Dodd–Frank's Anti-Arbitration Provision Does Not Apply to Whistle-Blower Retaliation Claim

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In *Khazin v. TD Ameritrade Holding Corp.*, 2014 U.S. App. LEXIS 23098 (3d. Cir. (N.J.) December 8, 2014), Boris Khazin, was a financial services professional and former employee of Appellees TD Ameritrade, Inc. and Amerivest Investment Management Company who at the start of his employment, executed an employment agreement in which the parties agreed to arbitrate all disputes arising out of Khazin's employment.

At TD, Khazin was responsible for performing due diligence on financial products offered to TD customers. When he eventually discovered that one of TD's products was priced in a manner that did not comply with the relevant securities regulations, he reported this violation to his supervisor and recommended changing the price to remedy the violation.

In response, the supervisor instructed Khazin to conduct an analysis of the "revenue impact" of his proposed change. The analysis revealed that although remedying the violation would save customers $2,000,000, it would cost TD $1,150,000 in revenues and negatively impact the balance sheet of one of the supervisor's divisions. After reviewing these results, his supervisor allegedly told Khazin not to correct the problem and to stop sending her emails on the subject. When Khazin subsequently approached her to renew his initial recommendation, she again informed him that no change would be made.

Over the next few months, the supervisor and TD's human resources department confronted Khazin about a purported billing irregularity that, according to him, was unrelated to his duties and turned out to be nonexistent. Nevertheless, Khazin was told that he could no longer be trusted, and his employment was terminated.

Alleging that TD Ameritrade had fired him for reporting the securities violations to his supervisor, Khazin filed suit for whistleblower retaliation pursuant to the Dodd-Frank Act. Although Khazin had signed an arbitration agreement with TD Ameritrade he argued that it had been nullified by another provision in Dodd-Frank that prohibits the enforcement of predispute arbitration agreements in certain whistleblower disputes. The District Court disagreed, compelled arbitration, and dismissed the complaint.

Khazin appealed raising issues of first impression in the Third Circuit surrounding the proper interpretation of Dodd-Frank's restrictions on predispute arbitration agreements. Khazin's primary contention was 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. TD contended that this argument failed because neither the Anti-Arbitration Provision nor any other provision of Dodd-Frank prohibits the arbitration of the sort of claim that Khazin chose to bring against TD. The District Court acknowledged that TD had made this argument but did not address it further.

Affirming the lower court's order dismissing Khazin's complaint and compelling arbitration of his claim under 15 U.S.C. § 78u-6(h), the Third Circuit found that the plain text and structure of the Dodd-Frank Act limits the provision barring the enforcement of predispute arbitration agreements to whistle-blower claims brought under the Sarbanes-Oxley Act, the Commodity Exchange Act and the Consumer Financial Protection Act. The Dodd-Frank Act includes no similar arbitration prohibition for Section 78u-6(h) claims. The court stated "[t]he fact that Congress did not append an anti-arbitration provision to the Dodd-Frank cause of action while contemporaneously adding such provisions elsewhere suggests … that the omission was deliberate." The court held that Khazin's whistleblower claim is subject to arbitration for the simple reason that it is not covered by any of these restrictions.

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