Unforeseen Practical Ramifications Of Accepting An Adjournment In Contemplation Of Dismissal

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The vast majority of criminal defense attorneys believe that Adjournments in Contemplation of Dismissal ("ACD") are a victory for their clients. Lurking behind the acceptance of an ACD, however, is the very real possibility that by accepting an ACD your client may be prevented from ever holding a position at a Federal Deposit Insurance Corporation ("FDIC") insured bank. Most attorneys believe that ACDs are sealed records that cannot be used in any way against their clients, but this belief is sorely misguided. This article sheds lights on the practical and very real ramifications of accepting an ACD for criminal defense attorneys and their clients.

Under New York law, the ACD program is designed to nullify the arrest that is ultimately dismissed, returning the defendant "to the status he occupied before arrest and prosecution." *See* NYCPL § 170.55 (8). The nullification of the arrest serves to protect the professional standing of the Defendant and NYCPL § 160.60 explicitly states that an ACD shall not "operate as a disqualification of any person from any occupation or profession." *See* NYCPL § 160.60. Following these guidelines, the New York Human Rights Law ("NYHRL") makes it unlawful to discriminate against an individual on the basis of a termination of criminal proceedings favorable to that individual, stating that:

It shall be unlawful discriminatory practice unless specifically required or permitted by statute for any corporation to act upon, adversely to the individual involved, any arrest or criminal accusation of such individual not then pending, against the individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the Criminal Procedure Law. (Emphasis added).

See NYHRL § 296(16). An ACD is defined as a termination of criminal proceedings in favor of the accused,[1] and therefore the above section makes it unlawful to discriminate against an individual on the basis of an ACD. *See* NYCPL § 160.50 (2). However, the NYHRL contains one extremely important qualification to this protection: a corporation may be specifically required or permitted to consider a past ACD by statute. So while there is evidence that New York lawmakers intended for an ACD to leave an individual with a clean slate, they did leave open the possibility of a statutory basis under which some individuals who accepted an ACD may not be covered by the NYHRL's prohibition against hiring discrimination.

Unfortunately for those who have accepted an ACD, this type of statutory provision exists in the Federal Deposit Insurance Act ("FDIA"). Section 19 (a) of the FDIA ("Section 19"), which prevents the hiring of "any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into *a pretrial diversion or similar program* in connection with prosecution for such offense" (emphasis added). *See* 12 U.S.C. § 1829 (a) (1). This raises the question of whether an ACD fits the definition of a "pretrial diversion or similar program" within the meaning of

Section 19.

Strong evidence that an ACD *should* be considered a "pretrial diversion or similar program" can be found in the FDIC's Section 19 Statement of Policy, which defines a "pretrial diversion or similar program," as being "characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives." *See* 63 Fed. Reg. at 66, 184-85. Similarly, ACDs are an agreement that must be voluntarily consented to by the Defendant, and are characterized by a "suspension or eventual dismissal of charges or criminal prosecution." Under New York law, charges in an ACD are initially suspended with "a view to" ultimate dismissal provided the Defendant complies with certain conditions for a set period of time. *See* NYCPL § 170.55 (2). Furthermore, dismissal in an ACD is based on "noncriminal or nonpunitive" conditions being fulfilled. These conditions may include the Defendant participating in dispute resolution or performing public service, and generally involve the Defendant not being re-arrested for any crime. *See* NYCPL § 170.55 (5), (6). Thus, the characteristics of the ACD program appear consistent with the FDIC's definition of a covered program.

The first definitive step towards a decision on whether the New York ACD program falls under Section 19 came in a May 13, 2009 opinion letter from the FDIC. In that letter, the FDIC officially agreed that an ACD falls within the meaning of Section 19 of the FDIA, stating that "the granting of an ACD constitutes entry into a pretrial diversion or similar program within the meaning of Section 19." In coming to this conclusion, the FDIC acknowledged that the ACD program has "characteristics of a pretrial diversion program," including its nonpunitive alternatives to punishment and the fact that an ACD comes prior to entry of a plea and is "not deemed to be a conviction or admission of guilt." *See* Opinion Letter, Federal Deposit Insurance Corporation (May 13, 2009).

Two Courts have weighed in on this issue. Both cases involved commercial banks that claimed to be barred under Section 19 from hiring an individual who had previously consented to an ACD. In *HSBC v. NYC Commission on Human Rights*, the Court ruled that it was "unclear whether New York's ACD is a pretrial diversion program within the meaning of the [FDIA]," and dismissed an injunction against the New York City Commission on Human Rights barring enforcement of the NYHRL. *See HSBC v. NYC Commission on Human Rights*, 673 F.Supp.2d 210, 217 (S.D.N.Y. 2009). However, in *Smith v. Bank of America*, the Court endorsed the decision of the FDIC in its Opinion Letter, stating that New York's ACD program does constitute a pre-trial diversion program because it imposes non-punitive conditions, and is not deemed a conviction or admission of guilt. The court in *Smith* allowed Section 19 to serve as justification for not hiring a woman who had an ACD on her record. *See Smith v. Bank of America*, 865 F.Supp.2d 298, 306 (E.D.N.Y. 2012).

Including ACDs as a "pretrial diversion or similar program" pursuant to Section 19 has potentially wide-ranging implications. As of March 31, 2013 the FDIC insured over 7,000 banks nationwide,[2] meaning that broad swaths of the public are now subject to exclusion from consideration for employment across much of the banking industry, traditionally one of the largest employers in the country. This will undoubtedly have a disparate impact on minorities, who are charged with crimes at greater rates, and therefore are more likely to have accepted an ACD.

Those accused of crimes involving dishonesty who may wish to work at an FDIC-insured institution in

the future are left with two options, apply for a waiver from the FDIC or reject an ACD and risk a criminal conviction. Defendants seeking an individual waiver must fill out an application with the FDIC. The instructions to the application make clear that waivers are subject to a heavy burden, advising that an "individual waiver will be granted on an infrequent basis, and only in truly meritorious cases and upon good cause shown."[3] This presents a high threshold for plaintiffs to meet, not to mention the time cost of going through the waiver process. Defendants unwilling or unable to obtain a waiver are forced to reject an ACD and proceed with the criminal process. This will clog the court system with relatively minor cases that the ACD program had previously disposed of, making the judicial process longer and potentially more expensive for all defendants, as well as exposing more defendants to criminal liability.

Faced with these alarming effects on the ACD program, it is clear that the best remedy to these issues would be an amendment to Section 19 of the FDIA. Given the type of service that banks provide there is undoubtedly a policy reason for attempting to regulate the employment of individuals with a history of dishonesty. However, the prohibitive language in Section 19 is too broad as currently written. In short, the benefit of excluding people who have committed minor crimes of dishonesty from the floors of banks is *greatly* outweighed by the burdens that this regulation imposes on peoples' rights, as well as the smooth operation of the judicial system.

Looking to other sections of federal law provides a clear roadmap for how to structure a potential amendment to Section 19. For example, 49 U.S.C § 44936 makes a background check mandatory for individuals who are granted unescorted access to a "secured area of an airport." *See* 49 U.S.C § 44936. Employers are then allowed to exclude from consideration potential employees who have committed certain enumerated felonies. *Id*. The benefit here is obvious, as protecting airports and airline passengers is of paramount importance. However, the regulation is tailored so that exclusion is only permitted in the case of extremely serious felonies. Section 19 could potentially adopt this same form, limiting its exclusion to the hiring of individuals who have committed only serious crimes of dishonesty, such as embezzlement or other financial crimes.

In conclusion, the need to reform Section 19 of the FDIA is apparent in light of the recent support for including the New York ACD program as a "pretrial diversion program," as this prevents FDIC-insured banks from hiring individuals who have gone through the ACD process. However until Congress amends Section 19, criminal defense lawyers would be well served to inform clients that an ACD could very well carry serious professional consequences for their client.

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[1] It should be noted that an ACD is not considered a favorable outcome in every context, such as Section 1983 malicious prosecution and false arrest claims (see, e.g., *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980)). This distinction is based on the definition of favorable outcome at common law, while ACDs are specifically included favorable terminations under NYCPL §160.50. New York law confirms an ACD is a favorable outcome under the NYHRL (see e.g., *Johnson v. New York City Comm'n on Human Rights*, 270 A.D.2d 186 (1st Dep't 2000)) (conviction under Maryland statute was analogous to New York ACD and therefore was "terminated in [plaintiff's] favor").

[2] Federal Deposit Insurance Corporation, Industry Analysis-Statistics at a Glance, *at* http://www.fdic.gov/bank/statistical/stats/2013mar/industry.html.

[3] Federal Deposit Insurance Corporation, Application Pursuant to Section 19 of the Federal Deposit Insurance Act, *at* http://www.fdic.gov/formsdocuments/6710-07.pdf.