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Judge vacates confidentiality clause

Investment company can't shield documents

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By Phillip Bantz

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A Superior Court judge recently shed some light on the secretive world of arbitration by lifting a blanket confidentiality clause that had veiled documents in a dispute between a Wall Street brokerage firm and a former employee.

Judge Frances A. McIntyre's ruling in *Dever v. Oppenheimer & Co., Inc.* raises questions about the penetrability of a closed-door arbitration system designed to settle internal disputes while protecting sensitive information about businesses and their staffers.

In *Dever*, Oppenheimer tried to impose a blanket confidentiality agreement on a former employee who said he was wrongly fired and believed the company was withholding arbitration records that proved his innocence.

Oppenheimer argued to maintain the confidentiality provision in the judicial confirmation of the award, claiming that the records the employee sought to release contained embarrassing personal matters that surfaced during a dispute hearing.

The judge rejected Oppenheimer's bid to shield the documents, which included transcripts from the arbitration proceeding. She found that the confidentiality clause in the award was overbroad and against public policy.

"In the highly-regulated securities industry, the public's interest in transparency trumps a financial institution's interest in concealing its dealings with employees, regulatory agencies, and their lawyers," McIntyre said.

She added that "the public interest in the conduct of its agencies at the business of protecting consumers is higher than Oppenheimer's interest in keeping

the matters secret.”

Stuart D. Meissner, the plaintiff's New York attorney, said companies “almost always want to keep things hush-hush, keep everything confidential. This is a dispute in almost every single arbitration that I've been involved in.”

Oppenheimer's Boston attorneys, Fred A. Kelly Jr., Timothy W. Mungovan and Kurt M. Mullen, all of Nixon Peabody, declined to comment on the case. An Oppenheimer spokesman did not respond to an e-mail requesting an interview.

The four-page decision is *Dever v. Oppenheimer & Co., Inc.*, Lawyers Weekly No. 12-299-10. The full text of the ruling can be ordered by clicking [here](#).

‘Worlds collide’

The Dever decision illustrates a cultural divide between arbitration and courtroom litigation, where openness is the norm, said Boston labor law attorney Ellen J. Messing of Messing, Rudavsky & Weliky.

“Courts are very reluctant to impound documents, to close the courtroom — all those practices that keep things quiet. Arbitration is a whole secret world,” said Messing, an experienced labor law attorney and arbitrator who was not involved in Dever. “This [case] is where the two worlds collide.”

Opponents of arbitration, typically employment and consumer protection lawyers, say the practice is supplanting litigation and restricting plaintiffs' rights. They also claim that arbitration's shadowy nature is deleterious to the court system, because it does not further caselaw or establish legal precedents.

“Not only does it hide behind the cloak of darkness whatever dirty secrets these companies don't want revealed, it also harms our judicial system,” said Shannon Liss-Riordan of Lichten & Liss-Riordan in Boston. “I think that when these arbitration cases come into court for confirmation, there will be a judicial hesitancy to keep them confidential.”

Oppenheimer had argued that the Federal Industry Regulation Authority panel that oversaw the arbitration was a private procedure and thus did not implicate state action.

But the plaintiff, James F. Dever, said the arbitrators overstepped their bounds by inserting the confidentiality clause into the award without his consent.

McIntyre first concluded that confirmation of the award would implicate state action under G.L.c. 251, §14. She then looked to a FINRA publication that indicated blanket confidentiality provisions should not be the norm.

“I am not persuaded that members expect FINRA forums to cloak their proceedings with secrecy,” McIntyre said. “This court is persuaded that the confidentiality provision in this award offends public policy.”

She struck the confidentiality clause and confirmed the modified award.

“Oftentimes in these arbitrations, firms will produce documents that unveil securities violations and wrongdoing, and to keep it confidential is basically a cover-up,” Meissner said. “McIntyre's decision helps refocus arbitrators, and it tells them that they shouldn't be doing this.”

But Christopher P. Kauders, founder of Pre-Trial Solutions, a private alternative dispute resolution company in Boston, worries that Dever will undermine the basis of arbitration.

“My concern is that every time a party is dissatisfied with an arbitrator's ruling or wants to put aside a confidentiality agreement, they'll cite public policy. And what could be broader than public policy?” he said. “There has to be an extraordinarily high level of public policy consideration for the court to decide to overturn the willingness of parties in arbitration, and the threshold seems to be lowering.”

Sanctions

Earlier this month, the Appeals Court released a pair of documents in Dever that Oppenheimer had fought to conceal by obtaining an emergency stay following McIntyre's order of their release.

Oppenheimer filed a motion to dissolve the stay shortly after The Boston Globe obtained the two documents during the brief window that they were public as part of McIntyre's order.

The documents are a detailed draft settlement offer Oppenheimer submitted to the Massachusetts Securities Division and a memo from the company to the MSD referencing an internal audit report, which the plaintiff alleges was never actually filed.

(The documents can be found by [clicking here](#) and [checking here](#).)

In the settlement offer, Oppenheimer admits e-mail policy violations along with several oversights in its handling of Stephen Jon Toussaint, a broker who stole \$135,000 from an elderly couple while working at the firm's Boston office under Dever's management.

Dever alleged that Oppenheimer wrongly blamed him for Toussaint's actions and had tarnished his reputation. He said the documents the company sought to conceal proved that he had done nothing wrong and would clear his name in the investment industry.

Meanwhile, Meissner has accused Oppenheimer's Nixon Peabody attorneys of misrepresenting the procedural history of Dever in court filings as part of several attempts to manipulate judges to impound documents in the case.

Appeals Court Judge Mitchell J. Sikora Jr. denied Meissner's request for sanctions because his involvement in the case was “fleeting and fragmented.” He relayed the request to the Superior Court, which has yet to decide the issue.

Sidebar:

Case demonstrates hearings aren't always recorded in Superior Court

Counsel for the plaintiff in *Dever v. Oppenheimer & Co., Inc.* was taken aback when he tried to obtain a transcript of a hearing in the case and learned that none existed, though a bailiff had told him the proceeding was recorded.

New York lawyer Stuart D. Meissner said important testimony came out during a hearing last August before Superior Court Judge Carol S. Ball that was not recorded.

In fact, it turns out the entire session went unrecorded.

"I feel like I'm in Haiti or something," Meissner said. "How do people appeal rulings if there's no transcript, and you don't even know if it's being recorded or not?"

Ball could not be reached for comment, but court spokeswoman Joan Kenney said the judge's session was not taped because all the hearings before her that day involved non-evidentiary matters.

"Judge Ball followed the standard practice of the Superior Court," Kenney wrote in an e-mail to Lawyers Weekly. "Attorneys who practice in the Superior Court are aware of this routine practice."

The court's recording policy is unwritten, Kenney said.

Four attorneys who appeared before Ball during the Aug. 25 session told Lawyers Weekly that they had no idea whether their hearings were being recorded and received no notification that the recorder was off that day. Two other lawyers who were reached could not recall specifics from the session.

"They usually let us know those things," said Thiadora Ann Pina of the Law Office of Neil Burns in Boston, who appeared before Ball during the session in question. "I was over there just the other day, and they had to move us to several courtrooms because the recording equipment wasn't working. It was my understanding that recording is a matter of course."

Another lawyer who was in Ball's courtroom on Aug. 25, Robert M. Higgins of Boston's Lubin & Meyer, said he does not expect to be told whether a session is being recorded. But he added that he was at least able to tell if a record was being made when the court used stenographers.

The stenographers were replaced several years ago with recording machines as part of budget cuts.

"This is the fear that everyone's had with the [recording] system: that you're going to have something important and it's not going to be picked up," Higgins said. "I never know when they're recording or not."

— Phillip Bantz

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