U.S. District Court Retroactively Applies Dodd-Frank Whistleblower Restriction to Bar Arbitration Provision in Employment Agreement

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In *Pezza v. Investors Capital Corp.*, a Massachusetts federal district court held recently that Section 922 of the Dodd-Frank Act, which amends the Sarbanes-Oxley Act (SOX) whistleblower protections to bar enforcement of pre-dispute arbitration agreements in whistleblower challenges, applies retroactively.[1] Accordingly, the *Pezza* court denied the defendant employer's motion to compel arbitration, invalidating the pre-dispute arbitration agreement that was executed before Dodd-Frank's enactment.

Specifically, on January 26, 2010, Paul Pezza filed suit in federal court claiming that several defendants wrongfully retaliated against him in violation of SOX's whistleblower provisions. Defendants first raised as an affirmative defense that Pezza's employment agreement obligated him to arbitrate the dispute and then defendants moved to compel arbitration, requesting that the court stay or dismiss the action. While defendants' motion to compel was pending, Congress passed the Dodd-Frank legislation, which, under Section 922, amended SOX whistleblower protections, providing, in relevant part, that "[n]o pre-dispute arbitration agreement shall be enforceable, if the agreement requires arbitration of a dispute arising under this section" addressing whistleblowing. Pezza seized on this new legislation to argue that it retroactively prohibits enforcing the pre-dispute arbitration agreement in his case and, thus, Defendants could not compel arbitration before a Financial Industry Regulatory Authority (FINRA) arbitration panel.

The *Pezza* court noted the tension courts face applying the law at the time a decision is rendered and the undesirable approach of construing a statute to apply retroactively absent language requiring that result. In analyzing whether Section 922 applies retroactively, the court employed a two-step test: examining whether congressional intent could be discerned from the statute; and, if not, determining whether applying Section 922 retroactively would be prejudicial.

In examining congressional intent, the court first turned to Section 4 of Dodd-Frank, which addresses the legislation's effective date, stating that "[e]xcept as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act." The court found that this statement was neutral and failed to provide "sufficient direction regarding the retroactive application of Section 922." The court identified only one case that addressed the retroactivity of the Dodd-Frank legislation, but declined to follow *Riddle v. Dyncorp. Int'l, Inc.*, which held Section 4 should be interpreted as congressional intent that Dodd-Frank does not apply retroactively.[2]

Given the court did not find a clear statement of congressional intent regarding the temporal reach of Section 922, the court turned to normal rules of statutory construction and relied on other sections of

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[1] No. 10-10113-DPW, 2011 U.S. Dist. LEXIS 20038 (D. Mass. March 1, 2011).

[2] 733 F.Supp. 2d 743, 747-48 (N.D.Tex. 2010).

Dodd-Frank to provide guidance on Congress' implicit intent of whether the statute applies retroactively. The *Pezza* court examined Sections 758, 921 and 1028 of Dodd-Frank, which all contain prohibitions on arbitration provisions. Section 921 applies only to "any future dispute." Section 1028 prohibits an arbitration provision in certain contracts entered into after 180 days from the effective date of the section. Finally, Section 758, like Section 922, was silent with regard to retroactive effect. As a consequence, the *Pezza* court concluded that Congress' intent remained unclear.

The *Pezza* court then turned to the second step in its analysis, determining whether applying Section 922 retroactively would have prejudicial consequences affecting the substantive rights or obligations of parties. The court concluded that Section 922 affected only the procedural rights of parties by conferring jurisdiction upon the courts while ousting jurisdiction from FINRA arbitration panels. The court noted that a party would not be prejudiced by applying the statute retroactively in this instance because a change in forum does not alter the substantive rights of the parties. In light of the unclear congressional intent regarding the temporal reach of Section 922 and the procedural rather than substantive effect of Section 922, the *Pezza* court held that Section 922 retroactively applies to invalidate the pre-dispute arbitration agreement. Consequently, the court retained jurisdiction over the plaintiff's whistleblower claim and denied defendants' motion to compel arbitration.

It remains to be seen whether other courts will follow the rationale of *Pezza*, or whether that rationale could be extended to pending or concluded arbitrations.

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