

All These Morgan Stanley Lawsuits Raise Warnings About Emailed Arbitration Agreements

By Miriam Rozen August 30, 2018

Three years have passed since Morgan Stanley emailed a crucial message to more than 15,000 employees, including financial advisors. That message conveyed to employees -- clearly enough for them to understand -- that they had a limited-time opportunity to opt out of a revised and more expansive employment arbitration agreement, according to arguments Morgan Stanley's management has made in multiple lawsuits.

But litigation against Morgan Stanley about those emails and their enforceability persists. The legal battles underscore both the potential problems awaiting wirehouse managers if they fail to communicate clearly to their financial advisors, and Morgan Stanley's recent doubling down on efforts to keep employee disputes out of public courts.

In one of the cases, pending in New York federal court, **John Lockette**, a former Morgan Stanley financial advisor and manager in Pennsylvania, argues that the 2015 email was part of "Morgan Stanley's secretive attempts to force employees into arbitration."

Lockette, who alleges the firm discriminated against him on the basis of race, bolsters his argument by detailing numbers that show initially only 1.2%, or 186 employees, opted out of the arbitration agreement proposed in that email. But later, in September 2015, when news of Morgan Stanley's attempt to force employees into secret arbitration of their discrimination claims leaked to the press and began appearing in an online industry newsletter, the percentage of employees opting out of the proposed arbitration agreement "skyrocketed" to 27.8%, according to Lockette's brief.

The brief specifically references AdvisorHub stories published in September and October of 2015.

"Morgan Stanley has not disclosed these opt-out percentages in any of the other cases nationwide in which employees are challenging the enforceability of Morgan Stanley's arbitration agreement," Lockette's brief states.

The disparity between the opt-outs in the spring and the fall of 2015 "shows that, when some employees read the industry press reports and learned of the arbitration proposal, the opt-out rate increased more than 23-fold," Lockette's brief states. "Put another way, 97.2% of the opt-outs occurred after the program became less secretive," his brief argues.

Lockette is represented by **Linda Friedman** and **Suzanne Bish**, partners in **Stowell & Friedman**, a law firm which has won more than \$300 million in class action settlements based on discrimination lawsuits it filed against other wirehouses, including Merrill Lynch and Wells Fargo.

Stowell & Friedman has opposed Morgan Stanley's efforts in multiple cases to compel former employees to arbitrate their bias claims, rather than try them in a federal court — and failed in some of those cases to persuade judges to let their clients keep the litigation out of arbitration.

But in the Lockette litigation, the court has not yet ruled. And the plaintiff lawyers remain hopeful their arguments will prevail.

“We were able to get a little more context,” Lockette's lawyer Bish says. “But we still don't know how many people received, opened and understood the email.”

A Morgan Stanley spokesperson declined comment for this story. But in its brief in the Lockette litigation, the wirehouse, represented by lawyers from **Morgan, Lewis & Bockius**, argues that Lockette received notice of, agreed to and is bound by the arbitration agreement. In his brief, Lockette “fails to offer any persuasive basis” for a court to deny Morgan Stanley's motion to compel him to arbitrate and instead raises “disingenuous and meritless arguments,” the wirehouse's lawyers argue.

In 2001, Lockette began working as a financial advisor for **Smith Barney**. When Morgan Stanley acquired the firm eight years later, it laid off Lockette (among others) in a reduction in force. In 2013, Morgan Stanley rehired Lockette to serve as an African-American regional training officer. He was terminated in August 2016 after, he alleges, enduring “a campaign of harassment, discrimination and retaliation.”

Lockette seeks to litigate his discrimination claims against the brokerage in federal court, rather than go through arbitration. In his discrimination case, Lockette argues that because he and so few other Morgan Stanley employees opened that emailed message – or clicked on enough of its hyperlinks to understand its implications – a court should not treat it as creating a binding contract.

Morgan Stanley seeks to compel Lockette to arbitrate his claims of race discrimination and retaliation “based on a single misleading email the firm sent to thousands of employees just before a holiday weekend,” Lockette's brief argues.

“Lockette did not assent to the arbitration proposal and he never received the email and knew nothing about the arbitration proposal until long after Morgan Stanley fired him,” his brief argues.

“Even if Lockette had received the email – and he did not – it deliberately obscured the fact that he would be required to arbitrate discrimination claims,” his brief states.

Morgan Stanley, which previously resolved race and gender discrimination lawsuits “by paying tens of millions of dollars and promising in consent decrees and class action settlements to reform its discriminatory practices and improve employment opportunities for minorities and women,” did not reform its business practices to remove biases but instead, “embarked on a secret campaign to strip its employees of the right to file public lawsuits and to sue collectively,” Lockette's brief argues.

Morgan Stanley said it sent the disputed email to Lockette after the close of business on May 20, 2015 – the Wednesday before Memorial Day that year. Its subject line – “Expansion of CARE Arbitration Program” – reassured rather than put the employees on notice that they were about to lose rights, Lockette's brief argues.

“The email was neither flagged as important nor sent with a request to acknowledge receipt,” Lockette's brief alleges. “Morgan Stanley sent no follow-up or reminder emails alerting Lockette to the upcoming deadline for opting out, and did not request or require any acknowledgment that Lockette had read or assented to the arbitration proposal,” the brief adds. “The content of the email downplayed its significance and steered registered employees like Lockette away from reading further, by explaining that the ‘expansion’ of the [arbitration] program solely affected non-registered employees,” the brief states.

“The email strongly suggested that nothing would change for registered employees like Lockette, who would remain subject to the pre-2015 arbitration program,” the brief argues.



(Getty)

“When Morgan Stanley managers want employees to read things, they know how to do it,” Lockette’s lawyer Bish says. Typically, under circumstances when Morgan Stanley managers want to inform employees about other new policies, they inform them through emails, printed material, and at weekly meetings as well – and also seek written confirmation of receipt, according to Bish.

For his part, Lockette alleges he never received or saw the email until long after Morgan Stanley fired him. Morgan Stanley “has presented no evidence” that the email “reached his inbox, let alone that Lockette opened the email or clicked on hyperlinks to the arbitration proposal” and a related guidebook, his brief argues.

In another case, Stowell & Friedman represents former Morgan Stanley financial advisor Kathy Frazier, who filed a race bias claim on behalf of a class of the wirehouse’s ex-employees which the wirehouse also seeks to remove from federal court.

Frazier, who worked at Morgan Stanley from 2013 to 2015, was sent the emailed message with the information about modifications to the arbitration agreement on Sept. 2, 2015 one day after the Dow Jones Industrial Average dropped 470 points and NASDAQ lost all of its gains for the entire year. On that day, according to Frazier’s brief opposing Morgan Stanley’s motion to compel her to arbitrate claims, advisors needed to “perform their duties in triage mode,” with little time left over to read HR emails.

In a brief in Frazier’s litigation, Morgan Stanley argues that the email sent to her and other employees “adequately communicated” the new terms of the proposed arbitration agreement and their options to opt out.

“The scope and effect of the arbitration agreement is readily apparent from the email and the agreement,” Morgan Stanley’s brief states. “Further, there is nothing ‘misleading’ or ‘confusing’ about the email or the agreement, and the binding contractual nature of the agreement was clearly explained in the email,” the brief adds.

Other litigation pending in an appeals court about the same email messages pits Morgan Stanley against one of its former sales assistants. In October, Morgan Stanley is scheduled to file a response brief in the case, which is pending in the U.S. Court of Appeals for the Second Circuit.

In that lawsuit, filed last year, former sales assistant Roberta Antollino alleges the wirehouse discriminated against her because of her age and gender.

In the lower court ruling in Connecticut, U.S. District Judge Vanessa L. Bryant decided an employment-arbitration agreement between Morgan Stanley and Antollino was enforceable, even though Antollino, like Lockette, claimed she never read a 2015 email the wirehouse sent notifying her she would be entered into such a contract. Based on that enforceability, Bryant ruled Antollino must arbitrate her age- and gender-discrimination claims.

“[R]easonable people in the position of the parties would have known about the terms and the conduct that would be required to assent to them,” Bryant writes about the email Morgan Stanley sent Antollino.

Gregory Antollino, a New York lawyer who represents Antollino and who is also her nephew, focuses his arguments particularly on state laws governing a contract's enforceability in Connecticut, where his aunt was employed. Antollino says Connecticut's laws are less lenient than other states' statutes.

With her appeal, first filed in July, Antollino seeks to reverse Bryant's ruling. His aunt "presents abundant evidence that, under Connecticut law, there was no enforceable agreement between these litigants to arbitrate," her appellate brief states.

Antollino is entitled to a trial on the enforceable contract question, her appellate brief states. Morgan Stanley persuaded the lower court by citing federal, Georgia, New Jersey and New York laws, but did not address fully Connecticut laws governing contracts, Antollino's brief adds.

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