First Circuit Court of Appeals Decides Close Case in Favor of Confirming FINRA Arbitration Panel Award: Raymond James Financial Services, Inc. v. Fenyk

Introduction

Probably most of the Federal Arbitration Act Section 10(a)(4) outcome-review challenges that parties file are disposed of pretty easily because the applicable highly-deferential standard of review forecloses relief as long as the arbitrators were at least arguably interpreting the parties' agreement, the applicable law or both. The most challenging cases are those falling either on or close to that imaginary, blurry line dividing arguable interpretation from clear disregard of the contract. Cf. *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1506 (7th Cir. 1991) (?The zanier the award, the less plausible it becomes to ascribe it to a mere error in interpretation rather than to a willful disregard of the contract. This approach can make the line between error and usurpation waver.?).

In Raymond James Financial Services, Inc. v. Corp. v. Fenyk, No. 14-1252, slip op. (3rd Cir. Mar. 11, 2015), the U.S. Court of Appeals for the First Circuit addressed one of those challenging cases. The panel in a FINRA arbitration (the "FINRA Arbitration Panel" or "Panel") awarded a discharged stock broker $600,000.00 in back pay for wrongful termination, but the district court vacated the arbitration award because it concluded that the FINRA Arbitration Panel did not have the authority to award back pay in the circumstances. On appeal the First Circuit reversed, explaining in clear and cogent terms why the case, while close, was not one warranting Section 10(a)(4) vacatur.

Facts

Mr. Fenyk served as a Raymond James Financial Services ("Raymond James" or "James") securities broker for seven years. His career there began in New York City, but he worked in Vermont beginning in 2004, managing a small branch office. He had an independent contractor agreement with Raymond James, entitled "Independent Sales Associate Agreement," which stipulated that Florida law would govern any disputes. He also executed a Business Ethics Policy, which required him to arbitrate disputes "arising out of the independent contractor relationship."

In May 2009 Raymond James, during a routine client-communication review, discovered an e-mail sent to Fenyk's former domestic partner, which suggested that Fenyk had an alcohol problem. The e-mail referred to "Fenyk's 'slip' and his 'need [for] meetings and real sobriety for a dialoug [sic] with you.'" The e-mail also explained that "Fenyk's 'new AA friend was very hard on [him] last night.'" Slip op. at 3.

Raymond James terminated its relationship with Fenyk after it learned about Fenyk's apparent alcohol problem. About two years later, Fenyk filed suit "in Vermont state court alleging that he had been fired on account of his sexual orientation and his status as a recovering a recovering alcoholic, in violation of Vermont's Fair Employment Practices Act ("VFEPA"), Vt. Stat. Ann. tit. 21, § 495." Slip op. at 4. Fenyk subsequently agreed to dismiss his complaint and commence a Financial Industry Regulatory Authority ("FINRA") arbitration, as required by his agreement with Raymond James.

Fenyk's FINRA Statement of Claim "reiterated the same two causes of action asserted in his court complaint: retaliation based on sexual orientation and disability, in violation of Vermont law." He requested "$665,000 in back pay, $588,000 in front pay, and $250,000 in punitive damages, along with attorney's fees and costs." Slip op. at 4.

Raymond James contended, among other things, that: (a) the parties agreed Florida?not Vermont?law governed, and that Fenyk's Vermont claims therefore failed; (b) Fenyk was not an employee and was therefore not protected by Florida, or for that matter, Vermont, employment discrimination law; and (c) Fenyk's employment discrimination claims were time barred. See slip op. at 4.

The FINRA Arbitration Panel held a hearing in January 2013, and on the first day Fenyk requested the Panel to amend his Statement of Claim to include a claim under the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117 (the "ADA"). Fenyk explained that the ADA "'mirrors' the Vermont and Florida employment discrimination statutes and that, hence, there would be no prejudice to the defense." Slip op. at 4-5. Raymond James objected, contending that "the proposed amendment [w]as untimely," and "that [it] had 'responded to the claims that have been proffered.'" Slip op. at 5. Raymond James also argued that Fenyk had "only asserted claims for retaliation[,]" and "had not. . . alleged discrimination per se. . . ." Slip op. at 5. Fenyk did not at that juncture request permission to add any Florida-law claims. See id.

The FINRA Arbitration Panel proceeded to hear the case without ruling on Fenyk's application. After the four-day hearing, Fenyk moved once again to amend his Statement of Claim, this time to add disability discrimination claims under federal, New York and Florida law. Fenyk asserted "that the statutes and the elements of the claims 'are essentially the same[,] as are the interpretative judicial decisions,' though he noted that damage awards are handled differently under the various provisions." Slip op. at 5.

On the same day he renewed his motion for leave to amend, Fenyk submitted a post-hearing brief, which pointed out among other things, that Fenyk had initially asserted claims only under Vermont law but had subsequently sought leave to amend "'to add claims for violations of other relevant jurisdictions.'" Slip op. at 5.

Raymond James' post-hearing brief urged the FINRA Arbitration Panel to deny Fenyk's request for leave to amend. Raymond James contended that Fenyk's application violated FINRA rules because it was allegedly untimely, granting it would prejudice Raymond James and the ADA claim was barred by the statute of limitations. Raymond James, however, "acknowledged that Florida employment discrimination law 'substantially' differs from Vermont law only in its treatment of sexual orientation, and asserted that, even under Vermont's choice-of-law principles, Florida law would apply." Slip op. at 6.

In March 2013 the Panel denied Fenyk's requests for relief to amend his Statement of Claim. The Panel said the request was untimely and that there were "'no special circumstances alleged to justify such relief.'" In the same order the FINRA Arbitration Panel "granted what it described as a request from both parties that Florida law be applied to the proceedings." Slip op. at 6.

The FINRA Arbitration Panel made the following award (the "Award") in April 2013:
After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable for and shall pay to Claimant compensatory damages in the amount of $600,000.00 for back pay on his claim of
discrimination based on disability.

2. Respondent is liable for and shall pay to Claimant attorneys' fees in the amount of $33,627.50 plus litigation expenses in the amount of $2,414.53 pursuant to paragraph 22(b) of the contract between the parties and § 760.11(5) of the Florida Civil Rights Act.

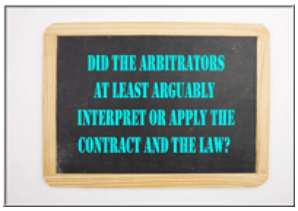
3. Any other relief sought under Claimant's claims of statutory discrimination [] is denied.
4. Any and all relief not specifically addressed herein, including punitive damages, is denied.
Slip op. at 7-8. The Panel also required Raymond James to pay $20,000 in arbitration fees. Slip op. at 8.

Raymond James petitioned the federal district court for the District of Massachusetts to vacate the award. James contended that the FINRA Arbitration Panel exceeded its powers by awarding Fenyk damages on a claim that he never submitted to arbitration: violation of the Florida Civil Rights Act (the "FCRA"). The district court granted the petition, noting that the Panel had concluded that Florida law applied, but disregarded Florida's one-year statute of limitations for FCRA claims "'and somehow construed Florida law to find a violation of a Vermont statute?a statute which, given the governing law, was wholly inapplicable to the case.'" According to the district court: "Awarding damages to a plaintiff who has pled no claims under applicable law plainly transgressed the limits of the arbitrators' power[,]" and [f]or this reason, the award must be vacated." Slip op. at 8.

On appeal Fenyk contended that the district court erred by "construing the Florida statute of limitations to bar his claim. . . ." James contended that the district court's decision should be affirmed because: "(1) the panel awarded damages despite its finding that Florida law applied and Fenyk brought no claims under Florida law; and (2) even assuming Fenyk's claims may be analyzed as alleged violations of Florida law, such claims fail as time-barred under the one-year statute." Slip op. at 8-9.
The First Circuit's Decision

The First Circuit reversed the district court's judgment and remanded the case for the district court to enter an order confirming the Award. The Court concluded that the FINRA Arbitration Panel did not exceed its authority under the Stolt-Nielsen/Oxford manifest disregard of the contract standard of review. The Court also acknowledged that the First Circuit had not definitively decided whether the manifest disregard of the law standard of review survived the Supreme Court's decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008), but explained that it need not decide that question because, even assuming the manifest disregard of the law standard survived Hall Street, it would not authorize vacatur of the award. See Slip op. at 10-12.

In a well-written and reasoned opinion by Senior Circuit Court Judge Kermit Lipez, the First Circuit evaluated and rejected the two independent conclusions on which the district court based its decision to vacate the Award: (a) the Arbitrators disregarded Florida's statute of limitations; and (b) the Arbitrators effectively granted Fenyk relief on a Florida-law claim he did not assert.
The FINRA Arbitration Panel did not Disregard Florida's Statute of Limitations
Raymond James contended that the district court's decision to vacate the award was correct because the parties agreed Florida law governed their relationship and Fenyk's claims would be barred by the statute of limitations unless Vermont statute of limitations law applied. The Court "agree[d] that Florida's statute of limitations governs[,]" because the arbitrators determined "that Florida law applies to Fenyk's claims. . . ." But "that judgment[,]" said the Court, "does not help" Raymond James." Slip op. at 13.



As we've pointed out many times in other posts (see, e.g., here, here, here & here), when a party contends that arbitrators have manifestly disregarded the parties agreement, or (where applicable) the law, the challenger must show that the alleged "disregard" of contract or the law was not even arguably the result of an interpretive or legal error, but resulted from the arbitrators not interpreting the law or contract at all. Egregious error is not enough; the challenger has to show that the only plausible conclusion was that the arbitrators must have intentionally or unintentionally "abandoned their interpretive role." See Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2070 (2013).

The Third Circuit correctly found that the demanding standards for Section 10(a)(4) vacatur were not?and could not have been?met because there was at least one plausible basis for the arbitrators not to have applied Florida's statute of limitations. As of the date of the Award, "Florida law on the applicability of statutory limitations periods to arbitrations was evolving." Slip op. at 13-14. Before the Florida Supreme Court was the question whether a generally applicable statute of limitations provision, Fla. Stat. § 95.011, "governs arbitrations only if the parties' arbitration agreement expressly incorporates a statutory filing deadline." Slip op. at 14. "Two weeks after the . . . [Award]," said the Court, "the Florida Supreme Court held that. . . [Section 95.011] applies to arbitration proceedings." Slip op. at 16 (citing Raymond James Fin. Servs., Inc. v. Phillips, 126 So.3d 186, 188 (Fla. 2013) (issued May 16, 2013, and revised Nov. 7, 2013)). The Florida Supreme Court, answering a certified question, and reversing a Florida intermediate appellate court, held that because Section 95.011 defines "actions" as including "proceedings," it therefore applied to civil actions and arbitration proceedings. Slip op. at 14.

Although the parties "debate[d] whether the [Florida Supreme Court's] holding in Phillips extends to claims brought under the FCRA, Fla. Stat. Ann. §§ 760.01-760.11[,]" the Court said that did "not matter." Slip op. at 15: "Given the legal uncertainty reflected in the certified question presented to the Florida Supreme Court, and the fact that even 'serious error' by arbitrators will not invalidate their award, any error by the panel in refusing to dismiss Fenyk's claims as untimely does not rise to the level necessary to justify vacatur." Slip op. at 15 (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l
Corp., 559 U.S. 662, 671 (2010)).

The FINRA Arbitration Panel did not Exceed its Powers by Granting Fenyk Florida-Civil-Rights-Act Relief

The Court "understood" the district court's "discomfort" about "[t]he panel's award of damages based on Florida law[]" given the Panel's "denial of Fenyk's request to amend his Statement of Claim to include a claim under the FCRA[.] . . ." Slip op. at 16. But the Court could not "conclude, conclude, in the particular circumstances of this case, that the arbitrators' decision to impose liability on RJFS under Florida law 'willfully flouted the governing law' or otherwise exceeded the bounds of the arbitrators' authority to resolve the parties' dispute. " Slip op at 15-16 (quoting Stolt-Nielsen,
559 U.S. at 672 n.3).

Raymond James asserted in the arbitration that Vermont's and Florida's anti-discrimination statutes statutes "are substantially equivalent in covering disability discrimination." Slip op. at 16. And because James did not "know[] how the arbitrators would treat Fenyk's inappropriate Vermont claims, the company prudently explained in its prehearing brief the reasons why it believed Fenyk's claims failed under both Florida and Vermont law." Slip op. at 16.

While the Court explained that "reliance on Florida law would be a different matter if the pertinent statutes in Florida and Vermont materially diverged[,]" "the arbitrators' decision to apply Florida law -- the approach [Raymond James] ha[d] demanded throughout the proceedings-- protect[ed] the company from obligations at odds with those encompassed by the arbitral agreement." (Slip op. at 16 & 17.) The Court acknowledged that Florida's shorter statute of limitations "was a potentially crucial difference from Vermont law that favored [Raymond James]," but the Panel "applied" Florida law and nevertheless "made a determination adverse to [James]." Slip op. at 17. Because the parties agreed that Florida law governed, and because the Panel's interpretation and application of Florida law to the dispute was at least arguably an interpretation and application of Florida law to the parties' contract, the Panel did what it was commissioned to do, and therefore did not exceed its powers. Slip op. at 17-18.

The Court explained that "[o]ne might reasonably argue that the panel's decision to grant Fenyk a remedy under Florida law is incompatible with its denial of Fenyk's request to amend his arbitration complaint to include claims under the FCRA and, for that reason, was improper." Slip op. at 18. "In effect," said the Court, "the panel did what it told Fenyk it would not do: view his allegations of discrimination through the lens of Florida statutory law." Slip op. at 18.

The FINRA Arbitration "[P]anel's unexplained reliance on the FCRA" "perplexed" the Court, "and may have been erroneous. . . ." Slip op. at 18. But noting that FINRA Rule 13309(b) authorized the Panel to allow the addition of claims, the Court explained that the arbitrators "had the authority to allow addition of Florida claims," the Court reasoned that "the panel apparently decided that Fenyk's mistake in labeling his claims did not justify denying him relief." "Where," said the Court, "the arbitrators applied the substantive law that [Raymond James] agreed would govern its conduct, that choice to apply Florida law falls within the category of judgments ? even if erroneous ?that we may not disturb." Slip op. at 18-19.

What to Make of Fenyk?

Fenyk was a close call, but the First Circuit called it well. The Court explained its reasoning clearly and the decision should be a helpful aid for predicting the results of other cases that raise interrelated issues concerning the parties' submissions; apparent inconsistencies between procedural rulings and awards; choice-of-law clauses; and statutes of limitations.

Had we the space (and the time!) we might address several questions that were not directly addressed by the First Circuit's decision, but which can arise in arbitration-law cases involving the interplay between statutes-of-limitations and choice-of-law clauses. To name at least a few:

1. Would the result in Fenyk have been different had the Florida Supreme Court decided Phillips before the hearing?

2. Should the parties' choice-of-Florida law have been deemed to encompass statute of limitations law? In New York and a number of other jurisdictions, a choice of law provision is, for conflicts-of-law purposes, generally deemed to determine only the applicable "substantive" law (i.e., the law governing the merits of the dispute), but not the statute-of-limitations, which is considered "procedural" because it affects only the availability of a remedy, purportedly without effecting the parties' rights and obligations.

3. Assuming courts should interpret general choice-of-law clauses to mean consent to application of the chosen jurisdiction's statute-of-limitations law for arbitration-law purposes, but not for judicial choice-of-law purposes, then what would the rationale for that rule be?

4. Assuming there is a rationale, is it one that can be squared with Federal Arbitration Act Section 2's "equal footing" principle?

5. Given that one of the key objectives of statute of limitations law is to relieve court congestion, what, if anything, is the rationale for assuming that arbitrators should be bound to apply it in the absence of the party's clearly-expressed intent to that effect? Remember that, while our overburdened courts generally do not want to have to decide more cases, arbitrators and arbitration providers generally welcome the increased revenue stream associated with deciding or administering more cases. There are other rationales for statute-of-limitations law?protecting defendants and the evidentiary and practical problems associated with stale claims?but are they as applicable to arbitration as they are to litigation?

Photo Acknowledgements: