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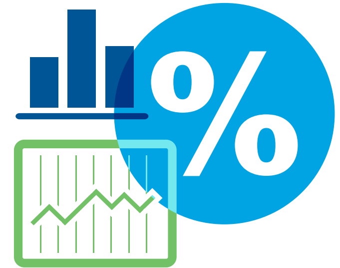

Financial Services Employment Arbitration

Second Circuit Upholds Class Action Waivers in FINRA Arbitration

By Robert S. Whitman, Cameron A. Smith, and Jade M. Wallace

The FINRA Code of Arbitration Procedure, which generally precludes FINRA from administering arbitrations of class or collective claims, does not prevent industry member firms from enforcing pre-dispute class and collective action waivers against their employees, according to a new ruling from the Second Circuit.

The Plaintiff in *Cohen v. UBS Fin. Servs., Inc.*, was a financial advisor who agreed to a compensation plan that included an arbitration clause, which mandated arbitration of any claim under FINRA rules and waived "any right to commence, be a party to or an actual or putative class member of any class or collective action arising out of or relating to [Cohen's] employment with UBS."

Notwithstanding that clause, Plaintiff and several other former and current employees initiated a putative class and collection action asserting wage-and-hour claims under the FLSA and California state law. Arguing that plaintiffs' claims were covered by the arbitration clauses, the Defendants moved to stay the lawsuit and to compel arbitration.

The plaintiffs, however, argued that FINRA Rule 13204 was a "contrary congressional command" that, under Supreme Court precedent, barred UBS from enforcing the arbitration agreements and the plaintiffs' waivers of class and collection procedures. That rule states that "class action claims may not be arbitrated under the Code" and that "[a]ny claim that is based upon the same facts and law, and involves the same defendants as in a ... putative class action ... shall not be arbitrated under the Code."

The District Court granted the Defendants' motion and stayed the case pending FINRA arbitration, holding that enforcement of the arbitration agreements would not be inconsistent with FINRA's rules.

Last week, the Second Circuit agreed. Emphasizing the plaintiffs' voluntary waiver of their right to bring such claims on a class or collective basis, the court held that "[e]nforcement of the UBS Compensation Plan would not be 'contrary' to Rule 13204 because the Rule bars neither the enforcement of pre-dispute waivers of class and collective action procedures nor the arbitration of Cohen's individual claims." Moreover, the Second Circuit held that, even though Rule 13204 provides that "class action claims may not be arbitrated under the Code," the plaintiffs had ignored the provision of the rule explicitly

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stating that its subparagraphs "do not otherwise affect the enforceability of any rights under the Code or *any other agreement*." As the Court made clear: "The rule therefore: (1) recognizes that parties may choose to enter into additional agreements beyond the scope of the Code; and (2) provides that the Code does not affect the enforceability of these additional agreements."

The Second Circuit has previously upheld the use of class and collective action waivers by financial services *employers* in settings outside of FINRA. The *Cohen* decision now removes any doubt that such waivers will be enforced within FINRA as well. It thus provides welcome clarity for member firms that wish to ensure individualized arbitration of employment-related disputes.

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