Employee Relations
LAW JOURNAL

ERISA Dispute Resolution

Arbitration of ERISA Claims Part III: Courts Continue to Grapple with Competing Considerations

By Joseph J. Torres and Emma J. O'Connor

This column previously considered the issue of whether the Employee Retirement Income Security Act (ERISA) allows plans to require arbitration of ERISA claims[1] and the continued uncertainty that plan sponsors have had to navigate to the extent they wish to arbitrate ERISA claims.[2]

Our first column (Part I) discussed the competing views of the U.S. Court of Appeals for the Ninth Circuit in *Dorman v. Charles Schwab Corp.*,[3] which endorsed a broad right of plan sponsors to require arbitration, and of the U.S. District Court for the Northern District of Illinois in *Smith v. Greatbanc Tr. Co.*, which found that the plaintiff's claims were not subject to arbitration where the plaintiff participated in an employee stock ownership plan (ESOP) which had a broad arbitration clause.[4] As Part I noted at the time, *Smith* was pending before the U.S. Court of Appeals for the Seventh Circuit.

Our next column (Part II) addressed the decision by the U.S. Court of Appeals for the Seventh Circuit in *Smith*.[5] There, the Seventh Circuit affirmed the lower court's decision, but acknowledged that nothing in ERISA precludes arbitration agreements as a general proposition.[6] The *Smith* court's holding rested on the "effective vindication" exception.[7] When applicable, this exception, as a matter of public policy, invalidates arbitration agreements that, inter alia, prevent a party from asserting their statutory rights.[8]

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Since then, two courts this year have followed the Seventh Circuit's lead in holding that the arbitration clauses in those cases were invalid per the "effective vindication" exception because they prevented participants from pursuing their right to pursue plan-wide remedies under ERISA.

In one case, *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*,[9] the U.S. Court of Appeals for the Tenth Circuit held that an ESOP's arbitration provision, which contained some of the same language as the provision in *Smith*, was invalid under the "effective vindication" exception because it impermissibly restricted the plaintiff's pursuit of class-wide remedies.[10] The Tenth Circuit also held in *Harrison* that because the remedies limitation could not be severed from the arbitration provision, the entire arbitration provision was null and void.[11]

In the other case, *Burnett v. Prudent Fiduciary Servs. LLC*, the district court judge adopted in full the report and recommendation by the magistrate judge, who cited the lower court decision in *Harrison* to conclude that a "nearly identical" arbitration provision in an ESOP document was unenforceable because it too directly conflicted with the beneficiaries' right to seek the statutory remedy of plan-wide relief.[12]

BACKGROUND ON ARBITRATION GENERALLY AND THE EFFECTIVE VINDICATION EXCEPTION

By way of reminder, whether arbitration can, as a general matter, be required is fully endorsed by the Federal Arbitration Act's[13] (FAA) "liberal federal policy favoring arbitration agreements" because it can provide employees and employers "quicker, more informal, and often cheaper resolutions" of workplace-place related disputes.[14] However, two hurdles must be cleared in order to arbitrate statutory claims.

First, the FAA's general endorsement of arbitration can be "overridden by a contrary congressional command."[15] In other words, if Congress intended to preclude parties from arbitrating a statutory claim, then that determination will trump the FAA's mandate.

Second, the parties cannot agree to arbitrate a claim if the claimant is unable to effectively vindicate his or her statutory rights in an arbitral forum. As noted above, this is known as the "effective vindication" exception, and it permits a court "to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedy.'"[16]

BACKGROUND ON DORMAN AND SMITH

Dorman *Holds ERISA Claims May Broadly Be Arbitrated*

As discussed in Part I, the Ninth Circuit in *Dorman* endorsed a broad right of plan sponsors to require arbitration, both in terms of the breadth

of that requirement and the ease by which participants can be deemed to have consented to arbitration.

The *Dorman* plaintiff participated in a company's 401(k) plan which, after he left that company's employment, was amended to include an arbitration provision.[17] The provision required binding arbitration of any claim related to the plan, and barred class or multi-participant claims.[18]

After leaving the company, the plaintiff filed a class action alleging various claims pursuant to ERISA Sections 502(a)(2) and 502(a)(3) for breach of fiduciary duty and violations of ERISA's prohibited transactions rules.[19] In response, the defendants moved to compel arbitration, which the lower court denied.[20] It reasoned, inter alia, that Ninth Circuit precedent precluded arbitration because class action waivers were deemed unenforceable.[21]

On appeal, the Ninth Circuit addressed the threshold question of whether ERISA claims could be subject to mandatory arbitration.[22] The court acknowledged that it had previously held in *Amaro v. Continental Can Co.*[23] that "ERISA mandated 'minimum standards [for] assuring the equitable character of [ERISA] plans' that could not be satisfied by arbitral proceedings."[24] However, subsequent Supreme Court decisions held "arbitrators are competent to interpret and apply federal statutes."[25] Accordingly, the Ninth Circuit held *Amaro* was no longer binding precedent.[26]

The Ninth Circuit then addressed whether arbitration should be compelled, and held that the district court erred in several respects. As an initial matter, the Ninth Circuit held that the district court incorrectly concluded that the plaintiff was not bound by the plan's arbitration provision, because the plaintiff participated in the plan for almost a year after the arbitration provision was enacted.[27]

Most relevant to the below discussion of *Harrison* and *Burnett*, the Ninth Circuit held that although ERISA Section 502(a)(2) claims seek relief on behalf of the plan, "such claims are inherently individualized when brought in the context of a defined contribution plan like that at issue."[28] And since the plaintiff and the plan agreed to arbitration on an individualized basis, the plan's "waiver of class-wide and collective arbitration must be enforced according to its terms."[29] In the end, the Ninth Circuit reversed the lower court and remanded the case with instructions for the district court to order arbitration of the individual claims.[30]

Smith *Holds Some ERISA Claims May Be Arbitrated and Considers the "Effective Vindication" Exception*

As also discussed in Part I, the lower court in *Smith v. Greatbanc Tr. Co.* found that the plaintiff's claims were not subject to arbitration.[31] In *Smith*, the plaintiff participated in an ESOP which, while the plaintiff was employed, had a broad arbitration clause.[32] And, like the one in *Dorman*,

it prohibited any group, class or collective arbitrations.[33] Specifically, the arbitration provision set forth the following, in pertinent part:

> All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to one Claimant's Covered Claims, and that Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant or Beneficiary other than the Claimant.[34]

After the plaintiff filed a suit alleging various breaches of fiduciary duty, the defendants moved to compel arbitration. The plaintiff argued, among other things, that the arbitration provision was invalid because he did not consent to its inclusion, and because it prevented him from pursuing plan-wide remedies under ERISA Section 502(a)(2).[35]

On the scope of remedies argument, the district court found that the arbitration provision impermissibly restricted the plaintiff to pursuing only individualized relief, notwithstanding the fact that ERISA Section 502(a)(2) allows individuals to sue for plan-wide relief.[36] In so holding, the court disagreed with the Ninth Circuit's conclusion in *Dorman* that such an outcome was aligned with the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates*, where the Court held that Section 502(a)(2) claims can be pursued for individual relief, at least where the claims relate to defined contribution plans.[37] According to the *Smith* court, *LaRue* did not "suggest that an individual plan participant's claim can somehow be split from a claim seeking plan-wide relief."[38] The *Smith* court, therefore, did "not see how plan-wide relief could be achieved in individual arbitration . . . which . . . limits claimants to 'individual relief.'"[39]

On its review, the Seventh Circuit affirmed the district court's holding.[40] The Seventh Circuit noted the case presented "complicated" facts[41] but found the "correct resolution" of the case to be "straightforward."[42] In short, the court concluded that the defendant's arbitration requirement failed because it precluded relief that would benefit any employee, participant or beneficiary other than the plaintiff.[43] The Seventh Circuit explained that its holding emanated from the "effective vindication" exception the Supreme Court explored in *American Express Co. v. Italian Colors Restaurant*.[44]

As the Seventh Circuit explained, prior Supreme Court precedent "asserted the existence of an 'effective vindication' exception," that as a matter of public policy, would invalidate an arbitration agreement that prevented a party from asserting their statutory rights.[45] While describing the exception as "rare," the Seventh Circuit found it applied to the defendant's arbitration agreement.[46] Notably, however, Seventh Circuit did acknowledge that nothing in ERISA precluded arbitration agreements as a general proposition.[47] The Seventh Circuit succinctly explained its

view: "the problem with the plan's arbitration provision is its prohibition on certain plan-wide remedies, not plan-wide representation."[48]

In reaching this holding, the Seventh Circuit addressed the defendants' reliance on *Dorman*.[49] Notably, the Seventh Circuit saw no conflict with its ruling and *Dorman* because the *Dorman* arbitration provision "lacked the problematic language present here."[50] In particular, the Seventh Circuit noted the conflict between the language barring claims that seek a remedy which has "the purpose or effect of providing additional benefits or monetary or other relief" and the relief the *Smith* plaintiff sought because, for example, his request to remove the plan trustee and appoint a new one "cannot have anything *but* a plan-wide effect."[51]

HARRISON *APPLIES THE "EFFECTIVE VINDICATION" EXCEPTION*

The Lower Court in Harrison *Finds the Arbitration Provision Invalid Under the "Effective Vindication" Exception*

In *Harrison*, a participant in a corporation's ESOP filed a class action against the corporation and its officers, alleging financial misconduct in violation of ERISA.[52] The participant's complaint sought various forms of relief, including a declaration that the defendants breached their fiduciary duties, the removal of the current plan trustee, the appointment of a new fiduciary, an order directing the current trustee to restore all losses to the plan that resulted from the fiduciary breaches, and an order directing the defendants to disgorge the profits they obtained from their fiduciary breaches.[53] In response, the defendants moved to compel arbitration, citing the arbitration provision of the plan document.[54]

The ESOP's "ERISA Arbitration and Class Action Waiver" provision provided, in relevant part, as follows:

> All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to only Claimant's Covered Claims, and that Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant, or Beneficiary other than the Claimant . . . The arbitrator(s) shall consequently have no jurisdiction or authority to compel or permit a class, collective, or representative action in arbitration, to consolidate different arbitration proceedings, or to join any other party to any arbitration.[55]

The plaintiff argued that the defendants' motion to compel should be denied because the ESOP's arbitration provision prospectively eliminates

his statutory remedies under ERISA.[56] Specifically, the plaintiff argued that Section 502(a)(2) "is a unique provision of ERISA that allows plan participants to sue plan fiduciaries and recover *all* losses suffered by *all* plan participants, not only individual losses," and the arbitration provision prohibited him from proceeding under that section and seeking relief on behalf of the plan.[57]

The defendants argued that while arbitration provisions are invalid as prospective waivers of statutory rights where "they prohibit *any federal claim whatsoever*," they are not void where, as here, they "merely *curtail*[] certain claims."[58]

The U.S. District Court for the District of Colorado noted that the Supreme Court has instructed that an arbitration provision will be deemed invalid if it acts as a "prospective waiver of a party's *right to pursue* statutory remedies."[59] The district court explained that an arbitral forum is adequate (and an agreement to arbitrate should be upheld) so long as the plaintiff can effectively vindicate his statutory cause of action in the arbitral forum.[60] The court found the *Harrison* plaintiff could not do so.[61] The court explained that the ESOP's arbitration provision was invalid because it acted as a prospective waiver because it disallows plan-wide relief, which is expressly contemplated by ERISA.[62]

The court described as "instructive" the defendants' citation *Epic Sys. Corp. v. Lewis*,[63] where the Supreme Court found that a provision in an employment contract did not violate the National Labor Relations Act (NLRA) because it focused on the right to organize and bargain collectively and did not mention class or collective action procedures, and therefore did not necessarily preclude "individual attempts at conciliation"[64] through arbitration.[65] However, the *Harrison* court said *Epic Systems* did not answer the question of whether the arbitration provision at bar violates ERISA, but noted that *Smith*, discussed above in this column, "considered this exact question."[66] The court agreed with *Smith*'s acknowledgement that while the applicability of the "effective vindication" exception is rare – and was not applied, for example, in *Epic Systems* – it "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights."[67]

The defendants argued that *Smith* fails to address *Epic Systems* and contradicts the Supreme Court's instruction that courts must make every effort to harmonize federal statutes and read them together.[68] However, the *Harrison* court drew a distinction between the NLRA and ERISA, noting that, unlike the NLRA, "there is in fact a clear statutory right for a participant to seek Plan-wide relief" under ERISA.[69] As in *Smith*, the arbitration provision at issue in *Harrison*, according to the court, prohibits remedies that are explicitly provided for by ERISA.[70] The arbitration provision disallows a litigant from seeking plan-wide remedies, and the plaintiff therefore is unable to effectively vindicate his statutory cause of action in the arbitral forum.[71] Accordingly, the district court concluded that the arbitration provision was invalid and denied the defendants' motion to compel arbitration.[72]

The Tenth Circuit Affirms the Lower Court's Decision in Harrison

After the District of Colorado denied the defendants' motion based on "effective vindication" reasoning, the *Harrison* defendants appealed to the Tenth Circuit. On appeal, the defendants argued that the "effective vindication" exception did not apply because the ESOP's arbitration clause did not foreclose all claims under ERISA; it enforced only individual arbitration, and did not foreclose plan-wide relief.[73] The plaintiff again argued that the exception applied because the arbitration provision impermissibly restricted remedies and abridged his substantive rights.[74] Ultimately, the Tenth Circuit, which reviewed the case *de novo*,[75] affirmed the lower court, finding that the arbitration provision's prohibition on any form of relief that would benefit anyone other than the plaintiff conflicted with the statutory remedies available under ERISA Sections 409, 502(a)(2) and (a)(3).[76]

The Tenth Circuit discussed the specific language of the arbitration provision. The court explained that the prohibition on class or collective actions "is not cause for invoking the effective vindication exception,"[77] noting that the Supreme Court "has blessed that arbitration maneuver many times," including under the NLRA.[78] In the Tenth Circuit's view, the prohibition on a claimant proceeding in a representative capacity is "potentially more problematic," at least where the claimant asserts plan-wide harm and seeks relief under Section 502(a)(2).[79] Still, the court concluded that the language that "would clearly prevent" the plaintiff from effectively vindicating his statutory rights was the sentence that stated that the claimant "may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief" to any other employee, participant, or beneficiary other than the claimant himself.[80]

The Tenth Circuit explained that the arbitration provision "clearly encompasses" the *Harrison* plaintiff's complaint,[81] as his claims satisfied the plan document's definition of "Covered Claim," and said "it is not clear what remedies [the plaintiff] would be left with if [the arbitration provision] is enforced as written."[82] The provision "effectively prevents any claimant from pursuing the types of claims that [the plaintiff] asserts in his complaint."[83]

In addition to their argument that the effective vindication exception did not apply because the arbitration provision did not preclude all claims, the *Harrison* defendants presented several other arguments on appeal that the Tenth Circuit rejected. The defendants argued that finding that the arbitration provision violates the "effective vindication" exception "essentially concluded that an ERISA plan participant can never arbitrate an individual claim, because he can never waive the ERISA provision allowing for plan-wide remedies."[84] The Tenth Circuit explained this argument is incorrect for two reasons. First, the

plaintiff's complaint established that most of his claims are not unique to himself, but instead concern the defendants' actions with respect to the ESOP as a whole.[85] Second, the complaint not only cited to ERISA provisions that allow for plan-wide remedies, but also specifically requested such remedies.[86] Thus, unlike the *Harrison* plaintiff, an ERISA complainant who asserts a claim unique to himself could not, simply by citing to the same ERISA provisions cited by the *Harrison* plaintiff, avoid arbitration in reliance on the effective vindication exception.[87]

Like the lower court, the Tenth Circuit rejected the defendants' reliance on *Epic Systems*, describing the case as "inapposite" because, while it involved some relevant language, it did not implicate the "effective vindication" exception and it concerned a different federal statute (the NLRA).[88]

Additionally, the defendants argued that ERISA does not contain a "clearly expressed congressional intent to prohibit individual arbitrations."[89] Although the Tenth Circuit acknowledged the veracity of this point, it said the defendants' argument missed the key point that it is not the ESOP's requirement that a claimant engage in the procedural mechanism of individual arbitration that is the problem. Rather, the problem is the ESOP's prohibition on an individual claimant seeking any form of relief that would benefit anyone other than the claimant.[90]

The defendants also suggested that even if ERISA Sections 409 and 502(a)(2) allow participants to obtain class-wide relief, this does not mean that plan-wide remedies cannot be waived.[91] The Tenth Circuit disagreed, explaining that Sections 409 and 502(a)(2) allow claimants to obtain certain forms of plan-wide relief, and an arbitration provision cannot eliminate that form of relief.[92]

Lastly, the defendants asserted for the first time on appeal that, notwithstanding any arbitration provisions, ERISA specifically authorizes the Secretary of the Department of Labor (DOL) to bring actions on behalf of a plan to recover plan-wide relief.[93] The Tenth Circuit, however, explained that regardless of who brings suit, the fact remains that the suit is on behalf of the plan itself and therefore the same statutory remedies are available regardless of the named plaintiff.[94] Moreover, nothing in the statute requires the DOL to file any such suit, and it is unreasonable to assume that the DOL is capable of policing every employer-sponsored benefit plan in the country.[95] In other words, if the arbitration provision in *Harrison* were enforced, participant-claimants would be left without any guarantee that a suit seeking the statutory remedies set forth in Section 502(a)(2) would ever be filed by the DOL (and, in turn, that those statutory remedies would ever be available).[96] Notably, the DOL filed an amicus brief in support of the plaintiff, agreeing that it cannot monitor every plan and that the provision at issue impermissibly abridged the plaintiff's rights under ERISA.[97]

In addition to addressing the above, the Tenth Circuit also considered the ESOP's non-severability clause, which reads as follows: "In the event a court of competent jurisdiction were to find these requirements to be unenforceable or invalid, then the entire Arbitration Procedure . . . shall be rendered null and void in all respects."[98] The Tenth Circuit explained that because it agreed with the district court that the remedies limitation contained in the ESOP's arbitration provision prevented the plaintiff from effectively vindicating his statutory remedies, that means that the entire arbitration provision was rendered null and void. [99] Thus, the defendants were precluded from arguing that the plaintiff is required to submit his claims to arbitration without the remedy limitations outlined in the arbitration provision.[100]

BURNETT *APPLIES THE "EFFECTIVE VINDICATION" EXCEPTION*

Like *Smith* and *Harrison*, *Burnett* involved an arbitration provision in an ESOP. The *Burnett* plaintiffs were all employee-participants in the defendant company's ESOP, and they filed a lawsuit claiming that the defendants breached their fiduciary duties to the ESOP by causing it to pay inflated prices for certain shares.[101] The complaint sought, among other things, an order directing the defendants to make good to the ESOP the losses resulting from the breaches of fiduciary duties under ERISA and to disgorge any profits they made through the use of plan assets.[102] The defendants filed a motion seeking to compel arbitration of the plaintiffs' claims in accordance with the arbitration provision in the ESOP's governing documents.

The lengthy arbitration provision provided, in pertinent part, as follows:

> All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to one Claimant's Covered Claims and that Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Employee, Participant or Beneficiary other than the Claimant. . . . In the event that the requirements of this subsection (the "Class Action Waiver") were to be found unenforceable or invalid by the court . . . then the entire Arbitration Procedure . . . . shall be rendered null and void in all respects.[103]

In response to the defendants' motion, the plaintiffs made a few arguments as to why they should not be compelled to arbitrate, but the magistrate judge considered only their argument that the arbitration provision is invalid because it precludes ESOP participants from seeking substantive statutory remedies provided by ERISA.[104]

The magistrate explained that while the FAA mandates that courts enforce arbitration agreements according to their terms, the law does not require that every provision must be enforced just because it is titled "arbitration agreement."[105] The magistrate judge found that the provision at issue directly conflicted with beneficiaries' ERISA rights, because it "does not merely purport to change the manner in which plaintiffs' individual claims are decided; rather, it purports to change the nature of the substantive remedy provided by the statute" and, therefore, it "deprives plaintiffs of the right to seek the statutory remedy of plan-wide monetary relief."[106] Therefore, the provision is unenforceable.

The magistrate judge described the conclusion as "consistent with other courts that have recently considered similar provisions."[107] Specifically, the judge cited the District of Colorado's decision in *Harrison*, where the court held that a "nearly identical" arbitration procedure in an ESOP plan document was unenforceable because it disallowed plan-wide relief under Sections 409(a) and 502(a)(2).[108] Further, the magistrate judge cited to *Cedeno v. Argent Trust Co.*, an appeal from which is currently pending in the Second Circuit.[109] *Cedeno* considered another "nearly identical" arbitration provision and came to the same conclusion, holding that the arbitration provision was limiting a prospective plaintiff's relief to losses to his own individual account and therefore was "invalid and unenforceable" because it restricted the available remedies for which ERISA explicitly provides.[110] The magistrate judge's report and recommendation was adopted in full by the district judge in *Burnett*.[111] An appeal was filed on April 3, 2023, and it is currently pending in front of the Third Circuit.

WHERE DOES THIS ALL LEAVE ARBITRATION OF ERISA CLAIMS?

Fortunately for plan sponsors who wish to arbitrate ERISA claims, the Tenth Circuit, like the Seventh and Ninth, has declined to take the position that ERISA claims can never be arbitrated. Rather, as the *Harrison* court explained, "both the nature of the claims and the specific relief sought by the complainant matter."[112]

Still, while courts generally agree that arbitration clauses are, in theory, enforceable in the ERISA context, the extent to which courts will enforce a particular clause remains uncertain. Indeed, although courts at all levels have viewed the FAA as strongly favoring the enforcement of arbitration provisions, it is clear from the cases discussed in this column that provisions that are read to expressly prohibit plan-wide relief are not likely to be enforced in ERISA actions seeking such remedies.

The most interesting takeaway from the cases discussed above is perhaps that particular plan language can be the determining factor in cases where "effective vindication" issues may arise. Crucially, the key arbitration provisions in *Smith, Harrison*, and *Burnett* are all almost identical. All three provisions contain the following language word-for-word:

> All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to [one] Claimant's Covered Claims, and that Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant, or Beneficiary other than the Claimant.

While *Dorman*'s arbitration provision, which was not found to be invalid, provided that claims must be brought on "an individual basis," it did not include language stating that the claimant may not seek relief that would benefit any other plan participants. This is, notably, the "problematic language" that the *Smith* court called out and used to distinguish *Smith* from *Dorman*,[113] and the language on which the *Harrison* court relied to apply the "effective vindication" exception.[114]

Thus, while courts continue to grapple with the arbitration of ERISA claims, a practical tip for plan sponsors is to consider whether the provision includes language that could be read as prohibiting remedies that ERISA permits. Undoubtedly, more courts will weigh in on this discussion. And, in the meantime, careful drafting of plan documents, and awareness of evolving case trends, is critical.

Notes

1. M. Hlousek and J. Torres, Arbitration of ERISA Claims: Courts Continue to Grapple with Competing Considerations, 47 Employee Relations L.J. No. 1 (Summer 2021).

2. J. Torres, Arbitration of ERISA Claims Part II: Courts Continue to Grapple with Competing Considerations, 47 Employee Relations L.J. No. 4 (Spring 2022).

3. Dorman v. Charles Schwab Corp., 780 F. App'x 510 (9th Cir. 2019) (Dorman II).

4. Smith v. Greatbanc Tr. Co., No. 20 C 2350, 2020 WL 4926560 (N.D. Ill. Aug. 21, 2020) (Smith I).

5. Smith v. Board of Directors of Triad Mfg., Inc., 13 F.4th 613 (2021) (Smith II).

6. Id. at 619-20.

7. American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 235 (2013).

8. Smith II, 13 F.4th at 621 (quoting Italian Colors, 570 U.S. at 235-36) (other citations omitted).

9. Harrison v. Envision Mgmt. Holdings, Inc. Bd. Of Directors, 59 F.4th 1090 (10th Cir. 2023) (Harrison II).

10. Id. at 1112.

11. Id.

12. Burnett v. Prudent Fiduciary Servs. LLC, No. CV 22-270-RGA-JLH, 2023 WL 387586, at *6 (D. Del. Jan. 25, 2023), report and recommendation adopted sub nom. Burnett v.

Prudent Fiduciary Serv., LLC, No. CV 22-270-RGA, 2023 WL 2401707 (D. Del. Mar. 8, 2023).

13. 9 U.S.C. §§ 1-16.

14. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018). See also American Express Co., 570 U.S. 229.

15. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).

16. American Express Co., 570 U.S. at 235-36. See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, & n.19 (1985) ("And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

17. Dorman v. Charles Schwab Corp., 934 F.3d 1107, 1109 (9th Cir. 2019) (Dorman I), rev'd and remanded sub nom. Dorman v. Charles Schwab Corp., 780 F. App'x 510 (9th Cir. 2019).

18. Id. at 1109-10.

19. Id.

20. Id.

21. Id. at 1111 (citing Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), reversed by Epic Sys. Corp., 138 S. Ct. 1612).

22. Id. at 1109.

23. Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984).

24. Dorman I, 934 F.3d at 1111 (quoting Amaro, 724 F.2d at 752).

25. Id. (citing American Express Co., 570 U.S. at 233).

26. Id. at 1112.

27. Dorman II, 780 F. App'x at 512-13 (citing Chappel v. Lab. Corp. of Am., 232 F.3d 719, 723-24 (9th Cir. 2000)).

28. Id. at 514 (citing LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008)).

29. Id. (quoting American Express Co., 570 U.S. at 233).

30. Id.

31. Smith I, 2020 WL 4926560, at *1-4.

32. Id. at *1-2.

33. Id.

34. Id. at *2 (N.D. Ill. Aug. 21, 2020) (alteration omitted).

35. Id.

36. Id. at *4.

37. LaRue, 552 U.S. at 256.

38. Smith I, 2020 WL 4926560, at *4.

39. Id.

40. Smith II, 13 F.4th 613.

41. Id. at 615.

42. Id.

43. Id.

44. American Express Co., 570 U.S. at 235.

45. Smith II, 13 F.4th at 621 (quoting American Express Co., 570 U.S. at 235-36) (other citations omitted).

46. Id.

47. Id. at 619-20.

48. Id. at 622.

49. Id.

50. Id.

51. Id.

52. Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors, 593 F. Supp. 3d 1078, 1079-80 (D. Colo. 2022) (Harrison I), aff'd, 59 F.4th 1090 (10th Cir. 2023).

53. Id.

54. Id. at 1080.

55. Id. at 1081.

56. Id.

57. Id. at 1082.

58. Id.

59. Id. (quoting American Express Co., 570 U.S. at 235 (internal citation omitted)).

60. Id.

61. Id. at 1081.

62. Id.

63. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

64. Id. at 1617.

65. Harrison I, 593 F. Supp. at 1083.

66. Id.

67. Id. at 1084 (quoting Smith II, 13 F.4th at 621).

68. Id.

69. Id. at 1085 (quoting Epic Sys. Corp., 138 S. Ct. at 1619).

70. Id.

71. Id.

72. Id. at 1086.

73. Harrison II, 59 F.4th at 1100.
74. Id.
75. Id. at 1097.
76. Id. at 1107.
77. Id. at 1106.
78. Id. (quoting Smith II, 13 F.4th at 622).
79. Id.
80. Id.
81. Id. at 1106.
82. Id. at 1107.
83. Id. at 1107.
84. Id. at 1109.
85. Id.
86. Id.
87. Id.
88. Id. at 1110.
89. Id. at 1111.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id. at 1112.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Burnett, 2023 WL 387586, at *1.
102. Id.
103. Id. at *2.
104. Id. at *3.
105. Id. at *4.
106. Id. at *8.
107. Id. at *6.

108. Id.

109. Cedeno v. Argent Tr. Co., No. 20-CV-9987 (JGK), 2021 WL 5087898, at *2 (S.D.N.Y. Nov. 2, 2021).

110. Id. at *4.

111. Burnett v. Prudent Fiduciary Serv., LLC, No. CV 22-270-RGA, 2023 WL 2401707, at *1 (D. Del. Mar. 8, 2023) (adopting report and recommendation).

112. Harrison II, 59 F.4th at 1109.

113. Smith II, 13 F.4th 613, 622 (7th Cir. 2021).

114. Harrison II, 59 F.4th at 1106.