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Immunizing Arbitrators From Claims for Equitable Relief

Michael D. Moberly*

I. INTRODUCTION

Both state¹ and federal courts have consistently held that arbitrators cannot be subjected to civil liability for acts performed in the course and scope of their arbitral duties.² This concept of “arbitral immunity” developed out of the more familiar judicial and quasi-judicial immunity doctrines,³ and reflects the inherent similarity of the judicial and arbitral processes.⁴ In both situations, parties rely on impartial decision-makers to resolve their disputes.⁵ Similarly, both arbitrators and judicial officers need protection from parties that may sue because they are unhappy with a ruling.⁶ The Sixth Circuit explained this principle in the following terms:

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1. See *Feichtinger v. Conant*, 893 P.2d 1266, 1267 (Alaska 1995) (“Arbitral immunity is the rule in virtually all jurisdictions, and we now adopt it.”) (footnote omitted); *Baar v. Tigerman*, 211 Cal. Rptr. 426, 428 (Ct. App. 1983) (“Courts of this country have long recognized immunity to protect arbitrators from civil liability for actions taken in the arbitrator’s quasi-judicial capacity.”); cf. *Seligman v. Allstate Ins. Co.*, 756 N.Y.S.2d 403, 405 (Sup. Ct. 2003) (noting that “rules precluding lawsuits against arbitration tribunals and arbitrators have been upheld by the courts of this state and other jurisdictions”).

2. See *Austern v. Chi. Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990) (“[T]he Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity.”) (citing cases).

3. See *Int’l Med. Group, Inc. v. Am. Arbitration Ass’n, Inc.*, 149 F. Supp. 2d 615, 629 (S.D. Ind. 2001), *aff’d*, 312 F.3d 833, 840 (7th Cir. 2002) (characterizing arbitral immunity as “an extension of judicial immunity”); *United Food & Commercial Workers Int’l Union v. SIPCO, Inc.*, 138 L.R.R.M. (BNA) 2917, 2918 (S.D. Iowa 1990) (“Arbitral immunity is an outgrowth of the doctrine of judicial immunity . . .”).

4. See *Wasyll, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (discussing the “functional comparability of . . . arbitrators’ decision-making process and judgments to those of judges”); *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1210 (6th Cir. 1982) (“[A]rbitration proceedings resemble judicial proceedings in several respects.”).

5. See *City of Detroit v. Detroit Police Officers Ass’n*, 294 N.W.2d 68, 130 (Mich. 1980) (Levin, J., dissenting) (“We expect independence and impartiality in a judge or . . . arbitrator.”); *Dennis R. Nolan & Roger L. Abrams, Arbitral Immunity*, 11 INDUS. REL. L.J. 228, 234 (1989) (“An arbitrator’s decisionmaking . . . is, without doubt, functionally comparable to that of a judge. Like a judge, an arbitrator must render an impartial decision based on evidence and applicable interpretive principles.”).

6. See *Olson v. Nat’l Ass’n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996).

The functional comparability of the arbitrators' decision-making process and judgments to those of judges . . . generates the same need for independent judgment, free from the threat of lawsuits. Immunity furthers this need. As with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.⁷

But these doctrines traditionally provide "an immunity from damages... not an immunity from declaratory or injunctive relief."⁸ The judicial immunity doctrine, for example, generally does not preclude the imposition of injunctive relief against judicial officers.⁹ The same is true of quasi-judicial immunity,¹⁰ which extends traditional judicial immunity to individuals "performing tasks so integral or intertwined with the judicial process that [they] are deemed to be an arm of the [judiciary]."¹¹

This limitation on the immunity available to judicial and quasi-judicial officers suggests that arbitrators also may be subject to suit for declaratory or injunctive relief.¹² In fact, one of the few prior commentators to address the issue expressed this view.¹³ However, there is actually surprisingly little case law

7. *Corey*, 691 F.2d at 1211.

8. *Browning v. Vernon*, 874 F. Supp. 1112, 1124 (D. Idaho 1994), *aff'd*, 44 F.3d 818 (9th Cir. 1995); *see also* *Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981) ("[I]mmunity from liability in damages may not bar prospective relief, injunction, for example, against a judge."); *Fixel v. United States*, 737 F. Supp. 593, 597 (D. Nev. 1990) (stating that "immunity is not a defense against injunctive relief").

9. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986); *see also* *Partington v. Gedan*, 961 F.2d 852, 860 n.8 (9th Cir. 1992) (noting that claims for declaratory relief "are not jurisdictionally barred" by the judicial immunity doctrine, which merely "protects judges and their agents from suits involving monetary damages").

10. *See* *Williams v. McGinnis*, 192 F. Supp. 2d 757, 759 (E.D. Mich. 2002) ("[Q]uasi-judicial immunity does not usually preclude declaratory relief."); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1252 (C.D. Cal. 1999) ("[Q]uasi-judicial immunity provides immunity from damages but not injunctive relief."); *rev'd in part on other grounds*, 251 F.3d 1230 (9th Cir. 2001); *Schmidt v. Degen*, 376 F. Supp. 664, 670 (E.D. Pa. 1974) ("As a general rule, the immunity doctrine will not preclude the granting of equitable relief against judicial or quasi-judicial officials.").

11. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994); *see also* *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1108 (9th Cir. 1987) ("Quasi-judicial immunity, like judicial immunity, derives historically from the recognition that participation in the court system raises a significant risk of 'entanglement in vexatious litigation.'" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985))).

12. *See generally* *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977) ("[A]n arbitrator has an immunity analogous to judicial immunity because he performs a quasi-judicial function."); *Yates v. Yellow Freight Sys.*, 501 F. Supp. 101, 105 (S.D. Ohio 1980) ("A validly appointed arbitrator is clothed with immunity analogous to judicial immunity against actions brought by either of the parties arising out of the performance of his duties."); *Higdon*, 71 S.W.3d at 132 (discussing "the doctrine of quasi-judicial immunity, to which arbitral immunity is often compared").

13. *See* Richard J. Mattera, Note, *Has the Expansion of Arbitral Immunity Reached Its Limits After United States v. City of Hayward*, 12 OHIO ST. J. ON DISP. RESOL. 779, 795, n.124 (1997) ("As

discussing this subject,¹⁴ and the courts that have considered it are not in agreement.¹⁵ This article attempts to reconcile these seemingly conflicting authorities.¹⁶

The article begins with a summary of the historical origins of the judicial and arbitral immunity doctrines.¹⁷ Next, the article discusses the courts' refusal to extend judicial immunity to claims for declaratory, injunctive, or other equitable relief,¹⁸ except perhaps in the case of federal judges.¹⁹ The article then explores the propriety of recognizing a similar limitation in cases construing the arbitral immunity doctrine.²⁰ The article ultimately concludes that (1) arbitrators should be immune from claims for equitable relief as a matter of policy,²¹ and

a matter of law, arbitral immunity does not act to bar claims for equitable relief.”) (citing *TWA, Inc. v. Sinicropi*, No. 93 CIV. 3094 (CSH), 1994 WL 132233 (S.D.N.Y. Apr. 14, 1994)).

14. See *I. & F. Corp. v. Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local 8*, 493 F. Supp. 147, 150 (S.D. Ohio 1980) (“There is relatively little case law in the federal courts on the subject of an arbitrator’s immunity from suit.”); *McKown v. Am. Arbitration Ass’n*, 444 S.E.2d 114, 115 (Ga. Ct. App. 1994) (noting that the propriety of naming the arbitrator as a defendant “in judicial proceedings seeking to enjoin arbitration” has “rarely [been] addressed”).

15. See generally *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 896 (D. Conn. 1991) (stating that “the law is unsettled on the appropriateness of injunctive relief in . . . arbitration situations”).

16. Some courts have reserved judgment on this issue. See, e.g., *Greenfield & Montague Transp. Area v. Donovan*, 758 F.2d 22, 27 (1st Cir. 1985) (“[W]e need not address . . . arguments that [an arbitrator] enjoys arbitral immunity from a suit [for declaratory and injunctive relief].”); *Int'l Union, United Autoworkers of Am. v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1187 n.10 (6th Cir. 1983) (“We intimate no viewpoint . . . as to whether the doctrine of arbitral immunity would bar an action for equitable relief . . .”).

17. For a prior discussion of the origins of judicial immunity, see J. Randolph Block, *Stamp v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879. For a discussion of the history of arbitral immunity, see Nolan & Abrams, *supra* note 5, at 229-36.

18. See *Hammond v. Creative Fin. Planning Org., Inc.*, 800 F. Supp. 1244, 1248 (E.D. Pa. 1992) (“A judge is not immune from suit where the plaintiff seeks prospective relief rather than damages.”). For a previous discussion of this limitation on judicial immunity, see Thomas J. Noto III, Note, *Pulliam v. Allen: Delineating the Immunity of Judges From Prospective Relief*, 34 CATH. U.L. REV. 829 (1984).

19. See generally *Switzer v. Coan*, 261 F.3d 985, 990 n.9 (10th Cir. 2001) (“The Supreme Court [has] held . . . that judicial immunity does not insulate state judges from claims for equitable relief . . . and it is unsettled whether the corresponding immunity afforded federal judges . . . permits or precludes such claims.”) (citing *Pulliam v. Allen*, 466 U.S. 522 (1984)).

20. See generally Nolan & Abrams, *supra* note 5, at 229 (“Surprisingly little has been written about arbitral immunity; thus its proper scope and limitations . . . remain unexamined.”).

21. See generally *Corey*, 691 F.2d at 1211 (“[T]he limits of [arbitral] immunity should be fixed in part by federal policy.”); *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 376 (Minn. 1989) (noting that arbitral immunity “rests upon considerations of public policy”); *Babylon Milk &*

(2) in jurisdictions where that result is currently precluded by existing precedent, a comparable result can be reached by holding that the arbitrator is not a necessary party in litigation challenging the arbitrator's authority or the validity of an arbitration award.²²

II. THE ORIGINS OF JUDICIAL AND ARBITRAL IMMUNITY

The courts have long held that judges cannot be subjected to civil liability for acts performed within the scope of their authority.²³ This principle has been traced to Lord Coke's 1607 decision in *Floyd & Barker*,²⁴ which held that judges of England's principal common law court, the King's Bench,²⁵ were immune from suit in competing courts for acts taken in their judicial capacity.²⁶ The principle was subsequently expanded to afford comparable immunity to all judges.²⁷ The need for this immunity was so clear that the United States Supreme Court, which formally adopted the judicial immunity doctrine in *Bradley v. Fisher*,²⁸ has noted that "[f]ew doctrines were more solidly established at

Cream Co. v. Horvitz, 151 N.Y.S.2d 221, 224 (Sup. Ct. 1956) ("Considerations of public policy are the reasons for the [arbitral immunity] rule . . ."), *aff'd*, 165 N.Y.S.2d 717 (App. Div. 1957).

22. See, e.g., *Int'l Med. Group*, 149 F. Supp. 2d at 615:

[A] claim intended to determine whether an arbitral body has the authority to proceed is one in which the arbitral body itself has no real interest and its decision-making in this regard would be protected by 'arbitral immunity,' or, alternatively, is one in which the body is not properly joined . . .

Id. at 629 (emphasis added).

23. See *In re Castillo*, 297 F.3d 940, 947 (9th Cir. 2002) ("Anglo-American common law has long recognized judicial immunity, a 'sweeping form of immunity' for acts performed by judges that relate to the 'judicial process.'") (quoting *Forrester v. White*, 484 U.S. 219, 225 (1988)); *Laskowski v. Mears*, 600 F. Supp. 1568, 1572 (N.D. Ind. 1985) ("Long ago, the Supreme Court reorganized that judicial officers in general are not subject to civil liability for judicial acts done within their jurisdiction.") (citing *Wilkes v. Dinsman*, 48 U.S. 89 (1849)).

24. *Floyd & Barker*, 12 Co. Rep. 23, 77 Eng. Rep. 1305 (1607).

25. See *Pulliam*, 466 U.S. at 546 (Powell, J., dissenting) (noting that "the King's Bench was the central common law court" in medieval England); cf. *Wightman v. Jones*, 809 F. Supp. 474, 477, n.2 (N.D. Tex. 1992) (describing the King's Bench as a "common law court" with appellate jurisdiction over other "inferior" common law courts).

26. See *Pulliam*, 466 U.S. at 530 (discussing *Floyd & Barker*).

27. See *id.* at 531 ("In time, Coke's theory was expanded . . . so that judges of all courts were accorded immunity, at least for actions within their jurisdiction."); see, e.g., *Schmidt*, 376 F. Supp. at 669 (rejecting the proposition that a justice of the peace, as "a relatively low-level member of the judiciary, is not entitled to the same sweeping degree of judicial immunity as a higher placed judge," and holding that justices of the peace instead have "precisely the same judicial immunity from suits for damages as any other judge, irrespective of level").

28. *Bradley v. Fisher*, 80 U.S. (13 Wall) 335 (1872); see *Corey*, 691 F.2d at 1209 n.4 (noting that the "principle behind the doctrine of judicial immunity [was] first adopted by the Supreme Court in *Bradley v. Fisher*").

common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction.²⁹

While arbitral immunity is of more recent origin,³⁰ and has never been specifically adopted by the Supreme Court,³¹ it is now also well entrenched in American law.³² The doctrine's history was discussed in *Hill v. Aro Corp.*,³³ where the court traced its judicial recognition to two nineteenth century state court decisions,³⁴ *Jones v. Brown*³⁵ and *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*.³⁶ The *Hill* court noted that recognition of the doctrine was premised on the view that "arbitrators 'are in a certain sense a court,'" and thus should be

29. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

30. *See, e.g., Feichtinger*, 893 P.2d at 1268 ("[B]efore this decision, no Alaska case had addressed the issue of arbitral immunity."); *Higdon*, 71 S.W.3d at 132 (noting that "no Kentucky appellate decision [had] addressed the arbitral-immunity doctrine"). As noted earlier, the arbitral immunity doctrine was "adapted" from the established judicial immunity doctrine. *Howland v. U.S. Postal Serv.*, 209 F. Supp. 2d 586, 592 (W.D.N.C. 2002). Its later development undoubtedly stems in part from the fact that agreements to arbitrate disputes "were not enforced at common law on the ground that they deprived the courts of jurisdiction to resolve the controversy." *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1090 (9th Cir. 2000).

31. *See* Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 476 (2004) ("The United States Supreme Court has never specifically endorsed arbitrator immunity . . ."); *cf.* William T. D'Zurilla, *Alternative Dispute Resolution*, 42 LA. B.J. 474 (1995) ("The U.S. Supreme Court has granted judges full exemption from liability for actions within the scope of their duties. The lower federal courts have unambiguously extended similar immunity to arbitrators.") (emphasis added).

32. *See* Howland, *supra* note 30 (noting that the arbitral immunity doctrine "has been uniformly recognized and consistently followed"); *Moore v. Conliffe*, 871 P.2d 204, 214 (Cal. 1994) ("There is hardly any aspect of arbitration law and practice more settled, both in domestic and international relations, than the immunity of arbitrators from court actions for their activities in arriving at their award.") (quoting Martin Domke, *The Arbitrator's Immunity from Liability: A Comparative Survey*, 3 U. TOL. L. REV. 99, 99 (1971)).

33. *Hill v. Aro Corp.*, 263 F. Supp. 324 (N.D. Ohio 1967).

34. *See id.* at 325; *see also I. & F. Corp.*, 493 F. Supp. at 150 (noting that the court in *Hill* "surveyed the law regarding arbitral immunity"); *Corbin v. Wash. Fire & Marine Ins. Co.*, 278 F. Supp. 393, 397 (D.S.C.) (stating that the *Hill* court engaged in "an exhaustive and scholarly review of the pertinent cases"), *aff'd*, 398 F.2d 543 (4th Cir. 1968).

35. *Jones v. Brown*, 6 N.W. 140 (Iowa 1880); *see also* Nolan & Abrams, *supra* note 5, at 235 ("The 1880 Iowa decision of *Jones v. Brown* is most frequently cited as the first case on point.") (footnote omitted); Weston, *supra* note 31, at 484-85 ("A history of arbitral immunity in the United States can be traced back as early as 1880 in *Jones v. Brown*.")

36. *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424 (1884); *see also* Robert H. Smit & Nicholas J. Shaw, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, 8 AM. REV. INT'L ARB. 275, 322 n.212 (1999) (describing *Hoosac Tunnel* as "a much cited state court decision" recognizing the arbitral immunity doctrine).

“clothed with the same immunity as the judiciary.”³⁷ The court then quoted with approval the rationale for the doctrine first articulated in *Hoosac Tunnel*:

An arbitrator is a quasi judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of the opinion that the same immunity extends to him.³⁸

III. THE “EQUITABLE” EXCEPTION TO JUDICIAL IMMUNITY

A. The General Rule: Judges Are Not Immune From Equitable Claims

Given the arbitral immunity doctrine’s roots in the concept of judicial immunity,³⁹ courts considering the scope of an arbitrator’s immunity have consistently looked to judicial immunity cases for guidance,⁴⁰ and generally hold that arbitrators should be immune from suit to the same extent as judges.⁴¹ The present issue thus arises primarily from the Supreme Court’s holding in *Pulliam v. Allen*⁴² that judicial immunity does not preclude an award of injunctive relief against judicial officers,⁴³ and the attendant presumption that an arbitrator’s immunity “should be no broader.”⁴⁴

37. *Hill*, 263 F. Supp. at 325 (quoting *Jones*, 6 N.W. at 142).

38. *Id.* (quoting *Hoosac Tunnel*, 137 Mass. at 426); see also *Int’l Union*, 701 F.2d at 1186 (“[T]he public policy considerations of protecting a judge’s or a juror’s impartiality, independence, and freedom from undue influence apply with equal force as to arbitrators.”).

39. See *Howland*, 209 F. Supp. 2d at 593 (“The doctrine of arbitral immunity is rooted in the doctrine of judicial immunity . . .”) (quoting *Galuska v. N.Y. Stock Exch.*, 210 F.3d 374, 2000 WL 347851, at *2 (7th Cir. 2000)); *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 131 (Tex. App. 2003) (“Arbitral immunity is derived from judicial immunity . . .”); Nolan & Abrams, *supra* note 5, at 229 (“Arbitral immunity stems from judicial immunity.”).

40. See *Int’l Med. Group*, 149 F. Supp. 2d at 628 (“Courts have . . . analogiz[ed] to the principle of judicial immunity to shape the contours of arbitral immunity to suit.”); *Olney v. Sacramento County Bar Ass’n*, 260 Cal. Rptr. 842, 844 (Ct. App. 1989) (“We shall . . . examine the scope of arbitrator . . . immunity by reviewing the scope of the immunity afforded judges.”); cf. *L & H Airco, Inc.*, 446 N.W.2d at 382 (Yetka, J., concurring in part and dissenting in part) (“The standard for arbitral immunity is related to the scope of judicial immunity.”).

41. See, e.g., *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221, 224 (Sup. Ct. 1956) (“[T]he same rule of immunity should apply to arbitrators as applies to the judiciary, inasmuch as the same reasons of public policy are applicable.”), *aff’d*, 165 N.Y.S.2d 717 (App. Div. 1957); Nolan & Abrams, *supra* note 5, at 238 (“[W]here the arbitrator functions in a way comparable to a judge, the arbitrator’s immunity will extend as far as a judge’s.”); cf. *Moore*, 871 P.2d at 217 (“[T]he differences that exist between arbitration and court proceedings do not warrant affording an arbitrator less protection than that conferred upon a judge.”).

42. *Pulliam*, 466 U.S. at 522.

43. See *id.* at 541-42. The *Pulliam* case has received considerable academic attention. See, e.g., Joseph R. Weisberger, *The Twilight of Judicial Independence – Pulliam v. Allen*, 19 SUFFOLK U. L. REV. 537 (1985); Peter E. Glick, Comment, *Pulliam’s Pacific Progeny: Deep Pockets in the*

Pulliam involved an action against a state magistrate.⁴⁵ The plaintiffs asserted that the magistrate's practice of imposing bail on persons arrested for non-jailable offenses, and incarcerating them if they failed to make bail, was unconstitutional.⁴⁶ The district court enjoined the practice and awarded costs and attorneys' fees to the plaintiffs,⁴⁷ and the Fourth Circuit affirmed that ruling on appeal.⁴⁸

The Supreme Court granted certiorari to consider the propriety of the district court's award of attorneys' fees.⁴⁹ However, the Court began by addressing the more fundamental question of whether the magistrate was immune from the plaintiff's claim for injunctive relief,⁵⁰ even though the magistrate herself had not challenged the district court's ruling on that issue,⁵¹ because the fee award was clearly unwarranted if the magistrate was immune from the underlying substantive relief on which the award was premised.⁵²

The Court began its analysis by noting that although "there was no such thing as an injunction against a judge" at common law⁵³ (and thus no need to immunize judges from such relief),⁵⁴ the judicial immunity doctrine was influenced in large part by the common law tradition of judicial oversight over infe-

Judges Robes?, 17 PAC. L.J. 461 (1986); Noto, *supra* note 18; Jeffrey A. Zaluda, Note, *Pulliam v. Allen: Harmonizing Judicial Accountability for Civil Rights Abuses With Judicial Immunity*, 34 AM. U. L. REV. 523 (1985).

44. *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1033, *modified*, 559 F.2d 268 (5th Cir. 1977). The principle underlying this presumption is that an immunity doctrine that is derivative of judicial immunity "should be at most no broader than the judicial immunity from which it is derived." *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983) (construing prosecutorial immunity).

45. *See Pulliam*, 466 U.S. at 524.

46. *See id.* at 524-25.

47. *See id.* at 525.

48. *See Allen v. Burke*, 690 F.2d 376 (4th Cir. 1982), *aff'd sub nom. Pulliam*, 466 U.S. at 522.

49. *See Pulliam*, 466 U.S. at 527.

50. *See id.* at 527-28.

51. *See id.* at 542 & n.22.

52. *See id.* at 528. The Court relied on one of its procedural rules permitting it to consider a "subsidiary question fairly included" within a question upon which certiorari has been granted, noting that "[t]he question whether judicial immunity should have barred the injunctive relief awarded [was] 'fairly included' in the question" of whether the magistrate was immune from the attorneys' fee award. *Id.* at 528 n.5 (quoting SUP. CT. R. 21.1(a) (current version at SUP. CT. R. 14.1(a))).

53. *Id.* at 529.

54. *See Wightman*, 809 F. Supp. at 477 ("[T]he Supreme Court first noted that at common law there was no such thing as an injunction against a judge; hence there was no discussion in the common law regarding judicial immunity from injunctions.").

rior tribunals.⁵⁵ The Court referred in particular to the medieval English practice “in which a judge of the King’s Bench, by issuing a writ of prohibition at the request of a party before an inferior or rival court, enjoined that court from proceeding with a trial or from committing a perceived error during the course of that trial.”⁵⁶

Extending this analysis to the relationship between state and federal judges,⁵⁷ the Court held that the state magistrate was not immune from the injunctive relief awarded against her.⁵⁸ While acknowledging that the analogy it was drawing was inexact,⁵⁹ the Court noted that no federal appellate court had ever held that judges are immune from claims for injunctive relief,⁶⁰ and that several federal courts had concluded that there is no immunity from such relief.⁶¹ The existence of this precedent, the Court asserted, is no mere coincidence:

To the extent that we rely on the common-law practice in shaping our own doctrine of judicial immunity, the control exercised by the King’s Bench through the prerogative writs is highly relevant. It indicates that, at least in the view of the common law, there was no inconsistency between a principle of immunity that protected judicial authority . . . and the availability of collateral injunctive relief in exceptional cases.⁶²

55. See *Pulliam*, 466 U.S. at 532-33. For a summary of the development of judicial immunity under the English common law, see Glick, *supra* note 43, at 463-67.

56. *Pulliam*, 466 U.S. at 533; see also *Herrmann v. Brooklyn Law Sch.*, 432 F. Supp. 236, 239 (E.D.N.Y. 1976) (discussing the common law writs used as a “means of exercising control by the King’s Bench over inferior courts”).

57. In essence, the *Pulliam* Court equated the authority of federal courts to enjoin state court judges “with the ability of superior courts to exercise control over inferior courts at common law.” *Page v. Grady*, 788 F. Supp. 1207, 1211 n.5 (N.D. Ga. 1992) (construing *Pulliam*); see also *Wightman*, 809 F. Supp. at 477 (“The Supreme Court then analogized the relationship between the King’s Bench and its rival and inferior courts to the relationship between the federal courts and the state courts in our current system.”).

58. See *Pulliam*, 466 U.S. at 541-42.

59. See *id.* at 535 (“The relationship between the King’s Bench and its collateral and inferior courts is not precisely paralleled in our system by the relationship between the state and federal courts.”); see also *Stephens v. Herring*, 827 F. Supp. 359, 364 (E.D. Va. 1993) (“[T]he analogy drawn in *Pulliam* between the prerogative writs issued by the King’s Bench to inferior and rival courts and the injunctions issued by federal courts to state judges . . . [is] perhaps imperfect . . .”). See generally Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293 (2003) (“[O]ur system of parallel state and federal courts is unusual in a federalism, to put it mildly.”).

60. See *Pulliam*, 466 U.S. at 537. But see *Coleman v. Court of Appeals*, 550 F. Supp. 681, 684 (W.D. Okla. 1980) (“There is a split of authority concerning whether judicial immunity shields judges from actions seeking only injunctive relief.”).

61. See *Pulliam*, 466 U.S. at 537. But cf. *Zimmerman v. Spears*, 428 F. Supp. 759, 761 (W.D. Tex.) (“The doctrine of judicial immunity applies to a proceeding in which injunctive or other equitable relief is sought, as well as to suits for money damages.”), *aff’d*, 565 F.2d 310 (5th Cir. 1977).

62. *Pulliam*, 466 U.S. at 536.

B. A Limited Exception: Federal Judges May Be Immune From Equitable Claims

In *Mullis v. United States Bankruptcy Court*,⁶³ a divided panel of the Ninth Circuit recognized a limited exception to the *Pulliam* rule,⁶⁴ the court held that the immunity available to *federal* judges is not limited to damages,⁶⁵ but also extends to claims for declaratory, injunctive and other equitable relief.⁶⁶ The court based this extension of judicial immunity beyond that available to state court judges on its belief that allowing federal courts to enjoin federal judges would impede the orderly administration of justice by permitting “a ‘horizontal appeal’ from one district court to another or even a ‘reverse review’ of a ruling of the court of appeals by a district court.”⁶⁷

63. *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385 (9th Cir. 1987).

64. *Id.* The analysis in *Pulliam* has not been universally accepted. See *Cooney v. Park County*, 792 P.2d 1287, 1336 (Wyo. 1990) (Urbigkit, J., dissenting) (asserting that *Pulliam* “has provided a continuing firestorm particularly among the membership of the federal bench”), *vacated sub nom. Cooney v. White*, 501 U.S. 1201 (1991); Chief Admin. Justice of Trial Ct. v. Labor Relations Comm’n, 533 N.E.2d 1313, 1317 n.4 (Mass. 1989) (“We have never accepted . . . the distinction made in the *Pulliam* case between a judge’s absolute immunity from liability for damages when acting in a judicial capacity and a judge’s lack of absolute immunity in an action for injunctive relief . . .”). Indeed, one state court judge predicted that *Pulliam* might “signal the twilight of judicial independence” by exposing judges “to a wide range of harassing and vexatious litigation.” Weisberger, *supra* note 43, at 554, 558; see also Noto, *supra* note 18, at 834 (“[T]he Court’s decision in *Pulliam v. Allen* . . . may impose upon state judges a burden that the common law doctrine was designed to prevent.”).

65. The Ninth Circuit has observed “federal judges, like state judges, enjoy an absolute common law immunity from civil liability for acts committed in their official capacity.” *United States v. Claiborne*, 727 F.2d 842, 845 (9th Cir. 1984). In this regard, *Pulliam* “did not overrule the settled principle that judges are immune from liability for *damages* for acts committed within their judicial capacity.” *Sunn v. Dean*, 597 F. Supp. 79, 83 (N.D. Ga. 1989) (emphasis added).

66. See *Mullis*, 828 F.2d at 1394; see also *Atkinson-Baker & Assocs., Inc. v. Kolts*, 7 F.3d 1452, 1454 (9th Cir. 1993) (“Federal judges are absolutely immune from claims for declaratory and injunctive relief arising from their judicial acts.”); *Gartner v. SEC*, 913 F. Supp. 1372, 1379 (C.D. Cal. 1995) (“Judicial immunity . . . bars declaratory and injunctive relief against federal judges . . .”).

67. *Mullis*, 828 F.2d at 1392-93; cf. *Stephens*, 827 F. Supp. at 362 (“[I]n the context of our federal system, while *Pulliam*’s rationale may permit a federal court to enjoin the . . . conduct of a state court judge, it does not, for reasons of policy and jurisdictional power, permit a federal court to enjoin the conduct of a co-equal or superior federal tribunal.”).

Although other courts have reached the same conclusion,⁶⁸ the analysis in these cases has been questioned,⁶⁹ not least by the dissenting judge in *Mullis* itself,⁷⁰ who asserted that the majority in that case misread *Pulliam*,⁷¹ and that there is no basis for distinguishing between state and federal judges for immunity purposes.⁷² In any event, the immunity from equitable claims recognized in *Mullis* and its progeny is limited to federal judges.⁷³ Even in the Ninth Circuit,⁷⁴ state court judges, at least,⁷⁵ continue to enjoy immunity from damages only.⁷⁶

68. See *Bolin v. Story*, 225 F.3d 1234, 1240 (11th Cir. 2000) (“Most . . . courts [that have addressed the issue] have held that the doctrine of absolute judicial immunity serves to protect federal judges from injunctive relief as well as money damages.”); *Hale v. Lefkow*, 239 F. Supp. 2d 842, 845 (C.D. Ill. 2003) (“Several courts . . . have found federal judges absolutely immune from equitable relief . . .”).

69. See, e.g., *Scruggs v. Moellering*, 870 F.2d 376, 378 (7th Cir. 1989) (asserting that *Mullis* “carves an exception to *Pulliam* . . . of doubtful merit”), *abrogated on other grounds* in *Antoine v. Byer & Anderson, Inc.*, 508 U.S. 429 (1993); *Church of Scientology Int’l v. Kolts*, 846 F. Supp. 873, 885 n.10 (C.D. Cal. 1994) (finding *Mullis* to be binding precedent “on the specific issue of absolute immunity for federal judicial officers,” even though the case may have been “wrongly decided in light of policy and dicta found in the *Pulliam* case”).

70. See *Bolin*, 225 F.3d at 1241 (noting that “the dissent in *Mullis* [took] an opposing position”).

71. See *Mullis*, 828 F.2d at 1394 (O’Scannlain, J., concurring in part and dissenting in part); cf. *Weisberger*, *supra* note 43, at 558 (asserting that reading *Pulliam* in conjunction with prior Supreme Court precedent “leads to the conclusion that injunctive relief could be awarded against a federal magistrate or judge”) (citing *Butz v. Economou*, 438 U.S. 478 (1978)).

72. See *Mullis*, 828 F.2d at 1395 (O’Scannlain, J., concurring in part and dissenting in part). Nevertheless, the Eleventh Circuit has joined the Ninth Circuit in providing “different immunities for federal and state judges.” *Bryan v. Murphy*, 243 F. Supp. 2d 1375, 1378 (citing *Bolin*, 225 F.3d at 1239–42), *reconsideration denied*, 246 F. Supp. 1256 (N.D. Ga. 2003).

73. See *Scruggs*, 870 F.2d at 378 (asserting that the immunity from claims for equitable relief recognized in *Mullis* only applies in “cases where the defendant is a federal judge rather than a state one”); *Bayliss v. Madden*, 204 F. Supp. 2d 1285, 1290 (D. Or. 2001) (relying on *Pulliam* in holding that a federal administrative law judge was “not immune from an action for declaratory relief,” despite the immunity from such claims extended to federal judges in *Mullis*).

74. In several cases decided after *Mullis*, courts in the Ninth Circuit have confirmed that state court judges “are not immune from . . . claims for prospective relief.” *Lebbos v. Judges of Superior Court*, 883 F.2d 810, 813 n.5 (9th Cir. 1989); see also *Root v. Schenk*, 953 F. Supp. 1115, 1119 (C.D. Cal. 1997) (observing that “state judicial officers do not enjoy the same type of judicial immunity for injunctive relief as federal judges”).

75. In some jurisdictions, even federal judges remain subject to the possibility of claims for equitable relief. See *Kampfer v. Scullin*, 989 F. Supp. 194, 201 (N.D.N.Y. 1997) (“[S]ome courts have also held that the *Pulliam* exception to absolute judicial immunity applie[s] to . . . actions against federal judges.”). The Seventh Circuit, for example, “has not yet determined if the doctrine of absolute judicial immunity protects federal judges from injunctive relief as well as money damages.” *Hale v. Lefrow*, 239 F. Supp. 2d 842, 845 (C.D. Ill. 2003); see also *Weisberger*, *supra* note 43, at 558 (“*Pulliam* may darken the horizon not only of state but federal judges as well.”).

76. See *Moore v. Brewster*, 96 F.3d 1240, 1243–44 (9th Cir. 1996) (citing *Mullis* and *Pulliam*); see also *Moreno v. Cal.*, 25 F. Supp. 2d 1060, 1063 (N.D. Cal. 1998) (“State judges are immune from suit for money damages, but may be subject to suit for prospective injunctive or declaratory relief.”); *Church of Scientology*, 846 F. Supp. at 885 n.10 (“It is . . . established that judicial

IV. THE APPLICABILITY OF THE EQUITABLE EXCEPTION IN ARBITRAL IMMUNITY CASES

A. *The View That Arbitrators Are Not Immune From Equitable Claims*

Under the foregoing analysis, arbitrators also presumably remain subject to claims for declaratory, injunctive, and other equitable relief.⁷⁷ Insofar as their relationship to courts considering challenges to their jurisdiction or to the validity of their awards is concerned, arbitrators are analogous to lower courts.⁷⁸ Thus, the prospect of enjoining an arbitrator does not implicate the principal systemic concern – the imposition of equitable relief upon a court “of equal stature in the same court system”⁷⁹ – that led the Ninth Circuit and other courts to immunize federal judges from claims for equitable relief.⁸⁰

immunity does not bar declaratory or injunctive relief in actions against state judges . . .”) (citing *Pulliam*).

77. See Nolan & Abrams, *supra* note 5, at 245 n.97 (asserting that “arbitrators, like judges, are theoretically subject to injunctive or declaratory relief” under *Pulliam*); cf. *United Food & Commercial Workers*, 138 L.R.R.M. (BNA) at 2918 (“Arbitral immunity is an outgrowth of the doctrine . . . which limits judicial liability for *damages* resulting from judicial decisions.”) (emphasis added).

78. See *Council of Sch. Officers v. Vaughn*, 553 A.2d 1222, 1227 n.11 (D.C. 1989) (noting that the “role of arbitrator [is] analogous to that of trial judge in appellate proceedings”) (citing *Sys. Fed’n, No. 30, Ry. Employees’ Dep’t v. Braidwood*, 284 F. Supp. 607, 610-11 (N.D. Ill. 1968)); *Attorney Gen. v. Morgan*, 565 A.2d 1072, 1074 (N.H. 1989) (referring to an arbitrator “acting in his capacity as a trial judge”).

79. *Stephens*, 827 F. Supp. at 364; cf. *TCF Film Corp. v. Gourley*, 240 F.2d 711, 713 (3rd Cir. 1957) (observing that “judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other”); *Bojas-Gutiérrez v. Hoy*, 161 F. Supp. 448, 450 (S.D. Cal. 1958) (“For judges of co-ordinate jurisdiction to presume to overrule one another usually adds only unseemly conflict and confusion where certainty and predictability are most to be desired.”); *aff’d*, 267 F.2d 490 (9th Cir. 1959).

80. See *Stephens*, 827 F. Supp. at 364-65 (asserting that the judicial immunity doctrine “cannot be interpreted to permit . . . an untenable system of ‘horizontal appeals’ and ‘reverse review’ of federal court judgments”) (quoting *Mullis*, 828 F.2d at 1292-93); cf. *Baier v. Parker*, 523 F. Supp. 288, 290 (M.D. La. 1981):

Whatever the plaintiffs have styled their [declaratory judgment] action, plaintiffs’ suit is nothing more than a horizontal appeal taken to a district court’s decision and of a decision rendered by an appellate court. Such attempts to deliberately bypass the proper channels for appellate review shall not be tolerated or condoned . . .

Id.

This conclusion is bolstered by the immunity provision contained in the Uniform Arbitration Act.⁸¹ That provision immunizes arbitrators to the same extent as state court judges who,⁸² based on the debatable premise that they are “inferior” to their federal counterparts,⁸³ “are not immune from federal suits seeking equitable or declaratory relief.”⁸⁴ In addition, the Ninth Circuit, which was the first federal appellate court to hold that federal judges are immune from claims for equitable relief,⁸⁵ specifically held that arbitrators are *not* immune from such claims in *Kemner v. District Council of Painting and Allied Trades No. 36*.⁸⁶

The employer in *Kemner* was a party to a collective bargaining agreement that created a tiered pair of arbitration committees for the purpose of resolving disputes between the employer and the union.⁸⁷ The union invoked this arbitration procedure,⁸⁸ claiming that the employer violated the agreement by failing to make trust fund contributions.⁸⁹ The employer appeared at hearings before the

81. A substantial majority of states have adopted, in substance, the provisions of the Uniform Arbitration Act in order “to encourage and facilitate the use of arbitration.” Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 n.2 (Tex. 1992). This objective is “furthered by the recognition and frustrated by the non-recognition of arbitral immunity.” *Higdon*, 71 S.W.3d at 132.

82. See UNIF. ARBITRATION ACT § 14(a) (2000), 7 U.L.A. 31 (Supp. 2004) (“An arbitrator...acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.”). For an academic discussion of the Uniform Arbitration Act, see Francis J. Pavetti, *Why the States Should Enact the Revised Uniform Arbitration Act*, 3 PEPP. DISP. RESOL. L.J. 443 (2003).

83. Compare Weisberger, *supra* note 43, at 549 (“[U]ntil the *Pulliam* opinion, the relationship between state and federal courts [had] never been described as one of a superior court toward an inferior one.”) with *Stephens*, 827 F. Supp. at 364 (“[A]lthough the state courts in our federal system are not ‘inferior’ to the federal courts, the decisions of state courts are subject to federal review in matters involving federally protected rights, and, under limited circumstances, are also subject to federal court injunctions.”) (citations omitted).

84. *Crane v. Tex.*, 759 F.2d 412, 421 n.11, *modified on other grounds*, 766 F.2d 193 (5th Cir. 1985); see also *T.W. v. Brophy*, 954 F. Supp. 1306, 1311 (E.D. Wis. 1996) (“*Pulliam* allows a federal court to enjoin a state court judge in certain circumstances....”); *Battle v. Whitehurst*, 831 F. Supp. 522, 528 (E.D. Va. 1993) (“The doctrine of judicial immunity does not insulate state court judges from claims for injunctive relief. . .”).

85. See *Bolin v. Story*, 225 F.3d 1234, 1240 (11th Cir. 2000) (discussing *Mullis*); see also *Wightman*, 809 F. Supp. at 476 (“While two circuit court decisions have addressed this issue, only the Ninth Circuit’s decision in *Mullis*...gave this issue substantial consideration.”).

86. *Kemner v. District Council of Painting and Allied Trades No. 36*, 768 F.2d 1115, 1119-20 (9th Cir. 1985). Another federal appellate court reached a similar conclusion with respect to mediators. See *Wagshal v. Foster*, 28 F.3d 1249, 1251-52 (D.C. Cir. 1994) (relying on *Pulliam* in holding that a claim for injunctive relief against a court-appointed mediator was “not barred by judicial immunity”); cf. *Nat’l Football League Players Ass’n v. Office & Prof’l Employees Int’l Union, Local 2*, 947 F. Supp. 540, 545 (D.C. 1996) (indicating that “quasi-judicial immunity...applies to arbitrators and mediators”) (emphasis added).

87. *Kemner*, 768 F.2d at 1117.

88. Grievance and arbitration provisions are “a standard feature of almost all collective bargaining agreements.” *Antol v. Esposito*, 100 F.3d 1111, 1121 (3d Cir. 1996).

89. *Kemner*, 768 F.2d at 1117.

arbitration committees and objected to the committees' proceedings,⁹⁰ arguing that the union's grievance raised matters that were not covered by the collective bargaining agreement.⁹¹

When the arbitration committees ultimately concluded that the employer was liable for unpaid trust fund contributions,⁹² the employer brought suit to vacate the committees' award under Section 301 of the Labor Management Relations Act,⁹³ arguing that the committees had exceeded their authority under the terms of the collective bargaining agreement.⁹⁴ The employer named as defendants both the union and the arbitration committees.⁹⁵ The defendants then moved to dismiss the complaint, arguing among other things that the arbitrators were immune from suit, and the district court granted the defendants' motion without discussion.⁹⁶

On appeal, the Ninth Circuit reversed, holding that the district court erred in concluding that the arbitration committees were immune from suit.⁹⁷ Although the Ninth Circuit has recognized that arbitrators are "immune from civil liability for acts within their jurisdiction arising out of their arbitral functions in contrac-

90. The Ninth Circuit imposes upon a party opposing arbitration "an affirmative obligation to present to the arbitrator any arguments why the arbitration should not proceed." *United Steelworkers of Am. v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981). However, the arbitrability of a dispute is ultimately "a matter for the courts to determine." *Sheet Metal Workers Int'l Ass'n, Local No. 252 v. Standard Sheet Metal, Inc.*, 699 F.2d 481, 483 (9th Cir. 1983).

91. *Kemner*, 768 F.2d at 1117.

92. *Id.* at 1118.

93. 29 U.S.C. § 185 (2000). Section 301 establishes federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). The provision has been interpreted to provide "a basis for federal question jurisdiction over actions to...vacate arbitration awards." *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 835 (9th Cir. 2004); *see also Burns Int'l Sec. Servs., Inc. v. Int'l Union, United Plant Guard Workers of Am.*, 47 F.3d 14, 16 (2d Cir. 1994) ("Section 301(a) of the Labor Management Relations Act...provides [federal] subject matter jurisdiction for an action to vacate an arbitration award.") (citation omitted).

94. *Kemner*, 768 F.2d at 1118; *cf. Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6677*, 916 F.2d 63, 65 (2d Cir. 1990) ("An arbitrator's authority to settle disputes under a collective bargaining agreement is contractual in nature, and is limited to the powers that the agreement confers.")

95. *Kemner*, 768 F.2d at 1117; *cf. Nolan & Abrams, supra* note 5, at 247 (noting that the language of Section 301 "could refer to any suit arising out of a contract between an employer and a labor organization, in which case an arbitrator conceivably could...be sued in federal court for breach of the agreement.")

96. *Kemner*, 768 F.2d at 1117.

97. *Id.* at 1120.

tually agreed upon arbitration hearings,”⁹⁸ the *Kemner* court refused to extend this immunity to claims for equitable relief:

[The employer] has sued only for relief from those acts allegedly taken in excess of the committees’ jurisdiction, not for damages against the committees or any individual. Section 301 confers jurisdiction on the courts to determine such issues, and the policy concerns underlying the doctrines of judicial and arbitral immunity from damages actions do not obtain.⁹⁹

This is also the conclusion reached by a federal district court in *TWA, Inc. v. Sinicropi*.¹⁰⁰ That case involved an employer’s suit to vacate a retirement board’s decision to award benefits to a former employee.¹⁰¹ When the board members were initially split over whether the employee was entitled to benefits, an impartial referee was appointed¹⁰² in accordance with the terms of the retirement plan to break the deadlock.¹⁰³

When the referee subsequently sided with the board members who favored awarding benefits to the employee,¹⁰⁴ the employer brought suit against those board members, the referee, the employee, and his union¹⁰⁵ seeking equitable relief under the Employee Retirement Income Security Act of 1974 (“ERISA”).¹⁰⁶ In particular, the employer asked the court to vacate the board’s decision on the ground that the board had exceeded its authority under the terms of the plan.¹⁰⁷

98. *Wasyf*, 813 F.2d at 1582; *see also* *Cort v. Am. Arbitration Ass’n*, 795 F. Supp. 970, 971 (N.D. Cal. 1992) (“Ninth Circuit...courts have generally recognized that the doctrine of judicial immunity is applicable to the arbitration process.”).

99. *Kemner*, 768 F.2d at 1119-20 (citation omitted); *see also* *Falkner v. Blanton*, 419 U.S. 977, 977 (1974) (Douglas, J., dissenting from denial of certiorari) (observing that two other federal appellate courts “have concluded that the reasons for immunity in damage actions are inapplicable when injunctions or declaratory judgments are sought”) (citing cases).

100. *Sinicropi*, 1994 WL 132233.

101. *See id.* at *1.

102. The appointed referee is a prominent arbitrator who has written a number of respected articles and treatises on arbitration, including MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, *EVIDENCE IN ARBITRATION* (2d ed. 1987) and MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, *REMEDIES IN ARBITRATION* (2d ed. 1990).

103. *See Sinicropi*, 1994 WL 132233 at *1.

104. The referee actually drafted the opinion that became the board’s decision. *See id.* at 601-02.

105. *See id.* at 600, *1.

106. 29 U.S.C. §§ 1001-1461 (1996).

107. *See Sinicropi*, 1994 WL 132233 at *1. Section 502(a) of ERISA authorizes a beneficiary of a covered plan to bring suit for injunctive or other equitable relief to enforce the terms of the plan or to redress any violations of ERISA or the terms of the plan. 29 U.S.C. § 1132(a)(3); *see also* *Murphy v. Keystone Steel & Wire Co.*, 850 F. Supp. 1367, 1373 (C.D. Ill. 1994) (“ERISA provides a private right of action to any beneficiary or participant to enforce the terms of either a pension or a welfare benefit plan.”), *aff’d*, 61 F.3d 560 (7th Cir. 1995).

The referee then moved to dismiss the employer's claim against him,¹⁰⁸ arguing that, as an impartial arbitrator he was "functionally comparable" to a judge,¹⁰⁹ and therefore immune from suit.¹¹⁰ However, the employer, who was not seeking monetary relief from the referee or any of the other defendants,¹¹¹ responded that although arbitrators may be immune from damage awards, they are not immune from awards of prospective equitable relief.¹¹²

The court agreed with the employer, noting that the case on which the referee was relying to support his contrary contention, *International Union, United Automobile Workers of America v. Greyhound Lines, Inc.*,¹¹³ had specifically reserved judgment on the issue.¹¹⁴ Relying instead on *Pulliam v. Allen*,¹¹⁵ the *Sinicropi* court held, as a matter of law, that arbitral immunity does not shield an arbitrator from a claim for equitable relief,¹¹⁶ and therefore refused to dismiss the employer's claim against the referee.¹¹⁷

108. It is not clear why the board members named as defendants did not join in this motion, since they would appear to be no less entitled to immunity than the referee. See *I. & F. Corp.*, 493 F. Supp. at 149 (holding that even members of dispute resolution boards who are "vitaly interested in the matters before them" may be protected by arbitral immunity, because "it is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties").

109. See *Sinicropi*, 1994 WL 132233 at *1. This argument was premised upon the Supreme Court's indication, in *Butz*, 438 U.S. at 478, that it is appropriate to extend immunity to non-judicial officers acting in a capacity "functionally comparable to that of a judge." *Id.* at 513 (internal quotation marks omitted).

110. See *id.* at *1; cf. *Corey*, 691 F.2d at 1209-10 (noting that other courts "have applied in substance a functional comparability test and accorded arbitrators immunity for acts arising out of the scope of their arbitral functions").

111. See *Sinicropi*, 1994 WL 132233 at **1-2.

112. See *id.* at *1.

113. *United Auto. Workers*, 701 F.2d at 1181.

114. See *Sinicropi*, 1994 WL 132223 at *2 ("*United Automobile Workers* is not to the contrary. In concluding that the arbitrator was entitled to immunity from liability for damages, the court declined to address whether the doctrine of arbitral immunity would bar an action for equitable relief.") (citing *United Auto. Workers*, 701 F.2d at 1187 n.10); cf. *Nolan & Abrams*, *supra* note 5, at 250: *Greyhound* is not so strong an extension of arbitral immunity . . . as it might appear. One of the three panel members opposed reaching the immunity issue, and even the majority reserved the question of whether a plaintiff could maintain an action against an arbitrator for equitable relief, as opposed to damages. (Footnotes omitted.)

115. *Pulliam*, 466 U.S. at 522.

116. See *Sinicropi*, 1994 WL 132233 at *2.

117. See *id.* at *3. The referee subsequently moved for reconsideration of this ruling, but the court found it unnecessary to rule on the motion because the referee and the other defendants were awarded summary judgment on other grounds. See *Sinicropi*, 887 F. Supp. at 602 n.5.

B. The View That Arbitrators Are Immune From Claims for Equitable Relief

An opposing view was expressed in *Tamari v. Conrad*,¹¹⁸ one of the seminal federal court decisions addressing the scope of the arbitral immunity doctrine.¹¹⁹ *Tamari* involved a claim for declaratory relief brought by commodity futures investors¹²⁰ against a panel of arbitrators selected to arbitrate a dispute between the investors and their broker.¹²¹ The investors asserted that the panel was improperly constituted,¹²² and requested an injunction prohibiting any further arbitration proceedings, as well as a declaration that any award issued by the panel was void.¹²³ The investors named only the panel members as defendants, although the broker was subsequently permitted to intervene in order to protect its own interests.¹²⁴

The district court dismissed the action on the ground that arbitrators are immune from suits challenging their authority to resolve disputes,¹²⁵ and the investors appealed.¹²⁶ The investors argued that the principal rationale for immunizing arbitrators from claims for monetary relief – the presumption that “an arbitrator cannot impartially resolve a dispute unless he is free from the fear of reprisal by a dissatisfied litigant” – does not apply in cases that only involve claims for equitable relief.¹²⁷

Although that argument is supported by the analysis in *Pulliam v. Allen*¹²⁸ (which had not been decided when *Tamari* arose)¹²⁹ and other Supreme Court

118. *Tamari*, 552 F.2d at 778.

119. *Tamari* was the first reported case holding that “immunity attaches even where a litigant calls into question the arbitrator’s jurisdiction.” *Raitport v. Provident Nat. Bank*, 451 F. Supp. 522, 527 (E.D. Pa. 1978). Prior to that time, “[c]ases in which courts . . . clothed arbitrators with immunity [had] involved disgruntled litigants who sought to hold an arbitrator liable for *alleged misconduct in arriving at a decision*.” *Baar*, 211 Cal. Rptr. at 428; *see also Nolan & Abrams, supra* note 5, at 240 (describing *Tamari* as a “leading case” on arbitral immunity).

120. Commodity futures trading “involves the purchase and sale of contracts for delivery at some future date of specific quantities of a given commodity at fixed prices.” *Ping He (Hai Nam) Co. v. Nonferrous Metals (U.S.A.) Inc.*, 22 F. Supp. 2d 94, 102 n.1 (S.D.N.Y. 1998), *vacated in part on other grounds*, 187 F.R.D. 121 (S.D.N.Y. 1999). For a comprehensive discussion of commodity futures trading, *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 356-67 (1982).

121. *See Tamari*, 552 F.2d at 779-80.

122. In particular, the investors claimed that “the selection and composition of the arbitration panel violated the terms of the [parties’] agreement to arbitrate as well as the rules of the Chicago Board of Trade.” *Id.* at 780.

123. *See id.*

124. *See id.*

125. *See id.* at 779.

126. *See id.* at 780.

127. *See Tamari*, 552 F.2d at 780; *cf. Guerin v. Riley*, 573 F. Supp. 110, 111 (D.N.J. 1983) (“[T]he decision not to extend immunity to . . . suits for equitable relief is supported by the reasoning which underlies the principles of judicial immunity.”).

128. *Pulliam*, 466 U.S. at 522.

precedent,¹³⁰ the Seventh Circuit held that arbitral immunity extends to cases in which the plaintiff is only challenging the arbitrator's authority to resolve the parties' dispute.¹³¹ The court reasoned that arbitrators have no direct interest in the outcome of such cases,¹³² and will be unlikely to agree to arbitrate disputes if they can be "caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit."¹³³

In *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*,¹³⁴ a federal district court relied on *Tamari* in holding that arbitrators are immune from claims for injunctive relief,¹³⁵ despite acknowledging the existence of prior case law holding that arbitral immunity does not shield arbitrators from claims for equitable relief.¹³⁶ The *Brandon* court noted that arbitrators are not necessary parties to actions challenging their awards because those awards are subject to federal judicial review by means of a motion to modify or vacate the award.¹³⁷

The court also noted that, as a policy matter, permitting suits against arbitrators "threatens to scuttle the efficacy of arbitration and to intimidate the [arbitra-

129. In particular, the *Pulliam* Court's refusal to immunize state court judges from claims for equitable relief was based, in part, upon its conclusion that "the absence of immunity from prospective injunctive relief . . . had not chilled judicial independence." *Bolin*, 225 F.3d at 1241 (discussing *Pulliam*).

130. See *Falkner*, 419 U.S. at 978 (Douglas, J., dissenting from denial of certiorari) ("I assume that subjecting judges to damage liability would discourage vigor and independence of the bench, yet there need be no fear that subjecting judges to equitable relief . . . will inhibit desirable judicial behavior.").

131. See *Tamari*, 552 F.2d at 780.

132. See *id.* at 781. The court also noted that the investors could challenge the arbitration panel's authority by bringing an action against their "real adversary" -- the broker -- to have the panel's award set aside. *Id.*; see also *Raitport*, 451 F. Supp. at 527 (concluding that "arbitrators' immunity does not deprive [the plaintiff] of a remedy for any wrong he may have suffered; it simply requires that he pursue his remedies against . . . his real adversary") (internal quotation marks omitted) (citing *Tamari*).

133. *Tamari*, 552 F.2d at 781; see also Bernard Dobranski, *The Arbitrator As a Fiduciary Under the Employee Retirement Income Security Act of 1974: A Misguided Approach*, 32 AM. U. L. REV. 65, 84 (1982) ("An arbitrator cannot be expected to decide . . . disputes if he may be saddled with the burden of defending his decision in a law suit. Arbitrators, especially the most experienced and knowledgeable ones, will not accept appointment in such cases.").

134. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners*, 203 F.R.D. 677 (S.D. Fla. 2001), *aff'd in part and dismissed in part*, 312 F.3d 1349 (11th Cir. 2002).

135. *Id.* at 688 & n.10.

136. *Id.* at 689.

137. *Id.* at 688; cf. *Corey*, 691 F.2d at 1210 ("Although the scope of review differs slightly, the same protection is present in judicial review of arbitrators' decisions . . . as is present in the review of judicial or administrative decisions.").

tion] panel from adjudicating the dispute.”¹³⁸ The court went on to conclude that, in assessing this threat, there is no meaningful distinction between damage claims and claims for equitable relief,¹³⁹ and thus no persuasive policy reason for refusing to extend arbitral immunity to claims for equitable relief.¹⁴⁰

The same result was reached in *Prudential Bache-Securities Ltd. v. National Association of Securities Dealers Dispute Resolution, Inc.*¹⁴¹ *Prudential Bache-Securities* arose out of an arbitration commenced by an investor against three affiliated brokerage firms with whom he maintained investment accounts.¹⁴² The investor claimed that a stockbroker employed by one of the firms had engaged in numerous unauthorized transactions on his behalf as part of a “churning” scheme to increase the stockbroker’s commissions.¹⁴³

Two of the brokerage firms, who were not parties to the account agreement under which the investor was seeking arbitration,¹⁴⁴ filed suit to enjoin the arbitration panel from proceeding with the arbitration.¹⁴⁵ The panel moved to dismiss the claim,¹⁴⁶ indicating that it would abide by any court order concerning the firms’ obligation to arbitrate.¹⁴⁷ The brokerage firms opposed the motion,

138. *Brandon*, 203 F.R.D. at 688; cf. *Blue Cross*, 114 S.W.3d at 133 (“[F]reedom from the threat of lawsuits initiated by dissatisfied parties [is] essential to the success of the arbitration process.”).

139. *Brandon*, 203 F.R.D. at 689 (characterizing the difference between damage claims and claims for equitable relief as “a distinction without a difference”); cf. *Jordan v. Haw. Gov’t Employees Ass’n Local 152*, 472 F. Supp. 1123, 1129 (D. Haw. 1979) (“[I]njunctive relief with its attendant contempt powers may pose as real a threat to impartial decision-making as a suit for damages.”). *But see Giacalone v. Abrams*, 850 F.2d 79, 84 (2d Cir. 1988) (rejecting “the implicit assumption that the burden of defending a suit for equitable relief . . . is no less than the burden of defending against personal liability for damages”).

140. *See Brandon*, 203 F.R.D. at 689; cf. *Star Distributions, Ltd. v. Marino*, 613 F.2d 4, 7 (2d Cir. 1980) (“[T]he justification for . . . immunity against injunctive relief, while somewhat different from that for immunity for damages, is no less compelling.”).

141. *Prudential Bache-Securities Ltd. v. National Association of Securities Dealers Dispute Resolution, Inc.*, 289 F. Supp. 2d 438 (S.D.N.Y. 2003).

142. *Id.* at 439-40.

143. *Id.* at 439.

144. *Id.* Each of the investor’s account agreements contained a different dispute resolution procedure, and the investor invoked only one of them. *Id.*

145. *Id.* Even though the firms had not agreed to the pertinent arbitration provision, the arbitration panel had issued an order purporting to compel them to participate in the arbitration the investor initiated. *Prudential Bache*, 289 F. Supp. 2d at 439-40.

146. *Id.* at 439-40. The suit was actually brought against, and the motion to dismiss made by, the arbitration organization from which the arbitration panel was selected. *Id.* However, the defendant is characterized here as the arbitration panel for the sake of simplicity in view of the fact that “organizations that sponsor arbitrations, as well as arbitrators themselves, enjoy . . . immunity from civil liability.” *New Eng. Cleaning Servs., Inc. v. Am. Arbitration Ass’n*, 199 F.3d 542, 545 (1st Cir. 1999).

147. *Prudential Bache*, 289 F. Supp. 2d at 440.

arguing that the arbitration panel was subject to suit challenging its jurisdiction over the parties' dispute.¹⁴⁸

The court granted the panel's motion to dismiss,¹⁴⁹ holding that arbitrators are immune from claims challenging their jurisdiction.¹⁵⁰ In reaching this result, the court noted the similarity between arbitral and judicial functions,¹⁵¹ and specifically held that arbitrators are entitled to the same immunity as *federal* judges from suits challenging the exercise of their jurisdiction¹⁵² – meaning, obviously, immunity “from injunctive relief as well as money damages.”¹⁵³

V. AN ALTERNATIVE APPROACH: THE ARBITRATOR IS NOT A NECESSARY PARTY

A. *The Arbitrator Is Not the Real Party in Interest*

There was no appeal from the district court's ruling in *Prudential Bache*,¹⁵⁴ nor was the propriety of extending arbitral immunity to claims for equitable relief addressed on appeal in the *Brandon* case.¹⁵⁵ Thus, apart from *Tamari v. Conrad*,¹⁵⁶ there is no federal appellate authority explicitly holding that arbitrators are immune from such claims.¹⁵⁷ However, other federal courts have

148. *Id.*

149. *Id.* at 441.

150. *Id.* at 440 (“[T]he Court concludes that arbitrators . . . are immune from suit for jurisdictional determinations made in their capacity as arbitrators.”).

151. *Id.* (“[T]he nature of the function performed by arbitrators necessitates protection analogous to that traditionally accorded to judges.”) (quoting *Austern*, 898 F.2d at 886).

152. *Id.* (“[I]t is appropriate to extend to arbitrators the same immunity that federal courts currently enjoy from suits based on the wrongful exercise of jurisdiction.”)

153. *Bolin*, 225 F.3d at 1240.

154. Telephone interview with Terri L. Reicher, Associate General Counsel, National Association of Securities Dealers, Inc. (October 19, 2004). An appeal from the court's immunity ruling would have been particularly surprising because the court enjoined the investor, who intervened in the action, from proceeding with the arbitration, and the arbitration panel agreed to abide by that ruling. See *Prudential Bache*, 289 F. Supp. 2d at 439-41.

155. *Brandon*, 312 F.3d at 1359 (“No need exists. . . to decide whether arbitral immunity protects arbitrators from suits seeking only injunctive relief.”).

156. *Tamari*, 552 F.2d at 778.

157. However, *Prudential Bache* and *Brandon* are not the only federal district court decisions extending arbitral immunity to “challenges to the right of . . . arbitrators to make any decision in the case before them.” *Krecun v. Bakery, Cracker, Pie, Yeast Drivers and Misc. Workers Unions, Local 734, Int'l Bhd. of Teamsters*, 586 F. Supp. 545, 550 (N.D. Ill. 1984) (applying *Tamari*); see also *Nolan & Abrams*, *supra* note 5, at 240-41 (“Although *Tamari* is one of the very few reported cases involving a preaward challenge to the arbitrator's jurisdiction, other authority recognizing immunity form a postaward jurisdictional challenge supports the *Tamari* holding.”).

reached essentially the same result by holding that arbitrators are not indispensable parties in litigation challenging the validity of their decisions or addressing the arbitrability of a dispute.¹⁵⁸

In *Honeywell, Inc. v. United Instrument Workers Local No. 116*,¹⁵⁹ for example, an employer sought to compel a union to arbitrate a dispute under the terms of an expired collective bargaining agreement.¹⁶⁰ The union challenged the court's jurisdiction to adjudicate the dispute on the ground that the arbitrator was an indispensable party who the employer had failed to join in the action.¹⁶¹

However, the court rejected the union's argument.¹⁶² The court noted that the only question properly before it was whether the parties agreed to arbitrate the dispute at issue.¹⁶³ Because the arbitrator could provide nothing to assist in resolving this question,¹⁶⁴ the court concluded that he was not an indispensable party and that his absence from the proceedings did not prejudice the employer.¹⁶⁵ Finding the union's other arguments to be equally lacking in merit,¹⁶⁶ the court ordered the parties to proceed to arbitration.¹⁶⁷

A similar result was reached, in a different context, in *Franklin v. Sandra Greer Real Estate, Inc.*¹⁶⁸ The plaintiff in *Franklin* challenged the termination of his employment, which had been upheld in an arbitration conducted in accordance with the terms of a collective bargaining agreement between his employer and the union that represented him.¹⁶⁹ The plaintiff brought suit alleging claims against (1) the arbitrator for injunctive relief in the form of an order vacating the

158. See generally *Cadle v. Am. Arbitration Ass'n*, 230 F.3d 920, 922 (7th Cir. 2000) ("It is not clear whether [the applicable] principle is properly understood as an 'immunity' rather than a conclusion that arbitrators . . . are not the real parties in interest").

159. *Honeywell, Inc. v. United Instrument Workers Local No. 116*, 307 F. Supp. 1126 (E.D. Pa. 1970).

160. See *id.* at 1126-28.

161. *Id.* at 1128.

162. *Id.* ("The Court concludes that [the union's] contention is without merit").

163. *Id.*

164. *Id.*; cf. *AT&T Techs., Inc. v. Communication Workers of Am.*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

165. See *Honeywell*, 307 F. Supp. at 1128. Ironically, the court did not address the potential prejudice to the union, who was the party claiming the arbitrator was an indispensable party. However, it seems clear that the union likewise suffered no prejudice from the employer's failure to name the arbitrator as a party. See generally *Int'l Med. Group*, 149 F. Supp. 2d at 628 (asserting that joinder of the arbitrator as a party "is unnecessary to the resolution of any claim directed at determining the propriety of arbitration..."); Nolan & Abrams, *supra* note 5, at 242 ("Neither side need[s] the arbitrator as a party . . .").

166. In particular, the court noted that "[a]ll of the other issues raised [by the union were] factual questions for the arbitrator to decide." *Honeywell*, 307 F. Supp. at 1129.

167. *Id.*

168. *Franklin v. Sandra Greer Real Estate, Inc.*, 89 L.R.R.M. (BNA) 2575 (S.D.N.Y. 1975).

169. *Id.* at 2575-76.

arbitration award,¹⁷⁰ (2) his former employer for wrongful discharge, and (3) his union for breach of the duty of fair representation.¹⁷¹

The arbitrator moved to dismiss the claim asserted against him.¹⁷² Although the plaintiff was seeking to recover damages from the employer and the union,¹⁷³ he disclaimed any such intent with respect to the arbitrator.¹⁷⁴ The court held that, under these circumstances, the arbitrator was not a necessary party to the action,¹⁷⁵ and because there could be no prejudice to the plaintiff in doing so, granted the arbitrator's motion to dismiss.¹⁷⁶

Similar reasoning has been applied in other cases.¹⁷⁷ In *Aberle Hosiery Co. v. American Arbitration Association*,¹⁷⁸ for example, a party who had agreed to purchase certain industrial machinery brought suit to enjoin the seller and an arbitration association¹⁷⁹ from proceeding with an arbitration that had been initi-

170. *Id.* at 2576. "The only relief requested by plaintiff which concerns [the arbitrator] is the demand for an order vacating the arbitrator's award." *Id.*

171. *Id.* As the exclusive representative of the employees in a bargaining unit, a union has a duty to represent the interests of all of those employees fairly and impartially. See *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). That duty is breached "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

172. See *Franklin*, 89 L.R.R.M. (BNA) at 2575-76.

173. It appears that the plaintiff was, at a minimum, seeking reinstatement to his former position and the recovery of damages attributable to his "loss of pay." *Id.* at 2576.

174. *Id.* "The plaintiff, in his memorandum and at oral argument, has specifically denied seeking any monetary damages against [the arbitrator]." *Id.*

175. *Id.* ("It is clear that the arbitrator is not a necessary party to an action seeking to set aside an arbitrator's award") (citing *Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974), *aff'd in relevant part and rev'd in part*, 514 F.2d 285 (2d Cir. 1975)).

176. See *id.* at 2576. "[W]e can see no possible prejudice to the plaintiff resulting from the granting of the motion to dismiss. . . . This court has the authority to vacate [the arbitration] award . . . in a suit brought solely against the employer and the local union, as plaintiff has done in this case." *Id.*

177. See *Howland*, 209 F. Supp. 2d at 592 ("The case law is clear that no cause of action can be asserted against an arbitrator based on the issuance of an unfavorable decision."); cf. *Higdon*, 71 S.W.3d at 133 ("[D]issatisfaction with the result of an arbitration is not a sufficient ground to overcome an arbitrator's . . . immunity.").

178. *Aberle Hosiery Co. v. Am. Arbitration Ass'n*, 337 F. Supp. 90 (E.D. Pa. 1972).

179. Although "[a]rbitral immunity ordinarily protects the individual arbitrator from liability," *United States v. City of Haywood*, 36 F.3d 832, 838 (9th Cir. 1994), the courts have generally held that this immunity "extends beyond arbitrators themselves to organizations that sponsor arbitrations." *Olsons*, 85 F.3d at 382. The reasoning underlying this extension of the doctrine is that the failure to immunize such an organization would "discourage it from sponsoring future arbitrations." *New Eng. Cleaning Servs.*, 199 F.3d at 546.

ated by the seller.¹⁸⁰ The court held that the arbitration association was not a necessary party to the action¹⁸¹ because it had no interest in the outcome of the matter.¹⁸²

The court also noted that the relief the purchaser sought could be granted without joining the arbitration association as a defendant,¹⁸³ because the arbitration would not proceed if the seller was enjoined from arbitrating the parties' dispute.¹⁸⁴ In this regard, the court was applying a common judicial preference for enjoining the parties to a dispute, rather than directly enjoining another tribunal from hearing the dispute.¹⁸⁵

B. Implications of the Real Party in Interest Issue for Arbitral Immunity

In *Thomas v. Consolidation Coal Co.*,¹⁸⁶ the Fourth Circuit noted the relative absence of any contrary authority holding that arbitrators are necessary

180. See *Aberle Hosiery*, 337 F. Supp. at 91.

181. The issue arose because the seller removed the case from state to federal court on the basis of diversity of citizenship, and the purchaser then sought a remand to state court on the ground that the purchaser and the arbitration association were citizens of the same state. See *id.* at 92; cf. *Walker v. Norwest Corp.*, 108 F.3d 158, 161 (8th Cir. 1997) ("It is, to say the least, well settled that federal diversity jurisdiction requires complete diversity, so that no defendant is a citizen of the same state as any plaintiff."). The seller opposed remand, invoking the principle that the citizenship of nominal or unnecessary parties is to be disregarded in determining the propriety of removal on diversity grounds. See *Aberle Hosiery*, 337 F. Supp. at 92; cf. *Jakoubek v. Fortico Benefits Ins. Co.*, 301 F. Supp. 2d 1045, 1049 (D. Neb. 2003) ("[C]omplete diversity of citizenship . . . depends on the citizenship of the real parties to the controversy when the complaint is filed, and not on the citizenship of nominal parties to the suit with no real substantial legal interest in the controversy.") (citations omitted).

182. See *Aberle Hosiery*, 337 F. Supp. at 92; see also *Nolan & Abrams*, *supra* note 5, at 241 ("The party doubting the arbitrator's jurisdiction can raise the jurisdictional issue in a suit brought before the hearing against the other party. The arbitrator has no legal interest in the dispute, is not an essential party, and should therefore have no role in such a suit.").

183. In an effort to confirm this fact, the arbitration association itself indicated that it would "continue to process [the seller's] claim only until such time as [the seller] is enjoined by the Courts from proceeding further." *Aberle Hosiery*, 337 F. Supp. at 92; see also *N. Ill. Gas Co. v. Airco Indus. Gases, Div. of Airco, Inc.*, 676 F.2d 270, 272 (7th Cir. 1982) (describing another communication from the same association asserting that it was "not a necessary party in judicial proceedings relating to . . . arbitration and should not be named as a party-defendant" because it would "abide by any court order directed against either party to the arbitration which is binding upon the parties.") (bracketing omitted).

184. See *Aberle Hosiery*, 337 F. Supp. at 92.

185. See *McKown*, 444 S.E.2d. at 115 (noting that *Aberle Hosiery* and similar cases reflect "a judicial preference to restrain parties to a controversy rather than restraining the tribunal from hearing the matter"). This preference often manifests itself in a reluctance to enjoin other courts from proceeding. See, e.g., *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982) ("[A] court should not enjoin judges from applying statutes when complete relief can be afforded by enjoining all other parties with the authority to seek relief under the statute.").

186. *Thomas v. Consolidation Coal Co.*, 380 F.2d 69 (4th Cir. 1967).

parties to actions in which the validity of their awards is at issue,¹⁸⁷ and asserted that the law “seems clear that the arbitrator is not a necessary party to such a suit.”¹⁸⁸ The consistency of this case law is particularly notable in view of the split of authority over whether arbitrators are “immune” from such actions,¹⁸⁹ and its legal significance is suggested by the interplay of the two issues in *Wooldridge v. Commonwealth of Virginia*.¹⁹⁰

In *Wooldridge*, the court dismissed a claim for declaratory relief asserted against a state official,¹⁹¹ despite acknowledging that his quasi-judicial immunity from liability for monetary damages¹⁹² did not necessarily shield him from an award of equitable relief.¹⁹³ Noting that a refusal to impose declaratory relief on the official would not prejudice the plaintiff,¹⁹⁴ the court concluded that it would serve little purpose to keep the official in the case.¹⁹⁵ Because its jurisdiction

187. See *id.* at 80 n.17. *But cf.* *Paine v. Lowndes County Bd. of Tax Assessors*, 183 S.E.2d 474, 476 (Ga. Ct. App. 1971) (“In our view an arbitrator would be a necessary party in any proceeding designed to prevent him from acting in the capacity to which he was appointed and had accepted.”), *disapproved on other grounds in* *Chancey v. Hancock*, 213 S.E.2d 633, 636 (Ga. 1975).

188. *Thomas*, 380 F.2d at 80 n.17.

189. See *supra* notes 77-153 and accompanying text.

190. *Wooldridge v. Commonwealth of Virginia*, 453 F. Supp. 1333 (E.D. Va. 1978).

191. The official was the Director of the Virginia Department of Welfare. See *id.* at 1335.

192. See *id.* at 1336-37. Due to the nature of their duties, many non-judicial government officials with decision-making authority have been afforded a degree of quasi-judicial or “official” immunity:

It has been recognized that the threat of civil liability can have a chilling effect on governmental officials in the proper performance of their duties. Accordingly, various forms of official immunity have been recognized to insure the independence necessary to protect the decision maker from bias or intimidation arising out of the exercise of judicial functions.

Cort, 795 F. Supp. at 971-72 (citations omitted).

193. See *Wooldridge*, 453 F. Supp. at 1337 n.3 (“The dismissal of the action for damages does not necessarily dispose of plaintiff’s prayer for declaratory judgment because judicial and quasi-judicial immunity may not extend to suits for declaratory relief.”); see also Steven L. Micas, *The Doctrinal Bases for Absolute and Qualified Public Official Immunities*, 29 URB. LAW. 47, 47 n.1 (1997) (“The public official immunity doctrines do not constitute a bar to prospective injunctive relief against a public official.”).

194. See *Wooldridge*, 453 F. Supp. at 1337 n.3 (“A declaratory judgment [against the state official] does not appear to be a necessary predicate for any future action to be undertaken by the plaintiff.”).

195. See *id.* (“[I]t would serve little purpose to keep [the official] in the suit solely on the strength of plaintiff’s prayer for declaratory relief . . .”).

over the plaintiff's equitable claim was discretionary,¹⁹⁶ the court dismissed the state official from the case entirely.¹⁹⁷

The same analysis should apply in cases seeking equitable relief from arbitrators.¹⁹⁸ In suits challenging the validity of arbitration awards or an arbitrator's authority to act, injunctive relief clearly can be obtained from the real parties in interest.¹⁹⁹ Because that relief should ordinarily be sufficient to protect an aggrieved party's interests,²⁰⁰ compelling the arbitrator to participate in such an action would "serve little purpose."²⁰¹

Accordingly, where an arbitrator *has* been named as a party in a case seeking equitable relief,²⁰² the court should, in the interest of judicial and litigant economy,²⁰³ ordinarily exercise its discretion to dismiss the arbitrator as a defendant.²⁰⁴ This *sub silentio* application of the arbitral immunity doctrine²⁰⁵ can be summarized in the following terms:

196. See *id.* ("[I]t is well established that judicial power to entertain actions solely for declaratory relief is discretionary.") (citing cases).

197. See *id.* ("[D]efendant . . . will be wholly dismissed from this action.").

198. See *Me. Sch. Admin. Dist. #5 v. Me. Sch. Admin. Dist. #5 Teachers Ass'n*, 324 A.2d 308, 309 n.1 (Me. 1974) ("The Arbitrator acts in a quasi-judicial capacity and need not and should not be designated a party in any procedure to modify or set aside his award."); *Weston*, *supra* note 31, at 506 ("If a claim against a provider is really a disguised complaint against the arbitrator's decisional acts, . . . the provider simply is not the real party in interest – immunity is irrelevant.").

199. See *Corey*, 691 F.2d at 1211 ("An aggrieved party alleging . . . lack of jurisdiction, etc., by arbitrators should pursue remedies against the 'real' adversary through the appeal process.").

200. See *DeVries v. Interstate Motor Freight Sys.*, 91 L.R.R.M. (BNA) 2764, 2769 (N.D. Ohio 1976) (asserting that the conclusion that an arbitrator was "not a proper party defendant" in an action challenging the validity of an arbitration award "in no way affects the relief that the plaintiffs may otherwise be entitled to if they are successful on the merits"), *aff'd*, 620 F.2d 302 (6th Cir. 1980); *Independence Dev., Inc. v. Am. Arbitration Ass'n*, 59 Pa. D. & C.2d 416, 423 (Ct. C.P. Bucks County 1972) ("[T]he relief which plaintiffs seek can be afforded even though [the arbitrator] is not mentioned as a party; a decree binding upon [the real parties in interest] will be sufficient to prevent further pursuit of the arbitration process.").

201. *Wooldridge*, 453 F. Supp. at 1337 n.3.

202. See *Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 691 (5th Cir. 1985) ("[A]rbitrators are . . . likely targets of recriminatory lawsuits by disappointed parties."); *Nolan & Abrams*, *supra* note 5, at 245 (asserting that dissatisfied litigants "might be inclined to forego damages and sue arbitrators for equitable relief").

203. See *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 774 (M.D.N.C. 2000) ("[T]he dismissal of unnecessary parties will promote judicial efficiency.").

204. See, e.g., *Shropshire v. Int'l Bhd of Teamsters of Am.*, 102 L.R.R.M. (BNA) 2751, 2752 (S.D. Ohio 1979) (dismissing claims asserted against arbitrators because they were "immune from civil suits" and therefore "improper party defendants"). See generally *Genovese v. Skol Co.*, 73 F. Supp. 423, 424 (S.D.N.Y. 1945) (noting that a "court in its discretion, can retain jurisdiction of a suit [while] allowing dismissals as to proper, but not necessary parties").

205. One court has asserted that a finding that an arbitrator "is not a necessary party" to litigation challenging the propriety of arbitration can be "stated otherwise" as a finding that arbitrators "are protected by arbitral immunity." *Int'l Med. Group, Inc.*, 312 F.3d at 833; see also *Shropshire*, 102 L.R.R.M. (BNA) at 2752 (stating that arbitrators "are not proper parties to . . . suit because they enjoy immunity as arbitrators") (emphasis added); *Nolan & Abrams*, *supra* note 5, at 242 (character-

Occasionally a losing party seeking to challenge an award in court names the arbitrator as a defendant along with the other party. This is improper. Once the arbitrator renders an award, his role is finished. The proper challenge to an award is an action to vacate it brought against the other party, the real adversary, not against the arbitrator. . . . [T]he arbitrator is not a proper party in a suit over the award and has no interest in the dispute once the award is rendered.²⁰⁶

VI. POLICY CONSIDERATIONS

*Kemner v. District Council of Painting & Allied Trades No. 36*²⁰⁷ and *TWA, Inc. v. Sinicropi*²⁰⁸ are the only federal court decisions specifically holding that arbitrators are not immune from claims for equitable relief.²⁰⁹ That conclusion reflects the view that arbitrators²¹⁰ and other individuals “who enjoy only quasi-judicial status, neither need nor can claim an immunity broader than judges.”²¹¹ Nevertheless, there is a striking absence of any discussion in either *Kemner* or *Sinicropi* of any policy reason for this conclusion.²¹² *Kemner*, in particular, has

izing the view that “the arbitrator is not a proper party in a suit over the award” as an “application of arbitral immunity”. See generally Weston, *supra* note 31, at 457-58 (“[T]he law in various guises confers substantial protection from civil liability through the doctrine of arbitral immunity.”) (emphasis added).

206. Nolan & Abrams, *supra* note 5, at 242 (footnotes omitted).

207. *Kemner*, 768 F.2d at 1115.

208. *Sinicropi*, 1994 WL 132233.

209. However, in *Durden*, the court suggested its agreement with the analysis in *Kemner* and *Sinicropi* by observing that “[a]rbitral immunity shields an arbitrator only from claims for damages,” despite leaving open “the propriety of [naming] the arbitrator as a defendant for the purpose of vacating . . . [an] award.” *Durden v. Lockheed-Georgia Co.*, 123 L.R.R.M. (BNA) 2262, 2263 n.1 (N.D. Ga. 1985).

210. See *Portland Gen. Elec. Co.*, 218 F.3d at 1090 (“[T]he arbitrator plays a quasi-judicial role.”); *Florasynt, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984) (noting that “arbitrators act in a quasi-judicial capacity”); *John W. Johnson, Inc. v. Basic Constr. Co.*, 292 F. Supp. 300, 302 (D.D.C. 1968) (“The arbitrator’s acts are somewhat analogous to a quasi-judicial process.”).

211. *Rouselle v. Perez*, 293 F. Supp. 298, 300 (E.D. La. 1968); see also *Anderson v. N.Y. State Div. of Parole*, 546 F. Supp. 816, 825-26 (S.D.N.Y. 1982) (questioning whether persons who “may not enjoy the independence of the true judiciary, should be accorded an immunity equally broad in scope”).

212. *Sinicropi* contains no discussion whatsoever of the policies underlying arbitral immunity, and the court in *Kemner* merely asserted, without elaboration, that those policies “do not obtain” in actions for equitable relief. *Kemner*, 768 F.2d at 1120.

been criticized on this basis,²¹³ as well as for failing to consider the alternative real party in interest issue.²¹⁴

The reason ordinarily advanced for refusing to interpret the various immunity doctrines to preclude claims for equitable relief stems from the view that decision-makers, whether judges or arbitrators,²¹⁵ need only be free from “the fear of adverse ‘personal consequences’” to maintain the impartiality necessary to the proper performance of their duties.²¹⁶ Immunity from claims for declaratory or injunctive relief is unnecessary, this reasoning goes, because relief of this nature “does not visit ‘personal consequences’ upon the defendant,” but instead merely “affects an individual in the conduct of his or her official duties.”²¹⁷ As one commentator explained:

[A]n injunction . . . does not threaten a judge in the same way as an action for damages which the judge may have to pay out of personal funds. Injunctive relief, then, does not pose the same kind of risk to the judiciary as other forms of liability, and therefore, it is not necessary to use judicial immunity to interdict it.²¹⁸

213. See Nolan & Abrams, *supra* note 5, at 237-38 (criticizing the “brief discussion” of arbitral immunity in *Kemner*, and predicting that “[m]ore thoughtful courts” will find the Ninth Circuit’s analysis in that case unpersuasive).

214. See *id.* at 237-38 (“The *Kemner* court seemed to confuse an action to vacate an award brought against the other party with an action brought against the arbitrator. The allegations were sufficient to state a cause of action against the other party, but not against the arbitrator.”).

215. See *L & H Airco, Inc.*, 446 N.W.2d at 376 (“Arbitrators must be protected from the harassment of personal suits brought against them by dissatisfied parties so that, like judges, they are able to ‘act upon their convictions free from the apprehensions of possible consequences.’”) (quoting *Gammel v. Ernst & Ernst*, 72 N.W.2d 364, 368 (Minn. 1955)).

216. *Adams v. Super. Ct. of Pa.*, 502 F. Supp. 1282, 1286 (M.D. Pa. 1980) (quoting *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978)); see also *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 688 F. Supp. 1522, 1525 (S.D. Fla. 1988).

The immunity doctrines are premised on the concern that the threat of personal liability will thwart the officials’ ability to carry out their duties with the decisiveness and good faith judgment required. The immunity doctrines, therefore, do not protect officials when they are not threatened with personal liability, such as when a complaint seeks injunctive relief. (Footnotes omitted).

217. *Adams*, 502 F. Supp. at 1286; see also *Larsen v. Gallogly*, 361 F. Supp. 305, 311 (D.R.I. 1973) (“A preventive remedy does not shackle a judge in the performance of his duties by fear of personal consequences.”), *vacated*, 420 U.S. 904 (1975); cf. *Spencer v. Holesinger*, 693 F. Supp. 703, 712 (C.D. Ill. 1988) (“[I]njunctive relief is much less intrusive than relief in the form of damages in terms of restricting . . . decision making”).

218. Jeffrey R. Shaman, *Judicial Immunity From Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 14 (1990); see also *Hogge v. Hedrick*, 391 F. Supp. 91, 96 (E.D. Va. 1975) (“The chilling effect on decision making occasioned by suits for monetary damages . . . is not present when equitable relief is sought”); cf. *Guerin*, 573 F. Supp. at 112 (“[E]xposure in equity poses no more danger to the independence and impartiality of . . . decision-making than does the possibility of reversal.”) (internal quotation marks and citation omitted).

Whatever merit this reasoning may have in the context of judicial immunity,²¹⁹ it ignores the fact that unlike judges,²²⁰ arbitrators are typically compensated directly for the services they provide,²²¹ and thus have an interest in maximizing the number of cases they hear.²²² Accordingly, the possibility of being enjoined from proceeding with an arbitration -- or even of having an arbitration award vacated²²³ -- clearly may have personal economic consequences for arbitrators that could impact their impartiality.²²⁴

219. See, e.g., *Childrens & Parents Rights Ass'n v. Sullivan*, 787 F. Supp. 724, 731 (N.D. Ohio 1991) ("The doctrine of judicial immunity, which is favored because it allows judges to apply the law without fear of personal consequences and prevents circumvention of the appellate process, does not apply where the requested relief is injunctive.").

220. See Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 473 (1998) (noting that the income of federal judges "is essentially unaffected by the number of cases they decide"); cf. *Brown v. Vance*, 637 F.2d 272, 284 (5th Cir. 1981) (invalidating, on due process grounds, a judicial compensation system in which the income of judges "depends directly on the volume of cases filed").

221. See *Hudson v. Chic. Teachers Union Local No. 1*, 743 F.2d 1187, 1195 (7th Cir. 1984) ("The arbitrator, unlike a federal judge, is not paid a salary that is independent of the number of cases he presides over"), *aff'd*, 475 U.S. 292 (1986); FRANK ELKOURI & EDNA JASPER ELKOURI, *HOW ARBITRATION WORKS* 40 (6th ed. 2003) ("Ad hoc arbitrators typically charge on a per diem basis for hearing time, travel time, and time spent studying the case and preparing the decision").

222. See *Hudson*, 743 F.2d at 1195 ("The arbitrator is paid for each arbitration, and this gives him a financial interest"); *Toppings v. Meritech Mortgage Servs., Inc.*, 140 F. Supp. 2d 683, 684 n.1 (S.D. W. Va. 2001) (describing arbitrators who "receive payment for their services based solely on the number of cases they handle"); Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1303 (2000) ("[T]he objectives of the arbitrator [are] furthered by an increase in the number of cases she handles.").

223. See *Wright-Austin Co. v. Int'l Union, United Auto. Workers of Am.*, 422 F. Supp. 1364, 1371 (E.D. Mich. 1976) (suggesting that the parties to an arbitration might not be obligated to compensate an arbitrator whose award is vacated if their arbitration agreement "state[s] that the arbitrator will only be compensated for his time and expenses if his Award is upheld by the courts"); cf. Drahozal, *supra* note 220, at 502 (noting that "the incentives of arbitrators differ from the incentives of trial court judges" because the compensation of judges "is the same regardless of how they decide cases").

224. See *Linney v. Turpen*, 49 Cal. Rptr. 2d 813, 824 (Ct. App. 1996) (Kline, J., dissenting) (discussing "the conflict of interest created by the pecuniary interests of . . . arbitrators whose income depends upon the number of cases they are selected to hear"); Donald J. Peterson & Julius Rezler, *Fee Setting and Other Administrative Practices of Labor Arbitrators*, 68 LAB. ARB. (BNA) 1383, 1391 (1977) ("When . . . a hearing [is] cancelled on such a short notice that the date cannot be used for an alternate case, the arbitrator may well be out actual expenses as well as [the] opportunity costs for a hearing date foregone."). See generally *Florasynth, Inc.*, 750 F.2d at 173 (noting that arbitrators often have interests "that overlap with the matter they are considering as arbitrators").

In addition, while judicial and arbitral immunity both protect the decision-making process from reprisals by dissatisfied litigants,²²⁵ arbitral immunity is also premised on an independent (although perhaps somewhat less compelling)²²⁶ policy rationale that is unique to arbitration²²⁷ -- the need to persuade qualified individuals to serve as arbitrators.²²⁸ This policy objective reflects an important difference between arbitrators and judges (the latter of whom rarely need to be recruited),²²⁹ and militates in favor of extending greater protection to arbitrators than is currently enjoyed by state court judges under *Pulliam*.²³⁰

In this regard, arbitrators may be compelled to expend personal resources in responding to claims for equitable relief,²³¹ which they might not be able to re-

225. See *Corey*, 691 F.2d at 1209-11; *Austern*, 898 F.2d at 882 (citing cases).

226. One federal court has characterized the goal of encouraging private actors to serve in decision-making roles as a "less important 'immunity-producing concern'" than the need to assure impartial decision-making. *Murphy v. N.Y. Racing Ass'n*, 76 F. Supp. 2d 489, 507 (S.D.N.Y. 1999) (quoting *Richardson v. McKnight*, 521 U.S. 399, 411 (1997)).

227. See *Nolan & Abrams*, *supra* note 5, at 235 ("Arbitral immunity cases follow two policy strands, one common to both judges and arbitrators (finality and independence), the other peculiar to arbitrators (which for lack of a better term we call 'recruitment')."); cf. *United Auto. Workers*, 701 F.2d at 1181 ("One of the policies underlying the doctrine of 'arbitral immunity' is that of protecting the integrity of the arbitrator or decision-making process from reprisals by dissatisfied parties.") (emphasis added).

228. See *Cort*, 795 F. Supp. at 973 ("[A]rbitral immunity has a two-fold goal; to protect arbitrators from suit, and to ensure that there is a body of individuals willing to perform the service."); *Austern*, 716 F. Supp. at 124 (stating that the need "to develop and maintain a pool of qualified persons to act as arbitrators" is one of "two important policies that are promoted by according arbitrators immunity from suit"); *Grane v. Grane*, 493 N.E.2d 1112, 1119 (Ill. Ct. App. 1986) ("[P]art of the reasoning to extend immunity to arbitrators is to encourage their voluntary participation in dispute resolution without being caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit . . .").

229. See *Nolan & Abrams*, *supra* note 5, at 235 ("The second [policy rationale supporting arbitral immunity] reflects significant distinctions between arbitrators and judges. A risk of liability in extreme circumstances would not deter many applicants from the judiciary, but it might well limit the number of those willing to serve as arbitrators."). *But see Reed v. Village of Shorewood*, 704 F.2d 943, 952 (7th Cir. 1983) ("[F]orcing judges to defend their judicial rulings by standing trial on the complaint of a disappointed litigant would make it difficult . . . for society to recruit competent judges.").

230. See *Austern*, 716 F. Supp. at 124 (noting that the need to recruit qualified persons to serve as arbitrators supports "an expansive treatment of the conduct included within the scope of protection"); *Nolan & Abrams*, *supra* note 5, at 234 (advocating "an immunity for the arbitrator at least as broad as a judge's"); cf. *Hill*, 263 F. Supp. at 326 ("If national policy encourages arbitration and if arbitrators are indispensable agencies in the furtherance of that policy, then it follows that the common law rule protecting arbitrators from suit ought not only to be affirmed, but, if need be, expanded.").

231. See *Toyota of Berkeley v. Auto. Salesmen's Union, Local 1095*, 834 F.2d 751, 757 (9th Cir. 1987) (observing that an arbitrator named as a defendant in an action to enjoin arbitration may be "eager to defend himself" and can "hardly be expected to do nothing"), *modified*, 856 F.2d 1572 (9th Cir. 1988); *Caso v. Coffey*, 359 N.E.2d 683, 686 (N.Y. 1976) (noting that in the absence of immunity, arbitrators may be required "to defend their awards in court . . . at their own expense"); *Forum Ins. Co. v. First Horizon Ins. Co.*, No. 87 C 2177, 1989 WL 65041, at *5 (N.D. Ill. June 8,

coup from the party asserting the claim.²³² While this expense will occasionally be modest,²³³ and the risk of incurring it thus may not have “the *in terrorem* effect . . . that the threat of a subsequent damage action would have,”²³⁴ it cannot fairly be characterized as being of no consequence to the arbitrator.²³⁵ In this respect, arbitrators are in a more vulnerable position than judges responding to equitable claims.²³⁶ Judges are likely to be “defended by government lawyers at no cost . . . and with no risk of personal monetary loss”²³⁷ for the very reasons that support *immunizing* judges – and arbitrators – from such claims altogether:

1989) (discussing the possibility that an arbitrator, “although shielded with immunity, would have to bear the fees and costs of litigation arising out of the arbitration proceeding”).

232. See, e.g., *Toyota of Berkeley*, 834 F.2d at 757 (noting the denial of an arbitrator’s request for an award of attorneys’ fees and costs, even though the request was a “reasonable response” to having been named as a defendant in an action to enjoin arbitration); *Calzarano v. Liebowitz*, 550 F. Supp. 1389, 1391 (S.D.N.Y. 1982) (refusing to award an arbitrator costs incurred in obtaining the dismissal, on immunity grounds, of a claim that appeared to have been “groundless”); *Feichtinger*, 893 P.2d at 1268 (rejecting an arbitrator’s contention that he should have received a larger award of attorneys’ fees in order to “discourage suits against arbitrators and thereby serve the public policies behind arbitral immunity”).

233. Arbitrators occasionally elect not to respond to claims for equitable relief, choosing instead to rely on one of the real parties in interest to defend any challenge to their authority or to the validity of an arbitration award. See, e.g., *Folse v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603, 605 n.3 (5th Cir. 1995) (describing an arbitrator who had “not asserted immunity or . . . even responded to [a] complaint” challenging his jurisdiction); *Southwire Co. v. Am. Arbitration Ass’n*, 545 S.E.2d 681, 684 (Ga. Ct. App. 2001) (holding that an arbitrator’s “failure to file an answer and its resulting default” was not “operative” against the real party in interest in an action to set aside an arbitration award); see also *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, 467 N.E.2d 87, 90 (Mass. 1984) (noting, in a union’s action to enforce an arbitrator’s award, that the interests of the union and the arbitrator were “virtually identical”).

234. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969), *aff’d*, 401 U.S. 154 (1970); cf. *De Abadia v. Izquierda Mora*, 792 F.2d 1187, 1189 (1st Cir. 1986) (“The fear of being sued and held personally liable for damages is a far cry from a suit for . . . injunctive relief . . .”) (bracketing omitted) (quoting *Bever v. Gilbertson*, 724 F.2d 1083, 1091-92 n.4 (4th Cir. 1984) (Hall, J., dissenting)).

235. See *Star Distributions, Ltd.*, 613 F.2d at 7 (“The deterrent effect of the threat of injunctive relief may be less but the cost and inconvenience and distractions of a trial . . . remain.”) (internal quotation marks and citation omitted). But cf. *Nolan & Abrams*, *supra* note 5, at 245 (asserting that “injunctive and declaratory relief are prospective remedies of little concern to ad hoc arbitrators”).

236. See, e.g., *Ashlodge, Ltd. v. Hauser*, 163 F.3d 681, 682 n.2 (2d Cir. 1998) (“We did not request the judge to defend [her] order because she might have then felt obliged to do so and this might have been an unfair imposition requiring the judge either personally or through an attorney to spend money or time or both in connection with the [matter].”); cf. *Noto*, *supra* note 18, at 856 (“[T]he task of defending against actions brought for injunctive relief, even where they do not succeed, [would] lay a substantial burden on judges.”).

237. *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 718 (10th Cir. 1988); see also *Bryan*, 246 F. Supp. 2d at 1260 (observing that “government attorneys should be made available

The rationale for providing a government attorney to defend official acts taken by judges is that such representation is necessary to ensure the independence of the judiciary. If a government attorney were not provided, judges would be forced to hire counsel with their own private funds. Judges would then be vulnerable to improper pressure created by threatened lawsuits. Furthermore, lack of such protection would increase the difficulty in recruiting talented attorneys to join the . . . bench.²³⁸

This argument for immunizing arbitrators from equitable claims is even more compelling if, as suggested by analogy to *Pulliam*,²³⁹ the failure to do so would also subject them to potential attorneys' fee awards in favor of parties who are successful in obtaining equitable relief.²⁴⁰ As one state court judge has observed: "If it is thought that damages would deter . . . independent and fearless decision-making, it must equally be conceded that the possibility of a [substantial] counsel fee accompanied by an injunction would deter even the most stouthearted [individual] from deciding a case without fear of personal consequences."²⁴¹

The foregoing analysis strongly suggests that failing to extend arbitral immunity to claims for equitable relief, like the threat of liability for damages,²⁴²

to judges being forced to defend their official actions"); *United States v. Zagari*, 419 F. Supp. 494, 505 (N.D. Cal. 1976) ("The United States Attorney customarily represents a federal judge in matters involving his judicial actions.").

238. *Tashima v. Admin. Office of U.S. Courts*, 967 F.2d 1264, 1268 (9th Cir. 1992).

239. In *Pulliam*, the Supreme Court "held that 'judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity' or to [an award of] costs and attorney's fees associated with the action." *Kampfer*, 989 F. Supp. at 201 (quoting *Pulliam*, 466 U.S. at 541-42); see also *Affeldt v. Carr*, 628 F. Supp. 1097, 1100 (N.D. Ohio 1985) ("*Pulliam* specifically held that judicial immunity does not bar an award of attorney's fees against a judicial officer.").

240. See *Sinicropi*, 1994 WL 132233 at *2 ("[I]mmunity does not shield [an arbitrator] from claims for attorney's fees if plaintiffs prevail in their quest for equitable relief."); cf. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1224 n.7 (5th Cir. 1991) (Garwood, J., dissenting) (asserting that an award of declaratory relief could be accompanied by an attorneys' fee award in "a far more significant amount than any damages [a plaintiff] might have recovered").

241. *Weisberger*, *supra* note 43, at 554; see also *Pulliam*, 466 U.S. at 543 (finding "some logic" to the contention that "the chilling effect of a damages award is no less . . . when the award is denominated attorney's fees"); *Stepanek v. Delta County*, 940 P.2d 364, 369 (Colo. 1997) (asserting that the *Pulliam* Court found persuasive the argument that "imposing liability for attorney fees . . . would have the same effect on the proper functioning of the judiciary as money damages" because in this context "attorney fees represent the functional equivalent of money damages").

242. See *Pavetti*, *supra* note 82, at 446 n.15 ("It is recognized that qualified people would have a disincentive to serve as an arbitrator if he or she were to be subject to claims for monetary damages by disgruntled [parties] after the arbitration."). See generally *Mejia v. City of N.Y.*, 119 F. Supp. 2d 232, 265 (E.D.N.Y. 2000) (asserting that "private actors" may be "deterred by the threat of damages suits from . . . service").

may deter qualified individuals from serving as arbitrators.²⁴³ Indeed, the drafters of the revised Uniform Arbitration Act appear to have concluded that subjecting arbitrators to *any* civil claims²⁴⁴ would deter individuals from serving in that capacity “because of the costs involved in defending even frivolous actions.”²⁴⁵ As the California Court of Appeals, from whose jurisdiction the uniform act’s immunity provision was taken,²⁴⁶ has explained: “The proper challenge to an [arbitration] award is an action to vacate it brought against the other party, the real adversary, not against the arbitrator. . . . *Dragging arbitrators into subsequent litigation would drastically interfere with their recruitment and independence.*”²⁴⁷

Finally, even if the potential burden of responding to claims for equitable relief does *not* significantly deter individuals from serving as arbitrators,²⁴⁸ it is

243. See *I. & F. Corp.*, 493 F. Supp. at 150 (asserting that a failure to immunize arbitrators from challenges to their authority would “discourage qualified arbitrators from lending their services”); *Caso*, 359 N.E.2d at 686 (“[A] requirement that those who serve on [arbitration] panels be prepared to defend their awards in court, perhaps even at their own expense, could only work to discourage qualified and competent persons from serving as arbitrators and, perhaps, even to frustrate the flexible design of the arbitral process itself.”).

244. See UNIF. ARBITRATION ACT § 14(a) cmt., 7 U.L.A. at 32 (noting that “full immunity from *any* civil proceedings is what is intended by the [act]”) (emphasis added); cf. *Weston*, *supra* note 31, at 473 (noting that “the drafters . . . intended to provide nearly absolute certainty that legal challenges to arbitral conduct are barred,” and therefore “explicitly endorse[d] broad arbitral immunity”).

245. *Id.* § 14(e) cmt., 7 U.L.A. at 32-33; see also *Austern*, 716 F. Supp. at 124 (discussing “the burden that would be placed on arbitrators . . . if they had to defend frivolous lawsuits”). See generally *Pulliam*, 466 U.S. at 545 (Powell, J., dissenting) (“The burdens of having to defend. . . a suit are identical in character and degree, whether the suit be for damages or prospective relief.”).

246. The act’s immunity provision “is based on the language of [a former California statute] establishing immunity for arbitrators.” UNIF. ARBITRATION ACT § 14(a) cmt., 7 U.L.A. at 31 (citing CAL. CIV. PROC. CODE § 1280.1 (repealed 1997)). It thus reflects a “policy determination that . . . complete immunity [is] essential to encourage persons to serve as arbitrators.” *Coopers & Lybrand v. Superior Court*, 260 Cal. Rptr. 713, 720 (Ct. App. 1989) (emphasis added).

247. *Stasz v. Schwab*, 17 Cal. Rptr. 3d 116, 131 (Ct. App. 2004) (emphasis added) (quoting *Nolan & Abrams*, *supra* note 5, at 242); see also *Skidmore v. Consol. Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979) (noting that “the recruitment of qualified arbitrators” would be hindered if they “were subject to lawsuits by dissatisfied [litigants]”); *L & H Airco*, 446 N.W.2d at 377 (“Permitting civil suit . . . would chill the willingness of arbitrators to serve . . .”).

248. See *Weston*, *supra* note 31, at 484 n.159 (“No empirical study confirms the assumption that . . . arbitrators . . . would refuse to participate in arbitration without immunity.”). In this regard, it is clear that despite the risk of being sued for equitable relief, “[l]arge numbers of professional arbitrators have been recruited, trained, enlisted and rehired as arbitrators in industry or securities related groups.” *Onvoy, Inc. v. Shal, LLC*, 669 N.W.2d 344, 360 (Minn. 2003) (Gilbert, J., concurring in part and dissenting in part).

likely to be reflected in the fees they charge for their services²⁴⁹ and, accordingly, increase the overall cost of arbitration.²⁵⁰ Thus, subjecting arbitrators to claims for equitable relief would be costly and inefficient,²⁵¹ and conflict with one of the most important objectives of arbitration²⁵² -- providing an efficient and inexpensive means of resolving disputes.²⁵³ This fact alone suggests that arbitrators should not be compelled (or even permitted)²⁵⁴ to participate in litigation.

249. See Nolan & Abrams, *supra* note 5, at 251 (suggesting that arbitrators who are not immune from suit will “pass the cost onto the parties”); Guzman, *supra* note 222, at 1327 (noting that arbitrators “will be able to charge a lower price” if they “face fewer lawsuits”). See generally Country Best v. Christopher Ranch, LLC, 361 F.3d 629, 633 (11th Cir. 2004) (noting that the price of goods and services in a free market “is influenced by a variety of factors, including . . . litigation costs”); Oregon v. Assembly of God, Pentecostal, of Albany, 368 P.2d 937, 940 (Or. 1962) (“Where private parties negotiate on a question of value the amount agreed upon frequently reflects the anticipated cost of litigation . . .”).

250. See BEM I, L.L.C. v. Anthropologie, Inc., 301 F.3d 548, 555 (7th Cir. 2002) (discussing “the added cost of arbitration if parties can challenge arbitrators’ legal errors in court”); Nolan & Abrams, *supra* note 5, at 261 (noting that the involvement of arbitrators in litigation “would eventually increase arbitrators’ fees, and thus the cost to the parties”); Guzman, *supra* note 222, at 1327 (“[T]he arbitrator must be compensated for accepting the risk of liability. One would therefore expect the costs of arbitration to increase at least slightly.”). See generally ELKOURI & ELKOURI, *supra* note 221, at 40 (“In some instances the arbitrator’s fee and expenses constitute the primary cost of arbitration.”).

251. See Fong v. Am. Airlines, Inc., 431 F. Supp. 1340, 1343 (N.D. Cal. 1977) (“Since the court . . . is given full authority to act on the award, the appearance of the [arbitrator] wastes attorney resources and clutters judicial proceedings with an unnecessary party.”); Duffey v. Superior Court, 4 Cal. Rptr. 2d 334, 340 (Ct. App. 1992) (“Even a ‘small’ lawsuit for declaratory relief can be expensive.”).

252. See Blue Cross, 114 S.W.3d at 136 (“To permit a cause of action against an arbitrator, in addition to the possibility of vacating the award, would contravene the purpose of arbitration. Speed, cost savings, and a final determination would no longer characterize an arbitration proceeding.”); cf. Prod. Employees Local 504 v. Roadmaster Corp., 916 F.2d 1161, 1163 (7th Cir. 1990) (noting that courts are reluctant “to see the benefits of arbitration smothered by the costs and delay of litigation”).

253. See Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474 (10th Cir. 1996); cf. Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986) (observing that “a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings”); Diemaco, Div. of Devtek Corp. v. Colt’s Mfg. Co., 11 F. Supp. 2d 228, 234 (D. Conn. 1998) (“The purpose of arbitration is to avoid costly and protracted litigation.”).

254. See, e.g., Local 589, Amalgamated Transit Union, 467 N.E.2d at 90 (upholding trial court’s refusal to allow an arbitrator to participate in an action seeking to enforce his award); cf. Nolan & Abrams, *supra* note 5, at 237 (“It is important to note that arbitral immunity exists for the parties and the public, not for the arbitrators themselves.”).

tion contesting the arbitrability of a dispute²⁵⁵ or the validity of an arbitration award.²⁵⁶

VII. CONCLUSION

Immunizing arbitrators from claims for damages enhances their impartiality²⁵⁷ and, correspondingly, promotes the use of private arbitration as an alternative to litigation.²⁵⁸ The judicial recognition of this immunity also increases the likelihood that individuals will agree to serve as arbitrators;²⁵⁹ and, by reducing the overall cost of engaging in arbitration,²⁶⁰ furthers the primary objective of this alternative dispute resolution mechanism.²⁶¹

255. See *Southwire Co.*, 545 S.E.2d at 684-85 (“[T]he arbitrator is neither a necessary nor proper party in a proceeding to enjoin arbitration.”); *Hospitality Ventures of Coral Springs, L.C. v. Am. Arbitration Ass’n*, 755 So. 2d 159, 160 (Fla. Dist. Ct. App. 2000) (“The law does not require potential arbitrators to expend the time and money to participate in a lawsuit where the parties are fighting over the arbitrability of a dispute.”).

256. See *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. LTDA*, 256 F. Supp. 2d 594, 626 (S.D. Tex. 2002) (“[T]he arbitrator’s coerced involvement in post-award litigation will inevitably intrude upon the arbitrator’s quasi-judicial function and discourage qualified individuals from offering their services as arbitrators.”) (quoting *Frere v. Orthofix, Inc.*, No. 99CIV.4049(RMB)(MHD), 2000 WL 1789641, at *4 (S.D.N.Y. Dec. 6, 2000)); *Stasz*, 17 Cal. Rptr. 3d at 131 (“[T]he arbitrator is not a proper party in a suit over the award and has no interest in the dispute once the award is rendered. Given this lack of interest, judicial economy requires dismissal of the unnecessary party.”) (quoting *Nolan & Abrams*, *supra* note 5, at 242 (footnotes omitted)).

257. See *Cort*, 795 F. Supp. at 972 (noting that arbitrators are granted immunity “[i]n order to encourage independent judgment”); *Feichtinger*, 893 P.2d at 1267 (stating that arbitral immunity “enhances the impartiality and independence of arbitrators”); *Levine v. Wiss & Co.*, 478 A.2d 397, 401 (N.J. 1984) (“The grant of immunity serves to preserve the arbitrator’s integrity and independence, and to ensure that arbiters will act upon their convictions, free from the apprehension of adverse consequences.”).

258. See *Feichtinger*, 893 P.2d at 1267 (“Arbitral immunity encourages the settlement of disputes by arbitrators. . . . Exposing arbitrators to personal liability would weaken the effectiveness and attractiveness of arbitration as an alternative to litigation.”); cf. *Corey*, 691 F.2d at 1210 (“[I]ndividuals will not avail themselves of arbitration by contractual agreement if they lack confidence in the impartiality and reliability of the arbitration process”).

259. See *Feichtinger*, 893 P.2d at 1267 (noting that arbitral immunity “makes it easier to recruit arbitrators”); *Nolan & Abrams*, *supra* note 5, at 237 (“Without [arbitral immunity] . . . the parties might find it more difficult to persuade competent people to serve as arbitrators.”).

260. The prospect of an action to vacate an arbitration award (or an action to “prevent arbitration”) obviously makes arbitration “more costly” than it would be in the absence of that possibility. *Prod. Employees Local 504*, 916 F.2d at 1163. The cost of arbitration undoubtedly would be even greater if, in addition to entertaining “the possibility of vacating the award,” a court also might “permit a cause of action against [the] arbitrator.” *Blue Cross*, 114 S.W.3d at 136; cf. *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) (noting that “judicial review of an

The same considerations support interpreting the arbitral immunity doctrine to shield arbitrators from claims for equitable relief²⁶² -- that is, to provide them with "immunity from suit, not just from damages."²⁶³ Because the policies underlying arbitration are best served if arbitrators have no obligation to defend their decisions (or their authority) in judicial proceedings,²⁶⁴ they should be immune from claims for equitable as well as monetary relief.²⁶⁵ In those rare instances in which that outcome is precluded by *stare decisis*,²⁶⁶ essentially the same result can be reached by holding that arbitrators are not proper parties to judicial proceedings arising from the arbitral process.²⁶⁷

arbitration award should be, and is, very narrowly limited" because the "purpose of arbitration is to permit a relatively quick and inexpensive resolution of . . . disputes by avoiding the expense and delay of extended court proceedings").

261. See *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) (noting that parties utilize arbitration "in order to reduce the costs of resolving [their] disputes"); *Prod. Employees Local 504*, 916 F.2d at 1163 (discussing "arbitration's promise to expedite and cut the costs of resolving disputes"); *White v. Preferred Research, Inc.*, 432 S.E.2d 506, 508 (S.C. Ct. App. 1993) (stating that arbitration is "an alternative means for resolving disputes without the cost and delay of a lawsuit").

262. See *Coleman*, 550 F. Supp. at 684 ("The purpose of . . . immunity . . . is not served by protecting a [decision-maker] from actions for damages while exposing him to an action for injunctive relief.") (discussing judicial immunity); cf. *Zimmerman*, 428 F. Supp. at 761 ("The reasons for the rule of judicial immunity apply regardless of the nature of the relief sought").

263. *Johnson v. Miller*, 925 F. Supp. 334, 341 (E.D. Pa. 1996) (describing judicial immunity); see also *Kurowski v. Krajewski*, 848 F.2d 767, 772 (7th Cir. 1988) ("Absolute immunity establishes both a right not to pay damages and a 'right not to be tried' -- that is, it grants freedom from the emotional travail, commitment of time, and legal expense involved in going to trial.").

264. See *Fong*, 431 F. Supp. at 1343-44 ("[T]he integrity of the arbitral process is best preserved by recognizing the arbitrators as independent decision-makers who have no obligation to defend themselves in a reviewing court."); *Nolan & Abrams*, *supra* note 5, at 266 ("Courts . . . foster private dispute resolution mechanisms by discouraging the involvement of arbitrators in postaward litigation.").

265. See *Nolan & Abrams*, *supra* note 5, at 229 ("With very few exceptions [the arbitral immunity] doctrine protects arbitrators both from personal liability for their actions and from compelled involvement in postaward legal proceedings.").

266. Cf. *United Food & Commercial Workers*, 138 L.R.R.M. (BNA) at 2919 n.3 ("At the outset the court recognizes that the law governing arbitral immunity is not highly developed and that no existing case law is controlling in this matter.").

267. See *Weston*, *supra* note 31, at 505-06 ("The policy justifications for conferring immunity can be assuaged by reframing the question, not as to whether the arbitral actors are *per se* immune, but rather by identifying, as to the particular claim presented: Who is the real party in interest?").