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Bear Stearns Seeks 3rd Circ. Halt To FINRA Claim's Arbitration

By **Jeannie O'Sullivan**

Law360, New York (October 10, 2017, 5:10 PM EDT) -- Bear Stearns & Co. Inc. urged the Third Circuit to reverse a Pennsylvania district judge's order compelling arbitration in a securities case brought by Reading Health System, arguing Tuesday that the parties agreed any disputes would be hashed out in court.

The now-defunct predecessor to JPMorgan Chase & Co. contends that the health care system's Financial Industry Regulatory Authority claim over the investment bank's allegedly bad advice concerning auction rate securities was subject to a forum selection clause that overrode FINRA rules favoring arbitration.

"Here we have a contract that clearly states that all actions arising out of the broker-dealer agreement should be in the Southern District of New York," Bear Stearns' attorney Jonathan K. Youngwood of Simpson Thacher & Bartlett LLP told a three-judge panel during oral argument Tuesday in Philadelphia.

Bear Stearns wants to transfer Reading's claim, which was lodged with FINRA in February 2014, to federal court in Manhattan. Reading in March 2015 had asked the federal court for a declaration that the claim must be arbitrated. In February 2016, U.S. District Judge Lawrence F. Stengel ruled that the parties were directed to arbitrate their dispute under the provisions of the Code of Arbitration Procedure for Customer Disputes of FINRA.

Seeking to overturn Judge Stengel's ruling, the investment bank on Tuesday invoked the U.S. Supreme Court decision in Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas, which held that a forum selection clause may be enforced by a motion to transfer any civil action for the convenience of parties and witnesses.

Reading countered that the clause was void under FINRA rules and does not even specify arbitration.

"A forum selection clause that doesn't specifically reference arbitration doesn't include arbitration," Reading's attorney Mark A. Strauss of Kirby McInerney LLP told the panel. He added that Bear Stearns has raised no argument to explain why the FINRA guidance was wrong, and that to reject that guidance would contravene public policy.

Sitting by designation, U.S. District Judge Gerald J. Pappert questioned the notion of giving more weight to a FINRA rule than a contractual obligation, noting that to do so could conflict "with centuries of contact law principles."

Reading alleges that Bear Stearns, then a JPMorgan entity, grossly misrepresented the nature of the auction rate securities market when advising the health care system to issue nearly $519 million of ARS debt and enter interest rate swaps covering almost $319 million of that debt.

Reading was injured when JPMorgan and other banks suddenly ceased the secret support bidding that had propped up the ARS market, causing the market to collapse in February 2008, according to Reading's declaratory relief action.

U.S. Circuit Judges Patty Shwartz and Jane R. Roth and U.S. District Judge Gerald J. Pappert sat on the panel for the Third Circuit.

Reading is represented by Peter S. Linden, Randall K. Berger, Thomas W. Elrod and Mark A. Strauss of Kirby McInerney LLP and Lauren Wagner Pederson.

Bear Stearns is represented by Jonathan K. Youngwood of Simpson Thacker & Bartlett LLP and Michael K. Coran and Teri M. Sherman of Klehr Harrison Harvey Branzburg LLP.

The case is Reading Health System v. Bear Stearns & Co. Inc., case number 16-4234, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Edrienne Su.

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