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When Does an Anti-Arbitration Provision Not Prohibit Arbitration of a Dodd-Frank Whistleblower Claim?

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The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, provides broad whistleblower protections to individuals who report certain possible violations of federal securities laws. Mindful that such protections can be provided in more than one forum and by different statutes, the U.S. Court of Appeals for the Third Circuit held in *Khazin v. TD Ameritrade Holding Corp.*, ____ F.3d ____, 2014 WL 6871393 (3d. Cir. Dec. 8, 2014), that certain claims under Dodd-Frank are arbitrable.

In *Khazin*, Plaintiff, a financial services professional, claimed the defendant, TD Ameritrade, fired him for reporting alleged securities violations to his supervisor. Plaintiff, who was responsible for performing due diligence on financial products for TD Ameritrade customers, alleged he discovered that a product was priced in a manner that did not comply with relevant securities regulations. Plaintiff reported this to a supervisor who declined to implement the change the plaintiff allegedly sought. Subsequently, the supervisor and human resources confronted Plaintiff about a purported billing irregularity, which Plaintiff claimed was not related to his duties and did not exist. Plaintiff's employment was subsequently terminated.

Plaintiff filed suit in U.S. district court, claiming retaliation against him as a whistleblower under Dodd-Frank. Plaintiff, however, had signed an arbitration agreement with his employer, and the company asserted its rights under that agreement. The district court dismissed Plaintiff's complaint, holding he was bound by the arbitration agreement because it predated the Dodd-Frank Act. The Third Circuit affirmed, but on different grounds, holding what it termed the "Anti-Arbitration Provision" in the Dodd-Frank Act did not apply to Dodd-Frank whistleblower claims at all, but rather was limited to whistleblower claims under the Sarbanes-Oxley ("SOX") Act.

Dodd-Frank's Anti-Arbitration provision states, "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." Although Plaintiff argued that this provision invalidated the arbitration agreement, the court determined that, because the Anti-Arbitration Provision follows language referring to title 18, section 1514(A)(a) of the United States Code – part of the whistleblower provisions of the SOX Act – it specifically applied to that provision. Thus, Dodd-Frank's Anti-Arbitration provision did not apply to the separate Dodd-Frank whistleblower cause of action under 15 U.S.C. §78-6(h). The Third Circuit took care to note substantive differences between the SOX Act whistleblower

cause of action and the Dodd-Frank whistleblower cause of action, including different prohibited conduct, statute of limitations, remedies, and administrative requirements. The court added arbitrability to the list of substantive differences.

What Does this Mean for Employers?

This case provides yet another incentive for employers to consider having employees sign arbitration agreements. Arbitration may be particularly attractive in whistleblower cases under Dodd-Frank because it allows an employer to avoid having sensitive issues involving corporate governances aired in a public forum. When faced with a Dodd-Frank whistleblower claim, employers should consider whether a valid arbitration agreement controls, and not merely assume that an existing arbitration agreement is void.

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