

## Fifth Circuit Addresses Enforceability of Arbitration Clauses in ERISA Plans

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A recent case in the United States Court of Appeals for the Fifth Circuit reminds plan sponsors that adding arbitration clauses in their ERISA plans retroactively may be problematic. Specifically, in *Parrott v. Int'l Bancshares Corp*, the plan sponsor added a retroactive arbitration clause *after* the plaintiff had terminated employment. The clause required all claims to proceed individually, prohibited claims from being brought in a representative capacity or on a class, collective, or group basis, and contained a standard-of-review provision.

The Fifth Circuit held that:

1. The arbitration clause was not enforceable with respect to claims brought by the plaintiff in his individual capacity because an agreement to arbitrate requires mutual consent, and in this case, the plaintiff had not given his consent to arbitrate.
2. The provision expressly prohibiting claims from being brought in a representative capacity was void under the effective vindication doctrine, which requires courts to invalidate arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies. By prohibiting claims brought in a representative capacity, the arbitration clause operated as a waiver of plaintiff's right to bring such claims and left the plaintiff with no avenue to pursue statutory remedies on behalf of the plan.
3. The standard-of-review provision in the arbitration clause was an unlawful exculpatory provision because it lowered the standard of review in certain circumstances and thereby relieved fiduciaries of liability in violation of ERISA. The court thus held that the standard-of-review provision was void with respect to claims beyond denial-of-benefits claims.

Finding that the provision prohibiting representative claims was void, and the contract was ambiguous regarding the severability of that provision, the Fifth Circuit remanded the case back to the district court to determine whether that provision was severable under Texas law.

*Parrott v. Int'l Bancshares Corp* can be found [here](#).