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CLASS ACTION BLOG

# Ninth Circuit Overrules Amaro v. Continental Can Co.—Orders Individual, Not Class-Wide Arbitration.

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Dorman, a former participant in the Schwab retirement savings and investment plan, filed a class action suit alleging the defendants violated ERISA and breached their fiduciary duties by including Schwab affiliated funds in the 401(k) plan. Defendants moved to compel arbitration under the 401(k) plan and compensation plan documents, which the district court denied. The Ninth Circuit granted Schwab's interlocutory appeal, reversed its 1984 *Amaro* opinion in its published ruling, and in a separate, unpublished ruling followed the plan documents and ordered individual arbitration of Dorman's claim.

In the published opinion, the Ninth Circuit panel found that the Supreme Court's opinion in *American Express Co. v. Italian Colors Rest*., 570 U.S. 228 (2013) required the panel to hold that "*Amaro* is no longer good law." *Amaro* had held that "ERISA claims were not arbitrable." 724 F.2d 747 (9th Cir. 1984).

The district court had ruled that neither the 401(k) plan nor Dorman's compensation plan "required the claims asserted in the Complaint to be arbitrated." Alternatively, the district court denied the motion finding that Dorman's claims were not brought on his own behalf (so he "cannot waive rights that belong to the Plan") and held that recent Ninth Circuit precedent "further precludes arbitration."

The appeals court panel found the Ninth Circuit precedent had been reversed by the Supreme Court in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). After the ruling in *Lewis*, a different Ninth Circuit panel strongly suggested that *Amaro* had been overruled. *Munro v. Univ. of S. Cal*., 896 F.3d 1088, 1094, n.1 (9th Cir. 2018). Although the general rule in the Ninth Circuit is that a three judge panel cannot overrule earlier Ninth Circuit precedent, that rule evaporates in the face of "an intervening Supreme Court decision [which] undermines an existing precedent of the Ninth Circuit" whenever both cases are closely on point which then gives three judge panels the power to overrule prior circuit authority. *Miller v. Gammie*, 335 F. 3d 889, 899 (9th Cir. 2003)(*en banc* ).) Because *Amaro* could not be reconciled with *American Express,* the panel overruled *Amaro*.

After stripping the *Amaro* precedent of all vitality, the panel followed *Epic Sys.* and found that arbitration was a "quicker, more informal, and often cheaper resolution[]" for everyone involved. Because the plan expressly required arbitration and expressly allowed for individualized arbitration, the Supreme Court's holdings in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 684 (2010) and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) confirmed "that the parties here should be ordered into individual arbitration," because the parties "did not agree to class-wide or collective arbitration."

After the *Dorman* opinions, there is no impediment in the Ninth Circuit to proceeding with individual arbitration in ERISA cases where the plan documents provide for individualized arbitration and show a definite intent not to have class-wide or collective arbitration. The *Dorman* rulings are important in the Ninth Circuit and, by overruling *Amaro*, they also provide guidance to class action litigators nationwide.

Case Citation: Dorman v. Charles Schwab Corporation, 934 F.3d 1107 & 780 Fed.Appx. 510 (9th Cir. 2019)