Conclusion

Hopefully, this helps solve some of the issues regarding getting employees to act like owners. This will in turn help create and sustain an ownership culture in your organization. Let's go through the steps again.

- Share the financials and other data with them. The P&L, balance sheet, cash flow statement, etc.
- Teach them the business using financial literacy as the tool.
- Give them the authority to make decisions. Use the wrong decisions to teach. Trust me, they will want to learn.
- Set up an ESOP. This actually *makes* them owners. Even though you may have an ESOP, you can still incorporate bonuses, commissions, prizes, etc.

This approach will take time and effort to implement and sustain. You have to be intentional about it. All your leadership must buy into this first. There will be bad and good days. Hang on. This sounds exactly like what an owner goes through. Exactly!

I am 100 percent certain that if I talked to all the owners who have successfully created and sustained an ownership culture, they would say it was worth the effort. I'm also 100 percent certain the employees would say the same thing.

This article was reviewed and approved by the Chair of the Ownership Culture Committee, Jason Wellman, Senior Relationship Consultant, ESOP Partners.

Calendar of Deadlines and Important Dates

Oct. 1-31	Employee Ownership Month
Nov. 13-15	Employee Owned 2019, the Conference and Trade Show for ESOPs
Dec. 1-4	Leading in an Ownership Setting
Feb. 6-7	ESOP Professionals' Forum

To see the full list of .ESOP Association meetings, visit us online at: www.esopassociation.org.

Washington Report

The ESOP Association Joins an Industry Leading Coalition to Oppose a Potentially Emerging Tax Threat to ESOP Companies

By James Bonham, President and CEO, The ESOP Association

The proposals for the so-called Financial Transactions Tax, or FTT, may still be in their most nascent stage of the policy-making process, but The ESOP Association is already engaging with other entities to oppose this new potential threat to employee owners and ESOP companies. Action is called for now because some version of the FTT has been included in a number of different bills introduced recently in Congress—such as the Wall Street Tax Act (S. 647), and the Inclusive Property Act (H.R. 2923)—and are being promoted by some Presidential candidates.

This proposed tax provides the revenue to achieve unrelated policy goals, such as universal health care or free college tuition. None of these bills are positioned to become law in the current Congress. However, just the fact that the FTT is now appearing in several higher profile bills, and is being discussed on the campaign trail, is enough to cause The ESOP Association to engage on behalf of our membership.

What Is the FTT and Why Do We Care?

The FTT idea has been around capital markets for over 300 years, and has even been adopted in some countries. In its most simplified form, the FTT is the imposition of a tax upon the sale or transfer of a security (stock).

In some instances, the FTT would be applied to the seller, in others, to the buyer. Some proposals would apply the tax only to publicly traded securities or financial instruments, such as futures or derivatives.

Some analysts believe certain FTT proposals also could apply to the purchase or sale of privately held securities. This would potentially penetrate the sphere of securities owned by ESOPs or the shares of privately held corporations sold during the formation or expansion of an ESOP.

Employee owners should oppose the FTT in any of these instances, and this is why: Most directly, some analysis suggests that if the FTT were to be applied to private security transactions, it could impose a new cost for ESOPs or employees in a number of situations, including when:

- Shares are repurchased from retiring or departed employees.
- The ESOP's percentage of ownership in a company is increased.
- Shares are transferred into an ESOP trust.

The threat goes beyond these concerns, however. When applied to publicly traded securities, the FTT would impose significant new costs for the employees who hold 401(k)s or other retirement accounts. According to survey data, our members almost universally offer 401(k)s to employees as a critical part of retirement planning and to ensure a diversified approach to retirement investing. Typically, 401(k)s are invested in large funds that would be hit hard by transaction taxes as those funds buy, sell, and even rebalance according to their investment guidelines.

Those new expenses ultimately would be borne by the owners of the 401(k)—your employee owners.

TEA Invited to Join Leading Coalition

The ESOP Association has joined with other leading lobbying organizations to oppose the FTT.

As the voice representing employee owned businesses, TEA has become part of a coalition that includes representatives from multiple areas, such as: the Securities Industry and Financial Markets Association, the U.S. Chamber of Commerce, the American Benefits Council, the Insured Retirement Institute, the American Council of Life Insurers, and the National Association of State Retirement Administrators, among others. The coalition meets monthly to share information and collaborate on strategy.

Organized as a 501(c)6 organization, TEA enjoys the legal ability to spend its funds to actively lobby Congress and the Administration. The Association is a registered lobbying entity for employee owned companies, and has done so aggressively over its 43 years in existence.

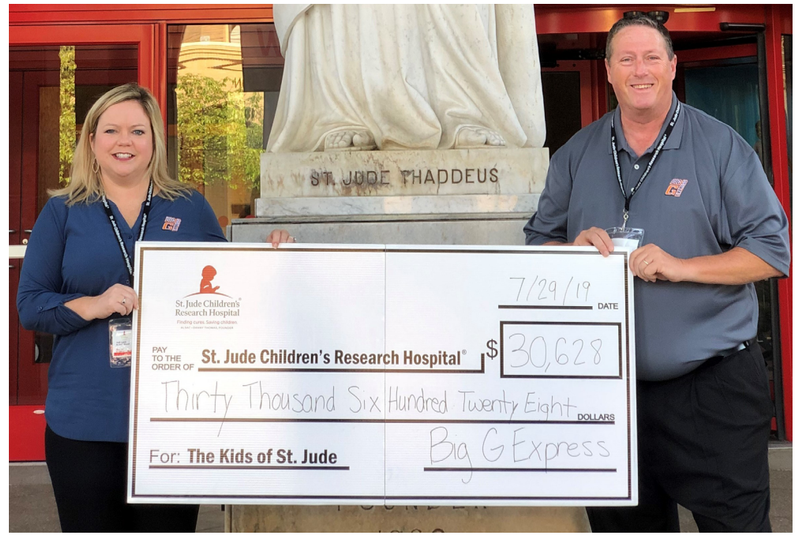
A Driving Force

Tim Chelette, right, a driver for the past 15 years with ESOP Association member Big G Express, is serious about giving to others and about being safe on the road.

For the past four years, Chelette has organized and run a motorcycle ride that has raised more than $30,000 for St. Jude's Children's Research Hospital. Pictured with Jodi Lamb, Big G's manager of marketing and communications, Tim holds a check showing the amount raised through his efforts.

Chelette also has driven more than 1.9 million accident-free miles delivering freight, and gives presentations on safety across the nation.

For his efforts, Chelette won top honors in the Pilot Flying J Road Warrior contest. First place winners are awarded a $10,000 prize.



Legal Update

Ninth Circuit Reverses Position on Arbitration of ERISA Claims

By: Jay Van Heyde, Shareholder, Dean Mead, Orlando, Florida
Edited by Julie Govreau, Senior Vice President and Chief Legal Counsel, Greatbanc Trust Company, Lisle, IL

On August 20th, the Ninth Circuit Court of Appeals issued both a published opinion (*Dorman v. The Charles Schwab Corporation*, 2019 WL 3926990 (9th Cir., August 20, 2019) and a companion, unpublished opinion (*Dorman v. The Charles Schwab Corporation*, 2019 WL 3936944 (9th Cir., August 20, 2019) in a non-ESOP, ERISA case involving a 401(k) plan. The case offers important legal guidance in the area of arbitration provisions in ERISA qualified plans—which includes ESOPs.

In the published opinion, the court held that their long-standing position on arbitration provisions in ERISA plans was no longer binding precedent in that circuit. Since 1984, *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) had stood for the proposition that ERISA claims could not

be determined by arbitral proceedings, and that arbitrators generally lacked the competence of courts to interpret and apply ERISA as Congress intended.

In the unpublished opinion, which is not regarded as legal precedence but nonetheless offers informative guidance, the Ninth Circuit addressed each of the positions taken by the District Court. The unpublished opinion also explains the Ninth Circuit's reasoning in denying the Schwab defendants motions and allowing the class action lawsuit to proceed.

The case has been reversed and remanded to the District Court, where arbitration of individual claims will occur, limited to seeking relief for the impaired value of Dorman's account resulting from the alleged fiduciary breaches. Dorman was not permitted to bring the action as a class action lawsuit.

In the published opinion, the court stated that subsequent to 1984, the Supreme Court had ruled that arbitrators are competent to interpret and apply federal statues, citing *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), and that federal statutory claims generally may be subjected to arbitration.

Background

Michael Dorman was employed by Schwab from early 2009 until October 8, 2015. He was an active participant, making salary deferrals in the 401(k) plan. He withdrew his entire account balance in December 2015.

Notwithstanding an arbitration provision and class action waiver in the plan document, in June 2017, Dorman filed a class action complaint asserting claims for all class members under ERISA Sections 502(a)(2) and (3). Section 502(a)(2) permits a participant to seek relief under ERISA Section 409 for a breach of fiduciary liability.

The complaint alleged that the Schwab defendants had

> ***Here, the participants waived their right to be part of a class action by virtue of continued participation in the amended plan.***

breached their fiduciary duties under ERISA Section 409. According to the complaint, Schwab engaged in prohibited transactions by including in the plan's investment options Schwab-affiliated investment funds that were alleged to be poor performers and were included and maintained in the plan to generate fees for Schwab entities.

The Schwab 401(k) plan was amended in December 2014 to add an arbitration provision that became effective January 1, 2015. The court noted that Dorman was an active participant in the plan at the time of the amendment. The amendment language was broad in scope, stating that "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration..."

This new language also included a waiver of class or collective actions that required individual arbitration. The amendment further stated that any arbitration would be conducted "on an individual basis only, and not on a class, collective, or representative basis," and that participants waived their right to be part of a class action.

The Schwab defendants moved the District Court to compel individual arbitration, but the motion was denied.

The Decision

In the unpublished opinion, the Ninth Circuit addressed item by item the rationale of the District Court's decision.

First, the District Court ruled that Dorman was not bound by the arbitration provision. But the Ninth Circuit stated that Dorman was a participant for nearly a year while the provision was in effect, so he had in fact agreed to be bound by it.

The Ninth Circuit judges also stated that ERISA Section 502(a)(2) claims belong to the plan, and they found that the plan had in fact agreed to be subject to arbitration. After all, the company and the fiduciaries had amended the plan.

And finally, it was noted that the claims made by Dorman did "arise out of" and "relate to" the plan, and thus they squarely fell within the language of the arbitration provision.

The District Court also had held the arbitration provision invalid, stating that the plan fiduciaries added the arbitration provision after they were sued and that under the rationale of *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009), the plan fiduciaries could not insulate themselves from fiduciary responsibility by amending a plan document.

The Ninth Circuit found that position was factually incorrect (the plan was amended years before the complaint was filed and more than 10 months before Dorman had even terminated employment.) More importantly, the court stated in the unpublished opinion that such reliance on *Johnson v. Couturier* was misplaced because the amendment was not an effort to insulate fiduciaries from liability.

An agreement to conduct arbitration does not relieve a fiduciary from responsibility or liability. Instead, arbitration was stated to be a forum that could offer a quicker, more informal and less expensive way to resolve an issue.

Once it was established that the dispute fell within the arbitration provision, the Ninth Circuit ruled in the unpublished opinion that the District Court must order arbitration unless the provision is found to be unenforceable under generally applicable contract defenses, such as fraud, duress, or unconscionability. Dorman had not alleged such defenses, so individual arbitration was ordered.

The court emphasized that the arbitration was to be on an individual basis. One cannot be ordered into class-wide or collective arbitration unless agreed to. Here, the participants waived their right to be part of a class action by virtue of continued participation in the amended plan.

In conclusion, the *Dorman* published opinion and unpublished opinion collectively represent a continuation of the evolution of the law relating to arbitration provisions and class action waivers. The trend clearly favors the enforceability of arbitration clauses in ERISA matters, but ESOP sponsors would be well advised to carefully consider with their ERISA/ESOP counsel whether to adopt an arbitration provision.

The presence of an arbitration clause is not a panacea for all litigation fears or concerns, and certainly does not guarantee a favorable result for ESOP sponsors and fiduciaries. Plan sponsors must consider a wide range of factors. The arbitrator may not have the expertise to understand ESOPs and ERISA, leading to an unfair and/or unjust result. And arbitration awards generally are binding and not appealable. Thus, it is possible to end up with a bad result and no place to turn.

On top of that, most ESOP sponsors have indemnification provisions and fiduciary liability insurance in place. All these things (including the specific language of the documents) must be reviewed and coordinated so that nothing falls between the cracks in the event the ESOP is amended to provide for arbitration.

Jeff Mounts, Winner of the 2019 Employee Owner of the Year Award

Winner Shows Creativity and a Passion for Telling the ESOP Story

Jeff Mounts, Marketing Manager at ESP International, absolutely loves a certain quote. When you hear it, you understand a lot about Jeff, why he has become an invaluable member of the Communications Committee at ESP International, and why he earned The ESOP Association award for 2019 Employee Owner of the Year.

That quote? It's from Albert Einstein, who said: "Creativity is intelligence having fun."

Take a look at what Jeff has helped ESP accomplish in a short time, and you see a living representation of that blend of intelligence and fun Einstein so eloquently described.

In the Beginning

When Jeff joined ESP five years ago, he did so based on the recommendation of his college roommate and with the goal of shortening his commute. The ESOP? He had no idea what that was. But he learned quickly. And as a member of the Marketing Department, he soon joined the Communications Committee and became involved in marketing ESP's ESOP.

Initially, Jeff wanted simply to educate himself, but the committee soon found he was a natural at educating others too. Leveraging his graphics and video skills, Jeff personally produced a series of short videos that are now some of the company's best ESOP education content.

Later, as co-chair, he led the creation of the committee's strategic plan and challenged the team to create innovative ideas to educate and engage employee-owners.

Communicating Internally and Externally

ESP's Communications Committee exists primarily to educate ESP employees about their ESOP and to increase

Jeff Mounts holds his award for the Employee Owner of the Year. Mounts was honored during The ESOP Association's Awards Ceremony in Washington DC in May, which kicks of the National Conference.

Pictured, from left to right, are: ESOP Association board members Derrick Vick and Missy Pieske; Board Chair Gary Shorman; Mounts; and ESOP Association Chapter Development Officer Dan Marcue.