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Second Circuit Rules Dodd-Frank Whistleblower Claims Arbitrable

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On September 19, 2019, the Second Circuit held that an employer may enforce a mandatory arbitration clause against an employee who brings a retaliation claim under the Dodd-Frank Act of 2010 (Dodd-Frank). *See Daly v. Citigroup Inc.*, 939 F.3d 415 (2d Cir. 2019). In doing so, the court differentiated Dodd-Frank claims from Sarbanes-Oxley Act (SOX) retaliation claims, which are not arbitrable.

SOX provides employees with a private right of action against employers who retaliate against them for reporting securities violations and fraud. In the wake of the 2008 financial crisis, Congress passed Dodd-Frank as part of its sweeping reform of the financial regulatory system. Dodd-Frank includes its own anti-retaliation provision, which protects employees who engage in certain types of protected activity under the statute, including "making disclosures that are protected under [SOX]." *See* 15 U.S.C. § 78u-6(h). Dodd-Frank also amended SOX to provide that agreements to arbitrate disputes "arising under" its anti-retaliation provision are not valid or enforceable. *See* 18 U.S.C. § 1514A(e). However, it did not explicitly add this language to its own anti-retaliation provision.

Daly v. Citigroup Inc.

Plaintiff Erin Daly was an Assistant Vice President at Citigroup, where she alleged, in relevant part, that her supervisor directed her to violate securities laws by disclosing material non-public information that he could pass along to his favored client. Two weeks after she reported this conduct, she alleged, Citigroup fired her and falsely claimed she had committed misconduct. She brought a number of claims against Citigroup, including retaliation under Dodd-Frank. Ms. Daly had entered into an arbitration agreement, however, and the lower court granted Citigroup's motion to compel arbitration and to dismiss. Ms. Daly appealed the decision.

The Second Circuit agreed that Dodd-Frank retaliation claims are arbitrable. Under the Federal Arbitration Act, a court must compel arbitration where the plaintiff's claims fall within the scope of a valid arbitration agreement, unless Congress intended those claims to be nonarbitrable. After establishing that the parties' agreement to arbitrate was valid and covered the Dodd-Frank claim, the court found that Congress did not intend that claim to be nonarbitrable.

The court noted that Dodd-Frank legislation added anti-arbitration language to other whistleblower provisions—including those under SOX, the Commodity Exchange Act, and the Consumer Financial Protection Act—but not to Dodd-Frank itself. Therefore, the court reasoned, Congress did not intend to preclude Dodd-Frank retaliation claims from arbitration.

Although Congress passed the SOX anti-arbitration provision in the same legislative act as it did the Dodd-Frank whistleblower law, Congress limited the SOX language to arbitration agreements "arising under this section" of the law. *See* 18 U.S.C. § 1514A(e). Dodd-Frank's whistleblower provision appears in a different section of the law. *See* 15 U.S.C. § 78u-6(h). Moreover, the court could not infer that Congress intended to extend SOX's application to Dodd-Frank because the two laws differ in significant ways. For example, the laws provide for different administrative exhaustion requirements and available damages. Finally, the court tersely rejected the plaintiff's argument that it should not separate her claims for the purposes of arbitration because they arose from the same act of whistleblowing.

Impact of *Daly*

Until *Daly*, the Third Circuit was the only federal circuit court to opine on arbitrability of Dodd-Frank retaliation claims, holding that employers could compel arbitration of such cases. *See Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492-95 (3rd Cir. 2014). As the *Daly* court noted, too, most district courts to confront the issue have reached the same conclusion. The Second Circuit's decision to join its sister circuit could signal the continuation of this trend.

One notable exception to this developing consensus was *Wiggins v. ING U.S., Inc.*, though it is now abrogated by *Daly*. *See Wiggins v. ING U.S., Inc.*, No. 3:14-CV-1089, 2015 WL 3771646, at *6-7 (D. Conn. June 17, 2015). In *Wiggins*, the court cited a Supreme Court case for the proposition that a cause of action "arises under" any law that provides a necessary element of the plaintiff's claim for relief. *See id.* (citing *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 376 (2004)). Like all retaliation claims, a necessary element of a Dodd-Frank claim is whether the plaintiff engaged in protected activity. Under Dodd-Frank, protected activity includes making disclosures protected by SOX. Therefore, the court reasoned, a Dodd-Frank claim may also arise under SOX, and so is not arbitrable. The *Daly* parties, however, do not appear to have briefed this argument based on the *Jones* or *Wiggins* decisions, and the Second Circuit did not discuss this approach.

It is increasingly common for employers to require employees to sign arbitration agreements as a condition of employment. Employees, however, face significant hurdles in arbitration. Employer-drafted arbitration provisions can set procedural rules that disadvantage workers – e.g., limiting discovery, shortening statutes of limitations, and eliminating punitive damages or other remedies.[1] Arbitration decisions do not carry precedential weight and offer little to no ability to appeal. Employers also benefit from a "repeat player" effect, by which appearing before the same arbitrator tends to increase their chances of favorable decisions. By contrast, an individual will likely arbitrate only once. Finally, unlike public litigation, arbitrations are confidential, shielding companies from the negative publicity that could deter them from future misconduct.

Anti-retaliation laws should empower whistleblowers to speak out against misconduct and unlawful practices within their industries without fear of reprisal by their employers. Yet forced arbitration drastically reduces an employee's ability to meaningfully vindicate these rights and diminishes the likelihood that employees will come forward.

A Legislative Solution?

Just four days after the *Daly* decision, Senator Chuck Grassley (R-IA) and a bipartisan group of cosponsors introduced legislation to amend Dodd-Frank. *See* Whistleblower Programs Improvement Act ("WPIA"), S. 2529, 116th Cong. (2019). In addition to its key reform —amending the definition of "whistleblower"— the bill would add an anti-arbitration provision to Dodd-Frank. The language mirrors that of SOX, making an agreement to arbitrate a dispute arising under Dodd-Frank invalid and unenforceable. *See* WPIA § 4(d)(2). In July 2019, the House of Representatives passed a similar Dodd-Frank bill to amend the definition of "whistleblower." *See* Whistleblower Protection Reform Act of 2019, H.R. 2515, 116th Cong. (2019). That bill, however, does not include an anti-arbitration provision. It remains to be seen whether any Dodd-Frank amendment will pass both houses and, if so, whether a final version will include protection against forced arbitration clauses.

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[1] It is not clear whether Ms. Daly's arbitration agreement implicated any such procedural rules.