Client Update

Third Circuit Affirms Enforceability of Pre-Dispute Arbitration Agreements for Whistleblower Claims Under Dodd-Frank

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On December 8, the Third Circuit Court of Appeals held in *Khazin v. TD Ameritrade Holding Corp., et al.* that the "text and structure" of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or, the "Act") "compel the conclusion" that whistleblower retaliation claims brought under the Act are not exempt from pre-dispute arbitration agreements.[1] The Third Circuit held that the restrictions on pre-dispute arbitration in the Act apply to retaliation claims under the Sarbanes-Oxley Act ("SOX") and certain other statutes, but not to retaliation claims under the Dodd-Frank Act itself. The decision is noteworthy in part because most commentary following the passage of Dodd-Frank assumed that the restrictions on pre-dispute arbitration in the Act applied to retaliation claims brought under the Act.

BACKGROUND

Boris Khazin's claims stemmed from his employment with TD Ameritrade, Inc. and Amerivest Investment Management Company (collectively "TD") where Khazin worked as a financial services professional. As part of his duties at TD, Khazin alleged that he discovered certain pricing practices that purportedly violated the federal securities laws. Khazin alleged that he reported the issue to his supervisor and recommended a change to how the relevant product was priced. At the request of his supervisor, Khazin conducted a "revenue impact" analysis which showed that the change suggested by Khazin would cost the company $1,150,000 in revenues. When confronted by that number, Khazin alleged that his supervisor told him not to correct the issue and to stop sending her emails regarding the topic. Khazin was fired shortly thereafter for reasons that TD Ameritrade contends were unrelated to the concerns raised by Khazin.

Khazin filed a whistleblower retaliation claim under Dodd-Frank in the District

[1] No. 14-1689 (3d Cir. Dec. 8, 2014).

Court of New Jersey. The district court dismissed Khazin's claim on the grounds that Dodd-Frank's anti-arbitration provision does not apply retroactively.

THE THIRD CIRCUIT OPINION

The Third Circuit affirmed the lower court's dismissal of Khazin's claim, holding that the pre-dispute arbitration agreement could be enforced by TD to compel Khazin to arbitrate his Dodd-Frank anti-retaliation claim under 15 U.S.C. § 78u-6(h). The court declined to address the lower court's analysis that Dodd-Frank's anti-arbitration provision does not apply retroactively to invalidate arbitration agreements pre-dating the passage of Dodd-Frank.

In affirming the dismissal of Khazin's claim, the Third Circuit relied on a textual analysis of Dodd-Frank. The court explained that Dodd-Frank not only created a new cause of action for whistleblowers that was substantively different from SOX's whistleblower provision, but also appended an anti-arbitration provision to whistleblower actions brought under SOX, as well as those brought under the Commodity Exchange Act and the Consumer Financial Protection Act.[2] The court noted that there is no such provision expressly restricting the arbitration of Dodd-Frank whistleblower claims, however. The Third Circuit concluded that the decision not to append an anti-arbitration provision to the Dodd-Frank whistleblower section of the Act was not, as Khazin argued, an inadvertent error, but rather suggested that the "omission was deliberate." Indeed, "by adding anti-arbitration provisions to certain statutes but not others, [Congress] expressed its intent unambiguously," the Third Circuit held. Finally, the court also rejected Khazin's policy argument that Dodd-Frank's broader purpose of enhanced whistleblower protections would be undermined by requiring arbitration, holding that "Congress's intent is clearly reflected in the text and structure of Dodd-Frank which grant Khazin no right to resist arbitration."

IMPLICATIONS

By holding that Dodd-Frank retaliation claims are not statutorily exempt from enforcement of pre-dispute arbitration agreements, the Third Circuit has handed employers a significant victory. The Third Circuit's decision is consistent with

[2] The anti-arbitration provision language that was appended to SOX as a result of the Dodd-Frank Act provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 18 U.S.C. §1514(e)(2). Similar language was added to the Commodity Exchange Act § 748 (7 U.S.C. § 26(n)(2) and the Consumer Financial Protection Act of 2010, §§ 1001, 1057 (12 U.S.C. § 5567(d)(2)).

two district court opinions,[3] but it is the first federal court of appeals decision to address the enforceability of arbitration agreements for claims brought under Dodd-Frank's whistleblower provision. It remains to be seen whether other courts will join what appears to be a growing consensus around the interpretation of Dodd-Frank's anti-arbitration provision as applied to Dodd-Frank whistleblower claims. Potential plaintiffs will now have to weigh the pros and cons of asserting claims under SOX – which cannot be subject to mandatory pre-dispute arbitration agreements, but which require exhaustion of administrative remedies and impose certain limitations on damages – versus pursuing claims under Dodd-Frank that may be subject to mandatory arbitration agreements.

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Please do not hesitate to contact us with any questions.

[3] *See Murray v. UBS Sec. LLC*, 2014 WL 285093, at *10-11 (S.D.N.Y. Jan. 27, 2014); *Ruhe v. Masimo Corp.*, 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011).