

# William & Mary Law Review

---

Volume 17 (1975-1976)  
Issue 2 Symposium: *The Employee Retirement  
Income Security Act of 1974 - Labor Law  
Considerations*

---

Article 3

December 1975

## The Use of Arbitration to Avoid Litigation Under ERISA

Richard P. Donaldson

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Labor and Employment Law Commons](#)

---

### Repository Citation

Richard P. Donaldson, *The Use of Arbitration to Avoid Litigation Under ERISA*, 17 Wm. & Mary L. Rev. 215 (1975), <https://scholarship.law.wm.edu/wmlr/vol17/iss2/3>

Copyright c 1975 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/wmlr>

# THE USE OF ARBITRATION TO AVOID LITIGATION UNDER ERISA

RICHARD P. DONALDSON\*

In response to a proliferation of private pension and welfare plans in recent years, Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA)<sup>1</sup> as a means of protecting the rights of the participants and beneficiaries of these plans.<sup>2</sup> Each benefit plan covered by ERISA must comply with its standards for reporting and disclosure,<sup>3</sup> participation and vesting,<sup>4</sup> funding,<sup>5</sup> and fiduciary responsibility.<sup>6</sup> The Act also outlines procedures for administering and enforcing these statutory requirements.<sup>7</sup> Although criminal penalties are provided for willful violations of the Act,<sup>8</sup> civil actions brought by the Secretary of Labor,

---

\* LL.B., University of Wisconsin Law School. Partner, Donaldson & Kiel, P.S., Seattle, Washington.

Author—Appreciation is expressed to Kathleen Boyle of the WILLIAM AND MARY LAW REVIEW for assistance in editing these materials.

1. Pub. L. No. 93-406, 88 Stat. 829 [hereinafter cited as ERISA].

2. Congress outlined the policy of ERISA in section 2(b) of the Act:

It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C.A. § 1001(b) (1975).

3. *Id.* §§ 101-11, 29 U.S.C.A. §§ 1021-31. The administrator of the plan must furnish a summary plan description to participants and beneficiaries. *Id.* § 101, 29 U.S.C.A. § 1021. Financial statements, actuarial statements, and insurance statements must be filed annually. *Id.* § 103, 29 U.S.C.A. § 1023. In addition, if the participant or beneficiary so requests in writing, the administrator must furnish a statement indicating the status of the participant's benefit rights. *Id.* § 105, 29 U.S.C.A. § 1025. A participant or beneficiary, however, is not entitled to receive more than one statement in any 12 month period. *Id.*

4. *Id.* §§ 201-11, 29 U.S.C.A. §§ 1051-61.

5. *Id.* §§ 301-06, 29 U.S.C.A. §§ 1081-86.

6. *Id.* §§ 401-14, 29 U.S.C.A. §§ 1101-14. The fiduciary must discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . ." *Id.* § 404(a) (1) (B), 29 U.S.C.A. § 1104(a) (1) (B).

7. *Id.* §§ 501-14, 29 U.S.C.A. §§ 1131-44.

8. *Id.* § 501, 29 U.S.C.A. § 1131. A person convicted of willfully violating the Act can be fined up to \$5,000, or imprisoned for a period of up to 1 year, or both. A corporation can be subjected to a fine of \$100,000.

participants, beneficiaries, or fiduciaries are the primary means of enforcement.<sup>9</sup>

Since pension and welfare plans are mandatory subjects of collective bargaining,<sup>10</sup> plans governed by ERISA are often included in collective bargaining agreements, many of which contain provisions requiring binding arbitration of disputes arising under the agreement. When a dispute arises with regard to the negotiated plan and a civil action is brought under ERISA to adjudicate the claim, the court must ascertain whether ERISA requires it to assert its jurisdiction over the claim or to dismiss the action in favor of the contractual arbitration process. It is submitted that the type of claim presented for litigation will determine the jurisdiction of the court. The use of arbitration will avoid litigation of ERISA benefit claims, but will not bar litigation of claims relating to fiduciary responsibility.

### BENEFIT CLAIMS

ERISA provides that a plan participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."<sup>11</sup> Such actions may be brought in a federal district court or in a state court.<sup>12</sup> Although

---

9. *Id.* § 502, 29 U.S.C.A. § 1132. See H.R. REP. NO. 533, 93d Cong., 1st Sess. 2 (1973). In this report the House Committee on Education and Labor stated: "[T]he Committee has placed the principal focus of the enforcement effort on anticipated civil litigation to be initiated by the Secretary of Labor as well as participants and beneficiaries."

10. Under the Labor Management Relations Act of 1947 employers and unions have a duty to bargain collectively. 29 U.S.C. §§ 158(a)(5), (b)(3) (1970). "To bargain collectively" is defined as the "mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." *Id.* § 158(d). "Wages, hours, and other terms and conditions of employment" are mandatory subjects of collective bargaining. See *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); Note, *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918, 925 (1974). Pension plans were found to be "wages" and "conditions of employment" and hence mandatory subjects of collective bargaining in *Inland Steel Co. v. NLRB*, *supra*. Cf. *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (if the pension plan concerns only retired employees it is a permissible rather than a mandatory subject of collective bargaining).

11. ERISA § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B) (1975).

12. *Id.* § 502(e)(1), 29 U.S.C.A. § 1132(e)(1). Section 502 removed procedural and jurisdictional obstacles that had hampered federal judicial enforcement of benefit claims under interstate benefit plans. *Id.* § 502(e)(1), 29 U.S.C.A. § 1132(e)(1) (broadened jurisdiction); *id.* § 502(e)(2), 29 U.S.C.A. § 1132(e)(2) (broadened venue); *id.*

the statute itself does not mention arbitration as a means to resolve benefit disputes, the propriety of arbitration is evidenced by the conference report on the Act, which states that benefit claims brought by participants or beneficiaries in state or federal courts are to "be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor Management Relations Act of 1947."<sup>13</sup>

### *Judicial Interpretation of Section 301*

Section 301(a) of the Labor Management Relations Act of 1947 (LMRA)<sup>14</sup> permits an individual to bring suit in a federal district court for "violation of contracts between an employer and a labor organization."<sup>15</sup> Although this section does not expressly require the submission of contract disputes to arbitration, it is settled that suits brought in federal or state court for breach of a collective bargaining contract will be dismissed if the party bringing suit has not exhausted an arbitration remedy included in the contract,<sup>16</sup> or if a final arbitration award has been rendered.<sup>17</sup>

The Supreme Court first applied the congressional policy favoring arbitration of labor disputes<sup>18</sup> to contractual claims brought under sec-

---

§ 502(f), 29 U.S.C.A. § 1132(f) (federal district courts have jurisdiction regardless of amount in controversy or citizenship of parties).

13. H.R. REP. NO. 1280, 93d Cong., 2d Sess. 327 (1974).

14. 29 U.S.C. § 185(a) (1970).

15. Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1970). Although section 301 is entitled "suits by and against labor organizations," the Supreme Court held in *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), that an individual employee may bring an action for breach of the collective bargaining agreement in his own right as a third-party beneficiary to the union contract.

16. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

17. See, e.g., *United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 730 (5th Cir. 1974) (arbitrator's award for breach of the reopener clause final); *Cady v. Twin Rivers Towing Co.*, 486 F.2d 1335, 1337-38 (3d Cir. 1973) (disposition of seaman's claim for wrongful demotion pursuant to grievance procedures final); *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414 (5th Cir. 1966) (after final relief had been granted under the collective bargaining agreement, the employee could not seek judicial relief for wrongful discharge); *Smith v. Union Carbide Corp.*, 350 F.2d 258 (6th Cir. 1965) (no trial de novo permitted for pension benefit claim subject to arbitration clause).

18. The congressional policy favoring arbitration of labor disputes is expressed in

tion 301 in three companion cases decided in 1960.<sup>19</sup> In this series of landmark decisions the Court compelled arbitration of disputes covered by collective bargaining agreements and precluded review of an arbitrator's decision in any dispute concerning a proper subject for arbitration under the terms of the labor contract.<sup>20</sup>

The Supreme Court extended its policy favoring arbitration of section 301 claims in *Republic Steel Corp. v. Maddox*,<sup>21</sup> which required the exhaustion of contract grievance procedures before suit could be brought under section 301<sup>22</sup> unless the contract itself expressly provided that the grievance procedures were not to be the exclusive remedy.<sup>23</sup> If the employee were allowed to forgo the contractual remedies, the Court reasoned, the finality and hence the desirability of a contractually con-

section 203(d) of the Labor Management Relations Act of 1947, which provides:

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The [United States Conciliation] Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. § 173(d) (1970).

19. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

20. In *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), suit was brought under section 301(a) of the LMRA to compel arbitration of a contractual grievance. The Supreme Court held that when the parties to a collective bargaining contract have agreed to submit all contractual disputes to arbitration, the arbitrator must decide the merits of all issues covered by the contract. The function of the court is limited to ascertaining whether the claim is governed by the contract.

The Court further held that in determining whether the dispute is covered by the contract, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," arbitration should be ordered. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

To protect the finality of the arbitrator's decision, judicial inquiry into the merits of the arbitrator's decision cannot be permitted. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

21. 379 U.S. 650 (1965). In *Republic* the employer failed to make severance payments to an employee as required by the collective bargaining agreement. The agreement provided a three-step grievance procedure followed by binding arbitration for settlement of disputes arising under the contract. Instead of pursuing the prescribed grievance procedure the aggrieved employee directly brought suit against the employer in state court to recover the severance pay allegedly due.

22. *Id.* at 652-53.

23. *Id.* at 657-58. See *Vaca v. Sipes*, 386 U.S. 171, 184 n.9 (1967); *Hayes v. Schmidt & Sons*, 87 L.R.R.M. 2466, 2468 (E.D. Pa. 1974).

firmed method of settling labor disputes would be defeated. Such a result would undermine congressional policy favoring arbitration of labor disputes.<sup>24</sup> Prior exhaustion of contractual remedies was similarly required by a state court in *Tombs v. Northwest Airlines, Inc.*,<sup>25</sup> in which a suit was brought to determine an employee's rights under a collectively bargained pension plan.

When suit is brought under section 301 after the contractual remedies have been exhausted and a binding arbitration decision has been rendered, the court will likewise dismiss the suit. The aggrieved employee has had his remedy under the contract and is bound by the arbitrator's decision.<sup>26</sup> This principle was applied to a pension benefit dispute by the Court of Appeals for the Sixth Circuit in *Smith v. Union Carbide Corp.*<sup>27</sup> Similar results in disputes concerning employee benefit plans have been reached

---

24. 379 U.S. at 653. *Accord*, *Durham v. Mason & Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1969); *Woody v. Sterling Aluminum Prod. Inc.*, 365 F.2d 448 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967); *Sturgill v. Lewis*, 372 F.2d 400 (D.C. Cir. 1966); *Reeves v. Tarvizian*, 351 F.2d 889 (1st Cir. 1965); *Belk v. Allied Aviation Serv. Co.*, 315 F.2d 513 (2d Cir. 1963); *Tombs v. Northwest Airlines, Inc.*, 83 Wash. 2d 157, 516 P.2d 1028 (1973). *See generally Cox, Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 647-52 (1956).

Although the collective bargaining grievance procedures are intended to be the exclusive remedy, exhaustion of contractual remedies will not be required if the aggrieved employee can show that the union breached its duty of fair representation in pressing his grievance. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967).

Failure to exhaust contractual grievance procedures results in dismissal of the legal action without prejudice. *Durham v. Mason & Dixon Lines, Inc.*, 404 F.2d 864, 865 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1969).

25. 83 Wash. 2d 157, 516 P.2d 1028 (1973). In *Tombs* an employee who believed he was entitled to larger pension benefits than he received failed to submit his claim to arbitration as required under the labor contract before filing suit in state court. The trial court heard the case on the merits and determined the benefits to which the employee was entitled; the state supreme court reversed the decision of the trial court, holding that the employee must pursue the contractually determined method for settlement of disputes before he could seek relief in the courts.

26. *United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 730 (5th Cir. 1974); *Cady v. Twin Rivers Towing Co.*, 486 F.2d 1335, 1338-39 (3d Cir. 1973); *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414 (5th Cir. 1966); *Smith v. Union Carbide Corp.*, 350 F.2d 258 (6th Cir. 1965).

The arbitrator's decision is final and binding only if it is fair and impartial and complies with the requirements of due process. *Tombs v. Northwest Airlines, Inc.*, 83 Wash. 2d 157, 516 P.2d 1028, 1030-31 (1973).

27. 350 F.2d 258 (6th Cir. 1965). A judgment on the merits of the claim dispute rendered by the trial court following a *de novo* hearing was reversed. Because the arbitrators had not followed proper procedure, the court of appeals remanded the dispute to the arbitrators for proceedings in accordance with the terms of the contract. *Id.* at 260-61.

under state law. In *Reeves v. Tarvizian*,<sup>28</sup> the Court of Appeals for the First Circuit held that a plaintiff beneficiary, who had elected to proceed with arbitration procedures included in a pension trust agreement, was bound by the consequences of that arbitration. A federal district court determined in *Lieberman v. Cook*<sup>29</sup> that under Pennsylvania law submission of an issue to an arbitration panel precluded judicial review of that issue, inasmuch as a beneficiary who invoked arbitration under the terms of a profit sharing plan had "taken his one bite at the apple and [was] not entitled to another one."<sup>30</sup>

Thus, federal or state courts should dismiss suits brought under section 301 for breach of the collective bargaining agreement if the aggrieved employee has not exhausted his contractual remedies or if a final and binding arbitration award has been rendered. Because the contract is the basis of the right claimed in such cases, it is proper to require compliance with the predetermined grievance provisions for settlement of disputes arising under the contract and to hold the complaining party bound by the remedy that was negotiated under the contract.<sup>31</sup>

A benefit plan that is covered by both a collective bargaining agreement and ERISA provides a participant or beneficiary with a statutory right to recover benefits under the plan as well as with a right based upon the collectively bargained contract.<sup>32</sup> Similarly, in many Title VII<sup>33</sup> employment discrimination cases the right to nondiscriminatory employment practices derives both from the statute and from a negotiated provision of the collective bargaining agreement. In such Title VII cases, prior exhaustion of contractual remedies is not required,<sup>34</sup> and the

---

28. 351 F.2d 889 (1st Cir. 1965) (applying Massachusetts law).

29. 343 F. Supp. 558 (W.D. Pa. 1972).

30. *Id.* at 562.

31. In *Vaca v. Sipes* the Court stated:

Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.

386 U.S. 171, 184 (1967).

32. Section 502(a)(1)(B) of ERISA grants the participant or beneficiary the right to recover benefits. 29 U.S.C.A. § 1132(a)(1)(B) (1975).

33. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), as amended, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972).

34. See *King v. Georgia Power Co.*, 295 F. Supp. 943, 949 (N.D. Ga. 1968) (when asserting statutory rights only the statutory procedures for relief must be followed); *Reese v. Atlantic Steel Co.*, 282 F. Supp. 905, 906 (N.D. Ga. 1967) (exhaustion of ad-

aggrieved employee may have a trial de novo of the discrimination issue after a final arbitrator's decision has been rendered.<sup>35</sup> Conceivably, the same rules could be applied to benefit claim suits under ERISA when the claim is based upon both the contract and the statute. Such claims should not be litigated in the same manner as Title VII claims, however; special policies and goals of Title VII, which are not applicable to other statutes, such as ERISA, dictate that unique procedures be adopted to aid in the enforcement of rights protected by Title VII.<sup>36</sup>

*Alexander v. Gardner-Denver Co. and Satterwhite v. United Parcel Service, Inc.: Implications for ERISA Benefit Claims*

In *Alexander v. Gardner-Denver Co.*,<sup>37</sup> a decision that demarcated the relationship between federal courts and grievance arbitration procedures in Title VII cases, the Supreme Court held that prior submission of a discrimination claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement did not preclude the employee's statutory right under Title VII to trial de novo in a federal district court.<sup>38</sup> The Court based its decision upon a finding that Title

---

ministrative remedies not required); cf. Baird, *Racial Discrimination in Employment: Rights and Remedies*, 6 GA. L. REV. 469, 482 (1972).

35. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

36. See notes 47-50 *infra* & accompanying text.

37. 415 U.S. 36 (1974). *Alexander v. Gardner-Denver Co.* resolved a conflict in authority relating to the relationship between collective bargaining and Title VII suits. Prior to *Alexander* the federal courts had developed three different approaches to this question. The first was that prior resort to arbitration would bar a subsequent suit under Title VII on the theory that the aggrieved employee had made a binding election of remedies. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided court*, 402 U.S. 689 (1971). *Hutchings v. United States Indus., Inc.*, 428 F.2d 303 (5th Cir. 1970), represented the second approach, that the statutory right of the employee to have his Title VII discrimination claim adjudicated in federal court could not be barred by prior arbitration. In reaching its decision the court relied heavily upon congressional intent that the federal courts be the final arbiter of a Title VII discrimination claim. *Id.* at 313-14. The accommodation approach was devised in *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). Under this approach the federal courts could defer to a prior arbitration award after first determining that the arbitration procedure had been fair and had given adequate consideration to the Title VII claim.

See Isaacson & Zifchak, *Fair Employment Forums After Alexander v. Gardner-Denver Co.: Separate and Unequal*, 16 WM. & MARY L. REV. 439, 447-54 (1975); Comment, *Federal Courts—Labor Arbitration—Employment Discrimination—Federal Courts as Primary Protectors of Title VII Rights*, 28 RUTGERS L. REV. 162, 172-76 (1974).

38. 415 U.S. 36 (1974). In *Alexander* a black employee who had been discharged filed a grievance under the nondiscrimination clause of the collective bargaining agreement between his union and the company. After his claim had been submitted to final arbitra-

VII was designed to supplement the remedies under existing antidiscrimination laws and institutions.<sup>39</sup> Therefore, pursuit of redress in one antidiscrimination forum, such as the arbitration process, does not preclude pursuit of the supplemental judicial remedy under Title VII.<sup>40</sup> Furthermore, submission of a grievance to arbitration to vindicate a contractual right cannot be determinative of the aggrieved employee's independent statutory right since the court is the proper forum for the determination of statutory rights.<sup>41</sup>

Considering an overtime wage claim based upon a collective bargaining contract and the Fair Labor Standards Act of 1938,<sup>42</sup> the Court of Appeals for the Tenth Circuit, in *Satterwhite v. United Parcel Service, Inc.*,<sup>43</sup> held the right to sue for overtime compensation under the Act<sup>44</sup> to be precluded by prior submission of the claim to final arbitration under the collective bargaining agreement.<sup>45</sup> In so holding, the court rejected the employee's argument that *Alexander v. Gardner-Denver Co.* compels a court to permit judicial determination of a statutory right fol-

---

tion and the arbitrator had rendered a decision adverse to his claim, the employee brought suit in federal district court under Title VII. The district court held that the employee was bound by the arbitrator's decision and dismissed the case. *Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012 (D. Colo. 1971), *aff'd*, 466 F.2d 1209 (10th Cir. 1972), *rev'd*, 415 U.S. 36 (1974).

39. 415 U.S. at 46-49.

40. *Id.*

41. *Id.* at 49-50.

42. 29 U.S.C. §§ 201-19 (1970).

43. 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974). In *Satterwhite* an employee sought to recover overtime compensation for the extra one-half hour worked daily after the employer unilaterally eliminated coffee breaks. The collective bargaining agreement provided that all employees were to be paid time and a half for hours worked in excess of 40 hours per week or 8 hours per day. The claim was submitted to arbitration and the arbitrator determined that the employees were entitled to compensation for the extra hours worked but allowed only straight pay as compensation. The employee then filed suit in federal district court under the Fair Labor Standards Act, which provides that an employee is entitled to overtime compensation at the rate of one and one-half times the regular hourly wage. The district court dismissed the case, holding the arbitration award final. *See id.* at 449.

44. 29 U.S.C. § 207(a)(1) (1970) provides in pertinent part: "[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The Fair Labor Standards Act also provides that an employee may maintain an action against his employer in a state or federal court to recover unpaid overtime compensation. *Id.* § 216(b).

45. 496 F.2d at 452.

lowing contractually established arbitration of a claim.<sup>46</sup> The court attributed the holding in *Alexander* to the unique nature of Title VII rights, stating that the strong national antidiscrimination policy embodied in Title VII calls for a special rule in discrimination cases with respect to the relationship between federal courts and the process of grievance arbitration.<sup>47</sup>

The legislative history of Title VII demonstrates congressional intent that a national antidiscrimination policy have priority over a policy favoring arbitration of labor disputes.<sup>48</sup> Since Congress manifested no similar intent with regard to the policy of the Fair Labor Standards Act, *Satterwhite* granted priority to grievance arbitration.<sup>49</sup> Likewise, Congress manifested no intent to give priority to the private enforcement provisions of ERISA dealing with benefit claims; on the contrary, the conference report reflects an intent that the proarbitration policy be applied to ERISA benefit claims.<sup>50</sup>

In *Alexander* the Court also stressed the concern of Title VII with rights that attach to individuals. Unlike rights conferred on employees collectively, such rights cannot be enforced through the collective bargaining process.<sup>51</sup> The emphasis on private enforcement of Title VII rights is evidenced by inclusion in the statute of parallel and overlapping remedies, which the individual may pursue in an effort to enforce his rights under the Act.<sup>52</sup>

---

46. *Id.* at 450.

47. *Id.* at 450-51.

48. For expression of congressional intent that Title VII antidiscrimination policies are to have the highest priority, see S. REP. NO. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 1-2 (1963). See also *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

49. 496 F.2d at 451.

50. The conference committee suggested that ERISA benefit claims are to be litigated in the same manner as claims arising under section 301 of the LMRA. See H.R. REP. NO. 1280, 93d Cong., 2d Sess. 327 (1974).

51. 415 U.S. 36, 51 (1974). Rights related to collective activity "are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." *Id.* The right to strike is such a collective right. See *Mastro Plastics Co. v. NLRB*, 350 U.S. 270 (1956).

52. The Equal Employment Opportunity Commission (EEOC) is authorized to investigate charges of discrimination filed with it and to endeavor to eliminate the unlawful employment practice by informal means. 42 U.S.C. § 2000e-5(b) (Supp. II, 1972). If the EEOC is unable to secure an informal conciliation, the EEOC, the Attorney General, or the aggrieved party may seek an injunction or order of affirmative action in the federal courts. *Id.* § 2000e-5(f). If the alleged discrimination occurs in a

Distinguishing wage claims under the Fair Labor Standards Act from Title VII discrimination claims, the court in *Satterwhite* found that wages and hours claims involve collective rights, are traditional subjects of collective bargaining, and thus are well suited to determination by the process of arbitration.<sup>53</sup> Consequently, the national policy favoring arbitration should be adhered to in the resolution of Fair Labor Standards Act wage claims. A rule precluding judicial determination of a wage claim previously submitted to final arbitration is consistent with this national policy.<sup>54</sup>

Since pension and welfare plans are closely related to wages and are mandatory subjects of collective bargaining,<sup>55</sup> ERISA benefit claims, like wage claims under the Fair Labor Standards Act, derive from collective rights. In light of *Alexander* and *Satterwhite*, the procedure for grievance arbitration set forth in a collective bargaining agreement is the appropriate forum for resolution of disputes concerning such collective rights.<sup>56</sup> Therefore, to promote the arbitration process, the rule of *Satterwhite* precluding judicial determination of finally arbitrated claims should be applied to ERISA benefit claims.

### *Proposed Regulations Issued Under ERISA*

Under the authority of section 503 of ERISA, which requires every employee benefit plan to adopt a reasonable benefit claims procedure,<sup>57</sup> the Department of Labor has issued proposed regulations endorsing the use of the arbitration process to resolve ERISA benefit claims disputes.<sup>58</sup>

---

state that prohibits unlawful employment practices, relief may be sought initially through state proceedings. *Id.* § 2000e-5 (c).

53. 496 F.2d at 451.

54. *Id.* at 452.

55. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). See note 10 *supra*. See also Fanning, *Commentary: Private Pension and Welfare Plans—the Role of the NLRB*, 18 WAYNE L. REV. 1527, 1530-31 (1972).

56. 496 F.2d at 451.

57. 29 U.S.C.A. § 1133 (1975). This section provides:

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

58. Proposed Dept. of Labor Reg. § 2560.2, 39 Fed. Reg. 42242 (1974).

Proposed regulation 2560.2 provides that "[a] claims procedure which is established and maintained pursuant to a collective bargaining agreement and which includes provision for binding arbitration of an appeal of a claim denial will be deemed a reasonable claims procedure."<sup>59</sup> Inasmuch as the regulation permits the submission of claims to "binding arbitration," it may be inferred that courts should dismiss claims that have been submitted to prior arbitration. Such a procedure would preserve the finality of the arbitrator's decision.

### *Congressional Rejection of Choice of Remedies Under ERISA*

The Senate version of ERISA envisioned arbitration of benefit claim disputes, but this provision was omitted in the final bill.<sup>60</sup> The applicable provision would have required each benefit plan to provide an arbitration procedure for a dissatisfied plan participant or beneficiary, although the participant or beneficiary could choose to arbitrate or sue as he might deem appropriate.<sup>61</sup> The deletion of this unusual choice of remedies arrangement does not imply that Congress was rejecting the use of private arbitration as a sole and exclusive remedy; on the contrary, coupled with the reference to section 301 of the LMRA,<sup>62</sup> it supports the proposition that arbitration is intended to be an exclusive remedy.

*United States Bulk Carriers, Inc. v. Arguelles*<sup>63</sup> demonstrates that a choice of remedy provision would result in optional remedies, rather than exclusive remedies. In *Arguelles*, an aggrieved seaman had the right to bring an action to recover wages under either section 301 of the LMRA or the Seaman's Statute.<sup>64</sup> The Supreme Court held that because the seaman had a choice of remedies, a section 301 suit was merely an optional remedy; therefore, the action could be brought without prior exhaustion of contractual remedies.<sup>65</sup> To insure the finality and exclusiveness of an arbitrator's decision, Congress denied an aggrieved employee a choice of suing or submitting to arbitration under ERISA. Elimination of a dual remedy provision precluded the possibility that arbitration would be held to be merely an optional remedy.

---

59. *Id.*

60. H.R. REP. NO. 1280, 93d Cong., 2d Sess. 328 (1974).

61. S. REP. NO. 127, 93d Cong., 1st Sess. (1973), in 1974 U.S. CODE CONG. & AD. NEWS 4870.

62. H.R. REP. NO. 1280, 93d Cong., 2d Sess. 327 (1974).

63. 400 U.S. 351 (1971).

64. 46 U.S.C. § 596 (1970).

65. 400 U.S. at 357.

*Arbitration Provisions Included in the Benefit Plan*

Although the use of binding arbitration to avoid costly and lengthy litigation of benefit claim disputes is desirable, some benefit plans are not covered by a collective bargaining agreement containing provisions for arbitration.<sup>66</sup> In such cases provisions for arbitration can be included in the benefit plan document.<sup>67</sup> The plan document should provide for hearings before the trustees of the plan on questions of the participant's

---

66. Jointly administered multiemployer benefit plans are an example of the type of plan that would not be subject to a collective bargaining agreement.

67. The following language can be included in a benefit plan document to provide a suitable claims procedure and to require binding arbitration of disputes arising under the plan:

*Hearings Before Board of Trustees—Arbitration*

Any participant or beneficiary of a participant who applies for benefits under this Plan and is ruled ineligible by the Trustees (or by an administrator acting for the Trustees) or who believes he did not receive the full amount of benefits to which he is entitled, or who is otherwise adversely affected by any action of the Trustees, shall have the right to request the Board of Trustees to conduct a hearing in the matter, provided that he makes such a request, in writing, within 60 days after being apprised of, or learning of, the Board's action. The Board then shall conduct a hearing, at which the participant or beneficiary shall be entitled to present his position. Any beneficiary may be represented at any such hearing by an attorney or by any other representative of his choosing. Thereafter, the Trustees shall issue a written decision reaffirming, modifying, or settling their former action.

If the participant or beneficiary is dissatisfied with the written decision of the Trustees, he shall have the right to appeal the matter to arbitration in accordance with the labor arbitration rules of the American Arbitration Association, provided that he submit a request for arbitration to the Board of Trustees, in writing, within 60 days of receipt of the written decision. If an appeal to arbitration is requested the Trustees shall submit to the arbitrator a certified copy of the record upon which the Trustees' decision was made.

The question for the arbitrator shall be whether, in the particular instance, the Trustees (1) were in error upon an issue of law, (2) acted arbitrarily or capriciously in the exercise of their discretion, or (3) whether their findings of fact were supported by substantial evidence.

The administration fees of the American Arbitration Association shall be borne equally by the appealing party and by the Trust Fund, and the arbitrator's fee and expenses also shall be borne equally, unless the arbitrator, in his award, should assess such expenses against either of the parties. The decision of the arbitrator shall be final and binding upon the Trustees and upon the appealing party.

The procedures specified in this section shall be the sole and exclusive procedures available to a participant or beneficiary of a participant who is dissatisfied with an eligibility determination, or benefit award, or who is otherwise adversely affected by any action of the Trustees.

right to benefits under the plan.<sup>68</sup> If the participant or beneficiary is dissatisfied with the decision of the trustees, he should be permitted to appeal the decision to arbitration. The document should further expressly provide that arbitration is to be the sole and exclusive remedy, so that the courts will afford exclusiveness and finality to the arbitration procedure.<sup>69</sup>

### FIDUCIARY RESPONSIBILITY CLAIMS

Although submission to the arbitration process avoids litigation of ERISA benefit claims, it does not bar litigation of fiduciary responsibility claims arising under the Act. ERISA provides that a plan participant or beneficiary, a fiduciary, or the Secretary of Labor can institute civil actions to redress breaches of fiduciary responsibility;<sup>70</sup> exclusive jurisdiction of such suits is vested in the United States district courts.<sup>71</sup> ERISA thus has departed significantly from existing enforcement procedures under the LMRA concerning actions for breach of fiduciary responsibilities.

#### *Fiduciary Responsibility Actions Under the LMRA*

Standards for permissible employee benefit trust funds were articulated in section 302(c)(5) of the LMRA,<sup>72</sup> and United States district

68. Such prearbitration hearings before the board of trustees must conform to "elemental requirements of fairness," which normally would include "notice, a hearing at which the applicant is confronted by the evidence against him, an opportunity to present evidence in his own behalf, articulated findings and conclusions having a substantial basis in the evidence taken as a whole, and a reviewable record." *Sturgill v. Lewis*, 372 F.2d 400, 401 (D.C. Cir. 1966).

69. See *Vaca v. Sipes*, 386 U.S. 171, 184 (1967).

70. ERISA § 502(a)(2), (3), (5), 29 U.S.C.A. §§ 1132(a)(2), (3), (5) (1975). The Secretary of Labor or the Secretary of the Treasury may intervene when a fiduciary responsibility suit is initiated by a participant, beneficiary, or fiduciary. *Id.* § 502(h), 29 U.S.C.A. § 1132(h).

Section 409 of ERISA, establishing liability for breach of fiduciary duty, provides in pertinent part:

Any person who is a fiduciary . . . who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C.A. § 1109(a) (1975).

71. ERISA § 502(e)(1), 29 U.S.C.A. § 1132(e)(1) (1975).

72. 29 U.S.C. § 186(c)(5) (1970), as amended, 29 U.S.C.A. § 186(c)(5) (Supp. 1975). Under the statute an employer may make payments to a trust fund provided that:

(A) such payments are held in trust for the purpose of paying, either from

courts were granted jurisdiction to restrain violations of that section.<sup>73</sup> Although the federal courts have jurisdiction of claims for structural violations of section 302 plans, a number of courts have held that there is no federal jurisdiction of claims for breach of fiduciary responsibility.<sup>74</sup>

Since section 302 of the LMRA provided no federal cause of action for breach of fiduciary duty, the aggrieved party was forced to seek his remedy for such breach in state courts.<sup>75</sup> Pension and welfare plans have become increasingly interstate in nature, however, making state courts a less desirable forum for the litigation of alleged breaches of fiduciary responsibility arising under the plan.<sup>76</sup> Recognizing the need for uniform national standards of responsibility for fiduciaries and appropriate remedies for breach of these standards,<sup>77</sup> Congress created a federal cause of action for breach of the fiduciary duties established in

---

principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance . . .

(B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund . . . and . . . contain provisions for an annual audit of the trust fund . . .

(C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust . . . .

*Id.*

73. 29 U.S.C. § 186(e) (1970).

74. *Haley v. Palatnik*, 509 F.2d 1038, 1040 (2d Cir. 1975); *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 424 (1st Cir. 1968); *Insley v. Joyce*, 330 F. Supp. 1228, 1231 (N.D. Ill. 1971); *Porter v. Teamsters Health, Welfare & Life Ins. Funds*, 321 F. Supp. 101, 103 (E.D. Pa. 1970); *Giordani v. Hoffmann*, 295 F. Supp. 463, 470 (E.D. Pa. 1969).

"Structural violations" relate to the conditions for establishment of a trust fund described in LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5) (1970), *as amended*, 29 U.S.C.A. § 186(c)(5) (Supp. 1975). See note 72 *supra*. A federal court, in addition, may determine "whether a trust fund has been established in accordance with the important prefatory condition in the statute that the fund must be ' . . . for the sole and exclusive benefit of the employees of such employer . . . .'" *Giordani v. Hoffmann*, 295 F. Supp. 463, 470 (E.D. Pa. 1969) (citation omitted).

75. See, e.g., *Insley v. Joyce*, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971).

76. The barrier that state procedural requirements can present to effective enforcement of fiduciary responsibilities under interstate pension plans was recognized by the Senate Labor and Public Welfare Committee when it stated, "The intent of the Committee is . . . to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law . . ." S. REP. NO. 127, 93d Cong., 1st Sess. (1973), in 1974 U.S. CODE CONG. & AD. NEWS 4871.

77. ERISA § 2(b), 29 U.S.C.A. § 1001(b) (1975). "It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct,

ERISA.<sup>78</sup> ERISA also was designed to remove jurisdictional and procedural obstacles that had hindered effective enforcement of fiduciary responsibilities under state law.<sup>79</sup>

Superseding state law, ERISA has imposed a significant change in the substantive law of fiduciary responsibilities, replacing varying state fiduciary responsibility rules with a uniform federal rule.<sup>80</sup> Federal preemption was provided to promote uniformity in the enforcement of the law in order to "help administrators, fiduciaries and participants . . . predict the legality of proposed actions without the necessity of reference to varying state laws."<sup>81</sup>

From the legislative history of ERISA it thus is apparent that Congress made procedural changes in the manner of enforcing fiduciary responsibility claims to facilitate access to the courts to redress such claims. A further purpose of the changes incorporated in ERISA was to promote uniformity in judicial enforcement of fiduciary responsibilities. There is no indication that Congress intended the arbitration procedure of the collective bargaining agreement to be a forum for redress of such breaches. On the contrary, since Congress expressly stated that benefit claims were to be resolved in a manner favoring arbitration, its failure to state a like intent for fiduciary responsibility claims reinforces the proposition that federal courts need not decline jurisdiction of fiduciary responsibility claims in favor of the arbitration process.<sup>82</sup>

### *Fiduciary Responsibility Claims As Individual Rights*

The proposition that fiduciary responsibility actions need not be submitted to prior binding arbitration is further supported by the distinction

---

responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." *Id.*

78. *Id.* § 409, 29 U.S.C.A. § 1109. See *Haley v. Palatnik*, 509 F.2d 1038, 1042 & n.5 (2d Cir. 1975).

79. See note 76 *supra*. For provisions designed to overcome procedural obstacles, see ERISA § 502(e)(2), 29 U.S.C.A. § 1132(e)(2) (1975). (nationwide service of process; venue in the district where the plan is administered, where the breach occurred, or where a defendant resides or can be found); *id.* § 502(f), 29 U.S.C.A. § 1132(f) (federal jurisdiction regardless of the amount in controversy or the citizenship of the parties).

80. ERISA § 514(a), 29 U.S.C.A. § 1144(a) (1975), provides in pertinent part: "[T]he provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ."

81. See S. REP. NO. 127, 93d Cong., 1st Sess. (1973), in 1974 U.S. CODE CONG. & AD. NEWS 4865.

82. "'The enumeration of particular things excludes the idea of something else not mentioned.' This is a primary rule of statutory construction." *Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387 (1939).

drawn in *Alexander v. Gardner-Denver Co.* between collective and individual rights.<sup>83</sup> Unlike pension and welfare benefit claims under ERISA, and wage claims under the Fair Labor Standards Act, fiduciary responsibility claims are not derived from traditional collective rights, which are well suited to resolution by the arbitration machinery of the collective bargaining agreement.<sup>84</sup> Rather, like Title VII rights, the right to bring an action for breach of fiduciary responsibility is an individual right that is properly vindicated in the courts by the aggrieved individual.<sup>85</sup> Because it is a right inhering in the individual rather than in the collective entity, the individual's right to bring an action for breach of fiduciary responsibilities cannot be waived by the collective entity in exchange for the economic benefits contained in the labor agreement.<sup>86</sup> The individual's right to bring suit is not governed by the labor contract, and therefore cannot be subordinated to a requirement to submit grievances to arbitration under the collective bargaining agreement.<sup>87</sup>

### SUMMARY

Arbitration can be used to avoid litigation of ERISA pension and welfare benefit claims if the negotiated plan or related collective bargaining agreement provides for arbitration of benefit disputes. This result is dictated by congressional intent to have ERISA benefit claim actions adjudicated in the same manner as suits arising under section 301 of the LMRA. In accordance with this intent, state or federal courts should dismiss an ERISA benefit claim action if contractual grievance procedures have not been exhausted or if a final arbitration award has been rendered.

---

Fiduciary responsibility questions that have caused a "deadlock" in the voting between employer and employee trustees on a jointly trustee fringe benefit fund must be excluded from the general rule that courts need not decline jurisdiction of fiduciary responsibility suits in favor of the arbitration process. Under section 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B) (1970), such a deadlock is to be determined by arbitration. ERISA did not repeal section 302. ERISA § 514(d), 29 U.S.C.A. § 1144(d) (1975). See *In re Trustees of Joint Welfare Fund, Operating Eng'rs., Local 14*, 88 L.R.R.M. 3262 (S.D.N.Y. 1975). It is likely, therefore, that a fiduciary responsibility suit, brought by one group of trustees against another in consequence of a deadlock, would be dismissed pending arbitration under LMRA § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B) (1970), as amended, 29 U.S.C.A. 186 (c)(5)(B) (Supp. 1975).

83. 415 U.S. 36, 51 (1974).

84. See notes 51-56 *supra* & accompanying text.

85. See *id.*

86. 415 U.S. at 51.

87. *Id.*

Prior arbitration, however, will not bar litigation of ERISA fiduciary responsibility claims even though the benefit plan is covered by a collective bargaining agreement that is broad enough to provide for arbitration of fiduciary responsibility claims. The courts have been the traditional forum for adjudication of such claims, and Congress, in enacting ERISA, manifested no intent that arbitration become the preferred forum. Therefore, a fiduciary responsibility action brought under ERISA in a federal court should not be dismissed in favor of the arbitration process.