CASE NOTE

NY Appellate Court holds "Uniform Application for Securities Registration Form U-4" incorporates FINRA rule barring class arbitrations.

By KENNETH J. KELLY

At Epstein Becker Green's March 7th 2012 Employment Law Briefing entitled *2012's Key Issues for Financial Services Employers: Dodd-Frank, Class Actions & Arbitration, and Diversity*, we had a discussion regarding an employer's ability to enter into employment agreements that provide exclusively for the arbitration of disputes while, at the same time, waive the right to bring class arbitrations. This Case Note provides a review of a New York appellate court decision rendered in the week following our briefing, and the unique twist it presented in the securities industry by reason of FINRA's Rule 13204, which states that FINRA will not entertain class arbitrations.

In *Gomez v. Brill Securities, Inc.*, (2012 NY Slip. Op 01 877, 1st Dep't 3/15/12), Gomez and the other plaintiffs, (registered representatives employed by a broker-dealer), had first brought a putative collective action in New York federal court alleging they had not been paid overtime in violation of the Fair Labor Standards Act ("FLSA"). You will recall that "collective" actions under the FLSA are different from ordinary class actions in that prospective FLSA plaintiffs must "opt-in" (*i.e.*, expressly join in) to the collective action, not expressly "opt-out" of a class (or otherwise be bound by the ultimate decision). The employer moved to compel arbitration on the basis of the agreement to arbitrate in the plaintiffs' Form U-4.

In opposition, the employees argued that the agreement to arbitrate at FINRA necessarily included the FINRA rule barring class arbitrations, and as a result, the employer had

implicitly agreed *not* to arbitrate *class* claims. Federal District Judge Rakoff first noted that while Rule 13204 prohibits arbitration of *class* claims, FINRA Rule 13312 allows multiple parties to join together in one arbitration to assert similar claims. He then concluded that an "opt-in" collective action under the FLSA was analogous to multiple parties arbitrating similar claims, which was permitted under the FINRA Rules, and directed the plaintiffs to arbitrate at FINRA.

The plaintiffs, obviously wanting to avoid arbitration, simply discontinued their FLSA action, and started a class action in New York State court alleging failure to pay overtime in violation of New York State law. Notably, in contrast to the FLSA, a state law overtime claim must be brought as an "opt-out" class action. The broker-dealer again moved to compel arbitration, but this time the trial court and three of the five appellate judges held that the agreement to arbitrate in the U-4 Form incorporates the FINRA rule barring class arbitrations. As a result, the majority refused to compel arbitration on the ground that the parties' agreement, by incorporating Rule 13204, excluded class arbitrations. The case thus stayed in court, and awaits a class certification motion.

The two dissenting judges saw what was really going on. In their words: "it is abundantly clear . . . that the plaintiffs are attempting . . . to improperly utilize the vehicle of a class action *to avoid their written agreement to arbitrate* their claims." (Emphasis added.) The judges pointed to the plaintiffs' voluntarily discontinuing the earlier federal court action as soon as they were forced to arbitrate, and said the plaintiffs were using "the same play book" to configure their case as a class action with this maneuver. The dissenters also noted that there might not be a large enough number of aggrieved employees to constitute a class, and that the procedural burdens and complexities of a class action were not superior to a simple multi-

employee/claimant arbitration with a small number of claimants. The dissenters were unwilling to allow the plaintiffs, once thwarted by Judge Rakoff in their attempt to avoid arbitration, to "pull off the same charade in state court," and would have enforced the agreement to arbitrate.

It should be noted, the broker-dealer may still prevail since Rule 13204(d) allows the employer to move to compel arbitration if class certification is denied by the state court. This decision, particularly in the eyes of the dissenters, illustrates the tactics used by both sides in the securities industry to elect, or avoid, class actions and arbitration.

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