ins. Co, Inc. v. Casualty & Surety, Inc.* stated:

> Any disputes concerning any aspect of this Agreement may be submitted to binding arbitration. The prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees.[30]

The district court in *PCH* noted that the first sentence contained the permissive word "may" and the second sentence contained the mandatory word "shall."[31] The court then concluded that this language can reasonably be read "to contemplate the possibility of arbitration, without mandating its use."

The arbitration clause in *Doyon Drilling, Inc. v. Loadmaster Eng'g, Inc.,* stated:

> The parties agree that the settlement of any disputes shall be attempted by informal negotiation in the first instance. In the event such dispute is not settled by informal means within sixty (60) days of the date such dispute arose, then the parties agree to retain the services of a professional mediator. In the event no resolution is reached within a further thirty (30) days then either party may by notice to the other party, refer the dispute to binding arbitration.[32]

The arbitration provision in *Doyon* is multipart. Part one is mandatory. If any dispute arises, the parties "shall" attempt informal negotiation. In part two, if negotiation is unsuccessful, the parties "agree" to retain a mediator. Part three is different. In an abrupt departure from the directives of the previous two sentences, part three states that either party "may" refer the dispute to binding arbitration if mediation also is unsuccessful. The clause vests discretion in either party to refer the case to arbitration, but it is not a mandatory arbitration provision. The clause is merely permissive.

In *Doyon*, the party seeking to compel arbitration argued that policy reasons compel a liberal reading of arbitration agreements and resolution of doubts in favor of arbitration.[33] The district court, however, ruled that the arbitration clause is "unambiguous and raises no doubts." The court ruled that the use of the word "may" in juxtaposition to use of the word "must" "indicates that other avenues of dispute resolution—including litigation—would remain available." The FAA's policy of liberal reading of arbitration agreements and resolution of doubts in favor of arbitration does not compel a different result: "The policy established by the FAA does not require a court to manipulate an explicitly permissive arbitration provision."

ERISA Plan sponsors that wish to impose mandatory arbitration should use clear mandatory language and avoid using the permissive "may."

Conclusion

When an ERISA plan sponsor decides to implement mandatory arbitration, it must turn to a second task: making sure that the language that is adopted reflects the sponsor's intentions with respect to the scope of the agreement and the arbitration procedure itself. ERISA plan sponsors should think carefully about the language they choose when adding an arbitration clause to their plan. Everyone hopes that disputes will never rise to the level of formal dispute resolution procedures. If they do, however, carefully drafted language goes a long way towards ensuring that the arbitration process progresses as the drafter intended.

Notes

1. *Hensley v. Eckenhart*, 461 US 424, 433 (1983); *D'emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1393 (9th Cir. 1990), overruled on other grounds by *Burlington v. Daque*, 505 U.S. 557 (1992).

2. 500 U.S. 20, 29 (1991).

3. 29 U.S.C. § 1132 (e)(1).

4. 29 U.S.C. § 1401.

5. *See Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cr. 1984).

6. *See* 29 C.F.R. § 2560.503-1.

7. *Id.*

8. 563 US ____, 2013 US LEXIS 3367 (2011).

9. *Armendariz v. Foundation Health Psychcare*, 34 Cal. 4th 83 (2000).

10. *Carter v. Healthnet of California, Inc.*, 374 F.3d 830, 836 (9th Cir. 2004).

11. *See Bird v. Shearson Lehman/American Express*, 926 F.2d 116 (2nd Cir. 1991) (parties may agree to arbitrate statutory breach of fiduciary duty claims).

12. *See, e.g., Boyd v. Burt Bell/Pete Rozelle NFL Players Ret. Plan*, 410 F.3d 1173, 1178–1179 (9th Cir. 2005).

13. *See, e.g., Christianson v. Poly-America, Inc. Medical Benefit Plan*, 2002 WL 31421684 (D. Minn. 2002).

14. AAA Employment Arbitration Rules & Mediation Procedures (AAA Rules), p. 31.

15. *See http://www.jamsadr.com/locations/*, last accessed March 7, 2015.

16. *See http://www.jamsadr.com/neutrals-search/* search run on March 7, 2015.

17. *See https://www.adr.org/aaa/faces/arbitratorsmediators/aboutarbitratorsmediators/qualifications?_afrLoop=1209623335850083&_afrWindowMode=0&_afrWindowId=ux0m40ko4_856#%40%3F_afrWindowId%3Dux0m40ko4_856%26_afrLoop%3D1209623335850083%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dux0m40ko4_900*, last accessed on March 7, 2015.

18. *See* "Qualification Criteria and Responsibilities for Members of the AAA Panel of Employment Arbitrators" available at *https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003881*, last accessed on March 7, 2015.

19. No. 12-729, 571 U.S. ___, 134 S. Ct. 604 (2013),

20. 29 U.S.C. § 1132(a)(1)(B).

21. *CIGNA Corp. v. Amara*, 563 U. S. ___, ___ (2011) (slip op., at 13).

22. *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986).

23. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, (1995) (holding that when parties did not clearly agree to submit question of arbitrability to arbitration, the court should independently decide the question); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301, (2010) ("[E]xcept where 'the parties clearly and unmistakably provide otherwise'…it is 'the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning' a particular matter") *citing AT&T Tech.*, 475 U.S. at 649.

24. *See id.*

25. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n. 11 (9th Cir. 2006) *citing Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002); *see also First Options*, *supra* n.23 at 943–944.

26. *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010) (overruled in part on other grounds) *citing Engalla v. Permanente Med. Grp., Inc.*, 938 P.2d 903, 916–917 (1997).

27. *First Options*, *supra* n.23 at 944–945.

28. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005); *Ace Constructors, Inc. v. United States*, 70 Fed. Cl. 253, 288 (Fed. Cl. 2006), *aff'd*, 499 F.3d 1357 (Fed. Cir. 2007).

29. *PCH Mut. Ins. Co, Inc. v. Casualty & Surety, Inc.*, 750 F. Supp. 2d 125, 144 (D.D.C. 2010); *Doyon Drilling, Inc. v. Loadmaster Eng'g, Inc.*, 2010 U.S. Dist. LEXIS 116278, 2010 WL 4386904 (D. Alaska Oct. 29, 2010).

30. *PCH Mut. Ins. Co, Inc.*, *supra* n.29 at 143.

31. *Id.* at 144.

32. *Doyon*, *supra* n.29, 2010 U.S. Dist. LEXIS 116278, at *4.

33. *Id.* at *5.

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