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SCOTUS May Weigh In On Right To Arbitration.

WASHINGTON – Issuers battling dealer firms over the right to seek arbitration to settle disputes over auction rate securities are planning to take their case to the Supreme Court now that a federal appeals court has ruled against them.

Two dealer firms are disputing the issuers' rights to arbitration in separate cases, which have been combined. Citigroup brought its suit against the North Carolina Eastern Municipal Power Agency in 2013, while Goldman Sachs sued the Golden Empire Schools Financing Authority of Kern County, Calif. in 2012. Both firms sought to prevent the issuers from seeking arbitration after it was determined the charges could not be brought before the courts.

The U.S. District Court for the Southern District of New York ruled in favor of the two firms. The issuers appealed.

The U.S. Court of Appeals for the Second Circuit in Manhattan ruled in favor of the underwriters last month, finding that financing documents barred the issuers from being heard by a Financial Industry Regulatory Authority arbitrator, but decided last week to withhold issuing a mandate for 90 days in order to give Golden Empire and NCEMPA a chance to appeal to the nation's highest court. The issuers have each indicated they plan to appeal to the Supreme Court. When the mandate is issued the jurisdiction of the appeals court will end, ending the case if the Supreme Court does not decide to hear it.

FINRA Rule 12200 states that FINRA members and their customers must arbitrate a dispute if a customer requests it. Attorneys for both Goldman and Citi argued that the claims of both NCEMPA and Golden Empire were time-barred by statutes of limitation from being brought in court, and that the documents signed by both parties specified that "all actions and proceedings" arising from the transaction be brought in U.S. district court in New York.

NCEMPA is seeking arbitration in connection with a 2004 issuance of auction-rate securities, complaining that Citi advised it to issue the securities and then "abandoned" the ARS market in 2008 causing it to suffer financial losses. The issuer said that it never waived its right to arbitration and that "actions and proceedings" do not include arbitration under the laws of New York where Citi is based and the suit was brought.

NCEMPA further argued that the governing law clause appeared in only one of a number of documents related to the transaction, which should be insufficient to invalidate a broader arbitration right under FINRA rules.

Golden Empire also wants arbitration related to ARS and is making the same claims. It also said it never waived its right to arbitration.

The appeals court agreed that the clauses in the underwriter contracts superseded the issuers' right to FINRA arbitration, but noted that similar cases have had very mixed results on appeal. The Ninth Circuit in California has held that a forum selection clause supersedes the FINRA rule, while the

Fourth Circuit in Richmond, Va. has held that it does not.

The Second Circuit relied on its own precedent in a similar non-muni case, noting that the clause in question is “all inclusive and mandatory” and thus supersedes the FINRA rule.

Decisions by the courts of appeal are binding only in the states covered by their jurisdictions, which means that identical cases could continue to be decided differently depending on which court hears it. A Supreme Court decision would create binding legal precedent over all U.S. courts.

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