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Ex-Wells Fargo Adviser Fights \$1.6M FINRA Award At 3rd Circ.

By **Jeannie O'Sullivan**

Law360 (November 17, 2021, 4:00 PM EST) -- A former Wells Fargo Advisors LLC employee urged the Third Circuit on Wednesday to undo a \$1.6 million Financial Industry Regulatory Authority arbitration award the company won in a commission dispute, citing public policy targeting illegal employment contract terms.

Even though Christopher N. Caputo won't have to repay the commission since the obligation was discharged in his bankruptcy, the arbitration award still represents an unlawful commission clawback practice triggered when employees leave the company within 10 years of earning it, a three-judge panel heard during an oral argument in Philadelphia. Caputo alleges he only left the company because he was fired without cause.

The enforcement of unjust employment agreement provisions provides an exception to the broad deference that courts traditionally afford to arbitral awards, according to Caputo's attorney Timothy W. Bergin of Potomac Law Group.

"Vacatur should occur because the award enforced an illegal contract," Bergin argued.

Bergin's emphasis on New Jersey law governing payment of commission-based remuneration to employees drew pushback from U.S. Circuit Judge Stephanos Bibas, who said, "I don't see any toehold for public policy in this statute."

"Where's the well-defined and dominant policy coming from that shows that this violates labor policy?" Judge Bibas asked.

Bergin conceded that some laws give rise to a public policy and some do not, yet said that a "classic case of a public policy argument" can derive from a statute that regulates contractual relationships when an illegal contract term is enforced.

"In that context, the courts are clear that there's an exception to the deferential review of arbitral awards," Bergin said.

A vacatur of the award would also open the door for Caputo to pursue his counterclaims, also dismissed by the arbitrator, according to Bergin.

Caputo has accused Wells Fargo Advisors of defamation for allegedly misrepresenting the circumstances of his termination to FINRA and others and is also seeking statutory damages under state law in Missouri, where the company is based, barring employers from withholding earned commission.

Bergin said the vacatur of the award would allow Caputo to access money — \$27,690, according to his appeal brief — left in his Wells Fargo accounts that offset the commission he was ordered to pay back.

U.S. Circuit Judges Julio M. Fuentes and Michael A. Chagares both established from their questions to counsel that Caputo never challenged the dismissal of the counterclaims when he fought the arbitration award in district court, prompting Chagares to wonder if the claims were forfeited.

Wells Fargo Advisors attorney Jonathan A. Scobie of Stevens & Lee suggested the counterclaims were forfeited, saying there was "no actual articulation by Mr. Caputo in the district court that the FINRA panel wrongly decided the counterclaims."

The company also takes the position that the discharge of the award in Caputo's bankruptcy renders his appeal moot, according to Scobie.

"There's really nothing for the court to decide, in our opinion," Scobie told the panel.

According to appeal briefs, Caputo worked for Wells Fargo Advisors as a financial adviser from February 2011 until his termination in December 2014. His employment agreement required him to repay Wells Fargo any commission-based remuneration he had earned if he didn't remain employed by the company for 10 years after earning it.

Wells Fargo contends that Caputo was fired following a workplace investigation that "uncovered facts demonstrating that Mr. Caputo had engaged in a pattern and practice of trading certain long-term investments for other long-term investments," which the company found to be "inappropriate" conduct. The probe centered on transactions involving the surrender of variable annuities for the purpose of reinvesting surrender proceeds in mutual funds, according to appeal briefs.

Caputo claims he was given conflicting information by Wells Fargo officials about the existence of the purported trading policy at issue, and that all of his customers were fully informed about their transactions and none had ever complained.

Caputo owed \$1,663,529.71 in commission payback as of his termination, according to appeal briefs. When he refused to pay it, Wells Fargo Advisors initiated the FINRA arbitration in August 2015 and Caputo filed his counterclaims.

Caputo told the three-member arbitration panel that the contractual arrangements were "expressly unlawful and void," but it ruled in favor of Wells Fargo Advisors "without any explanation of its reasoning, after eleven days of hearings," his appeal brief said.

Wells Fargo asserts that the arbitration panel "fully considered all of Caputo's arguments, including legal arguments that were briefed in multiple pre-hearing and post-hearing filings," along with testimony from 13 witnesses.

Last year, a New Jersey federal judge denied Caputo's vacatur and reconsideration bids in decisions Caputo said relied "simply on the fact that Caputo had signed on to the contractual provisions at issue, but gave no reason why they were not void" under New Jersey and Missouri labor laws.

The court later refused to stay the arbitration award pending Caputo's appeal.

Caputo claims he filed for bankruptcy in October 2020 after FINRA notified him that unless he satisfied the judgment or stayed it in court, or filed for bankruptcy, he would be suspended from association with any FINRA member.

U.S. Circuit Judges Stephanos Bibas, Michael A. Chagares and Julio M. Fuentes sat on the panel for the Third Circuit.

Caputo is represented by Timothy W. Bergin of Potomac Law Group and Mark A. Kriegel.

Wells Fargo Advisors is represented by Megan M. Christensen, Yio Kyung Lee and Jonathan A. Scobie of Stevens & Lee.

The case is Christopher Caputo v. Wells Fargo Advisors LLC, case number 20-3059, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Janice Carter Brown.

