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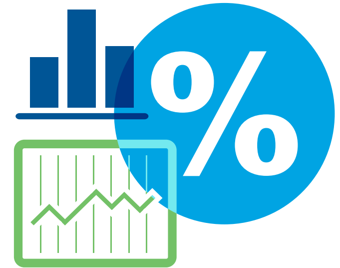

Financial Services Employment Arbitration Q&A

Compelling FINRA Arbitration for Dodd-Frank Whistleblowers

Financial-services employers typically struggle to keep whistleblower claims within the confines of FINRA arbitration. FINRA Rule 13201 carves out a broad swath of whistleblower claims from arbitration, namely (a) claims under whistleblower statutes that prohibit arbitration (such as the Sarbanes-Oxley Act ("SOX")), and (b) statutory employment discrimination claims (which has been construed in some occasions to exclude statutory retaliation claims). But a recent case from the Southern District of New York provides a ray of hope for financial-services employers facing Dodd-Frank whistleblower claims.

On January 27, 2014, the Southern District of New York handed financial-services employers a major victory in the fight to contain the growing trend of Dodd-Frank whistleblower litigation. In *Murray v. UBS Securities, LLC*, No. 2:12-cv-05914-KPF (S.D.N.Y. Jan. 27, 2014), the Court forced plaintiff's whistleblower claims into FINRA arbitration, holding that his dispute did not "arise under" SOX, even though he alleged that his whistleblowing activity was required by that statute. Because plaintiff chose to file his claim directly in federal District Court under Dodd-Frank, rather than through the Department of Labor under SOX, he could not take advantage of the anti-arbitration provision applicable to SOX whistleblower claims.

Background

Plaintiff was responsible for performing research and creating reports about UBS's mortgage products that were distributed to current and potential clients. He alleged that UBS pressured him to skew his ostensibly objective research in ways that were false and misleading and intended to favor UBS's products and trading positions. After he reported those concerns to his supervisors, he alleged that he was given limited resources to perform his research, and was eventually fired in retaliation for his reporting. The plaintiff then filed a whistleblower claim in federal District Court.

UBS first brought a motion to dismiss, arguing that the plaintiff was not a "whistleblower" within the meaning of the Dodd-Frank Act because he had not reported his concerns to the SEC. Relying on a growing body of federal case law[1], as well as the SEC's August 12, 2011 final rule interpreting the definition of a "whistleblower" under the statute, the Court held that whistleblowers are protected under Dodd-Frank even if they do not report directly to the SEC when those disclosures are required or protected by SOX, among other laws.

After failing to get the claims thrown out of court, UBS moved to compel arbitration under his Form U4.

1 See Genberg v. Porter, No. 11-cv-02434-WYD-MEH, 2013 WL 1222056 (D. Colo. Mar. 25, 2013); Kramer v. Trans-Lux Corp., No. 3:11-CV-1424 (SRU), 2012 WL 4444820 (D. Conn. Sept. 25, 2012); Nollner v. Southern Baptist Convention, Inc., 852 F. Supp. 2d 986 (M.D. Tenn. Apr. 3, 2012); and Egan v. TradingScreen, Inc., 2011 WL 1672066 (S.D.N.Y. May 4, 2011),

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The Court's Opinion

Plaintiff first argued that UBS had waived its right to arbitrate, because it had chosen to litigate in federal court when it filed its motion to dismiss. The Court rejected this argument, holding that such a motion does not automatically constitute waiver in the Second Circuit, and that plaintiff had suffered no prejudice as a result of UBS's delay in seeking arbitration.

The Court then considered whether plaintiff's claims were exempt from arbitration. First, the Court noted that Dodd-Frank had added two separate provisions: it amended the Securities Exchange Act of 1934 by adding the Dodd-Frank whistleblower provision, and it had added a prohibition against pre-dispute arbitration to the end of the SOX anti-retaliation provision. Crucially, Congress did not add a similar anti-arbitration provision to the Dodd-Frank provision. Given the differences between these provisions, which involve different procedural mechanisms and remedies, it was clear that Congress had created two separate anti-retaliation regimes, one that had an anti-arbitration provision and one that did not.

Plaintiff argued that his claim really arose under SOX, because the disclosures that allegedly got him fired were protected under that statute. The Court disagreed, holding that the complaint clearly based plaintiff's claims on Dodd-Frank, not SOX. Moreover, plaintiff's claim could not arise under SOX because he brought suit directly in federal court without exhausting his administrative remedies before OSHA -- as he would have been required under SOX.

Second, the Court held that when statutory rights are implicated, a party can prevent the enforcement of an arbitration agreement only by showing that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. The Court found no evidence in the statutory text to indicate that Congress intended the SOX anti-arbitration provisions to apply to the Dodd-Frank whistleblower provision.

Implications For Financial-Services Employers

Under *Murray v. UBS*, Dodd-Frank whistleblower claims would not be subject to the Rule 13201 carve out, even though the allegations could have been brought under SOX. The direct route to District Court litigation provided by Dodd-Frank has proven very attractive to whistleblowers in the financial-services industry. Under SOX, Department of Labor investigations can drag on for years in many regions and may result in an initial adverse finding.

However, whistleblowers licensed through FINRA may now find that they must arbitrate their Dodd-Frank claims through FINRA. While it remains to be seen whether other courts will follow the Southern District of New York's lead on this issue, this decision is a win for financial-services employers, because it allows them to resolve these often sensitive claims through FINRA arbitration, rather than in the federal courts.

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