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Second Circuit Holds Dodd-Frank Whistleblower Retaliation Claims are Arbitrable

Proskauer Whistleblower Defense on **October 28, 2019**

On September 19, 2019, the Second Circuit affirmed a New York District Court's order compelling arbitration of a whistleblower retaliation claim under the Dodd-Frank Act. *Daly v. Citigroup Inc., et al.*, No. 18-665.

Background

Plaintiff worked in the Private Bank Division of the bank. She allegedly complained to bank attorneys and human resources employees that her supervisor repeatedly demanded that she disclose material non-public information so that he could pass that information along to his favored clients. Plaintiff's employment was subsequently terminated.

Following her termination, Plaintiff filed a complaint in the Southern District of New York alleging, *inter alia*, several whistleblower retaliation claims, including claims under SOX and Dodd-Frank. The bank then filed a motion to compel arbitration and to dismiss Plaintiff's claims. The bank argued that with the exception of her SOX claim, her claims were all subject to an employment agreement Plaintiff had signed containing an arbitration provision. The bank further contended that Plaintiff's SOX claim should be dismissed because she had failed to exhaust her administrative remedies. The district court granted the bank's motion in its entirety and Plaintiff appealed to the Second Circuit.

Ruling

The Second Circuit affirmed the district court's ruling. It noted that while district courts in the Second Circuit had diverged on whether Dodd-Frank whistleblower retaliation claims are arbitrable, it would join the Third Circuit, the only federal circuit to have previously ruled on this issue, in holding that such claims are arbitrable. *See Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 495 (3d Cir. 2014) (our post on that ruling is here). The court first explained that in contrast to the SOX whistleblower retaliation provision, which contains an express anti-arbitration provision, nothing in Dodd-Frank's text suggests that claims arising under that statute are non-arbitrable, which is a strong indication of Congress's intent not to preclude Dodd-Frank whistleblower claims from arbitration. The court also found it notable that the language of the SOX anti-arbitration provision restricted its applicability to disputes "arising under this section" (i.e., SOX). The Dodd-Frank whistleblower retaliation provision, by contrast, is not located in the same section, or even the same title, of the federal code as SOX. Finally, the court explained that even if the SOX anti-arbitration provision was ambiguous, it still could not infer that Congress intended to extend its application to Dodd-Frank because "[d]espite some surface similarities, the whistleblower retaliation provisions of [SOX] and Dodd-Frank diverge significantly in their prohibited conduct, statute of limitations, and remedies." It concluded that "Plaintiff's SOX whistleblower claim cannot save her otherwise arbitrable claims from their fate."

Implications

This is a valuable win for employers facing Dodd-Frank whistleblower retaliation claims because the only federal appellate courts to address the issue have now both concluded that mandatory arbitration clauses are enforceable with respect to whistleblower retaliation claims arising under the Dodd-Frank Act.

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