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Whiplash: When a Court Finds That the Parties' Claims Are Within the Scope of a Valid Arbitration Agreement, But It Will Not Compel Arbitration

Article By:

Arbitration, Mediation, ADR Practice Group at Mintz Levin

Is there such a thing as an arbitration joke? Here is a test. Two plaintiffs walk into a court, claiming that each was wrongfully terminated by a bank (UBS). The bank moves to compel arbitration by plaintiff one; and it moves to dismiss the judicial claim of plaintiff two because that plaintiff had already brought his claim in an arbitration that he commenced. The Court finds that both plaintiffs are bound by arbitration agreements with UBS and that their claims are within the scope of the arbitration clauses. The punchline: "the court denies UBS's motion to dismiss [plaintiff two's] claims and to compel arbitration of [plaintiff one's] claims." *See Zoller v. UBS Secs. LLC*, 2018 U.S. Dist. LEXIS 44170 (N.D. Ill. Mar. 9, 2018) (emphasis added).

Wait, did I tell that right? Maybe if I add something that seemed crucial to the Court at the time. Both plaintiffs indicated that they wanted to represent a class of similarly-situated employees who were discharged by reason of a purported scheme by UBS to avoid paying them bonuses. *Id*. at *3. (The plaintiffs' respective claims were otherwise dissimilar, but they both alleged the aforesaid scheme by UBS.) Their claims were within the scope of relevant arbitration agreements with UBS, but they brought suit aiming to be class reps with regard to at least one of their claims. And although the plaintiffs had not yet asked the Court to certify the case as a class or collective action, *see id*. at *15, the Court would not compel arbitration.

The arbitration agreements in question each provided in pertinent part that "any arbitration of a Covered Claim shall be conducted under the auspices and rules of the Financial Industry Regulatory Authority [FINRA]." *Id.* at *10. The Court promptly focused on FINRA Rule 13204, which states that "[a] member … may not enforce any arbitration agreement against a member of a certified or a putative class action with respect to any claim that is the subject of the certified or putative class action" unless and until one of four conditions are met. FINRA Rule 13204(a)(4). (The Court noted that a similar rule governs collective actions. See FINRA Rule 13204(b)(4).) None of the four conditions — e.g., the decertification of a class — obtained. *Id.* at *6.

However, UBS argued that in order for the FINRA Rule "to override" the Federal Arbitration Act ("FAA") policy favoring arbitration, the rule must be a "contrary congressional command," which the rule is not. Specifically, UBS pointed out that the Supreme Court held in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 133 S.Ct. 2304 (2013), that a federal statutory claim could

be arbitrated “unless the FAA’s mandate has been overridden by a contrary congressional command.” 570 U.S. at 233. The District Court acknowledged that the “contrary congressional command” test had been applied by the Second Circuit in circumstances very similar to those in the *Zoller* case. In *Cohen v. UBS Fin. Servs., Inc.*, 799 F.3d 174 (2d Cir. 2015), the Second Circuit held that “the [plaintiff] must … establish both [a] that enforcement of the arbitration clause … would be ‘contrary’ to [FINRA] Rule 13204, and [b] that Rule 13204 qualifies as a ‘congressional’ command.” *Cohen*, 799 F.3d at 178, *citing CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98, 132 S.Ct. 665 (2012).

But the *Zoller* court would have none of that, and made a distinctive analysis. First it noted that the claims of the *Zoller* plaintiffs were not federal statutory claims, a distinction of seemingly limited significance in the circumstances. More importantly, it opined that the parties’ arbitration agreements incorporated all of FINRA’s Rules, including the prohibition on arbitration of class and collective actions. *See Zoller* at *9. It therefore found that FINRA Rule 13204 was “effectively part of the parties’ arbitration agreement.” *Id*., *citing Alakozai v. Chase Inv. Servs. Corp.*, 557 Fed. App’x 658 (9th Cir. 2014). And on that basis, the Court held that FINRA Rule 13204 need not be a “contrary congressional command” in order to apply. *See*, *id*. at *10.

UBS still had two other arguments deserving of serious consideration. First, UBS argued that the plaintiffs had contractually waived their right to bring class or collective claims. That is, the UBS compensation plan states that “the Employee and the Corporation agree that no Covered Claims may be initiated … on a class action basis, collective action basis, or representative action basis ….” *See*, *id.* at *11. Plaintiffs argued in opposition that those waivers were unenforceable because they were inconsistent with the National Labor Relations Act (“NLRA”), which states that “[e]mployees shall have the right to … engage in other considered activities for the purpose of … mutual aid or protection,” arguably including litigation. See 29 U.S.C. § 157. And the Seventh Circuit had held that “[c]ontracts that stipulate away employees’ [NLRA] rights are unenforceable.” Thus, the Court concluded that a waiver of an employee’s right to participate in class or collective actions was unenforceable. *Id*. at *11-*12, *citing Lewis v. Epic Systems Corp*., 823 F.3d 1147, 1153-55 (7th Cir. 2016), *cert. granted*, 137 SCt. 809 (2017).

It is well known that the tension between the FAA and the NLRA’s collective action provision, with regard to means of dispute resolution, is being considered by the U.S. Supreme Court in connection with the issue of the enforceability of class arbitration waivers. *See*, *NLRB v. Murphy Oil USA* (No. 16-307); *Epic Systems Corp. v. Lewis* (No. 16-285); and *Ernst & Young LLP v. Morris* (No. 16-300) — three consolidated cases that were argued to the Supreme Court early in its 2017-18 term. (*Lewis*, the decision on which the Seventh Circuit relied in *Zoller*, is one of those cases.) Decisions by the Supreme Court are anticipated before the end of the second quarter of 2018. Nonetheless, the District Court held in *Zoller* that the contractual waiver was inconsistent with the NLRA and therefore was unenforceable under the *Lewis* decision.

Second, UBS argued that plaintiff Zoller could not be a representative in a class or collective claim against UBS because she had released UBS from any such claims. But the Court took that to be an argument on the merits, notwithstanding the undisputed existence of an executed release by Zoller, and determined that that was “an issue for another day….” *See*, *id*. at *15.

Bottom line: the plaintiffs’ claims were arbitrable and within the scope of binding arbitration agreements; one plaintiff’s claims were already being arbitrated at the instance of that plaintiff; but the class action for which no class certification was requested may proceed. (There was no analysis of whether the court or an arbitrator should be deciding the arbitrability questions.) Funny. We look

forward to seeing whether the higher courts share the District Court’s sense of humor.

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