

Ex-Morgan Stanley Exec Can't Duck Arbitration of Bias Suit

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A New Jersey federal judge on Thursday refused to budge from her ruling last fall forcing arbitration of a former Morgan Stanley executive's claims he was fired because of past alcohol and drug abuse, rejecting his reconsideration bid as being filed too late.

Craig Schmell sought to change U.S. District Judge Anne E. Thompson's mind that he is bound by an arbitration agreement sent to him via a company email, relying on a state appellate decision from January on a similar situation in another case, but the judge said she would not consider the merits of his motion because it is "procedurally improper."

A court rule requires that reconsideration motions be filed within 14 days of the order being challenged, but Schmell filed his motion on Jan. 31 — more than three months after Judge Thompson's Oct. 15 opinion and 15 days after the New Jersey Appellate Division's Jan. 16 published opinion in *Skuse v. Pfizer Inc.*, according to the judge.

"Clearly, plaintiff could not have filed this motion before the *Skuse* decision was issued on Jan. 16, 2019. But even if the *Skuse* decision would reset the 14-day deadline to file a motion for reconsideration, plaintiff's motion would still be untimely, as it was filed fifteen days after *Skuse*," Judge Thompson said in her four-page opinion.

Judge Thompson also rejected Schmell's request under Rule 60(b) of the Federal Rules of Civil Procedure — which permits a district court to "relieve a party or its legal representative from a final judgment, order, or proceeding" — because her ruling compelling arbitration and staying the proceedings pending arbitration was an interlocutory order, not a final one.

The judge added that "one of the principal goals of arbitration is the speedy resolution of disputes, a goal that is undermined by relitigation of questions of arbitrability."

Schmell, a former senior vice president at Morgan Stanley Smith Barney LLC's Red Bank, New Jersey, office, received the email from the company's human resources department at 4:30 p.m. on Sept. 2, 2015, court documents state. The email was titled, "Expansion of CARE Arbitration Program," referring to Convenient Access to Resolutions for Employees, and it included links to the CARE arbitration agreement and the CARE guidebook, court documents state.

Such emails informed Morgan Stanley employees "that the program was mandatory unless they opted out and that their continued employment without opting out constituted acceptance of [the arbitration agreement]," court documents state. Schmell continued working for the company and did not opt out of the program, court documents state.

During his tenure at Morgan Stanley, Schmell began working on a self-help book about his drug and alcohol abuse decades earlier and his ultimate recovery, his complaint said. In June 2017, Schmell provided Morgan Stanley with a draft of the book, and he later agreed to edits requested by the company, including removing any mention of Morgan Stanley, according to his complaint.

But Schmell's continued employment was allegedly threatened by the book's anticipated publication and he was fired on Oct. 31, 2017, the complaint said. Schmell filed his complaint in New Jersey state court on Nov. 13, 2017, alleging violations of the state's Law Against Discrimination, and Morgan Stanley removed the matter to federal court the following month.

After the company moved to compel arbitration, Judge Thompson on March 1, 2018 held that Schmell's

continued employment after having notice of the agreement and without opting out of the program would constitute his assent, relying on the state Appellate Division's 2015 *Jaworski v. Ernst & Young* U.S. opinion.

Since there was a factual dispute as to whether Schmell had such notice, the judge refused to compel arbitration at that time.

After Morgan Stanley again moved to compel arbitration, the judge on May 30 gave the parties 60 days to conduct limited discovery on the question of whether Schmell had notice of the arbitration agreement. Following that discovery, the company moved a third time to compel arbitration.

In granting that motion on Oct. 15, Judge Thompson found that "the record presented to the court indicates that plaintiff had notice," noting that the email appeared in Schmell's inbox and that he replied to other emails that were sent before and after the email in question.

The judge rejected Schmell's argument that he never read the email sent to his work email address and does not recall reviewing it, saying he was required to review all work email as part of his job and that whether he "specifically recalls the email in question is beside the point."

On Jan. 16, the appellate panel in *Skuse v. Pfizer Inc.* disagreed with *Jaworski* in holding that an arbitration agreement sent to a former Pfizer employee via email was not binding even though she continued working there after being notified that continued employment constituted assent to the agreement.

Based on that decision, Schmell moved for reconsideration of Judge Thompson's Oct. 15 ruling, saying in a Jan. 31 brief "the *Skuse* opinion leaves no doubt that under state law defendant's arbitration agreement is unenforceable and it is inequitable to compel arbitration and continue the stay."

In rejecting his reconsideration bid, Judge Thompson noted Thursday that "the *Skuse* decision does not actually reverse *Jaworski*, weakening the notion that 'good cause' exists for the court to reconsider its opinion and order."

One of Schmell's attorneys, **Joshua S. Bauchner of Ansell Grimm & Aaron, PC**, told Law360 on Thursday, "We are disappointed that the court continues to ignore controlling law and denied our application on procedural technicalities. Indeed, the court even acknowledged that it was relying on an old case whose viability has been substantially called into questions by more recent jurisprudence in sacrificing our client's constitutional right to have his dispute adjudicated in a public forum."

Morgan Stanley attorneys could not immediately be reached for comment Thursday.

Schmell is represented by Joshua S. Bauchner and Michael H. Ansell of Ansell Grimm & Aaron PC.

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