ContractsProf Blog

Monday, February 3, 2014

# GLOBAL K: Big boys play rough

By Michael P. Malloy

We learn more about public policy limits on enforcement of arbitration clauses in a January 2014 ruling of the SDNY in *National Credit Union Admin. Bd. v. Goldman, Sachs & Co.* The case is a $40 million suit filed in September 2013 by the National Credit Union Adminsitration as Liquidating Agent of failed credit unions Southwest Corporate Federal Credit Union and Members United Corporate Federal Credit Union. A spinoff from the capital markets collapse of 2008, the complaint alleges that Goldman, Sachs – through GS Mortgage Securities Corp. – misrepresented the quality of securities sold in 2006 and 2007 to the two credit unions, in violation of sections 11 and 12(a)(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2), and the Texas Securities Act, *Tex.Rev.Civ. Stat. Ann.* art. 581, § 33 (2013).

Goldman's immediate response was to move for an order to compel arbitration, based on arbitration provisions in a 1992 cash account contract between Goldman and Southwest that appeared to govern "any controversy" between the parties. Citing 12 U.S.C. § 1787(c), the NCUA had repudiated the Cash Account Agreement between Southwest and Goldman Sachs. The court found that the NCUA had met the requirements of the statutory provision, and therefore the agency had broad authority to repudiate contracts that might burden its administration of a troubled credit union. Accordingly, the court denied Goldman's motion.

While this ruling is certainly consistent with growing policy skepticism about arbitration clauses discussed in an earlier Global K post, we need to keep in mind what the ruling does and does *not* represent. First, it is by no means the final word in this litigation. As the court noted in passing, Goldman had expressly reserved the right to file a motion to dismiss in the event that the court rejected the motion to compel arbitration. There is no reason to doubt that such a motion will be forthcoming.

Second, we should not over-read the ruling as a repudiation of arbitration clauses. In the course of its discussion, the court was careful to note the strong policy of the Federal Arbitration Act (FAA) "to counteract 'widespread judicial hostility to arbitration agreements' and [to] reflect[] 'a liberal federal policy favoring arbitration,' " quoting AT&T Mobility LLC v. Concepcion.

Nevertheless, the ruling does accord considerable credibility to the position that, despite the strong and longstanding FAA policy in favor of arbitration, a broad arbitration clause frustrates supervisory efforts to resolve institutional failures and should not be enforced in a financial institutions receivership. This observation leads to the third point to be noted – that in a regulated industry, contract law expectations skew in favor of overarching supervisory policy. Like the corresponding policy that applies to failed banks in FDIC receivership under 12 U.S.C. § 1821(d) and § 1823(e), § 1787(c) allows the NCUA as conservator or liquidating agent to "disaffirm or repudiate" any contract or lease of which the failed credit union is a party, if the conservator or liquidating agent determines in its discretion that the performance would be "burdensome" to it, and the disaffirmance or repudiation would "promote the orderly administration of the

credit union's affairs." Significantly, the Second Circuit has long taken the same position as *National Credit Union Administration* in cases dealing with bank receiverships. *See, e.g.*, *Resolution Trust Corp. ("RTC") v. Diamond,* 45 F.3d 665, 670 (2d Cir.1995); *Westport Bank & Trust Co. v. Geraghty,* 90 F.3d 661, 668 (2d Cir.1996). While the credit union statute allows for claims for damages for the contract repudiation, such claims are "limited to actual direct compensatory damages," and expressly exclude claims for "lost profits or opportunity." We must await further developments in this litigation to assess how far contracts principles skew in favor of supervisory intervention.

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