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ARBITRATION

Expert Analysis

Developments in Light of Dodd-Frank Act's Anti-Arbitration Provisions

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The meaning and scope of the identical anti-arbitration provision enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)[1] amendments to the Sarbanes-Oxley Act of 2002 (SOX)[2] and the Commodities Exchange Act of 1936 (CEA)[3] are becoming clearer as more courts have addressed the issues. The provision provides:

> (1) Waiver of rights and remedies. — The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.
>
> (2) Predispute arbitration agreements. — No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.
>
> 18 U.S.C. §1514A(e) (SOX); 7 U.S.C. §26(n) (CEA).

This provision raises several difficult questions which include: (1) Does the anti-arbitration provision apply retrospectively to predispute arbitration agreements entered into before Dodd-Frank's effective date (July 21, 2010)? (2) Is a predispute arbitration agreement that does not specifically exclude SOX and CEA retaliation claims void in its entirety even if the claim sought to be arbitrated (such as a discrimination or wage claim) is completely unrelated to SOX or CEA and would otherwise be arbitrable? (3) Does the anti-arbitration provision bar arbitration of causes of action created by Dodd-Frank that are separate from SOX and CEA, such as under the anti-retaliation provision added by Dodd-Frank to the Securities and Exchange Act of 1934 (the Exchange Act's anti-retaliation provision)?[4]

Retroactivity

We begin with the retroactivity issue. In *Wong v. CKX*,[5] the District Court (Judge John Koeltl) held that the anti-arbitration provision applied retroactively to a dispute over events that occurred between 2006 and 2009 and that were subject to an arbitration agreement entered into in 2006. The Wong court found retroactive application appropriate under the Supreme Court's test in *Fernandez-Vargas v. Gonzales*.[6] Even though the court has held that statutes are presumed not to apply retroactively, and nothing in the text of Dodd-Frank speaks to the issue, the court in *Wong* reasoned that retroactivity is appropriate because the anti-arbitration provision "primarily affects jurisdiction of the court to hear the substantive claim.… and does not affect the substantive rights of either party."[7] Koeltl did note that four other district courts had held otherwise, concluding that the anti-arbitration provision could not be applied retroactively because it affected contractual rights.[8]

More recently, two other district courts rejected the reasoning of *Wong*.[9] With the U.S. Supreme Court's recent holding in *Lawson v. FMR*[10] that the whistleblower protections in SOX apply not only to public company employees, but also to the employees of private contractors and subcontractors of public companies, a definitive answer to the question of whether the anti-arbitration provision's limitation on arbitration is retroactive will be even more significant.

Absence of Express Carve-Out

Is the entire arbitration agreement rendered void if it does not expressly exclude SOX and CEA retaliation claims from a comprehensive agreement to arbitrate? Relying on the text of subsection (2) of the anti-arbitration provision that "*[n]o predispute arbitration agreement shall be valid or enforceable*, if the agreement requires arbitration of a dispute arising under this section" (emphasis added), plaintiffs have sought to avoid arbitration of claims unrelated to SOX and CEA.

> Does the anti-arbitration provision apply retrospectively to predispute arbitration agreements entered into before Dodd-Frank's effective date?

In *Holmes v. Air Liquide USA*,[11] the plaintiff maintained that "if an arbitration agreement requires arbitration of disputes arising under [Dodd-Frank], then the entire agreement is invalid and no dispute (including disputes not arising under the relevant sections and entirely unrelated to Dodd-Frank) is subject to [arbitration]."[12] The district court in *Holmes* rejected that argument.

The U.S. Court of Appeals for the Fifth Circuit affirmed, stating that "[a]ny other

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decision would lead to the untenable conclusion that the act wholesale invalidates all broadly worded arbitration agreements (of which there are many) even when plaintiffs bring wholly unrelated claims."[13] The U.S. Court of Appeals for the Fourth Circuit in *Santoro v. Accenture Federal Serv.*[14] reached the same conclusion with respect to the Dodd-Frank amendment to CEA.

The court held that the plaintiff's argument "seeks to unmoor subsection (2) from its placement in Dodd-Frank and instead apply it as a broad, free-standing right, creating a windfall for non-whistleblowing employees. By doing so, he overlooks both the limiting language within subsection (2) and the broader context of the statute."[15]

Arbitrability of Claims

Among the many other provisions of Dodd-Frank, the Exchange Act's anti-retaliation provision provides protection for whistleblowers taking advantage of other amendments to the Exchange Act that create significant financial incentives for reporting securities violations to the Securities and Exchange Commission. The question arises: Is the Exchange Act's anti-retaliation provision created by Dodd-Frank subject to the anti-arbitration provision that Dodd-Frank added to SOX and CEA? Although the Federal Arbitration Act (FAA)[16] establishes a "liberal federal policy favoring arbitration agreements,"[17] the U.S. Supreme Court has recognized that the FAA mandate can be overridden by "a contrary congressional command"[18] and noted in dicta that Congress acted with the requisite "clarity" in the anti-arbitration provision.[19]

In *Murray v. UBS Securities*,[20] the plaintiff alleged that his employer terminated his employment in retaliation for disclosures he made that were protected under SOX. He brought a federal lawsuit under the Exchange Act's anti-retaliation provision, and the defendants moved to compel arbitration pursuant to the FAA, the arbitration agreement contained in the plaintiff's employment agreement and the Form U-4 required of registered representatives in the securities industry.[21] The district court (Judge Katherine Failla) held that the anti-arbitration provision did not apply to a claim arising under the Exchange Act's anti-retaliation provision.

The court reasoned that Congress in Dodd-Frank amended SOX to add the anti-arbitration provision to SOX's own anti-retaliation provision and separately amended the Exchange Act to create the Exchange Act Anti-Retaliation Provision. "Of critical importance" to the court "is the absence of an analogous [anti-arbitration] prohibition in the [Exchange Act] anti-retaliation provision itself."[22] The court further reasoned that the separate pieces of legislation amended by Dodd-Frank involve distinct rights and responsibilities, including that under SOX an administrative exhaustion provision requires complaints to be first filed with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), whereas under the Exchange Act's anti-retaliation provision, a party may commence an action without any administrative exhaustion.[23]

> Is the entire arbitration agreement rendered void if it does not expressly exclude SOX and CEA retaliation claims from a comprehensive agreement to arbitrate?

Although the plaintiff contended that his claim arose under SOX because the disclosures he made were protected under SOX and allegedly led to the termination of his employment, the court was unpersuaded. The court held that because the plaintiff did not bring his claim under SOX by commencing an action with OSHA, and he sought the more expansive remedies under the Exchange Act's anti-retaliation provision, he could not "recast his claim to arise under" SOX to take advantage of the anti-arbitration provision.

Failla's decision is in line with the judicial trend to find in favor of arbitration. Indeed, following the court's decision construing the anti-arbitration provision narrowly, the court denied leave for an interlocutory appeal because it found to do so "would be inconsistent with the 'national policy favoring arbitration'"[24] as well as "the Second Circuit's distaste for delaying 'the arbitral process through appellate review.'"[25]

Conclusion

Future court decisions are expected to provide greater resolution to the open issues surrounding the anti-arbitration provision, although the decisions to date suggest that retroactive application is disfavored (with the Southern District of New York's decision on retroactivity in the minority), the anti-arbitration provision will not be a bar to arbitration of claims not arising under the retaliation provisions of SOX and CEA, and retaliation claims under the Exchange Act may continue to be subject to arbitration. In circumstances where Congress has not spoken with clarity about limiting arbitration, the courts continue the trend since *Gilmer v. Interstate/Johnson Lane*[26] to rule in favor of the arbitral forum.

1. Pub. L. No. 111-203, 124 Stat. 1376.
2. Pub. L. No. 107-204, 116 Stat. 745.
3. Pub. L. No. 74-675, 49 Stat. 1491.
4. Section 922 of Dodd-Frank added a new Section 21F to the Exchange Act, 15 U.S.C. §78u–6.
5. 890 F.Supp.2d 411 (S.D.N.Y. 2012).
6. 548 U.S. 30, 37-38 (2006).
7. 890 F.Supp.2d at 422-23, citing *Pezza v. Investors Capital*, 767 F.Supp.2d 225, 228 (D. Mass. 2011).
8. Id. at n.2, citing *Blackwell v. Bank of Am.*, 2012 WL 1229675 (D.S.C. April 12, 2012); *Taylor v. Fannie Mae*, 839 F.Supp.2d 259 (D.D.C. 2012); *Holmes v. Air Liquide USA*, 2012 WL 267194 (S.D. Tex. Jan. 30, 2012); *Henderson v. Masco Framing*, 2011 WL 3022535 (D. Nev. July 22, 2011).
9. *Khazin v. TD Ameritrade Holding*, 2014 U.S. Dist. Lexis 31142 (D.N.J. March 11, 2014); *Weller v. HSBC Mortg. Servs.*, 971 F.Supp.2d 1072 (D. Colo. 2013).
10. 134 S. Ct. 1158 (2014).
11. 2012 WL 267194 (S.D. Tex. Jan. 30, 2012), aff'd¸ 498 Fed. Appx. 405, 2012 WL 5914863 (5th Cir. 2012).
12. 2012 WL 267194, at *4.
13. 498 Fed. Appx. at 407, 2012 WL 5914863, at *2.
14. 748 F.3d 217 (4th Cir. May 5, 2014).
15. Id. at 223.
16. 9 U.S.C. §§1-14.
17. *Moses H. Cone Memorial Hosp. v. Mercury Constr.*, 460 U.S. 1, 24 (1983).
18. *CompuCredit v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quotations and citations omitted).
19. Id. at 672.
20. 2014 U.S. Dist. Lexis 9696 (S.D.N.Y. Jan. 27, 2014), denying leave for interlocutory appeal, 2014 U.S. Dist. Lexis 46009 (S.D.N.Y. April 1, 2014).
21. 2014 U.S. Dist. Lexis 9696, at *3-6.
22. Id. at *24.
23. Id.
24. 2014 U.S. Dist. Lexis 46009, at *23 (quoting *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1749 (2011)).
25. Id. (quoting *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002)).
26. 500 U.S. 20 (1991).

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