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Recent Developments in Arbitration Of Employment Disputes

RECENT developments may limit or qualify the arbitration of employment disputes in the securities industry. This article discusses developments concerning the arbitration of two types of employment disputes: mandatory arbitration of statutory discrimination claims and the arbitration of employee defamation claims.

In a decision that has generated wide publicity, the U.S. District Court for the District of Massachusetts last month denied a securities firm's motion to compel arbitration of a former financial consultant's claims under Title VII[1] and the Age Discrimination in Employment Act (ADEA)[2] for sexual harassment and age and gender discrimination in the termination of her employment. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*[3]

The defendant securities firm argued that the plaintiff had agreed to arbitrate "any dispute, claim or controversy" when she signed a securities industry registration Form U-4, the Uniform Application for Securities Industry Registration or Transfer, and that, under the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[4] (enforcing a Form U-4 arbitration clause in a case brought under the ADEA), the plaintiff's agreement to arbitrate must be enforced.

The district court disagreed. It held that,

> in the Civil Rights Act of 1991,[5] Congress intended to protect the right of a jury trial for Title VII claims against mandatory arbitration of employment disputes, distinguishing *Gilmer* which was not a Title VII case, and
>
> New York Stock Exchange (NYSE) arbitration is not an adequate forum to vindicate plaintiff's ADEA rights for a reason that, the court stated, was not addressed by *Gil-*

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mer: there is a "structural bias in the system — the extent to which the NYSE arbitration system is dominated by the securities industry, that is, by the employment side of this dispute."[6]

In addition, although the court expressly declined to decide whether the plaintiff's signature on the Form U-4 represented her voluntary acceptance of arbitration and an intentional waiver of her right to a jury trial of her Title VII claims[7], the court commented that Form U-4 is compulsory[8] and that no one explained to plaintiff, that by signing the form, she was agreeing to arbitrate all future disputes with her employer.[9]

Form U-4 includes an employee's explicit written agreement to "arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the [designated SROs] as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction."[10] However, the court found that plaintiff had not been provided the rules of the SROs "that would have given content to the open-ended commitment to arbitrate disputes under [such] rules . . . ."[11]

The court did not find that there had been any fraud in procuring plaintiff's signature, that the form had not been completed until after she signed it or that anyone had misrepresented to her the meaning of the form or the effect of her signing it.

The court's comments about Form U-4 point to a problem with incomplete or non-integrated agreements generally and, more particularly, with agreements that refer to, or incorporate provisions in, other documents or publications, such as employer manuals, employee handbooks or SRO rules. Employers and employees cannot solve the problem by revising the language of Form U-4 because they cannot amend the form.

Practice Point: Employers can help themselves to enforce SRO arbitration (and provide greater clarity to their employees) by providing a form of transmittal letter to new employees explaining the Form U-4, and either providing new employees with copies of the relevant SRO rules and having the employees sign a written acknowledgment of receipt, or providing copies of the relevant SRO rules on request and having new employees sign a written acknowledgment that the rules have been made available for their review.[12]

Rosenberg's holding that there is a structural bias in the NYSE arbitration system because it is dominated by the securities industry is troubling. Acknowledging that, in disputes involving public customers or employees, at least a majority of an arbitration panel must be comprised of public arbitrators knowledgeable in, but not from, the securities industry,[13] the court nonetheless found a structural bias because industry personnel select the pool of arbitrators, appoint individual arbitration panels and make important procedural and discovery decisions.[14]

The court stated that it was unable "to find an unmistakable pattern of bias within the NYSE system" based on data the parties presented "on the gender, age, and ethnic background of the NYSE arbitrators, the percentage of women employees who prevail at arbitration, and on what grounds, and the comparative rates of success and amount of recovery for women bringing Title VII suits in court before a jury of their peers."[15] In other words, the court's finding of an employer bias in NYSE arbitration is based not on actual case results, but on the perceived predisposition of staff personnel and arbitrators deemed to arise from their current affiliations or, in the case of retired industry members, past backgrounds. "Whatever the competence or fairness of individual arbitrators who participate [in] the NYSE system, its structural imbalance makes it an inadequate forum for vindicating civil rights."[16] This troubling finding is ironic given the district judge's earlier decision in the case not to recuse herself because she had represented a woman six years ago in a sex discrimination suit against the defendant securities firm.[17]

Other Challenges

Rosenberg is one of several recent challenges to the mandatory arbitration of employment discrimination claims. There have been a number of other employee challenges, but generally the courts have rejected them.[18]

The Equal Employment Opportunity Commission ("EEOC") has been an active critic of mandatory pre-dispute agreements to arbitrate statutory employment discrimination claims.[19] However, the EEOC is "in strong support of voluntary alternative dispute resolution programs [including binding arbitration] that resolve employment discrimination disputes in a fair and credible manner, and are entered into after the dispute has arisen."[20]

Legislation was introduced early last year in the House and Senate to prohibit pre-dispute agreements to arbitrate employment discrimination claims.[21] Three Representatives in Congress wrote to the Securities and Exchange Commission questioning the authority of the National Association of Securities Dealers and other SROs to require arbitration of discrimination claims in employment disputes through an employee's signing a Form U-4.[22] Interestingly, the SEC replied that the "question has no clear answer. Sound arguments could be made on both sides of the issue."[23]

One argument against compulsory arbitration of employment discrimination claims in the securities industry was suggested in the three Representatives' letter to the SEC and discussed in a subsequent article[24] by Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School: the statute authorizing the NASD to require Form U-4 registration and the arbitration of disputes, authorizes arbitration of customer disputes only, not employment disputes.

The NASD's statutory authority to register securities personnel and attach conditions to their registration, such as acceptance of mandatory arbitration, is section 15A(g)(3)(B) of the Securities Exchange Act of 1934[25] which provides that the NASD may "require a natural person associated with a member . . . to be registered with the association in accordance with procedures established [by the association]." Section 15A(b)(6) of the Exchange Act[26] grants the NASD broad authority to "prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . . and, in general, to protect investors and the public interest . . . ." However, the same section 15A(b)(6) denies the NASD authority "to regulate . . . matters not related to the purposes of this title or the administration of the association."

> Broad as the concepts of "just and equitable principles of trade" and the protection of investors are, they do not seem to require that employment disputes between a registered representative and the employer be arbitrated.