

## Third Circuit Compels Arbitration for Dodd-Frank Whistleblower

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Whistleblowers seeking protection from the anti-retaliation provisions of the Dodd-Frank Act suffered a setback on December 8, 2014, when the U.S. Court of Appeals for the Third Circuit ruled that the Dodd-Frank Act's anti-arbitration provision did not apply to whistleblower retaliation claims brought under the Dodd-Frank Act. In the case, *Khazin v. TD Ameritrade Holding Corp., et al.*, the Third Circuit explained that the Dodd-Frank Act's anti-arbitration provision at issue here precluded the enforcement of mandatory pre-dispute arbitration clauses only in the context of claims brought under the anti-retaliation provisions of the [Sarbanes-Oxley Act of 2002](#) ("SOX") – not under the Dodd-Frank Act. The court held that because the whistleblower retaliation claims of the plaintiff, Boris Khazin, were brought under the [Dodd-Frank Act](#) itself, and not SOX, the mandatory arbitration clause in Khazin's employment agreement with TD Ameritrade was enforceable. The Third Circuit therefore upheld the decision of the United States District Court for the District of New Jersey to dismiss Khazin's case.

Explaining the claims giving rise to the dispute, the court explained that "Khazin is a financial services professional and former employee of [TD Ameritrade]. When Khazin began working for TD, the parties executed an employment agreement in which they agreed to arbitrate all disputes arising out of Khazin's employment." Eventually, Khazin "discovered that one of TD's products was priced in a manner that did not comply with the relevant securities regulations, he reported this violation to his supervisor, Lule Demmissie, and recommended changing the price to remedy the violation." Demmissie instructed Khazin to analyze the "revenue impact" of the proposed change, and upon Khazin informing her that it may cost the company upwards of \$1,150,000 in revenues, "told Khazin not to correct the problem and to stop sending her emails on the subject." Not long after, Khazin was terminated for what he alleges was a false and pretextual reason.

Khazin filed a complaint alleging, *inter alia*, violations of the Dodd-Frank Act's anti-retaliation provision. TD Ameritrade moved to dismiss and to compel arbitration based on the arbitration clause in Khazin's employment contract. Khazin argued that the arbitration clause was invalid pursuant to the anti-arbitration provision of the Dodd-Frank Act. That provision amended 18 U.S.C. § 1514 – the anti-retaliation provision of SOX – to provide that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."

Khazin argued that "this section" referred to the Dodd-Frank Act itself, rather than the section of SOX that the provision amended. He also argued that interpreting the anti-arbitration provision as failing to cover claims brought under the Dodd-Frank Act would "undermine Dodd-Frank's broader purpose of enhancing protections for whistleblowers," and that "a bill as massive as Dodd-Frank will inevitably contain gaps not intended by Congress." The Court rejected both of these arguments. It first explained that "[t]he fact that Congress did not append an anti-arbitration provision to the Dodd-Frank cause of action while contemporaneously adding such provisions elsewhere suggests . . . that the omission was deliberate." Relying on the 1986 Supreme Court decision in *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, the court next explained that "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of

compromise and, in the end, prevents the effectuation of congressional intent.” Finally, the court noted that it found no agency or precedential support for Khazin’s position. Accordingly, it granted TD Ameritrade’s motion to dismiss Khazin’s claim and compel arbitration.