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ERISA AND ARBITRATION: HOW SAFE IS YOUR 401(K)?

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.

—Abraham Lincoln¹

INTRODUCTION

Imagine you are an employee working for a mid-size corporation. You are three years away from retirement, and you have been stashing half of your paycheck into your employer-sponsored 401(k) for years, eagerly anticipating the day you can clock out and retire. This is not a stretch of the imagination by any means—401(k) plans are among the most popular employer-sponsored retirement plans in the United States.² Now imagine you, like many American workers, are relying on your 401(k) to sustain you financially once you retire. Unfortunately, it turns out that your employer misrepresented the security of your 401(k) benefits, and your employment fund has decreased significantly in value, as have the funds of your coworkers.³ What are your options?

A recent line of Supreme Court cases⁴ suggests that if you and your coworkers signed class action waivers and an agreement to arbitrate individual claims arising under the Employee Retirement Income Security Act of 1974 (ERISA),⁵ you have only one option: to participate in arbitration. This might even be the case if you never signed an

1. Abraham Lincoln, *Notes for Law Lecture: About July 1, 1850*, in 2 LIFE AND WORKS OF ABRAHAM LINCOLN 194, 195 (Marion Mills Miller ed., 1907).

2. *401(k) Fast Facts*, AM. BENEFITS COUNCIL, http://www.americanbenefitscouncil.org/documents2013/401k_stats.pdf (updated Apr. 2014).

3. The actions of the employer in this hypothetical are adapted from *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

4. See *infra* notes 112–187 and accompanying text.

5. Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2012)).

arbitration agreement⁶ pertaining to the management of your funds,⁷ but your investment manager⁸ did.

Scholars consistently view arbitration as a cost-saving alternative to litigation.⁹ Benefits of arbitration include speedier resolutions, less cumbersome court and evidence rules,¹⁰ and arbitration provides a more confidential and less adversarial forum than courts.¹¹ However, there are some shortcomings to arbitration: it is more difficult to succeed on appeal, there is no right of discovery, there are no juries, and most importantly, arbitrators might exhibit unknown bias and incompetency in resolving the disputes at issue.¹²

Arguably, the potential negatives associated with arbitration are especially salient in the ERISA context. ERISA claims are often arbitrated, and employers are becoming more aware of the importance of drafting arbitration clauses in ERISA agreements.¹³ These clauses are often included in ERISA agreements without the employee beneficiaries¹⁴ even knowing about them. For example, because pension and welfare plans are mandatory subjects of collective bargaining, plans governed by ERISA are commonly included in collective bargaining agreements.¹⁵ These agreements frequently contain provisions requiring binding arbitration of disputes that arise under the

6. In this Comment, I use the terms “arbitration agreement” (an agreement to arbitrate found in a contract) and “arbitration clause” (a clause in which the parties to the contract agree to arbitrate disputes, as opposed to litigating in court) interchangeably. When referring to arbitration agreements found in the documents that are used to include an employee in an ERISA retirement plan, I refer to the plan documents themselves as “ERISA agreements.”

7. That is, an agreement between the plan provider (an employer) and a company that will manage the investment funds to ensure strong returns. This is separate from an agreement to join an employer’s 401(k) (referred to as “ERISA agreements” in this Comment).

8. In this Comment, I use the term “investment manager” and “investment adviser” interchangeably. I also make reference to “investment management companies,” which serve the same function as an investment manager.

9. Michael H. Leroy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, in *ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA* 511, 518 (Samuel Estreicher & David Sherwyn eds., 2004).

10. Arthur Mazirow, Presentation to the Counselors of Real Estate: The Advantages and Disadvantages of Arbitration as Compared to Litigation 1 (Apr. 13, 2008), available at http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf.

11. *Id.*

12. *Id.* at 2.

13. Chrys A. Martin, *Effective Arbitration of ERISA Claims Disputes*, IN-HOUSE DEF. Q., Summer 2012, at 44–47.

14. In this Comment, I use the terms “plan beneficiary” and “employee beneficiary” interchangeably.

15. Richard P. Donaldson, *The Use of Arbitration To Avoid Litigation Under ERISA*, 17 WM. & MARY L. REV. 215, 216 (1976).

collective bargaining agreement.¹⁶ Similarly, investment advisers often participate in the management of retirement plans, which can be litigated under ERISA, pursuant to an investment management agreement between the plan provider¹⁷ and an investment manager.¹⁸ These common scenarios suggest increased scrutiny is warranted when the court determines whether to compel arbitration because of an alleged ERISA violation. These scenarios also suggest that there might be serious legal issues surrounding enforcement of arbitration clauses—namely, the lack of privity between contracting parties.¹⁹

This Comment examines the use of class action waivers and arbitration clauses in ERISA agreements and argues against the use of arbitration or waiver in class action ERISA suits. Part II provides an overview of the relevant law, including background information on ERISA, the Federal Arbitration Act, the Supreme Court’s rulings on arbitration clauses, and the current state of the law regarding arbitration and ERISA.²⁰ Part III provides an analysis of the arguments for and against the use of arbitration clauses and class action waivers in ERISA agreements.²¹ Finally, Part IV provides an analysis of the practical implications of arbitration clauses in the ERISA context and connects legal theory with practical use.²² Part IV also addresses the potential impact of widespread use of arbitration clauses in the ERISA context of employee beneficiaries.²³

II. BACKGROUND

A. *The Employee Retirement Income Security Act of 1974*

ERISA is a federal law that establishes minimum standards for pension plans in private industry and provides extensive rules on the federal income tax effect of transactions associated with employee benefit plans.²⁴ Therefore, any private employer that implements a pension plan for its employees must comply with the requirements of ERISA.²⁵ Furthermore, when an employer creates and maintains a

16. *Id.*

17. In this Comment, I use the terms “plan provider,” “ERISA plan provider,” and “employer plan provider” interchangeably.

18. *See, e.g., Comer v. Micor, Inc.*, 436 F.3d 1098, 1100 (9th Cir. 2006).

19. *See, e.g., id.* at 1102.

20. *See infra* notes 24–187 and accompanying text.

21. *See infra* notes 188–280 and accompanying text.

22. *See infra* notes 282–296 and accompanying text.

23. *See infra* notes 282–296 and accompanying text.

24. Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2012)).

25. 29 U.S.C. § 1001(c) (2012).

financial benefit plan for its employees, ERISA creates a fiduciary relationship between those parties.²⁶ Accordingly, if an employer breaches its fiduciary duty to the beneficiaries of a plan it sponsors, the employee can sue the employer in federal court.²⁷

Employers that maintain employee pension funds often hire outside consultants to help them determine where to invest their money.²⁸ According to a survey conducted in 2011, 94% of pension funds were managed by investment managers or financial consultants.²⁹ While some have suggested that investment managers are often used to deflect negative attention when investments go sour,³⁰ evidence suggests that managers with experience and knowledge of both investing and ERISA are needed to meet the complex requirements of the fiduciary responsibilities imposed by ERISA on plan providers.³¹

ERISA claims are based on statutory law,³² which makes them especially well suited to arbitration, where the arbitrator needs only to interpret the statute without extensive incorporation of case law.³³ Additionally, ERISA's statutory scheme includes strong preemption of state law claims.³⁴ Because ERISA preempts state law, state legislators who want to limit arbitration by enacting legislation that invalidates arbitration clauses will be unsuccessful.³⁵ This dynamic ensures that arbitration of ERISA claims will be able to proceed in spite of state attempts to curtail the enforcement of these types of contract clauses.³⁶

26. § 1001(b).

27. § 1109.

28. Andrew Ross Sorkin, *Doubts Raised on Advice Pensions Get*, N.Y. TIMES, Oct. 1, 2013, at B1.

29. *Id.*

30. *Id.*

31. *Meeting Your Fiduciary Responsibilities*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html> (last visited Oct. 3, 2014).

32. Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2012)).

33. Alexis Mourre et al., *Arbitral Jurisprudence in International Commercial Arbitration*, KLUWER ARB. BLOG (May 28, 2009), <http://kluwarbitrationblog.com/blog/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions%E2%80%A6>.

34. Philip B. Ytterberg, *ERISA: Arbitration Now an Accepted Alternative to Litigation*, METROPOLITAN CORP. COUNS., Aug. 2005, at 17, available at www.metrocorp-counsel.com/pdf/2005/August/17.pdf.

35. *Supreme Court Issues Two Important Rulings*, FISHER & PHILLIPS LLP (Feb. 20, 2008), <http://www.laborlawyers.com/supreme-court-issues-two-important-rulings> [hereinafter FISHER & PHILLIPS].

36. *Id.*

B. The Federal Arbitration Act of 1925

The Federal Arbitration Act of 1925 (FAA) requires that courts recognize and enforce arbitration agreements and awards.³⁷ The United States Supreme Court has interpreted the FAA as establishing a “federal policy favoring arbitration.”³⁸ Pursuant to the FAA, when the parties to an agreement have agreed to arbitrate a federal statutory claim, the claim is subject to arbitration “unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”³⁹ In essence, the FAA preempts federal and state laws that limit the enforcement of arbitration agreements in order to achieve the goals of “favor[ing] enforcement of private agreements to arbitrate” and “eliminat[ing] traditional judicial hostility to arbitration and other roadblocks to the speedy and efficient resolution of disputes.”⁴⁰

In recent years, arbitration agreements that contain class action waivers have become increasingly controversial.⁴¹ In 2003, the Supreme Court held that arbitrators have the authority to determine “whether a contract allows class proceedings in arbitration if the contract is silent on the issue.”⁴² In reaction, fearing the uncertainty of class action arbitration, corporate defendants began including class action waivers in their contracts.⁴³ Class action waivers are used in contracts to prevent someone from filing a class action lawsuit.⁴⁴ “When a person signs a class action waiver, they are no longer allowed to join other people who are suing for the same issue.”⁴⁵ Class action waivers are often found in arbitration agreements.⁴⁶ Consequently, when someone signs a contract containing both an arbitration agreement for individual claims and a class action waiver, the individual will not be able to file a suit related to that contract on either an individual or

37. Federal Arbitration Act of 1925, ch. 213, 43 Stat. 883 (current version at 9 U.S.C. §§ 1-14 (2012)).

38. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).

39. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (internal quotation marks omitted).

40. FISHER & PHILLIPS, *supra* note 35. For more information on how the FAA has been found to preempt state law, see *infra* notes 112–187 and accompanying text.

41. Gregory C. Cook & A. Kelly Brennan, *The Enforceability of Class Action Waivers in Consumer Agreements*, 40 UCC L.J. 331, 333 (2008).

42. *Id.* (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)).

43. *Id.*

44. *Class Action / Arbitration Waivers*, FAIR CONTRACTS.ORG, <http://www.faircontracts.org/contract-provisions/class-action-arbitration-waivers> (last visited Feb. 1, 2015).

45. *Id.*

46. *Id.*

classwide basis.⁴⁷ The use of class action waivers is especially salient in the ERISA context, as many cases involving employee benefit plans are structured as class actions, with classes made up of plan beneficiaries.⁴⁸

Notwithstanding the Supreme Court's interpretation that federal policy favors arbitration, there is an active and ongoing debate as to whether arbitration is a positive alternative to litigation.⁴⁹ This section outlines the arguments presented on both sides of the debate. On the one hand, arbitration is considered a positive alternative to litigation. Arbitration is often heralded as a less expensive way for parties to come to a satisfactory resolution of claims.⁵⁰ It is widely accepted that arbitration leads to lower dispute resolution costs.⁵¹ Additionally, arbitration rules and procedures are simpler than those that govern litigation proceedings.⁵² In fact, according to a survey of adult arbitration participants, 63% of those polled found arbitration simpler than going to court.⁵³ The evidentiary rules that govern arbitration are less stringent than those that govern trial proceedings.⁵⁴ Additionally, arbitration is largely seen as increasing overall judicial efficiency.⁵⁵ Lastly, arbitration often comes to a resolution more quickly

47. *Id.*

48. Stuart H. Thomsen, *ERISA Class Actions*, BRIEF, Summer 1999, at 36, 36 (a publication from the Tort and Insurance Practice Section of the A.B.A.). For more information on the structural and procedural underpinnings of ERISA class action claims, see *id.* at 36–45.

49. See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005); Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 *SUPREME CT. ECON. REV.* 209 (2000); Maureen A. Weston, Symposium, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 *NEV. L.J.* 385 (2007) (The symposium, held by the Nevada Law Journal, focused exclusively on the benefits and downfalls of a comprehensive arbitration scheme in the modern American legal field.); Donna M. Bates, Note, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 *FORDHAM INT'L L.J.* 823 (2004).

50. See Ytterberg, *supra* note 34.

51. *Id.*

52. *Id.*

53. HARRIS INTERACTIVE, A SURVEY CONDUCTED FOR THE U.S. CHAMBER INST. FOR LEGAL REFORM, *ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION* 5 (Apr. 2005), available at <http://www.adrforum.com/control/documents/researchstudiesandstatistics/2005harrispoll.pdf>.

54. Michael Z. Green, Essay, *No Strict Evidence Rules in Labor and Employment Arbitration*, 15 *TEX. WESLEYAN L. REV.* 533, 533 (2009) ("Since arbitrators are not bound by the strict rules of evidence applicable in court, there originally developed a practice of admitting hearsay 'for what it is worth.'" (quoting *In re Barton Ctr., Senior Health Mgmt., LLP*, 121 *Lab. Arb. Rep.* (BNA) 249, 253 (2005) (Kravit, Arb.)).

55. Jay R. Sever, Comment, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 *TUL. L. REV.* 1661, 1667–68 (1991).

American courts, led by recent landmark decisions of the U.S. Supreme Court, have moved from a hostile and jealous attitude towards the institution of arbitration to al-

than litigation.⁵⁶ For example, the median length of time from filing an arbitration demand to an award in 2008 was 7.9 months.⁵⁷ In contrast, the length of time from filing a lawsuit to trial in the Seventh Circuit in 2010 was 25.4 months.⁵⁸

On the other hand, there are significant shortcomings to arbitration. Unlike a court ruling, arbitration rulings cannot be directly appealed without first returning to the court system.⁵⁹ An arbitration ruling is set aside only if a party can prove that the arbitrator was biased or that the arbitrator's decision violated public policy.⁶⁰ Furthermore, discovery is often more limited in arbitration than it would be in litiga-

lowing and enforcing almost any arbitration agreement A more recent (and arguably dangerous) undercurrent in the Court's rationale is a nearly absolute deference to arbitration, apparently for purposes of judicial efficiency. The judicial efficiency rationale appears to be peculiar to the United States.

Id. (footnotes omitted).

56. See Green, *supra* note 54, at 541–43 (balancing the advantages of arbitration, relatively lower costs and quicker resolution, against the need for stricter rules of evidence in arbitration); see also A.B.A. SECTION OF DISPUTE RESOLUTION, BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES 2–3 [hereinafter BENEFITS OF ARBITRATION], http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Feb. 14, 2015).

According to statistics furnished by the largest arbitration providers, the average time from commencement of a domestic, commercial arbitration to issuance of a final award ranges from 7 months to 7.3 months.

By contrast, in 2011, the median length of time from filing through trial of civil cases in the U.S. District Courts was 23.4 months and considerably longer in some of the busier courts.

The median length of time in 2011 from filing of a civil case in district court to disposition of appeal by the U.S. Circuit Courts of Appeal was 30.8 months and considerably longer in some of the busier courts.

Id. (footnotes omitted).

Furthermore,

It is axiomatic that the general purpose of private arbitration is to avoid the pitfalls of formal litigation. Arbitration is thus intended to provide for a more efficient and expeditious process than that afforded by formal litigation in which procedural measures such as discovery and extended motion practice can substantially protract and complicate the resolution of the parties' dispute.

James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 84 (2004) (footnotes omitted).

57. BENEFITS OF ARBITRATION, *supra* note 56, at 3.

58. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: ANNUAL REPORT OF THE DIRECTOR 175, 176 tbl. C-5 (2010), available at <http://www.uscourts.gov/sites/Statistics/JudicialBusiness/2010/appendices/C05Sep10.pdf>.

59. *CPR Arbitration Appeal Procedure and Commentary*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20%20Rules/CPR%20Arbitration%20Appeal%20Procedure.pdf> (last visited Aug. 19, 2014).

60. *Id.*

tion.⁶¹ Also, in some cases, the costs of arbitration can rise to the costs of litigation—there have been cases where courts have invalidated arbitration agreements on the grounds that the costs of arbitration were prohibitive.⁶² For example, the cost to initiate an arbitration claim is almost always higher than the cost to file a claim in court.⁶³ Additionally, because arbitration does not guarantee that the parties will stay out of court, the parties may have to pay to defend their claims twice—first in arbitration, and then at trial if the arbitration award is unsatisfactory.⁶⁴

Arguably, the use of mandatory arbitration raises significant due process concerns because judicial “review of arbitration awards . . . is extremely limited.”⁶⁵ Arbitration places important decision-making power in the hands of an arbitrator who is normally not elected or accountable to the community where the arbitration occurs.⁶⁶ There is no governmental accountability for arbitrators if they abuse their discretion; unlike judges, they are normally not elected or appointed by elected officials.⁶⁷ An arbitrator is not a jury, so she is not accountable to the community where the arbitration is held. Agreements covered by ERISA are also seen as contracts of adhesion,⁶⁸ “where one party significantly dominates the other so that there is no negotiation

61. Under § 7 of the FAA, arbitrators are granted subpoena powers equivalent to those of a court of law. 9 U.S.C. § 7 (2012) (“The arbitrators . . . may summon . . . any person.”). However, the federal courts are divided on whether this section authorizes arbitrators to subpoena nonparties for purposes of discovery. *Compare* *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) (“Section 7’s language unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.”), *with* *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 581 (2d Cir. 2005) (“We decide only that Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel . . .”).

62. *See, e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89–90 (2000) (“It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal rights in the arbitral forum.”); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 286 (Ct. App. 2003) (holding that a predispute arbitration clause may be unconscionable if the fees to initiate the arbitration process are unaffordable).

63. *The Costs of Arbitration*, PUB. CITIZEN, <http://www.citizen.org/publications/publicationneirect.cfm?ID=7173> (last visited Aug. 19, 2014).

64. *Id.*

65. Denise M. Barton, *The Evolution of Punitive Damage Awards in Securities Arbitration: Has the Use of Punitive Damages Rendered the Arbitration Forum Inequitable?*, 70 TUL. L. REV. 1537, 1557–60 (1996) (“The review of arbitration awards . . . is extremely limited. In light of this limited review, commentators have raised concerns about whether the review procedures for [arbitration awards] satisfy due process.”).

66. *Why Binding Interest Arbitration Is Bad, For BOTH Sides*, STRIKE FACTS, <http://strikefacts.com/analysis/binding-arbitration/> (last visited Oct. 12, 2013).

67. *Id.*

68. *Id.* “Contracts of adhesion are form contracts, offered on a take-it-or-leave-it basis, usually by a seller of a good or service.” Andrew Tutt, Note, *On the Invalidation of Terms in Con-*

of terms.”⁶⁹ Unlike a trial, which provides a public forum, arbitration serves to “hide” consumer gripes with corporations, making it a “lousy conflict resolution tool” because it limits corporate accountability.⁷⁰

Lastly, there are pitfalls to arbitration specific to ERISA claims. First, the statutory language of ERISA is incredibly complex and confusing.⁷¹ Arguably, arbitrators might be unable to comprehend the breadth and specificity of the statute,⁷² whereas federal judges have repeat exposure to ERISA litigation—a federal statute—and the resource of clerks to aid their understanding. Arbitrators are also not bound by case law or judicial interpretations.⁷³ As such, arbitration agreements untether claims from federal court rules or precedent, which makes claims under ERISA more unpredictable.⁷⁴ Additionally, ERISA agreements can specify that arbitrators must adopt decisions or factual issues pursuant to the determinations of plan providers.⁷⁵ This means that employers can preemptively stipulate facts that may or may not be at issue, to the detriment of the employee bringing suit. Lastly, courts almost always enforce an arbitrator’s award, even in spite of obvious mistakes.⁷⁶ This “abuse of

tracts of Adhesion, 30 YALE J. ON REG. 439, 441 (2013) (citation omitted). ERISA agreements are seen as contracts of adhesion:

It is clear that Congress accepted the unilateral contractual theory for establishing the right to benefits. A large portion of ERISA merely specifies what must be included in the contract. *This is the traditional legislative approach to regulating adhesion contracts*. . . . In sum, Congress recognized the employee benefit plan as a sort of unilateral adhesion contract that gives rise to fiduciary duties on the part of the dominant party.

George Lee Flint, Jr., *ERISA: Reformulating the Federal Common Law for Plan Interpretation*, 32 SAN DIEGO L. REV. 955, 988 (1995) (emphasis added) (footnotes omitted).

69. *Id.* at 1002. Because these contracts of adhesion include waiving the right to sue in court—a part of due process—they are troubling. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1031 (2000) (“Indeed, [the proliferation of arbitration clauses in contracts of adhesion] is arguably the fastest growing aspect of arbitration today—and the most troubling, *given the gravity of rights being waived and the potential for abuse.*” (emphasis added)).

70. *Id.*; see also Camille A. Laturno, Comment, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization’s New Arbitration Rules*, 9 TRANSNAT’L L. 357, 379-80 (1996) (“[C]onfidentiality is one of the benefits of arbitration, regardless of which arbitral institution is selected.”).

71. James P. Baker, *Requiem for ERISA Class Actions?*, BENEFITS L.J., Summer 2012, at 86, 91.

72. See Franck, *supra* note 49, at 1595, 1608 (arguing that the credibility of the arbitration system is “enhanced by calling on those individuals with the requisite legal and technical expertise”).

73. See generally W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010).

74. Baker, *supra* note 71, at 91.

75. *Id.*

76. *Id.* at 92.

discretion” standard of review is much more forgiving than the de novo standard applied to ERISA cases in litigation.⁷⁷

While ERISA is thought to have strong preemptory characteristics,⁷⁸ ERISA does not preempt arbitration⁷⁹ because ERISA falls under the scope of the FAA.⁸⁰ This idea is supported by the argument that because Congress did not exclude ERISA from the scope of arbitration under the FAA, preemption must be permitted.⁸¹ This proposition is also supported by the legislative history of the Act.⁸² ERISA’s legislative history states that “Congress sought ‘to protect . . . participants in employee benefit plans and their beneficiaries’ . . . ‘by providing ready access to the Federal Courts.’”⁸³ This assertion has been seen as mostly jurisdictional, and comports with antitrust legislation, which is frequently arbitrated. Consequently, where an ERISA agreement includes an arbitration agreement (supported by the FAA), employee beneficiaries subject to arbitration agreements will be unable to avoid arbitration on preemption grounds.⁸⁴

At one point, courts were hesitant to allow arbitration of ERISA claims for three reasons: (1) arbitrators lack the competence to interpret complicated statutes like ERISA;⁸⁵ (2) arbitrators are inappropriate decision makers in ERISA cases because they are not bound to consider law or precedent in their decisions;⁸⁶ and (3) contracts tend to be entered into on behalf of consumers by investment managers or collective bargaining agreements, which raises issues of privity be-

77. *Id.* at 91.

78. See Charles S. Mitchell, Note, *ERISA: Does Independent Medical Review of Benefit Denials Clear the ERISA Preemption Hurdle in the Sixth Circuit?*, 34 U. MEM. L. REV. 865, 869 (2004) (“Like many federal statutory schemes, ERISA contains an express preemption provision that ERISA ‘shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan’” (quoting 29 U.S.C. § 1001(a) (2004))).

79. See, e.g., *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 386–87 (2002) (holding that a state law, which creates a review process that resembles arbitration, is not preempted by ERISA and noting that ERISA-related inquiries such as conducting hearings and requiring the submission of evidence and cross-examination to construe contract terms are germane to arbitration). While the Supreme Court has not held that the FAA preempts ERISA, the majority of courts take the position that it does. *Simon v. Pfizer Inc.*, 398 F.3d 765, 774 (6th Cir. 2005) (“[T]he majority of courts considering this issue have held that disputes arising under ERISA . . . are subject to arbitration under the FAA.”).

80. See discussion *supra* note 79.

81. See Ytterberg, *supra* note 34.

82. *Id.*

83. *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 119–20 (2d Cir. 1991) (quoting 29 U.S.C. § 1001(b) (1988)).

84. *Simon*, 398 F.3d at 773 (“[A] compulsory arbitration provision divests the District Court of jurisdiction over claims that seek benefits under an ERISA plan . . .”).

85. *Amaro v. Cont’l Can Co.*, 724 F.2d 747, 750 (9th Cir. 1984).

86. *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 941 (3d Cir. 1985).

tween parties.⁸⁷ Today, the hesitation surrounding ERISA arbitration has all but vanished, as demonstrated by the rulings of the circuit courts discussed below.

C. The Circuit Courts: ERISA and Mandatory Arbitration

The majority of the circuit courts have embraced arbitration clauses in ERISA agreements. The First Circuit Court of Appeals has not formally addressed the issue, but district courts within the Circuit have held that Congress did not intend to exclude actions arising under ERISA from arbitration pursuant to the FAA.⁸⁸ The Eighth Circuit Court of Appeals has held the same.⁸⁹ A district court within the Fourth Circuit deferred to “the strong federal policy favoring arbitration.”⁹⁰ The Second Circuit has held that the FAA requires enforcement of an arbitration clause in an ERISA agreement, and that ERISA’s text and legislative history do not support a conclusion that Congress intended to preclude arbitration of ERISA claims.⁹¹ The Fifth⁹² and Tenth⁹³ Circuits have adopted similar reasoning. The Third Circuit reversed its position in 1993, holding that claims of ERISA violations are subject to mandatory arbitration when the parties have agreed to arbitrate.⁹⁴ The Sixth Circuit adopted a narrower interpretation, holding that only ERISA claims enumerated within the scope of an arbitration clause are subject to arbitration and that all other claims can proceed to court.⁹⁵ While the Seventh Circuit has not directly dealt with “the applicability of the FAA to ERISA litigation, it has upheld arbitration clauses where the allegations are primarily ERISA based.”⁹⁶

87. See, e.g., *Comer v. Micor, Inc.*, 436 F.3d 1098 (9th Cir. 2006). Privity of contract refers to parties who have a direct contractual relationship—in other words, the parties to a contract. BLACK’S LAW DICTIONARY 1320 (9th ed. 2009). In the ERISA context, the two parties to the hypothetical plan agreement discussed in the Introduction to this Comment would be the investment manager or advisor and the employee. If the employer raised the issue of enforcement of the arbitration clause, the employee could assert a defense based on privity of contract, stating that no agreement was entered into with the employer because there was no privity between the parties.

88. See, e.g., *Williams v. HealthAlliance Hosps., Inc.*, 158 F. Supp. 2d 156, 161 (D. Mass. 2001).

89. *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 479 (8th Cir. 1988); *Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952, 956 (D. Md. 1994).

90. *Kropfelder*, 859 F. Supp. at 955.

91. *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 121–22 (2d Cir. 1991).

92. *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996).

93. *Williams v. Imhoff*, 203 F.3d 758, 766 (10th Cir. 2000).

94. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1111–12 (3d Cir. 1993).

95. *Simon v. Pfizer Inc.*, 398 F.3d 765, 777 (6th Cir. 2005).

96. *Bd. of Trs. v. Linder*, No. 02 C 50182, 2002 WL 31061336, at *2 (N.D. Ill. Sept. 17, 2002) (citing *Challenger v. Local Union No. 1*, 619 F.2d 645 (7th Cir. 1980)).

The sole outlier is the Ninth Circuit. The Ninth Circuit refuses to bind employees to an arbitration agreement to which they are not privy, even if an investment manager signed the agreement on behalf of the employee. In the Ninth Circuit's central case on this issue, *Comer v. Micor, Inc.*,⁹⁷ the plan beneficiary to the employee pension and profit-sharing plans sued the employer's investment manager, alleging a breach of fiduciary duty under ERISA.⁹⁸ The *Comer* court held that a plan beneficiary could not be bound to an arbitration agreement between an investment manager and the employer because the plan beneficiary was not privy to the contract.⁹⁹ This position, when coupled with *Amaro v. Continental Can Co.* (holding that arbitrators are not capable of handling the complex issues embedded in the statutory language of ERISA),¹⁰⁰ arguably makes the Ninth Circuit a hostile forum for employers.

Despite establishing an unwillingness to intervene between employee plan providers and beneficiaries, the *Comer* court acknowledged that the employer and the investment manager agreed that the claim would have been fine to go to arbitration had it been brought by the employer rather than a beneficiary.¹⁰¹ If the employer or the investment manager had brought the claim (which is unlikely), there would have been privity between both parties. Furthermore, the *Comer* decision intimates that the Ninth Circuit, noting the newness of this issue, might join the other circuits in allowing arbitration of ERISA fiduciary claims the next time the issue is presented and casts some doubt on the stability of this field of law in the Ninth Circuit.¹⁰² Specifically, the court held that a nonsignatory to a contract could be subject to an arbitration clause if she "knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement."¹⁰³ Additionally, the *Comer* decision was made prior to the Supreme Court cases that bolstered the strength of arbitration agreements.¹⁰⁴ Consequently, it is possible that an investment adviser could present evidence that the signatories intended to give non-signatory beneficiaries the right to sue under the agreement, which

97. 436 F.3d 1098 (9th Cir. 2006).

98. *Id.* at 1099–1100.

99. *See id.* at 1103–04.

100. *Amaro v. Cont'l Can Co.*, 724 F.2d 747, 750 (9th Cir. 1984).

101. *Comer*, 436 F.3d at 1101.

102. *Id.* at 1100–01.

103. *Id.* at 1101 (quoting *E.I. DuPont de Nemours & Co. v Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 199 (3d Cir. 2001)).

104. Specifically, these cases are *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013), discussed *supra* notes 157–187 and accompanying text.

would allow arbitration of these kinds of claims.¹⁰⁵ However, for the time being, *Comer*¹⁰⁶ and *Amaro*¹⁰⁷ remain good law in the Ninth Circuit.

Currently, no published decisions directly address the enforceability of class action waivers under ERISA. In *Hornsby v. Macon County Greyhound Park Inc.*,¹⁰⁸ an unpublished decision, the Middle District of Alabama recently touched on the issue, compelling arbitration of a class action ERISA claim.¹⁰⁹ In *Hornsby*, the court held that an arbitration agreement precluded a class action claim, rejecting the plaintiffs' argument that the arbitration agreement was unconscionable under Alabama law to preclude class action claims when it would be more efficient to proceed as a class.¹¹⁰ Other than this decision, no other case has acknowledged an ERISA class action claim, despite steady increases in employment class action cases and settlements in the last few years.¹¹¹

D. Recent Evolution: The Supreme Court and Arbitration Clauses

The Supreme Court has a long history of ruling on the side of enforcement of arbitration clauses.¹¹² The Supreme Court has held that the FAA preempts state law, even when the state has expressed a clear intent of bypassing arbitration in certain contexts.¹¹³ Further, the law has expanded over the last ten years to enforce arbitration

105. *Id.*; see also *Need To Seek Arbitration*, 2 EMP. COORD. BENEFITS § 4534 (2015). Additionally,

For its part, the *Comer* court also noted that past Ninth Circuit decisions had seemingly ignored Supreme Court precedent . . . on the applicability of the FAA to ERISA claims, even though the Ninth Circuit has enforced arbitration clauses concerning other statutory claims that held antitrust and Lanham Act claims arbitrable. The *Comer* decision suggests that the Ninth Circuit may join the other circuits in allowing arbitration of ERISA fiduciary claims the next time the issue is presented.

Baker, *supra* note 71, at 90–91 (footnotes omitted).

106. *Comer*, 436 F.3d 1098.

107. *Amaro*, 724 F.2d 747.

108. No. 3:10cv680–MHT, 2012 WL 2135470 (M.D. Ala. June 13, 2012) (order compelling arbitration).

109. *Id.* at *2–4.

110. *Id.* at *9–10.

111. According to one estimate, ERISA class action settlements increased to \$1.16 billion in 2010. Gerald Maatman, Jr., *The 2011 Workplace Class Action Report Is Here*, WORKPLACE CLASS ACTION BLOG (Jan. 5, 2011), <http://www.workplaceclassaction.com/2011/01/the-2011-workplace-class-action-report-is-here/>.

112. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Preston v. Ferrer*, 552 U.S. 346, 362–63 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448–49 (2006); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

113. *Gilmer*, 500 U.S. at 35.

clauses in contracts, even when contracts may have been entered into without equal bargaining power and the use of arbitration would deprive a plaintiff of her day in court.¹¹⁴

This section discusses the major evolution of Supreme Court jurisprudence in the area of arbitration clause enforcement. The first, *Gilmer v. Interstate/Johnson Lane Corp.*,¹¹⁵ involves an employment dispute where the employee had, as part of his professional registration, agreed to arbitrate disputes between the employee and the employer.¹¹⁶ The second, *Preston v. Ferrer*,¹¹⁷ involves the intersection of state law and the FAA, establishing a clear-cut policy of the FAA preempting state law, despite clear indications of statewide public policy by the state legislature.¹¹⁸ The third, *AT&T Mobility LLC v. Conception*,¹¹⁹ involves the enforcement of class action waivers—which effectively waive the ability to proceed with a class action claim—even in situations when the contract at issue is adhesive and an arbitration agreement precludes individual litigation.¹²⁰ The fourth, *American Express Co. v. Italian Colors Restaurant*,¹²¹ reaffirms the logic of the third case by enforcing a class action waiver found in an arbitration agreement, even though doing so would essentially and effectively protect the defendant from antitrust suits.¹²² Together, these cases establish the enforceability of agreements containing both an arbitration agreement and class action waivers, regardless of principles of conscionability, public policy, or state directive. These cases, considered longitudinally, bring the Supreme Court’s preference for arbitration over litigation into clear focus.

i. Gilmer v. Interstate/Johnson Lane Corp.

Interstate/Johnson Lane Corp. (Interstate) hired Robert Gilmer as a Manager of Financial Services in May 1981.¹²³ The terms of his employment required him to register as a securities representative with the New York Stock Exchange (NYSE).¹²⁴ The NYSE registration form required Mr. Gilmer to agree to “arbitrate any dispute, claim or

114. See cases cited *supra* note 112.

115. 500 U.S. 20.

116. See *infra* notes 123–135 and accompanying text.

117. 552 U.S. 364.

118. See *infra* notes 136–156 and accompanying text.

119. 131 S. Ct. 1740 (2013).

120. See *infra* notes 157–176 and accompanying text.

121. 133 S. Ct. 2304 (2013).

122. See *infra* notes 177–187 and accompanying text.

123. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

124. *Id.*

controversy” arising between him and Interstate, forfeiting his right to sue Interstate in court.¹²⁵

In 1987, Interstate fired Mr. Gilmer, then 62 years old.¹²⁶ Mr. Gilmer filed an age discrimination claim with the Equal Employment Opportunity Commission and brought suit in federal court.¹²⁷ Interstate sought enforcement of the NYSE registration form arbitration agreement.¹²⁸ The United States District Court for the Western District of North Carolina denied Interstate’s motion to compel arbitration.¹²⁹ The Fourth Circuit reversed, stating that “an arbitration agreement is unenforceable [under the FAA] only if Congress has evinced an intention to preclude waiver of the judicial forum for a particular statutory right, or if the agreement was procured by fraud or use of excessive economic power.”¹³⁰

In a seven-to-two decision, the Supreme Court held that the arbitration agreement should be enforced.¹³¹ The Court noted that there was unequal bargaining power between Mr. Gilmer and Interstate/NYSE.¹³² However, the mere existence of inequality in bargaining power was not a sufficient reason to rule that the arbitration agreement was unenforceable in the employment context.¹³³ Further, the only defenses available to invalidate arbitration agreements are those that prevent the formation of contracts, “save upon such grounds as exist at law or in equity for the revocation of any contract.”¹³⁴ It is worth mentioning here that privity of contract would constitute one of those defenses.

In essence, the Court in *Gilmer* held that unless Congress explicitly precludes arbitration or the use of other nonjudicial means for resolving claims, the FAA stands.¹³⁵ This decision was a major win for employers wanting to avoid expensive and costly litigation arising from employment issues.

125. *Id.* (internal quotation marks omitted).

126. *Id.*

127. *Id.*

128. *Id.* at 24.

129. *Gilmer*, 500 U.S. at 24 (“The District Court denied Interstate’s motion . . . because it concluded that Congress intended to protect . . . claimants [under the Age Discrimination in Employment Act] from the waiver of a judicial forum.” (citation omitted) (internal quotation marks omitted)).

130. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196–97 (4th Cir. 1990).

131. *Gilmer*, 500 U.S. at 35.

132. *Id.* at 32–33.

133. *Id.* at 33.

134. *Id.* (quoting 9 U.S.C. § 2 (1988)) (internal quotation marks omitted).

135. *Id.* at 35.

ii. Preston v. Ferrer

The holding in *Gilmer* was bolstered by *Preston v. Ferrer*.¹³⁶ Alex Ferrer, star of daytime television's "Judge Alex" show, and his former manager, Arnold Preston, were engaged in a dispute over payment for management services.¹³⁷ Ironically, Judge Alex served as an arbitrator hearing small-claim legal disputes on his TV show.¹³⁸ Judge Alex was a Florida state judge and former prosecutor.¹³⁹ Preston was an attorney providing management services.¹⁴⁰ In 2002, Judge Alex and Preston entered into a contract stating that Preston would provide "personal management services" in exchange for 12% of Ferrer's earnings from the TV show.¹⁴¹ The arbitration clause in the contract limited any dispute about the contract to arbitration.¹⁴² In 2005, Preston initiated arbitration proceedings against Judge Alex seeking to recover the management fees under the contract.¹⁴³ Judge Alex filed a petition to stay the arbitration proceedings¹⁴⁴ and filed a claim with the California Labor Commission, arguing that the entire contract was void under the Talent Agencies Act (TAA),¹⁴⁵ a California law.¹⁴⁶ The arbitrator denied Judge Alex's motion to stay the arbitration, and Judge Alex filed suit in state court seeking (1) a declaration that the contract dispute was not subject to arbitration; and (2) to restrain Preston from proceeding with arbitration.¹⁴⁷ The trial court denied Preston's motion to compel arbitration, and granted Judge Alex's motion to stay the action pending final resolution by the Commissioner.¹⁴⁸ The court of appeals affirmed.¹⁴⁹

136. 552 U.S. 346 (2008).

137. *Id.* at 350–52.

138. *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 630 (Ct. App. 2007) ("Plaintiff is a former Florida Superior Court Judge, who now works arbitrating legal disputes on the television program, *Judge Alex*, on the Fox television network."), *rev'd*, 552 U.S. 346 (2008).

139. FISHER & PHILLIPS, *supra* note 35.

140. *Preston*, 552 U.S. at 350.

141. FISHER & PHILLIPS, *supra* note 35.

142. *Preston*, 552 U.S. at 350.

143. *Id.*

144. *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 630 (Ct. App. 2007) ("On July 1, 2005, plaintiff filed a motion to stay the arbitration with the arbitrator. Plaintiff also filed a Petition to Determine Controversy with the Labor Commissioner and a motion asking the Commissioner to stay the arbitration.")

145. CAL. LAB. CODE §§ 1700–1700.47 (West 2011). The TAA regulates the activities of talent agencies. § 1700.4(a). Section 1700.44(a) stated that "[i]n cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo."

146. *Preston*, 552 U.S. at 350.

147. *Ferrer*, 51 Cal. Rptr. 3d at 630.

148. *Id.*

California courts have historically been particularly hostile to arbitration.¹⁵⁰ However, California is not the only state to limit the enforceability of arbitration provisions. The Supreme Court struck down a Florida law similar to the TAA in the 2006 case *Buckeye Check Cashing, Inc. v. Cardegna*.¹⁵¹ The Court relied heavily on the opinion in *Buckeye* to reach its ruling in *Preston*.

In *Preston*, the Court held by a vote of eight to one that whenever parties agree to arbitrate a dispute arising under a contract, state laws that purport to give state courts or administrative forums primary jurisdiction to hear the dispute are superseded by the FAA and the dispute must be arbitrated.¹⁵² Accordingly, the Court ruled that the FAA supersedes a California law requiring submission of disputes involving talent agents to the California Labor Commissioner.¹⁵³ This decision validates the FAA's national policy favoring arbitration, despite state efforts to limit or undermine it. This ruling is also quite employer friendly—under the Court's logic, even in the face of clear state legislation that disfavors arbitration as a policy matter, ERISA arbitration under the FAA could proceed.

The Supreme Court found *Preston* to essentially be controlled by its prior decision in *Buckeye*.¹⁵⁴ This ruling bolstered the decision in *Gilmer*, precluding state legislators from curtailing the enforceability of arbitration clauses. By making it clear that the FAA preempts state law, even in cases where a state legislature has made its policy directives clear through the enactment of legislation and creation of state agencies,¹⁵⁵ the Supreme Court made jumping the arbitration hurdle all the more difficult. This is especially relevant in the context of ERISA, which has been consistently interpreted to preempt state law by courts, which means that ERISA agreements will be seen as overriding any applicable state law, weakening the policy arguments disfavoring arbitration.¹⁵⁶

149. *Id.* at 634.

150. FISHER & PHILLIPS, *supra* note 35.

151. 546 U.S. 440 (2006) (holding that challenges to the validity of a contract requiring arbitration of disputes should ordinarily be considered by an arbitrator and not a court).

152. *Preston*, 552 U.S. at 349–50.

153. *Id.* at 359.

154. *Id.* at 349–52.

155. “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

156. Ytterberg, *supra* note 34.

iii. AT&T Mobility LLC v. Concepcion

The Court took its pro-arbitration position a bit further in *AT&T Mobility LLC v. Concepcion*.¹⁵⁷ In 2002, Vincent and Liza Concepcion responded to an advertisement for a “free” AT&T cellphone with the purchase of a two-year service contract.¹⁵⁸ After learning they had to pay \$30.22 in sales tax for the putatively free device, the Conceptions initiated a class action lawsuit.¹⁵⁹ AT&T then moved to compel arbitration pursuant to the arbitration clause, which contained a class action waiver, in its standard service agreement.¹⁶⁰ The clause further provided that AT&T would pay claimants a minimum of \$7,500 and twice their attorney’s fees if they obtained an arbitration award in excess of AT&T’s final settlement offer.¹⁶¹

Prior to *Concepcion*, the California Supreme Court had held that class action waivers that appeared in contracts of adhesion were unconscionable and against public policy.¹⁶² The Conceptions argued that this rule—the *Discover Bank* rule—should apply.¹⁶³ Under the *Discover Bank* rule, California courts could refuse to enforce any contract found “to have been unconscionable at the time it was made.”¹⁶⁴ The courts could also “limit the application of any unconscionable clause.”¹⁶⁵ In the context of class action waivers in arbitration agreements, the *Discover Bank* rule stated that

when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.”

157. 131 S. Ct. 1740.

158. *Id.* at 1744. AT&T’s contract provided, “THIS AGREEMENT REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR CLASS ACTIONS, AND ALSO LIMITS THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE.” Charles Gibbs, Note, *Consumer Class Actions After AT&T v. Concepcion: Why the Federal Arbitration Act Should Not Be Used To Deny Effective Relief to Small-Value Claims*, 2012 U. ILL. L. REV. 1345, 1362–63.

159. *Concepcion*, 131 S. Ct. at 1744.

160. *Id.* at 1744–45.

161. *Id.* at 1745.

162. *Discover Bank v. Sup. Ct. of L.A.*, 113 P. 3d 1100, 1103 (Cal. 2005).

163. *Concepcion*, 131 S. Ct. at 1746.

164. CAL. CIV. CODE. § 1670.5(a) (West 1985).

165. *Id.*

Under these circumstances, such waivers are unconscionable under California law and should not be enforced.¹⁶⁶

The district court and Ninth Circuit Court of Appeals applied the *Discover Bank* rule, finding the contract entered into by the Concepcions a contract of adhesion and refusing to compel arbitration.¹⁶⁷

In an opinion written by Justice Scalia, the Supreme Court reversed, compelling arbitration.¹⁶⁸ The Court began by making reference to a “liberal federal policy favoring arbitration.”¹⁶⁹ Then, first noting that the FAA always preempts state law, the Court conducted the “more complex” inquiry as to whether a generally applicable doctrine—here, unconscionability—was applied in a fashion that disfavors arbitration.¹⁷⁰ The Court stated that it was improper for state courts to rely on the “uniqueness” of an agreement to arbitrate as a basis to refuse to compel arbitration on the grounds of unconscionability.¹⁷¹ Under this rationale, the Court overturned *Discover Bank* on the ground that *Discover Bank* categorically allowed claimants in any consumer case to demand classwide arbitration *ex post*.¹⁷²

Concepcion vastly expanded the ability of employers to rely on the FAA and destroyed states’ ability to legislate around the FAA by holding that “the FAA does indeed preempt state law.”¹⁷³ It also expanded the application of the *Preston* doctrine to class action suits, limiting access to litigation for a broader scope of claims and plaintiffs.¹⁷⁴

166. *Discover Bank*, 113 P.3d at 1110 (quoting CAL. CIV. CODE § 1668).

167. *Concepcion*, 131 S. Ct. at 1745.

168. *Id.* at 1744, 1756.

169. *Id.* at 1745 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

170. *Id.* at 1747.

171. *Id.* (“[A] court may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.’” (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987))).

172. *Id.* at 1750.

California’s *Discover Bank* rule . . . interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past.

Id. (citation omitted).

173. Roger Pilon, *Into the Preemption Thicket Again—Five Times!*, 2011 CATO SUPREME CT. REV. 263, 269.

174. Heather N. Retchless, *Alternative Dispute Resolution—Has the Supreme Court Significantly Expanded the Enforceability of Arbitration Agreements and Class-Action Waivers?—AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), 35 AM. J. TRIAL ADVOC. 227, 227–28 (2011).

iv. *American Express Co. v. Italian Colors Restaurant*

In *American Express Co. v. Italian Colors Restaurant*,¹⁷⁵ the Court marched ahead in its pro-arbitration,¹⁷⁶ pro-employer stance, ruling against rationales that center on protecting consumers with little bargaining power who enter into contracts of adhesion. A number of merchants sued American Express Co. (AMEX), alleging that the Card Acceptance Agreements (Card Agreements)—standard form contracts outlining the basic relationship between AMEX and the merchant—violated United States antitrust laws.¹⁷⁷ The Card Agreements included a class action waiver provision contained in a mandatory arbitration clause.¹⁷⁸ The merchants sued as a class because the individual damages would be less than the independent cost to litigate.¹⁷⁹ The Second Circuit held that the arbitration clause, in particular the class action waiver, was unenforceable because it would essentially protect AMEX from antitrust suits.¹⁸⁰ AMEX appealed to the Supreme Court.¹⁸¹

The Supreme Court held that even when suits against corporations (especially for antitrust violations) would be too expensive for individuals to bring, class action suits are barred when the consumers have explicitly waived them, even when disproportionate bargaining power existed at the time of formation.¹⁸² This is where the case law ends, and speculation, analysis, and argument begin.

In *Italian Colors*, the Court relied heavily on its decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,¹⁸³ holding that a party cannot be compelled to submit to classwide arbitration absent an agreement to do so.¹⁸⁴ In *Stolt-Nielsen*, the Court ruled that imposing class arbitration on parties whose arbitration clauses are silent on that issue is inconsistent with the FAA.¹⁸⁵ However, a later case es-

175. 133 S. Ct. 2304 (2013).

176. Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 325 (2011).

177. *Italian Colors*, 133 S. Ct. at 2308.

178. *Id.*

179. *Id.* “In resisting the motion, respondents submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be ‘at least several hundred thousand dollars, and might exceed \$1 million,’ while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled.” *Id.*

180. *Id.*

181. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012) (granting certiorari).

182. *Italian Colors*, 133 S. Ct. at 2310–11.

183. 559 U.S. 662 (2010).

184. *Id.* at 687.

185. *Id.* The *Stolt-Nielsen* decision came after another case that permitted arbitrators to decide whether a contract allows class proceedings in arbitration if the contract is silent on the issue. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion).

tablished that a contract with an arbitration agreement that is silent on the issue of class action cases can be interpreted to include a class action arbitration clause.¹⁸⁶ After *Stolt-Nielsen* and *Bazzele*, practitioners began including explicit class action waivers in their arbitration agreements, fearing uncertainty.¹⁸⁷ The Court's decision in *Italian Colors* guarantees that those class action waivers will be upheld.

III. ANALYSIS

Both courts and legal commentators have noted that ERISA claims are well suited for arbitration because they are confined to a discrete statutory scheme and often include contracts, which demonstrate the parties' intent to arbitrate.¹⁸⁸ However, just because something is easy, does not mean it is the best option. This section of the Comment analyzes how the use of class action arbitration waiver clauses in ERISA agreements could have potential legal pitfalls, limiting their success. First, an analogy between the bodies of law governing ERISA plans and the laws of trusts is appropriate because both bodies of law impose a fiduciary duty created by a legal instrument. In fact, "the common law of trusts served as the basis for ERISA's fiduciary duty provisions, and courts have often applied the common law of trusts in interpreting ERISA's fiduciary rules."¹⁸⁹ Courts have been hesitant to allow arbitration clauses in trust instruments for many of the same rationales against allowing arbitration clauses in ERISA agreements.¹⁹⁰ Second, the argument can be made that ERISA plans pre-

186. *Id.*

187. Cook & Brennan, *supra* note 41, at 333. In the wake of these decisions, which corporate-side labor attorneys have described as "positive development[s] for employers," practitioners have advocated for the inclusion of arbitration agreements in ERISA agreements. FISHER & PHILLIPS, *supra* note 35.

188. *See supra* notes 24–187 and accompanying text. For examples of other instances when the Court has enforced arbitration in statutory claims connected to contract, see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that an antitrust dispute was subject to arbitration under the FAA, and that there is no presumption against the arbitration of statutory claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that an age discrimination claim under the Age Discrimination in Employment Act was subject to compulsory arbitration pursuant to an arbitration agreement in a securities registration application).

189. Michael J. Collins, *It's Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 LAB. LAW. 391 (2001).

190. *See, e.g.*, *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 612–14 (Ct. App. 2011) (refusing to enforce an arbitration agreement in trust formation documents at the request of the trustee, who the beneficiary of the trust petitioned to remove, because neither was party to any agreement that such disputes would be resolved by arbitration), *vacated*, 287 P.3d 67 (Cal. 2012); *Schoneberger v. Oelze*, 96 P.3d 1078, 1082–84 (Ariz. Ct. App. 2004) (holding that trusts are contracts because they do not rest on an exchange of promises or any other characteristics of contract law, and that an arbitration agreement included in the trust formation documents was

sent issues of privity between parties because they are so frequently entered into on the behalf of plan beneficiaries by investment managers. Third, from a policy perspective, the proliferation of arbitration clauses in ERISA agreements will create long-term tension between plan providers and beneficiaries, making employer-provided retirement plans less appealing than alternative options available on the open market.

A. *The Trust Analogy*

ERISA plans and traditional trusts have many similarities.¹⁹¹ A traditional trust is a legal entity established to hold and manage assets for a purpose.¹⁹² There are three main parties to the trust: (1) the settlor who sets up and transfers property to the trust; (2) the trustee who manages the trust's assets and holds legal title to the trust; and (3) the beneficiary who ultimately benefits from the assets in which she has an equitable interest.¹⁹³ ERISA plans are usually comprised of three fiduciaries: (1) a trustee;¹⁹⁴ (2) an investment manager; and (3) a plan administrator.¹⁹⁵ The responsibilities of the fiduciaries are largely identical to the responsibilities of a normal trustee. The fiduciary must (1) act solely in the interest of the plan beneficiaries; (2) carry out her duties with skill, prudence, and diligence; (3) follow the plan documents (similar to carrying out the will of the settlor of a trust); (4) diversify plan investments; (5) pay only reasonable expenses in administering the plan and investing the plan assets; and (6) avoid conflicts of interest.¹⁹⁶ These responsibilities are highly analogous to

not enforceable), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2012); *Williams v. Orentlicher*, 939 N.E.2d 663, 670–72 (Ind. Ct. App. 2010) (holding that the Indiana State Teacher's Association (ISTA) trust was not bound by arbitration clauses in employment contracts between ISTA and former employees because (1) the employment agreements at issue did not mention the trust; (2) ISTA was not a named party in the lawsuit; and (3) the trust was nonsignatory).

191. Collins, *supra* note 189, at 395–97.

192. Owen G. Fiore et al., A.L.I.-A.B.A., *Probate Avoidance and Other Uses of Trusts*, in ESTATE PLANNING FOR THE FAMILY BUSINESS OWNER 469, 473 (1992), *reprinted at* C771 ALI-ABA 469.

193. *Id.*

194. The trustee is a fiduciary who is in charge of the day-to-day administration of the trust, and usually has “exclusive authority and discretion over the management and control of plan assets,” unless the plan documents delegate control over certain decisions (such as investment decisions) to another party, such as an investment manager. *Responsibilities of Retirement Plan Trustees—and What To Do About It*, BENEFITS L. GRP. CHI., <http://www.benefitslawgroupofchicago.com/HTML/Responsibilities-of-Retirement-Plan-Trustees.htm> (last visited Jan. 30, 2015).

195. *FAQs About Retirement Plans and ERISA*, U.S. DEP'T OF LABOR, http://www.dol.gov/ebsa/faqs/faq_consumer_pension.html (last visited Nov. 12, 2013) [hereinafter *FAQs About Retirement Plans*].

196. *Id.*

those of a trust, which include the duty of loyalty, the duty of prudence, the duty to diversify, and the duty to account.¹⁹⁷ Accordingly, the impact of arbitration on the fiduciary relationship between ERISA plan providers and beneficiaries is similar to its impact on the fiduciary relationship between trustees and beneficiaries. Because of the similar nature of the heightened responsibilities of fiduciaries in both trusts and retirement plans, arbitration should be disfavored in order to maintain the availability of litigation to injured plan beneficiaries.

The classic example of a trust's use of arbitration clauses goes as follows: a settlor, wanting to avoid the expense and publicity of fiduciary litigation, directs in the trust instrument that all disputes between a beneficiary and the trustee must be resolved by arbitration.¹⁹⁸ Courts are split as to whether or not these arbitration clauses are enforceable.¹⁹⁹ The Uniform Trust Code (UTC) does not provide a succinct answer. The only reference to arbitration can be found in a comment on trustees' powers, stating that "[s]ettlors wishing to encourage use of alternate dispute resolution may draft to provide it."²⁰⁰ This statement does not make clear whether a mandatory arbitration clause is enforceable—instead, the drafters of the UTC appear to simply encourage arbitration.²⁰¹

The use of arbitration clauses in trust instruments has faced significant pushback from state courts.²⁰² For example, in *Schoneberger v.*

197. See generally JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 579–685 (9th ed. 2013). The duty of loyalty requires the trustee to act in the best interest of the trust beneficiary and avoid conflicts of interest. *Id.* at 586. The duty of prudence requires the trustee to consider the purpose, terms, and requirements of a trust, and administer the trust as a prudent person would. *Id.* at 602. The duty to diversify, a subset of the duty of prudence, requires the trustee to make diverse investments to safeguard the trust assets and investments. *Id.* at 622–34. The duty to account requires the trustee to provide statements of accounting to trust beneficiaries so that they can stay informed of the health and growth of their assets. *Id.* at 667–68.

198. For an example, see AM. ARBITRATION ASS'N, *WILLS AND TRUSTS: ARBITRATION RULES & MEDIATION PROCEDURES* 17 (2012), available at <http://www.adr.org/>.

199. See generally David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027 (2012); Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L.J. 118 (2011); Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627 (2011); S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157 (2012); S.I. Strong, *Empowering Settlers: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP., TR. & EST. L.J. 275 (2012).

200. UNIF. TRUST CODE § 816 (amended 2010).

201. DUKEMINIER & SITKOFF, *supra* note 197, at 614.

202. See, e.g., cases cited *supra* note 190.

Oelze,²⁰³ the court refused to enforce a mandatory arbitration provision included in a trust instrument.²⁰⁴ The court asserted that a settlor “may not unilaterally strip trust beneficiaries of their right to access the courts absent their agreement.”²⁰⁵ In other words, because the beneficiaries never agreed to the arbitration clause at issue, they cannot be bound to arbitrate.²⁰⁶ However, this argument might fail because “a beneficiary’s interest is derivative of the settlor’s freedom of disposition”—the gift from the settlor to the beneficiary is conditional on the beneficiary accepting the conditions imposed by the settlor.²⁰⁷ Thus, the question becomes “whether requiring fiduciary disputes to be resolved by arbitration is within the settlor’s freedom of disposition.”²⁰⁸

Following *Schoneberger*, legislatures in Florida²⁰⁹ and Arizona²¹⁰ enacted statutes permitting settlors to include arbitration clauses “to resolve issues between the trustee and [a beneficiary] with regard to the administration or distribution of the trust.”²¹¹ These statutes (as well as recent cases upholding arbitration provisions) mandate that if a beneficiary brings a claim to enforce her interest as defined by the trust instrument, any arbitration clause contained in the instrument will be enforceable against the beneficiary. Courts have reasoned “that [a beneficiary’s] claim was to enforce [her] interests as defined by the settlor in the terms of the trust, including the arbitration clause.”²¹² A compelling counterargument is that fiduciary enforcement in court should be part of the mandatory core of trust fiduciary law, as asserted in *Schoneberger*.²¹³ This argument is based on the premise that trust instruments cannot include exculpatory clauses as to bad faith or willful neglect in the trust, because accountability is essential to the nature of the trust relationship.²¹⁴

Arguably, this “accountability” should be extended to “accountability in court,” before a judge.²¹⁵ If there is a shred of doubt regarding

203. 96 P.3d 1078 (Ariz. Ct. App. 2004), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2012).

204. *Id.* at 1082–84.

205. *Id.*

206. *See id.*

207. DUKEMINIER & SITKOFF, *supra* note 197, at 614.

208. *Id.*

209. FLA. STAT. § 731.401 (2012).

210. ARIZ. REV. STAT. ANN. § 14-10205 (2012).

211. *Id.*

212. DUKEMINIER & SITKOFF, *supra* note 197, at 614.

213. *Id.*

214. *Id.*

215. *Id.*

whether or not equal treatment can be obtained at arbitration as opposed to court,²¹⁶ the court should err on the side of restricting enforcement of arbitration clauses. Limiting the access of beneficiaries—who may not have been involved in the formation of the trust—to confront negligent or errant trustees in court curtails the accountability of the trustee, which is necessary to give fiduciary duties teeth. Such a limitation comes very close to restricting the right of an aggrieved party to their day in court, which raises significant constitutional problems.²¹⁷ For that reason, it makes sense that a court should err on the side of allowing beneficiaries access to courts, even when the settlor of a trust has contracted around it with an arbitration clause, as beneficiaries are independent from the formation of the trust. This, of course, is a balance between the freedom of disposition in trust (that is, the ability of the settlor to set up the trust as she pleases) and the duty of accountability of the trustee. Ultimately, the beneficiary's right to hold the trustee accountable is paramount—the trust exists for the benefit of the beneficiary. Additionally, because the fiduciary duty is the centerpiece of the modern trust,²¹⁸ the right of accountability seems to be the most important factor at issue.

Similarly, because of the fiduciary responsibilities created by ERISA, accountability in court is an essential part of ERISA, suggesting that arbitration clauses should not be used in the ERISA context. Where the fiduciary duties are similar between two bodies of law, it makes sense that the access to the judicial systems provided by both bodies should be analogous. The fact that the legislature of Arizona legislated around the court's construction of trusts as not being arbitrable²¹⁹ is dispositive here. In Arizona, the legislature needed to step in and assert "special action" jurisdiction to enforce arbitration clauses in trust documents after the courts refused to do so.²²⁰ This

216. One legal scholar has suggested that there is a lot of doubt on this issue, warranting a public rating system for arbitration providers. See generally Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System To Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985 (2012).

217. See generally Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 643–44 (2011).

218. John H. Langbein, *The Contractarian Basis of the Law of Trust*, 105 YALE L.J. 625, 628 (1995) ("[T]he law of fiduciary administration . . . is the centerpiece of the modern trust.").

219. *Schoneberger v. Oelze*, 96 P.3d 1078 (Ariz. Ct. App. 2004), in which the court refused to enforce an arbitration clause in trust documents, was overruled by ARIZ. REV. STAT. ANN. § 14-10205 (2015) ("A trust instrument may provide mandatory, exclusive[,] and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of a trust.").

220. *Schoneberger*, 96 P.3d at 1079; ARIZ. REV. STAT. ANN. § 14-10205 (2015); see also Jones v. Fink, No. 1 CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011).

fact is especially relevant to ERISA, which is a federal law. Arguably, because ERISA's preemptive power is so strong, it would take much more than a state law—like the one enacted in Arizona²²¹—to permit the enforcement of arbitration clauses. ERISA simply would not be subject to state law in that way—it is a *federal* statute. This concern is multiplied on a class action scale, as more and more employee beneficiaries would lose their ability to hold plan fiduciaries accountable in court.

The argument for including accountability in court in the doctrinal core of ERISA is stronger than it is in trust cases.²²² In trust cases, the beneficiaries are selected by the settlor, who “gives” the principal of the trust to a trustee, who takes on a set of fiduciary responsibilities and must follow the wishes of a settlor.²²³ In this case, the settlor selects the beneficiary—the beneficiary does not select the settlor.²²⁴ In the case of ERISA, the beneficiary of the trust contracts either directly with the plan provider or through one of the provider's agents (the trustee, financial advisor, or plan administrator).²²⁵ In that regard, the “giving” inherent in a trust is relatively one-sided—the beneficiary does not typically have a role in negotiating or discussing the contents of the trust with the settlor. This is in stark contrast with the workplace ERISA context, where the connection between the beneficiaries and the employer plan provider is direct and two-sided, with communication between the parties often occurring through a company's employee benefits or human resources department, making the need for accountability more salient. Furthermore, the argument presented above—that the beneficiary is unfairly subject to the will of the settlor—is moot, as there is no settlor in the ERISA context. The plan beneficiary and the plan provider enter the agreement themselves. This argument might be countered by the fact that pension plans are usually non-negotiable and that the plan provider usually dictates the terms of the package to the employee, who can opt in or out of an employer-provided retirement plan.²²⁶ Thus, one could

221. ARIZ. REV. STAT. ANN. § 14-10205.

222. *FAQs About Retirement Plans*, *supra* note 195.

223. DUKEMINIER & SITKOFF, *supra* note 197, at 579–80, 614.

224. *Id.* at 614.

225. According to the Department of Labor, the purpose of ERISA is to “protect[] the assets of millions of Americans so that funds placed in retirement plans during their working lives will be there when they retire.” *FAQs About Retirement Plans*, *supra* note 195. Holding those in charge of carrying out this goal accountable when they violate the law is, arguably, necessary to give the law teeth.

226. EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, AUTOMATIC ENROLLMENT 401(K) PLANS FOR SMALL BUSINESS, IRS PUBL'N NO. 4674 (2013) [hereinafter AUTOMATIC ENROLLMENT 401(K) PLANS], available at <http://www.irs.gov/pub/irs-pdf/p4674.pdf>.

make an analogy between the settlor to the plan administrator/provider. However, this argument holds less water because some plan providers will negotiate their packages, especially when it comes to the hiring context.²²⁷ This ability to negotiate is amplified with collective bargaining entities, as they are likely to have even more power when it comes to negotiating retirement plans.²²⁸

While there is some question regarding the degree to which judges are permitted to find arbitration clauses unconscionable following *Concepcion* and *Italian Colors*,²²⁹ there is very little movement in the courts regarding whether trust documents can be subject to arbitration clauses. Accordingly, the argument can be made that the arena of trust law has been less impacted by the increase in the adoption of arbitration clauses by sophisticated contract drafters than other areas of the law (specifically, antitrust law). The similarity between trusts and ERISA pension plans should give courts pause when applying the broad enforcement of arbitration clauses endorsed by the Supreme Court.

B. The Privity Problem

Privity of contract presents another argument against enforcing arbitration agreements in pension plans. Arbitration clauses in ERISA agreements should not be enforced because pension plan agreements between plan providers and beneficiaries are often subject to intermediary agreements between investment managers and plan providers. A prime example of this kind of arrangement is seen in *Comer*, where an ERISA beneficiary was enrolled in an employer pension plan that was not sufficiently diversified.²³⁰ The pension plan hired an investment management company, governed by “investment management agreements.”²³¹ Accordingly, the plan beneficiary never signed any of the agreements between the investment manager and the employer plan provider.²³² Because of this dynamic, the court found that there

227. *Negotiate a Smarter Retirement Package*, MERRILL LYNCH, http://insights.wm.ml.com/retirement/negotiate-a-smarter-retirement-package.html#fbid=jFIW_FB8yTV (last visited Nov. 12, 2013).

228. See Robert A. Blum, *Opportunities To Save Pension Costs Through Collective Bargaining After Pension Reform*, W. CITY, Apr. 2013, at 9, available at <http://www.westerncity.com/Western-City/April-2013/Opportunities-to-Save-Pension-Costs/>.

229. See generally David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217 (2013).

230. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1099–1100.

231. *Id.*

232. *Id.*

was no privity of contract between the plan provider, the investment manager, and the plan beneficiary.²³³

As discussed above,²³⁴ it is common for plan administrators to hire investment managers to ensure that pension plans are being invested wisely.²³⁵ It is very unlikely that plan beneficiaries have signed the investment management agreements.²³⁶ This is not surprising, especially given the size of many corporations that offer pension plans.²³⁷ For example, it would be nothing short of unwieldy for a corporation like Walmart to have every single plan beneficiary (which is likely to be high, as Walmart currently has around 2,000,000 employees)²³⁸ sign an agreement every time Walmart changes investment managers.

The court in *Comer* stated that “nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.”²³⁹ These principles include incorporation by reference and estoppel.²⁴⁰ Additionally, nonsignatories can enforce arbitration agreements as third-party beneficiaries.²⁴¹ To that end, the argument can be made that if the investment manager/pension plan agreement is entered into first, it can be attached to the plan provider/plan beneficiary agreements and incorporated by reference. However, an issue arises when a plan provider decides to make changes to

233. *Id.* at 1103–04.

234. *See supra* notes 18–19, 28–31 and accompanying text.

235. FISHER & PHILLIPS, *supra* note 35.

236. There are many government resources that outline who are considered plan fiduciaries and what their responsibilities are in retirement plans. *See, e.g., What You Should Know About Your Retirement Plan*, U.S. DEP’T OF LABOR, <http://www.dol.gov/ebsa/publications/wyskapr.html> (last visited July 29, 2014) [hereinafter *What You Should Know*].

237. While there are some sources that suggest the number of employer-sponsored 401(k) and defined benefit plans are decreasing, more than half of U.S. companies offer 401(k) plans for their workers. Brian O’Connell, *More U.S. Firms Shutter 401(k)s, Matching Programs*, THE STREET (May 2, 2013, 11:00 AM), <http://www.thestreet.com/story/11911313/1/more-us-firms-shutter-401ks-matching-programs.html>.

238. *Wal-Mart Company Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/wal-mart-company-statistics/> (last visited Nov. 12, 2013).

239. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2005) (quoting *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187–88 (9th Cir. 1986)) (internal quotation marks omitted).

240. *Id.* Under the doctrine of incorporation by reference, a nonsignatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the nonsignatory which incorporates the existing arbitration clause. *Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 505–06 (2d Cir. 1965). Under the doctrine of estoppel, a party who knowingly exploits an agreement without signing the agreement can be estopped from avoiding arbitration when the unsigned agreement contained an arbitration clause. *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).

241. *See Deloitte Noraudit*, 9 F.3d at 1064.

its plan or to whom it uses as an investment manager.²⁴² This is because it would be incredibly expensive from both a time and money standpoint to recontract and reincorporate every time any of the parties to either of the agreements change.²⁴³ As such, incorporation by reference is likely to be difficult to execute in practice.

Additionally, a party might raise estoppel as one argument for getting around the problem of privity to enforce arbitration clauses in ERISA agreements. Under this principle, a litigant would be estopped from asserting a privity defense to an ERISA agreement when she “knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement.”²⁴⁴ However, this argument does not have much force. It is unlikely that a court will find that by simply participating in pension plans managed for beneficiaries, a litigant has “exploited the agreement.” Arguably, the beneficiary was only exploiting the contract which she was privy to—the agreement between her and the pension plan provider. Accordingly, arbitration clauses are unlikely to be enforced under estoppel principles in the ERISA context.

Lastly, the Third²⁴⁵ and Ninth²⁴⁶ Circuits have held that only the intended beneficiary of a pension plan has standing to sue under the plan. In order “[t]o sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party.”²⁴⁷ In line with this argument, the party seeking to enforce the arbitration agreement would need to prove that the signatories to the agreement that was not signed by the party was intended to benefit the party, thereby granting it a right to sue under the agreement.²⁴⁸

The Third Circuit held in *DuPont* that “whether seeking to avoid or compel arbitration, a third party beneficiary has been bound by con-

242. In fact, changes to the plan must be made known to the beneficiary on a periodic basis. See, e.g., *What You Should Know*, *supra* note 236. This means that an update mailing might contain a voluminous description of changes, ranging from major changes to very small changes, which can go unnoticed by plan beneficiaries.

243. Not to mention that this would go above and beyond what is required by law. *Id.*

244. *Comer*, 436 F.3d at 1101 (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 199 (3d Cir. 2001)) (internal quotation marks omitted).

245. *DuPont*, 269 F.3d 187. This is discussed in greater detail at *infra* notes 249–252 and accompanying text.

246. *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) (holding that third-party beneficiaries suing for enforcement of a contract to which they were not parties did not have standing because there was no intention on the part of the signers of the contract to grant the third-party beneficiaries enforceable rights).

247. *Id.* at 1211.

248. *Id.*

tract terms where its claim arises out of the underlying contract to which it was an intended third party beneficiary.”²⁴⁹ However, this position is unusual and also faces a less straightforward version of the intention argument above—was the third-party beneficiary intended to arise out of the underlying contract? If not, is she estopped from arguing against enforcement of the arbitration clause if she received benefits under the contract? If these questions are answered in the negative, the question then becomes whether or not a trustee (the plan provider) acts as the beneficiary’s agent in entering into investment management agreements.²⁵⁰ An argument that the trust acts as the beneficiary’s agent is also likely to fail, as agents and trusts are not interchangeable.²⁵¹ So, in order to succeed in a *DuPont* analysis, the third-party beneficiary would need to demonstrate that a principle of contract or agency law present in the original contract (such as estoppel, incorporation by reference, etc.) led to the suit. This analysis repeats earlier arguments for getting around the privity requirement, and like those arguments, does not hold much water.²⁵²

The lack of privity between plan beneficiaries and investment manager/pension provider agreements is likely the strongest legal argument against the enforcement of arbitration provisions in these agreements. In order for these agreements to be enforceable as to third-party beneficiaries, drafters will need to find a way to incorporate by reference subsequent agreements. In the alternative, investment manager/pension provider agreements will need to “invite” beneficiaries to the contract, opening the possibility of lawsuits that may have been previously untenable due to privity concerns. This analysis shows that the privity sword cuts both ways—it might limit the ability to sue under the contract, but it also limits the enforceability of clauses that might be beneficial to the liable party (specifically, arbitration clauses).

C. Policy Considerations

In addition to the various legal arguments against the enforcement of arbitration clauses, there are also a number of policy considerations that suggest that the wide adoption of arbitration clauses in ERISA agreements might do more harm than good. While many of these

249. *DuPont*, 269 F.3d at 195.

250. For example, “when one corporation acts as the agent of a disclosed principal corporation, the latter corporation may be liable on contracts made by the agency. Liability may attach to the principal corporation even though it is not a party name in the agreement.” *Id.* at 198.

251. RESTATEMENT (SECOND) OF TRUSTS § 8 (1959).

252. See *supra* notes 230–244 and accompanying text.

concerns have been leveled in antitrust suits where defendants have been able to successfully compel arbitration, the ERISA context provides a stronger case for policy considerations against arbitration due to its underlying fiduciary elements.

As a preliminary matter, antitrust suits arising from contracts with arbitration clauses are distinguishable from ERISA agreements for a number of reasons. The number of individuals who are impacted by ERISA is high.²⁵³ While one might argue that the number of individuals impacted by ERISA cannot be larger than the number of people who use credit cards or cell phones, the important distinguishing factor here is that not *everyone* needs to use credit cards or cell phones. These items are discretionary, and require a discrete action by the consumer (namely, seeking out and purchasing the good while simultaneously entering into a service contract). This is unlike pension plans, which are often presented as a term of employment, and are a vital source of financial support for many who save for retirement.²⁵⁴ Similarly, an ERISA plan beneficiary need not seek out the services of a pension plan—it is offered by her employer and is often part of employment packages.²⁵⁵ For those reasons, strict enforcement of arbitration clauses in the antitrust context should not be strictly applied to ERISA agreements.

While the negative effects of the enforcement of arbitration clauses have traditionally been thought to affect consumer plaintiffs more than corporate defendants,²⁵⁶ pension plan providers might also be disadvantaged by the enforcement of arbitration clauses in the ERISA context. Without protective plan language (that is, language in the agreements themselves, taking privity concerns into consideration), “arbitration becomes a crapshoot.”²⁵⁷ “Once an unfavorable arbitra-

253. O’Connell, *supra* note 237.

254. See AUTOMATIC ENROLLMENT 401(K) PLANS, *supra* note 226.

255. See O’Connell, *supra* note 237.

256. See generally Tanya M. Marcum & Elizabeth A. Campbell, *The Arbitration Seesaw: Federal Act Preempts General Law Thereby Restricting Judicial Review*, 47 VAL. U. L. REV. 965 (2013). This much is clear, because

[s]mall recoveries do not encourage an individual to bring a sole action, and, as a result, putative defendants can engage in low stakes frauds and law violations with impunity and, if the number of occurrences is large enough, quite profitably. Not surprisingly, it has been an open secret for over a decade that a major motivation—perhaps the dominant motivation—for the imposition of arbitration clauses in adhesion contracts has been the hope that these clauses would blossom into class action waivers.

Id. at 970–71 (quoting David Schwartz, *Do-It-Yourself Tort Reform: How the Supreme Court Quietly Killed the Class Action*, SCOTUSBLOG (Sept. 16, 2011, 10:52 AM), <http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action/> (internal quotation marks omitted)).

257. Baker, *supra* note 71, at 91–92.

tor's decision has been made, the courts almost always enforce the arbitration award."²⁵⁸ Furthermore, "these arbitration awards are rarely overturned, even if the arbitrator makes an obvious mistake."²⁵⁹ This is because the court can only overturn an arbitrator's finding if there is an obvious, capricious, or arbitrary award—an incredibly high bar for a court to clear.²⁶⁰ Consequently, by participating in arbitration, an issue that might not have been the central issue in the initial suit might be decided and later precluded on *res judicata* principles. For example, imagine a situation where B and C sue A for negligence. A and B decide to resolve their dispute in arbitration instead of in litigation. The arbitrator finds that A created a dangerous condition and had a duty to B and C, but finds that the dangerous condition did not cause B's injuries. C, relying on that information, sues A. A is limited by the doctrine of *res judicata* and can no longer argue that she did not create a dangerous condition. Because of the arbitrary and capricious standard of review, it would be incredibly difficult for A to overturn the findings made at arbitration. A is now stuck with those stipulations.

Arbitrators are not bound by case law, so facing an arbitrator can be much riskier than facing a judge bound by precedent.²⁶¹ Arguably, this makes it more difficult to research and prepare for cases when they are to go in front of an arbitrator. Additionally, because arbitrators overwhelmingly rely on their own sense of justice and fairness, "enjoy[ing] a certain freedom in the exercise of their duties,"²⁶² arbitrators are potentially more likely to exhibit their biases, which may negatively impact an employer's case.

Arguably, employees are also harmed by the enforcement of arbitration clauses in the ERISA context. Specifically, by enforcing arbitration clauses in ERISA agreements, the employee is unable to immediately pursue a violation of ERISA in court.²⁶³ This harm is especially troubling because pension plans are often seen as "standard contracts"²⁶⁴—employees can take them or leave them.²⁶⁵ While

258. *Id.* at 92.

259. *Id.*

260. *Id.*

261. See generally Weidemaier, *supra* note 73.

262. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5 (2011).

263. See *supra* notes 188–252.

264. See, e.g., *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662 (7th Cir. 2003) (characterizing an ERISA agreement as "boilerplate," "form," "standard," and a "contract of adhesion").

265. For an example of one of these standard pension contracts, see I.A.M. NAT'L PENSION FUND, STANDARD CONTRACT LANGUAGE, http://mypension.iamnpf.org/media/21103/standard_contract_language.pdf (updated Nov. 2006).

some pension providers permit negotiations between plan providers and beneficiaries, many beneficiaries are not aware that they can bargain for different terms in their 401(k) agreements or simply do not think about retirement benefits at the time they are hired.²⁶⁶ Standard form contracts raise red flags, although courts have upheld them consistently.²⁶⁷ However, given the sheer number of people who enroll in employer-backed pension plans, courts should carefully consider the bargaining disparity of the parties. This argument is bolstered by the fact that what is at stake for the plan beneficiary is significant—for most people, their livelihood at old age is dependent on their pension plans.²⁶⁸ The financial security of a pension plan is paramount to an elderly person's ability to take care of her financial needs.²⁶⁹ The same cannot be said for more traditional examples of standard form contracts, such as software service agreements²⁷⁰ or cellphone contracts.²⁷¹

Arbitration clauses are also likely to deter potential ERISA plan beneficiaries from investing in employer-backed pension plans. This argument proceeds as follows: imagine a plan beneficiary checks up on her 401(k), only to realize that the plan has lost a significant amount of money due to the investor's negligent investing and lack of diversification. She attempts to sue her employer for the diminution in value of her pension, only to have her case thrown out after the employer compels arbitration. The employee has no recollection of ever signing any arbitration agreement. What will result? It seems reasonable that the employee would pull all of her money out of her 401(k) plan. She might warn others at her company that if anything were to happen to their pension funds, they would not be able to seek damages at court and would instead be forced into arbitration. Overall, this kind of emotionally charged reaction to being "trapped" by a contract a plan beneficiary did not bargain for could deter employees from signing up for employer-sponsored retirement benefit plans in the future. Arguably, pulling investment capital from 401(k) funds and other employer-sponsored retirement funds would have a nega-

266. *Negotiate a Smarter Retirement Package*, *supra* note 227.

267. *See, e.g., Dugan*, 344 F.3d at 662; *Nw. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990); *Comm'ns Maint., Inc. v. Motorola, Inc.*, 761 F.2d 1202 (7th Cir. 1985); *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967). *See generally* Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123 (2005).

268. U.S. DEP'T OF LABOR, *TAKING THE MYSTERY OUT OF RETIREMENT PLANNING* (2012), available at <http://www.dol.gov/ebsa/pdf/nearretirement.pdf>.

269. *Id.*

270. *Meridian Project Sys., Inc. v. Hardin Const. Co.*, 426 F. Supp. 2d 1101 (2006).

271. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

tive effect on the overall economic welfare of the American investment market.²⁷² Consumers switching from employer-sponsored retirement funds to individual ROTH IRA accounts²⁷³ and, arguably, index fund investment accounts might mitigate this effect, as the funds would still be used as investment capital, as opposed to being stored by the consumer herself or in a bank. However, these investment accounts do not include the advantageous employer-matching provisions,²⁷⁴ which are valuable to beneficiaries investing in the plans.

Lastly, there is a significant risk of bias and impartiality when corporations engage in arbitration.²⁷⁵ This issue is not unique to ERISA—it was discussed at length in the context of employment discrimination cases in the popular film *Hot Coffee*.²⁷⁶ However, the argument also applies to the fiduciary breach claims based on ERISA agreements. Traditionally, the party that requests arbitration (in this case, the plan provider) chooses which arbitrator to use.²⁷⁷ Additionally, corporations (and their legal counsel) are more likely to be aware of possible arbitrators or arbitration services.²⁷⁸ Arguably, these fac-

272. As of June 2014, 401(k) plans held an estimated \$4.4 trillion in assets, representing nearly 18% of the \$24.0 trillion in U.S. retirement assets. *Frequently Asked Questions About 401(k) Plans*, INVESTMENT COMPANY INST., http://www.ici.org/policy/retirement/plan/401k/faqs_401k (last visited Jan. 30, 2015).

273. In June 2012, IRAs constituted 26.5% of all retirement holdings, and there were nearly 15 million IRA accounts held by more than 11 million people with total assets of more than \$1 trillion. Karen DeMasters, *How Much Do People Really Have in IRAs?*, FINANCIAL ADVISOR (June 6, 2012), <http://www.fa-mag.com/news/how-much-do-people-really-have-in-iras-10914.html>.

274. 401(k) plans can be backed by “generous employers who provide decent matching contributions and additional funds to build your nest egg.” John Wasik, *Do You Have the Best or Worst 401(k) Plan?*, FORBES (July 23, 2014, 8:56 AM), <http://www.forbes.com/sites/johnwasik/2014/07/23/do-you-have-the-best-or-worst-401k-plan/> (a Forbes Contributor blog). IRAs allow individuals to make tax-deferred investments for retirement and are not tied to employment. *Individual Retirement Arrangements—Getting Started*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/Retirement-Plans/Individuals-Retirement-Arrangements—Getting-Started> (last visited Jan. 30, 2015) (“You can set up an IRA with a bank or other financial institution, life insurance company, mutual fund, stockbroker.”).

275. Michael D. Goldhaber, *Arbitration Bears Patina of Bias*, NAT’L L.J., June 17, 2013, at 4, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202604295415&slreturn=20131015003926>.

276. *HOT COFFEE* (HBO 2011). In this film, an employee alleging that she was raped while working as a defense contractor abroad chronicled her struggle to face her employer in court. *Id.* Her employment contract contained a mandatory arbitration clause, limiting her access to a jury trial. *Id.* *Hot Coffee* uses this case to show how “mandatory arbitration clauses are proliferating, nestled in the fine print of many employment contracts” and how this causes many Americans to “give up their fundamental right to access the legal system, often without realizing it and without choice.” *HBO Documentaries Synopsis*, HBO, [http://www.hbo.com/documentaries/hot-coffee/synopsis.html/#/](http://www.hbo.com/documentaries/hot-coffee/synopsis.html#/) (last visited Feb. 5, 2014).

277. Goldhaber, *supra* note 275.

278. *Id.*

tors can result in large corporations using an arbitration company on multiple occasions as disputes arise.²⁷⁹ These arbitrators might fear losing repeat business with these corporations if they make awards and determinations that are unfavorable to the corporation.²⁸⁰ There also might be some inherent bias in the familiarity the arbitration company has with the corporation. Additionally, because there is no court-appointed legal assistance²⁸¹ for arbitration proceedings, it is plausible that employee beneficiaries will be greatly disadvantaged (and may be unable to afford counsel) in contrast to the employer, which has access to significant financial and legal resources.

Overall, it appears that there are significant legal and policy rationales for limiting the enforceability of arbitration clauses in ERISA agreements. Based on the analogy to trust law and the doctrine of privity, courts should be hesitant to apply the broad acceptance of the antitrust cases, *Concepcion* and *Italian Colors*, to ERISA fiduciary breach suits. Additionally, public policy does not support the expansive use of these clauses in contracts. As a result, courts should decline to apply the holdings of *Concepcion* and *Italian Colors* to ERISA in both the individual suit and class action contexts.

IV. IMPACT AND RECOMMENDATIONS

The recent trend at corporate law firms has been to include arbitration clauses in agreements, regardless of the size or sophistication of either party. Proskauer Rose LLP, a law firm with six hundred attorneys,²⁸² issued a newsletter discussing the use of arbitration clauses:

Given the current state of the law, there appears to be enough of a possibility to prevail on enforcing class waivers in arbitration agreements that plan sponsors and fiduciaries should include them in their arbitration agreements and plan documents if perceived to be an advantage. Even if enforced, however, their impact remains unclear in light of the fact that, as mentioned, a single participant may commence a lawsuit in a representative capacity under ERISA, without resorting to the class action devices available under the Federal Rules of Civil Procedure.²⁸³

279. *Id.*

280. *Id.*

281. For a discussion on the use of court-appointed legal assistance, see William L. Dick, Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627 (1989).

282. *Proskauer Rose LLP—Firm Profile*, MARTINDALE, <http://www.martindale.com/Proskauer-Rose-LLP/law-firm-123738.htm> (last visited Feb. 5, 2014).

283. Thomas E. Clark, *It's a Matter of When, Not If: Validity of Class Action Waivers in ERISA Plans To Be Tested*, FIDUCIARY MATTERS BLOG (May 19, 2013), <http://blog.fraplantools.com/erisa-arbitration-clauses-class-action-waivers/>.

As this statement suggests, practitioners are already shifting towards including these kinds of waivers in ERISA agreements. However, uncertainty as to how courts will interpret arbitration agreements in ERISA agreements will remain until courts come down one way or another on the issue.

While firms such as Proskauer Rose are taking an active role in trying to limit access to litigation through the use of arbitration clauses, some companies are erring on the side of eliminating the clauses until courts have determined whether or not the clauses are enforceable. Charles Schwab Corporation, a brokerage account provider, has modified its account agreements²⁸⁴ “to eliminate the existing class action lawsuit waiver for disputes.”²⁸⁵ The company further asserted that while it believed arbitration was the “best” way to handle dispute resolution, it did not want to “leave clients with a degree of uncertainty about their dispute resolution options in the meantime” and elected to remove the clauses.²⁸⁶ While Charles Schwab is not a direct ERISA plan provider, it manages the investments of ERISA plans. Similarly, Fiduciary Risk Assessment LLC, an ERISA plan consultant company, issued its own statement:

[W]e believe that after nearly 40 years of jurisprudence in the federal courts, ERISA offers a scheme of rules and regulations that strongly attempts to balance the interests of both plan sponsor/fiduciaries and plan participants, despite not being perfect all the time. The creation of dueling venues of public resolution (courts) and private resolution (arbitration) has great potential for unintended consequences for all involved parties.²⁸⁷

This statement, while arguably hedged by public relations professionals, errs on the side of avoiding the waivers for fear of “unintended consequences.”²⁸⁸

The actions of Proskauer Rose and Fiduciary Risk Assessment provide examples of the two common courses of action that plan providers can take. Proskauer Rose’s approach is aggressive in its use of arbitration agreements, which may help keep its clients out of court in the case of a pension plan dispute. In doing so, the firm also takes a risk that the agreements and waivers will not be upheld in court or that its client’s plan beneficiaries will lose faith in the plans. Fiduciary

284. That is, investment management agreements that Charles Schwab has entered into with ERISA plan providers.

285. Thomas E. Clark, *It’s a Matter of When, Not If: Validity of Class Action Waivers in ERISA Plans To Be Tested*, FIDUCIARY MATTERS BLOG (May 19, 2013), <http://blog.fraplantools.com/erisa-arbitration-clauses-class-action-waivers/>.

286. *Id.*

287. *Id.*

288. *Id.*

Risk Assessment takes a more measured approach, waiting to see how the courts (and perhaps its plan beneficiaries) come down on the issue before using arbitration agreements. Given the unsettled nature of the law and the potential impact on employees who participate in ERISA plans, Fiduciary Risk Assessment's deference to the plan fiduciary relationship is preferable.

B. Economic Impact

Arguably, given the lack of public or media attention to the changing landscape of the law surrounding arbitration agreements, the economic impact of arbitration agreements on retirement plans will be subtle. Retirement plan documents are dense—they cannot be described as “comprehensible” to average Americans.²⁸⁹ The complicated plan documents, coupled with a general lack of information, benefit employers—the less informed an employee is, the less likely she is to take control of her retirement plan or notice plan irregularities.

Theoretically, if employees were given more information about their 401(k) plans, they might opt out of employer-sponsored retirement accounts. However, the benefits of employer-sponsored plans are not necessarily outweighed by the detriments. For example, matching provisions²⁹⁰ are incredibly positive not only for the employees who remain for the vesting period, but also for the economy as a whole. The more employers that match, the more funds there are in retirement accounts. Further, retirement accounts are a huge portion of the United States economy, and the size of these accounts directly affects the health and stability of the United States financial system. A study conducted by the National Institute on Retirement Security (NIRS) suggests that state and local retirement plans contribute over \$358 billion in total economic output nationwide and generate over \$57 billion in federal, state, and local tax revenue.²⁹¹ The NIRS study

289. This is evidenced by the fact that courts have described pension plan documents as “boilerplate,” “form,” and “standard.” See, e.g., *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662 (7th Cir. 2003).

290. *Ultimate Guide to Retirement: What Is a Matching Contribution?*, CNN MONEY, http://money.cnn.com/retirement/guide/401k_basics.moneymag/index9.htm (last visited Feb. 14, 2015). Many 401(k) plans include matching contributions from the beneficiary's employer. *Id.* “The match can often be 50 cents to a dollar for every dollar you contribute, up to a set maximum—perhaps 3% to 6% of your salary, or in some cases a dollar limit. The match is free money!” *Id.* The matching funds serve to increase an employee's income without increasing tax liability. *Id.* However, matching funds typically take two to three years to “vest”—that is, an employee needs to stay at the company for two to three years before the matched funds are officially “hers.” *Id.*

291. ILANA BOIVIE & BETH ALMEIDA, NAT'L INST. ON RET. SEC., PENSIONOMICS: MEASURING THE ECONOMIC IMPACT OF STATE AND LOCAL PENSION PLANS 1 (2009), available at <http://>

demonstrates how pension benefits have a direct and indirect impact on local and national economies. In the example in the NIRS study, a retired schoolteacher uses her pension money to buy a car.²⁹² As a result, the owner of the car dealership, the salesman who sold her the car, and every company involved in the production of the car all see an increase in income.²⁹³ That income not only benefits the government by generating tax revenue, it also benefits the economy in general.²⁹⁴

Arguably, there are two possible scenarios that would limit the economic performance of retirement accounts due to contractual arbitration agreements. First, employers could become less careful with maintaining employment accounts because the fear of retribution in the form of an individual or class suit is diminished when arbitration agreements are enforced. Second, informed employees might decide that employer-sponsored retirement accounts are too risky if employers cannot be held accountable for breaches of their fiduciary duty in court. Both scenarios could leave a dent in the economy that could have lasting effects.

The first scenario, while egregious, is not completely unimaginable. As employers experience financial setbacks or even more nefarious troubles (for example, the Enron collapse)²⁹⁵ retirement plans can become an early casualty.²⁹⁶ If financially troubled companies knew that they had arbitration agreements in place that would limit their legal liability, they might treat employee retirement accounts less diligently. If retirement accounts run dry due to corporate mismanagement or negligence, and employees have limited recourse for obtaining recovery, the overall economy will suffer because retirees will not be able to make purchases. This drop in economic activity could greatly limit spending for a growing sector of the population. This would certainly create problems for the United States economy.

The second scenario also presents problems, although perhaps not as serious as those related to employer misconduct. If employees are

www.nirsonline.org/storage/nirs/documents/Pensionomics%202009/nirs_2009_pensionomics_report_final.pdf.

292. *Id.*

293. *Id.* at 4.

294. *Id.* at 7.

295. For a discussion of the collapse of Enron and the ensuing havoc it wrecked on its employees' pension plans, see Sharon Reece, *Enron: The Final Straw & How to Build Pensions of Brick*, 41 DUQ. L. REV. 69 (2002).

296. Dallas Salisbury, *The Future of Retirement Plans*, WALL ST. J., <http://online.wsj.com/article/employeebenefits-future> (last visited Feb. 5, 2014) (an advertisement produced in cooperation with the Employee Benefit Research Institute and the International Foundation of Employee Benefit Plans).

uncomfortable with keeping their retirement funds in accounts managed by their employers, they can initiate their own investment accounts. This option maintains the pre-tax saving of funds in an investment account,²⁹⁷ but lacks the beneficial employer-matching provisions common to corporate retirement accounts.²⁹⁸ So, this solution reduces possible tax-free retirement income for retirees (which could then be spent, stimulating the economy). Additionally, if more employees opt out of employer-sponsored retirement accounts, employees might not be able to take advantage of the investment management resources available to large corporations, which are often costly. As a consequence, individual retirement accounts might become unstable or more poorly managed than corporate retirement accounts. Lastly, if employees continually reject employer-sponsored retirement accounts, some employers might stop offering them altogether. Employer-sponsored plans are successful because they operate in the aggregate—arguably, the more funds in an account, the more the funds can grow and appreciate. Pension plans (as compared to individual investment accounts) also create economies of scale, allowing for the more efficient use of investment resources, fund management, diversification, and risk allocation.²⁹⁹ If employers stopped offering 401(k) plans to their employees, many workers would suffer economic losses that translate directly into less money to be used during retirement.

V. CONCLUSION

ERISA was implemented to protect employees by setting strict fiduciary guidelines for employers that offer retirement plans. Under ERISA, if employers breach their fiduciary duty to employees, they can be held accountable in court. Potentially, arbitration undermines the strict fiduciary guidelines set forth in ERISA. Limiting the ability of employers to use arbitration clauses in their plan agreements will level the balance of power between employers and employees.

By limiting the ability of employers to use arbitration clauses in their plan agreements, courts will help re-establish this balance and ensure that retirement accounts continue to be widely used and

297. IRAs and similar investment accounts preserve tax benefits to the taxpayer. *Individual Retirement Arrangements—Getting Started*, *supra* note 274.

298. As discussed above, IRAs and investment funds are not associated with employers and as such, are not matched by employers.

299. See, e.g., John C. Coates IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J. CORP. L. 151 (2007) (discussing economies of scale and scope in funds).

trusted in the modern workplace. Because of the direct ties between retirement funds and economic stability, it is in society's best interest for courts to prohibit the enforcement of arbitration clauses. Additionally, the use of arbitration clauses effectively limits potential litigants' direct access to court, offering them an alternative that is at best questionable.

The recent line of Supreme Court cases supporting the use of arbitration clauses under the FAA should not be applied in the ERISA context. ERISA plans, like traditional trusts, require a heightened standard of responsibility to the plan beneficiary. The use of arbitration would cut against the fiduciary duties of the plan provider to the detriment of plan beneficiaries. This erosion of ERISA would be a huge blow to employees—a class of people with already diminished negotiating power and rights. It is the American worker who would suffer.

For the reasons discussed in this Comment, it would be in the best interest of the American workforce and economy for courts to refuse to enforce single litigant and class action arbitration clauses in the ERISA context. It is up to the courts to maintain the quality and integrity of the ERISA retirement plan by preserving access to courts for employees with valid causes of action. Whether or not this is the path that courts will take is a question that remains to be answered, but it will likely be addressed within the next few years as arbitration clauses continue to enjoy vast proliferation in the American legal system.

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