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Panel Permits Punitive Award In Arbitration

BY BILL ALDEN

FURTHER ERODING a 20-year-old Court of Appeals ruling which had barred awards of punitive damages in arbitration proceedings, a state appeals panel has declared that arbitrators can assess such damages notwithstanding a New York choice-of-law clause in a brokerage account agreement.

Instead, citing the U.S. Supreme Court's 1995 ruling in *Mastrobuono v. Shearson, Lehman, Hutton*, 115 S.Ct. 1212, a unanimous five-judge panel of the Appellate Division, First Department, concluded that the choice-of-law clause in *Layne v. Stratton Oakmont*, did not create "an unequivocal exclusion of punitive damages claims."

Noting that *Mastrobuono* required a clear statement in an agreement barring arbitrators from awarding punitive damages, Justice Angela M. Mazzarelli declared that the panel was "unpersuaded" that the language in the agreement which stated that "the parties' rights and liabilities are to be determined in accordance with New York law" amounted to "the explicit reference envisaged by *Mastrobuono*."

Such language, she added in an opinion joined in byst

Justices Betty Weinberg Ellerin, Israel Rubin, Theodore R. Kupferman and Milton L. Williams, created an "ambiguity with respect to whether the parties agreed to exclude a punitive damages award by an arbitrator"

In October, a different First Department panel, ruling in *Mulder v. Donaldson, Lufkin & Jenrette* (*NYLJ*, Oct. 9), had rejected the prohibition of punitive damages in arbitrations under New York law, which had stemmed from a 1976 Court of Appeals decision, *Garrity v. Lyle Stuart Inc.*, 40 NY2d 354.

Although noting that the *Mulder* case had not involved a choice-of-law clause, the judges in Layne made it clear that the *Mulder* rationale was applicable as they reversed a lower court's order which had thrown out an arbitration award that included punitive damages of more than $261,000.

"While this case differs from *Mulder*," Justice Mazzarelli said, "here, as in *Mulder*, the parties have not unequivocally agreed to preclude arbitrators from considering punitive damages."

Liabilities

The case before the panel was triggered by an arbitration claim filed by a Nevada-based company, R.C. Layne Construction Inc., against Stratton Oakmont Inc. under a "Customer Agreement," alleging that the embattled Long Island investment firm had bilked it out of nearly $300,000 through recommending unduly risky investments.

After a three-day arbitration hearing in Las Vegas held under the rules of the National Association of Securities Dealers (NASD), an award of $546,275.01, including punitive damages of more than $261,000 was entered against Stratton Oakmont and one of its employees.

Stratton Oakmont, which was expelled from the securities industry earlier this month by the NASD after 12 NASD regulatory actions since 1989, sued in New York court to set aside the award on the basis of *Garrity*.

Supreme Court Justice Charles Ramos, saying that the agreement in the Layne claim made explicit reference to "the liabilities of the parties," distinguished the case from *Mastrobuono* and granted Stratton Oakmont's application.

But the panel, citing eight federal court decisions issued since *Mastrobuono*, concluded that Justice Ramos has misinterpreted the high court's holding.

Pointing to the Customer Agreement's reference to the NASD as "one of the forums of arbitration," and an agreement signed prior to the Las Vegas proceeding "which made it clear that the parties were subjecting themselves to NASD rules," Justice Mazzarelli declared that the court could "discern no basis upon which to distinguish this matter from *Mastrobuono* or *Mulder*."

Leonard F. Lesser of Schenck Weltman Hashmall & Mischel represented R.C. Layne. Fredda L. Plesser and Martin P. Unger of Tenzer Greenblatt and Norman B. Arnoff of Capuder & Arnoff represented Stratton Oakmont.

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