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# 10th Circuit Affirms Reliance On 'Effective Vindication Exception' to Refuse to Enforce Arbitration Provision

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In a suit filed under the Employee Retirement Income Security Act (ERISA), the Tenth Circuit recently affirmed a district court's reliance on the relatively obscure "effective vindication exception," first announced a decade ago by the U.S. Supreme Court, as the basis to refuse to enforce an arbitration provision in a defined contribution retirement plan. *Harrison v. Envision Mgmt. Holding, Inc.*, --- F.4th ---, 2023 U.S. App. LEXIS 3144 (10th Cir. Feb. 9, 2023).

## The Underlying ERISA Claims

Defendant Envision Management Holding, Inc. (Envision) and a related entity collectively employ about 1,000 individuals. *Id.* at 3-4. Envision's founders created the Envision Employee Stock Ownership Plan (ESOP or Plan) at issue, which is an ERISA-protected defined contribution plan under which the employer makes contributions on behalf of the employee-participants and the contributions are invested in the employer's stock. *Id.* at \*4.

Envision was the primary sponsor of the ESOP; however, the ESOP was managed by a committee, whose members included the founders of Envision. *Id.* at \*5. The committee members served as named fiduciaries of the ESOP, along with other individuals and the Argent Trust Company (Argent) as trustee. *Id.*

Plaintiff Robert Harrison was an employee at Envision for approximately four years, was a Plan participant, and owned a vested interest in the Plan. *Id.* at \*4-5. Harrison alleged that Envision's founders created the ESOP so that the ESOP could purchase 100% of the founders' private Envision stock for \$163.7 million (the ESOP Transaction). *Id.* Because the ESOP did not have enough money to complete the ESOP Transaction, Harrison alleged that the ESOP borrowed over \$100 million from the founders at a 12% interest rate and over \$50 million from Envision at an unspecified rate. *Id.* at \*6. Harrison added that the ESOP significantly overpaid for the value of the Envision stock and, after the ESOP Transaction, that Envision's retirement contributions to the ESOP's employee-participants'

accounts were used to first pay interest due on the \$150 million plus debt. *Id.* at \*7.

### Procedural Background

Harrison initiated proceedings in the District Court for the District of Colorado against Envision, Envision's Board of Directors, the ESOP committee, Argent, the founders, and individual Board members. *Id.* at \*8. 's claims arose under ERISA and sought "plan-wide relief on behalf of the ESOP." *Id.* (internal quotes omitted). He alleged six causes of action arising under various provisions of ERISA and claimed that the ESOP Transaction "caused Plaintiff and all other ESOP participants to suffer significant losses to their ESOP retirement savings." *Id.*

In pertinent part, Harrison's complaint asked the district court to (1) declare that all Defendants breached their fiduciary duties under ERISA, (2) enjoin all Defendants from further violations of their fiduciary duties, (3) remove Argent as the Trustee of the ESOP, (4) appoint a new independent fiduciary, (5) order Argent to restore all the losses resulting from the fiduciary breaches and disgorge all profits made through use of assets of the ESOP, and (6) order Defendants to provide other appropriate equitable relief to the ESOP, including disgorgement of profits. *Id.* at \*26.

The Defendants moved to compel arbitration and stay the proceedings, arguing that the Plan's document contains an arbitration provision requiring Harrison to arbitrate his claims on an individual basis. *Id.* at \*8-9. Harrison countered that enforcing the arbitration provision would "endorse a severe limitation of the substantive relief Congress made available to [him] under ERISA, including his right to seek relief on behalf of the Plan as a whole[.]" *Id.* at \*9.

Specifically, Harrison noted that "[t]he statutory rights at issue derive[d] from ERISA § 502(a)(2), which gives a participant the right to sue 'for appropriate relief under section 1109 of this title.'" *Id.* at \*9 (quoting 29 U.S.C. § 1132(a)(2)). "Section 1109," he argued, "expressly authorizes removal of a breaching fiduciary and any 'such other equitable or remedial relief as the court may deem appropriate.'" *Id.* at \*10 (quoting 29 U.S.C. § 1109(a)). Harrison contended that "§ 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." *Id.* at \*10 (emphasis in original). He concluded that "[t]he arbitration provision here cannot be enforced because it would strip [him] of substantive rights conferred by ERISA: namely, the right to proceed under § 1132(a)(2) and seek multiple remedies on behalf of the Plan as a whole." *Id.* The U.S. Department of Labor (DOL) filed an amicus brief in support of Harrison. *Id.* at \* 21.

The district court agreed with Harrison and denied Defendants' motion to compel arbitration. *Id.* at \*10. court determined that the Plan's arbitration provision was "invalid because it conflicts with ERISA" and unenforceable under the effective vindication exception, because it "acts as a prospective waiver" of Harrison's right to pursue statutory plan-wide remedies

contemplated under ERISA. *Id.*

### **Arbitration Agreements and the Effective Vindication Exception**

The Tenth Circuit began its analysis by recognizing the general “liberal federal policy favoring arbitration agreements.” *Id.* at \*12. However, it also deemed relevant “what the Supreme Court has termed the ‘effective vindication’ exception.” *Id.* (quoting *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2013)).

This exception, “which rests on public policy grounds, finds its origin in the desire to prevent prospective waiver of a party’s right to pursue statutory remedies.” *Id.* at \*13 (citing *Am. Express Co.*, 570 U.S. at 236) (quotations omitted). “The key question is whether the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.” *Id.* (citing *Am. Express Co.*, 570 U.S. at 235) (quotations omitted). Thus, “a provision in an arbitration agreement forbidding the assertion of certain statutory rights would run afoul of, and be invalidated by, the effective vindication exception.” *Id.* (quoting *Am. Express Co.*, 570 U.S. at 236).

Interestingly, the circuit court noted that, “[a]lthough the Supreme Court has repeatedly recognized the existence of the effective vindication exception, it has, to date, declined to actually apply the exception in any case before it.” *Id.*; see also *id.* at \*13-19 (discussing cases in which the Court considered, but did not apply, the exception).

### **Tenth Circuit Affirms the Application of the Effective Vindication Exception**

To determine whether the district court appropriately applied the effective vindication exception, the Tenth Circuit first identified the statutory remedies that Harrison requested in his complaint and then evaluated whether the Plan’s arbitration provision “effectively prevent[ed] Harrison from obtaining those statutory remedies in the arbitral forum.” *Id.* at \*22.

Four of Harrison’s six claims for relief sought remedies available under ERISA sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), and section 1109, 29 U.S.C. § 1109. *Id.* at 27. In particular, section 502 allows a plan participant to bring a civil action “(A) to enjoin any act or practice which violates any provision [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan[.]” 29 U.S.C. § 1132(a)(3). Section 1109 provides that a fiduciary who breaches any of its responsibilities “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[.]” *Id.* § 1109.

The Tenth Circuit observed that the Supreme Court and other circuit courts have viewed relief under ERISA sections 1109 and 1132(a) as benefitting the entire plan, not just the individual participant. See *id.* at \*28-30 (discussing multiple cases). Here, the Plan’s arbitration provision provided in relevant part that claims arising out of the Plan “must be brought solely

in the Claimant's individual capacity and not in a representative capacity[.]” *Id.* at 32. More specifically, the provision added that “arbitration shall be limited solely to one Claimant's Covered Claims” and 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 Eligible employee, Participant or Beneficiary other than the Claimant.*” *Id.* (emphasis added).

The Tenth Circuit determined that the arbitration provision's limitation that claims must be “brought solely in the Claimant's individual capacity” (*i.e.*, a prohibition on class or collective actions) was “not cause for invoking the effective vindication exception.” *Id.* at \*35. However, the “the prohibition on a claimant proceeding in a representative capacity is potentially more problematic, at least where, as here, the claimant alleges that the named defendants violated fiduciary duties that resulted in plan-wide harm and not just harm to the claimant's own account and the claimant seeks relief under § 1132(a)(2).” *Id.*

The circuit court reasoned that the above-italicized language in the arbitration provision “would clearly prevent Harrison from obtaining at least some of the forms of relief that he seeks in his complaint pursuant to § 1132(a)(2)[.]” *Id.* at \*36. It therefore concluded that the district court appropriately invoked the effective vindication exception to deny the motion to compel arbitration because the Plan's arbitration provision, “if enforced, would prevent Harrison from vindicating in the required arbitral forum the statutory causes of action listed in his complaint[.]” *Id.* at \*38-39, 42.

### **The Court Rejects Defendants' Remaining Arguments**

The circuit court also rejected the Defendants' argument that the district court's order “violates a core tenet of ERISA, which requires that a plan document be enforced strictly according to its terms” and “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.” *Id.* at \*44-45. The court reasoned that its holding is consistent with the identified “core tenet” because ERISA does not allow plan documents to override statutory remedies. *Id.* at \*43. The court further explained that its holding did not preclude arbitration of individual claims because “both the nature of the claims and the specific relief sought by the complainant matter” in determining whether the effective vindication exception applies. *Id.* at \* 44.

The Defendants also maintained that “ERISA contains no clearly expressed congressional intent to prohibit individual arbitrations” and, even if an individual was precluded from seeking plan-wide relief by an arbitration provision, “ERISA specifically authorizes the Secretary of Labor to bring actions on behalf of a plan to recover plan-wide relief.” *Id.* at \*47-50. The court agreed that ERISA does not prohibit individual arbitrations, but that “misses the key point.” *Id.* at \* 47. The court did not conclude that the mechanism of individual arbitrations is problematic; rather, the arbitration provisions' bar on seeking certain relief was problematic. *Id.* at \*48. Finally, the court determined that it was unreasonable to rely on the

DOL to enforce plan-wide relief in all cases, particularly given the agency's limited resources. *Id.* at \*50-51.

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