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Third Circuit Holds That Parties to Arbitration Agreements Can Compel Arbitration of Dodd-Frank Whistleblower Claims

In *Khazin* v. *TD Ameritrade Holding Corp.* http://www2.ca3.uscourts.gov/opinarch/141689p.pdf, the Third Circuit addressed whether parties to a pre-dispute arbitration agreement can compel arbitration of whistleblower claims brought under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), 15 U.S.C. § 78u-6(h). *Khazin* v. *TD Ameritrade Holding Corp.*, 2014 WL 6871393 (3d Cir. Dec. 8, 2014). The court held that, notwithstanding Dodd-Frank's prohibition on the compulsory arbitration of whistleblower claims under other statutes, pre-dispute arbitration agreements are enforceable against such claims asserted under Dodd-Frank itself. The court declined to express a view on the district court's holding that the anti-arbitration provision of the Sarbanes-Oxley Act of 2002 ("SOX") does not apply retroactively.

Background

Enacted in July 2010, Dodd-Frank contains a provision that bars employers from retaliating against whistleblowers. It states in relevant part: "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.) . . . ." 15 U.S.C. § 78u-6(h)(1)(A). Although similar in some respects to the anti-retaliation provisions in SOX, the Dodd-Frank anti-retaliation provision is different in important ways. In particular, the Dodd-Frank provision contains a longer statute of limitation, does not require a potential plaintiff to exhaust administrative remedies before asserting a private action, and provides prevailing plaintiffs with double back-pay. *Compare* 18 U.S.C. § 1514A(c)(2)(B), *with* 15 U.S.C. § 78u-6(h)(1)(C)(ii).

In addition to creating a new anti-retaliation cause of action, Dodd-Frank also amended SOX's anti-retaliation provision by adding new language invalidating pre-dispute agreements to arbitrate claims arising under the SOX anti-retaliation provision: "[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. § 1514A(e)(2). Dodd-Frank added an identical anti-arbitration provision to the Commodity Exchange Act and similar language to the Consumer Financial Protection Act of 2010. However, the Dodd-Frank anti-retaliation provision itself does not contain an anti-arbitration provision.

Boris Khazin's claim arose in August 2012 when his employer, a brokerage firm, terminated his employment. The parties had entered into an arbitration agreement in 2006. Khazin claimed that he

reported to his supervisor that the pricing of a product offered by his employer violated securities regulations. He claimed that he recommended changing the price to comply with applicable regulations. However, after he was asked to conduct a "revenue impact" analysis, which showed that the change would cost the employer $1,150,000 in revenue, he alleged that his supervisor asked him not to fix the problem and to stop sending her emails on the topic.

Khazin was fired shortly thereafter, according to his employer, for an unrelated reason. He filed suit against the employer in the Superior Court of New Jersey, alleging a violation of Dodd-Frank and asserting various state-law claims. The state court dismissed the Dodd-Frank claim without prejudice, on the ground that federal courts had exclusive jurisdiction over Khazin's Dodd-Frank claim. The court also compelled arbitration of his state-law claims.

Khazin then filed his Dodd-Frank whistleblower claim in the District of New Jersey. The district court granted the employer's motion to dismiss and compel arbitration, holding that SOX's anti-arbitration provision does not apply retroactively and therefore did not invalidate the parties' arbitration agreement, which they entered into before Dodd-Frank was enacted. The district court did not address the employer's argument that Dodd-Frank's anti-retaliation provision does not preclude arbitration of claims asserted under it.

Third Circuit Opinion

On December 8, 2014, the Third Circuit affirmed the district court's decision to compel arbitration on the ground that parties to a pre-dispute arbitration agreement can compel arbitration of Dodd-Frank retaliation claims arising under 15 U.S.C. § 78u-6(h)(1)(A). The court declined to express a view on the district court's holding that SOX's anti-arbitration provision does not apply retroactively to invalidate arbitration agreements that predate the anti-arbitration provision.

On appeal, Khazin argued that the district court "erred in finding that his arbitration agreement was enforceable notwithstanding the Anti-Arbitration Provision and the general anti-arbitration spirit of the Dodd-Frank Act." *Khazin*, 2014 WL 6871393, at *2. The Third Circuit rejected this argument based on the plain language of the statute. The court first observed that the Dodd-Frank anti-retaliation provision is substantively different from SOX's anti-retaliation provision. The court noted that the anti-arbitration provision of Dodd-Frank applied only to claims "arising under *this* section," (emphasis added), meaning 18 U.S.C. § 1514A, the section of the United States Code that contains SOX's anti-retaliation provision. The *Khazin* court thus ruled that the Dodd-Frank arbitration bar could not apply to Dodd-Frank's own anti-retaliation provision, which is contained in a different title and section of the United States Code than is the SOX provision. "As Khazin asserts only a Dodd-Frank claim, his dispute does not 'arise under' the relevant section." *Khazin*, 2014 WL 6871393, at *3.

While the court held that the clarity of the statutory language is the beginning and end of the matter, it also addressed and rejected Khazin's argument that the failure to include an anti-retaliation provision in Dodd-Frank was an accident. The court reasoned that Congress's addition, in Dodd-Frank, of anti-arbitration provisions to SOX, the Commodity Exchange Act, and the Consumer Financial Protection Act of 2010, but not to Dodd-Frank itself, suggested, if anything, that the omission was intentional. *Id.* at *4.

The court further rejected Khazin's contentions that it would be "counterintuitive" for Congress to treat SOX retaliation claims differently from Dodd-Frank retaliation claims. Khazin argued that because Dodd-Frank, in other provisions, strengthened the cause of action for retaliation, it should be read broadly to permit individuals alleging whistleblower claims to select their forum. The Third Circuit concluded that it was not at all illogical that Congress might strengthen whistleblower protections in Dodd-Frank, yet not bar arbitration of such claims. Statutes are often compromises, the *Khazin* court held, and it is not for the courts to second-guess them. That is particularly so here, the court reasoned, where, while there is an evident intention to strengthen whistleblower protections, there is also a countervailing strong federal policy favoring arbitration of disputes. *Id.*

Analysis

The Third Circuit's opinion in *Khazin* is the first federal court of appeals decision to squarely address whether parties to an arbitration agreement can compel arbitration of claims brought under the Dodd-Frank anti-retaliation provision. The court's holding is, however, consistent with the two district court cases that have addressed the issue to date. *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). The *Khazin* decision will likely add momentum to the growing number of courts that have held that pre-dispute arbitration agreements are enforceable against Dodd-Frank whistleblower claims. This has important practical consequences for employers, and may significantly assist employers who seek to resolve whistleblower retaliation claims in arbitration rather than in a judicial forum. Because the conduct prescribed by both statutes is in most cases identical, potential plaintiffs who are signatories to arbitration agreements will be forced to choose whether to assert SOX claims in a judicial forum, or Dodd-Frank claims in an arbitral forum.

On the one hand, if potential plaintiffs pursue claims in court, they forgo the heightened remedies (such as double damages) and longer statute of limitations afforded by Dodd-Frank. On the other hand, if potential plaintiffs agree to arbitration and thereby forgo a judicial remedy, they potentially sacrifice what some plaintiffs may perceive as a more plaintiff-friendly forum.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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