A Funny Thing Happened On the Way to the (Proper) Forum: Dodd-Frank Whistleblower Retaliation Claims May Be Arbitrated

by Aaron Taishoff

In *Khazin v. TD Ameritrade Holding Corp.*,[1] the Court of Appeals for the Third Circuit addressed an issue of first impression: namely, do the Dodd-Frank Act's whistleblower retaliation protection provisions prohibit the enforcement of pre-dispute arbitration clauses? The resounding answer was "no."

Legislative History

With the recent emphasis placed on reforming the financial system in the wake of several widespread regulatory and legal proceedings that took place beginning in the mid-2000s, Congress passed several new pieces of legislation to address, and hopefully prevent, any reoccurrence of such unlawful conduct. In July 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act,[2] which was officially described by Congress as "an Act to promote the financial stability of the United States by improving accountability and transparency in the financial system."[3]

Dodd-Frank is a lengthy and sweeping piece of legislation that serves several purposes. The act amended numerous pre-existing statutes, such as the Securities Exchange Act of 1934, the Investment Advisors Act of 1940 and the Sarbanes-Oxley Act (SOX), but also created entirely new regimes, such as the Office of the Investor Advocate and a whistleblower bounty program, to be administered by the U.S. Securities and Exchange Commission (SEC).[4] Additionally, Dodd-Frank explicitly prohibits retaliation against any individual who provides information in connection with securities laws violations, and the act creates a private right of action for recipients of any such retaliation.[5]

Procedural Background

In *Khazin*, Boris Khazin, a former investment oversight officer at Amerivest Investment Management, LLC, initiated an action against his former employer and its related entities (collectively, TD Ameritrade).[6] Khazin's complaint, filed in the U.S. District Court for the District of New Jersey,[7] alleged that Khazin was terminated by TD Ameritrade in 2012 in retaliation for his reporting of purported securities violations to his superiors.[8] Khazin's complaint contained one cause of action against TD Ameritrade—a violation of Dodd Frank's anti-retaliatory provisions.[9]

In response to the complaint and prior to filing an answer denying all of the complaint's allegations, TD Ameritrade pointed to an agreement that Khazin signed on his first day of employment, Oct. 26, 2006, which mandated that all disputes between the parties be arbitrated either before the Financial Industry Regulatory Authority (FINRA) or the American Arbitration Association (AAA).[10] Accordingly, TD Ameritrade sought to enforce this agreement and have the claims arbitrated, rather than litigated in federal civil court.[11]

The parties were unable to resolve the issue of the proper forum for Khazin's claims among themselves and, therefore, TD Ameritrade filed a motion to dismiss the complaint for failure to adequately plead a Dodd-Frank whistleblower retaliation claim, or, in the alternative, compel arbitration of Khazin's claim to AAA.[12] The defendants argued that Khazin did not qualify as a true whistleblower under Dodd-Frank because he did not report the suspected violations directly to the SEC.[13] In the alternative, the defendants argued the Dodd-Frank claim should be compelled to AAA to be arbitrated along with Khazin's prior causes of action for two specific reasons: 1) Dodd-Frank does not prohibit pre-dispute arbitration provisions, and 2) Dodd-Frank should not be given retroactive effect to nullify an agreement that was signed prior to Dodd-Frank's enactment.[14]

Khazin opposed the motion and cited to Dodd-Frank's amendments to SOX and the 1934 act, which state that pre-dispute arbitration provisions are unenforceable under those statutes.[15] Khazin further argued

that Congress's intent behind Dodd-Frank was to broaden the opportunities for a whistleblower to come forward with information and to encourage such behavior.[16] Khazin stated that enforcing the agreement's arbitration provision did not align with Congress's intent.[17]

The district judge denied the motion to dismiss, holding that the reporting of suspected securities laws violations internally is sufficient to qualify as a whistleblower under Dodd-Frank,[18] and granted the motion to compel the claim to AAA arbitration on the grounds that Dodd-Frank should not be given retroactive effect.[19]

Khazin appealed the decision to the Court of Appeals for the Third Circuit.[20] On appeal, the briefing centered on the issue of whether the district court erred in holding that Dodd-Frank should not to be given retroactive effect.[21] However, at oral argument a three-judge panel pressed both sides to address a separate, but related, issue: the distinction between Dodd-Frank's amendments to SOX and Dodd-Frank's protections against retaliation for whistleblowers.[22] At the panel's request, both sides submitted supplemental letter briefs on this specific issue.

In its opinion affirming the district court's decision, the Third Circuit thoroughly analyzed the relevant statutory texts and legislative history and held that Dodd-Frank amended the provisions of SOX to prohibit the enforcement of pre-dispute arbitration provisions for claims brought *pursuant to SOX*, but it did not do the same with respect to claims brought solely under Dodd-Frank.[23] The Third Circuit's opinion fell in line with the two other federal courts that previously addressed this exact issue: the district courts of the Southern District of New York in *Murray v. UBS Sec., LLC*[24] and the Central District of California in *Ruhe v. Masimo Corp.*[25]

The Differences Between Claims Brought Pursuant to SOX and Dodd-Frank

The distinction highlighted in *Khazin* is an important one for employers, employees and employment attorneys alike.

As referenced above, Dodd-Frank amended several pre-existing statutes and codified brand new programs and legislative schemes. Specifically, Section 992 of Dodd-Frank[26] added Section 21F to the 1934 act.[27] Section 21F includes a subparagraph that prohibits an employer from retaliating against employees performing a whistleblowing activity (for example, reporting suspected securities laws violations).[28] There is no mention of the word arbitration anywhere within Section 21F.[29]

Separately, Dodd-Frank amended SOX, specifically 18 U.S.C. § 1514A, by, among other things, adding subparagraph (e)(2): "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising *under this section*."[30] The *Khazin* court noted the private right of action pursuant to Dodd-Frank "is not located in the same title of the United States Code, let alone the same section" as the SOX private right of action.[31] Clearly, Congress intended for the phrase "under this section" to explicitly refer to claims brought pursuant to SOX, that is, 18 U.S.C. § 1514A, and *not* Dodd-Frank, or 15 U.S.C. § 78u-6.[32] Therefore, the express language of Dodd-Frank does not bar the enforcement of an arbitration agreement for employment-related disputes.[33]

Both SOX and Dodd-Frank enable an aggrieved whistleblower to bring a private action; however, such claims are substantively different with distinct definitions of prohibited conduct, statutes of limitations and remedies.[34] Accordingly, it should not be surprising that SOX and Dodd-Frank have separate standards for the enforcement of pre-dispute arbitration agreements.[35]

Further, the precedential decisions in *Ruhe*, *Murray*, and *Khazin* provide the basis for Dodd-Frank whistleblower claims to be arbitrated in JAMS,[36] FINRA[37] and AAA.[38] The arbitration process has several advantages over civil litigation, in that discovery is expedited and matters are typically resolved efficiently, with significantly lower costs incurred by all parties. Employers frequently insert a mandatory arbitration provision into employment agreements in order to provide a level of certainty and predictability with respect to employment matters.

Implications Going Forward

As Dodd-Frank is still a relevantly new piece of legislation, and federal courts continue to publish decisions interpreting its provisions, the statute is evolving. However, for matters adjudicated in New Jersey, Pennsylvania, or Delaware or those matters governed by the laws of these states, the *Khazin* decision presents a clear directive from the Third Circuit that claims brought pursuant to Dodd-Frank's anti-retaliation protection provisions may be arbitrated if the parties entered into an agreement with a mandatory pre-dispute arbitration provision. Attorneys representing employees or employers in connection with issues relating to Dodd-Frank's whistleblower provisions should diligently monitor this area of law and stay abreast of all new developments shaping this legal landscape. ■

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Endnotes

1. 773 F.3d 488 (3d Cir. 2014).
2. Public Law 111-203, 124 Stat. 1376 (2010).
3. *Id.*
4. *Id.*
5. Presently, an on-going debate exists within the U.S. federal court system regarding whether an individual is required to provide information regarding potential securities laws violations directly to the SEC in order to qualify for the anti-retaliatory protections afforded to whistleblowers, as defined by Dodd-Frank. *Cf. Asadi v. G.E. Energy*, 720 F.3d 620 (5th Cir. 2013); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D. Cal. 2013) *with Murray v. UBS Sec., LLC*, No. 12-cv-5914(JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Verfuerth v. Orion Energy Systems, Inc.*, No. 14-cv-352(WCG), 2014 WL 5682514 (Nov. 4, 2014).
6. *Khazin*, 773 F.3d at 489.
7. Khazin initially filed a complaint against TD Ameritrade in the New Jersey Superior Court, Hudson County, and alleged several causes of action including, but not limited to, a violation of Dodd-Frank, a violation of the New Jersey Conscientious Employee Protection Act (CEPA), wrongful termination and defamation. *Khazin v. TD Ameritrade Holding Corp.*, No. 13-cv-4149(SDW), 2014 WL 940703, *2 (D.N.J. March 11, 2014). The presiding judge dismissed Khazin's Dodd-Frank cause of action, without prejudice, on the basis that federal courts have exclusive jurisdiction over Dodd-Frank claims, and compelled the remaining causes of action for arbitration before AAA. *Id.*
8. *Id.* at *1.
9. *Id.* at *2.
10. *Id.* at *7.
11. *Id.* at *6-7.
12. *Id.*
13. *Id.* at *4.
14. *Id.* at *7.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at *4-6.
19. *Id.* at *7-8.
20. *Khazin*, 773 F.3d at 489.
21. *Id.* at 490-1.
22. *Id.* at 491.
23. *Id.* at 492-3.
24. No. 12-cv-5914(KPF), 2014 WL 285093 (S.D.N.Y. Jan. 27, 2014).
25. No. 11-cv-00734(JCG), 2011 WL 4442790 (C.D. Cal. Sept. 16, 2011).
26. 15 U.S.C. § 78u-6.
27. *Id.*
28. 15 U.S.C. § 78u-6(h).
29. *Id.*
30. 18 U.S.C. 1514A(e)(2) (emphasis added).
31. *Khazin*, 773 F.3d at 492.
32. *Khazin*, 773 F.3d at 492-3; *Murray*, 2014 WL 285093, at *11.
33. *Khazin*, 773 F.3d at 492.
34. SOX requires claims to be brought directly before the U.S Department of Labor, via the Occupational Safety & Health Administration (OSHA), while Dodd-Frank has no exhaustion requirement, SOX's statute of limitations is shorter than that proscribed by Dodd-Frank and a SOX whistleblower may "obtain back pay, with interest" while a Dodd-Frank whistleblower may be "entitled to 2 times the amount of back pay otherwise owed to the individual, plus interest." *Khazin*, 773 F.3d at 491.
35. *Khazin*, 773 F.3d at 493 ("The fact that Congress did not append an anti-arbitration provision to the Dodd–Frank cause of action while contemporaneously adding such provisions elsewhere suggests, however, that the omission was deliberate.")
36. *Ruhe*, 2011 WL 4442790, at *5.
37. *Murray*, 2014 WL 285093, at *9.
38. *Khazin*, 773 F.3d at 495.