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Circuit Strikes Class Action Allegations on Pleadings, Sends Securities Fraud Claims to Arbitration

The Eighth Circuit recently enforced an arbitration clause despite evidence that the plaintiff never saw the clause or signed the arbitration agreement.

By Jason Halper and Adam Magid

On June 3, 2021, in *Donelson v. Ameriprise Financial Services, Inc.* [PDF], the U.S. Court of Appeals for the Eighth Circuit ordered class action allegations in a putative securities fraud class action stricken on the pleadings under Rule 12(f) of the Federal Rules of Civil Procedure and, incorporating by reference an arbitration clause in a separate agreement, directed the matter to arbitration. The decision is significant not only for its broad application of an arbitration clause to federal securities fraud claims but also as a rare appellate-level endorsement of striking class allegations under Rule 12(f)—which permits a court to strike from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"—prior to class discovery and a motion for class certification.

Background

The plaintiff in this case is Mark Donelson, a high school graduate and Sam's Club employee who had no formal training in securities trading. In 2010, Donelson's investment advisor, Mark Sachse, told Donelson he was joining Ameriprise Financial Services, Inc., and asked Donelson to open an investment account with his new firm. Donelson and Sachse met at a restaurant, where Donelson signed an Ameriprise account application. The application included an acknowledgement in small print that the applicant had "received and read" a separate "Ameriprise Brokerage Client Agreement for Non-Qualified Brokerage Accounts" and "consent[ed] to all these terms and conditions with full knowledge and understanding of the information contained in" that agreement, including a "predispute arbitration clause." The arbitration clause, which Donelson allegedly never saw, read, or signed, provided for arbitration of "all controversies that may arise between us," except for a "putative or certified class action." Thereafter, Sachse allegedly engaged in improprieties in handling Donelson's investment account.

Donelson filed a putative class action against Sachse, Ameriprise, and Ameriprise officers in the Western District of Missouri, asserting claims for violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The defendants moved to strike the complaint's class action allegations under Rule 12(f) and to compel arbitration, and the district

court denied the motions. Applying Missouri law, the district court concluded that there was no meeting of the minds concerning arbitration, given that Donelson did not receive or sign the client agreement with the arbitration clause, and the agreement was "illusory" because Ameriprise retained a unilateral right to amend its terms at any time. In denying the motion to strike, the district court further noted that courts generally view Rule 12(f) motions with disfavor and that class treatment is more appropriately addressed on a motion for class certification. The defendants appealed to the Eighth Circuit.

The Eighth Circuit's Decision

A panel of the Eighth Circuit reversed. The court held that the arbitration clause in the client agreement was valid and enforceable against Donelson, even if he never saw the provision or signed the agreement. It was sufficient for Donelson to sign a separate agreement—his account application—that "expressly incorporated the arbitration clause" by reference. Further, the agreement was not "illusory" because Ameriprise provided Donelson an investment account and could not amend the terms unless it gave 30 days' notice and Donelson then used the account, indicating his consent.

The court also held that the district court erred by declining to strike Donelson's class action allegations. Noting a split among federal district courts, the court explained that it is appropriate to strike class action allegations if it is "apparent from the pleadings that the class cannot be certified" because "unsupportable class allegations bring 'impertinent' material into the pleading." Considering the allegations of the complaint, the court concluded that the putative class was not sufficiently "cohesive" to qualify for class action status under Federal Rule 23(b)(2) because individualized determinations would have to be made with respect to multiple elements of the securities fraud claims pled by the plaintiff. Having disposed of the class action aspect of the case, the court ruled that the arbitration clause—which exempted putative or certified class actions—covered the dispute and ordered the matter to arbitration.

Implications

Donelson is notable in that it enforced an arbitration clause with respect to federal securities fraud claims, despite evidence that the plaintiff never saw the clause or signed the agreement. The decision vividly illustrates the power of the doctrine of incorporation by reference to bind contracting parties to arbitration, even as to federal statutory claims, no matter their level of sophistication. It also stands as a rare federal appellate-level endorsement of striking securities class action allegations on the pleadings under Rule 12(f) prior to class discovery and a motion for class certification.

A viable Rule 12(f) defense could substantially alter the settlement dynamics in federal securities cases where flaws in a putative class action are evident on the pleadings. As the Supreme Court has noted, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008). Class discovery—which frequently overlaps with merits discovery, including depositions and expert witnesses—is often a primary

source of such settlement pressure. The ability to strike class action allegations would enable courts to dispose of inadequate class claims at an early stage of the case, conserving judicial resources and protecting litigants from unnecessary discovery-related costs associated with class certification. It also would reduce distortions in the class action settlements created by such cost and burden considerations. The Eighth Circuit's endorsement could prove influential in

Jason Halper is a partner at Cadwalader, Wickersham & Taft LLP in New York, New York, and Adam Magid is a special counsel in Cadwalader's Global Litigation Group in New York, New York.
