

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PRUDENTIAL SECURITIES, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
	:	No. 96-CV-8407
GEORGE AND PATRICIA DESMOND	:	
AND LORI AND WILLIAM RITA,	:	
	:	
Defendants.	:	

**MEMORANDUM-ORDER**

**Green, S.J.**

**, 1997**

Presently before this court is Plaintiff's Motion to Enjoin Arbitration Proceedings Permanently and for a Declaratory Judgment barring all claims made by the Defendants in the arbitration proceedings. Also pending is Defendants' Motion to Dismiss this action for Improper Venue pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C.A. § 1406(a). For the reasons stated below, Defendants' motion will be granted and Plaintiff's motion for declaratory and injunctive relief will be denied.

**Factual Background**

Defendants are former clients of Prudential Securities Inc. ("Prudential"). During the period 1982 to 1985, Defendants made several large investments into various real estate partnerships sponsored by Prudential. Defendants allege that Prudential's brokers failed to disclose the risk and compensation structures of the investments, mismanaged the partnerships and engaged in other fraudulent conduct with respect to the investments.

It is undisputed that Prudential is a member of the Pacific Stock Exchange ("PSE"). Pursuant to Rule 12.1 of the PSE, Prudential has agreed to arbitrate any disputes between itself and its customers. Pursuant to this rule, Defendants requested arbitration before the PSE. This arbitration is presently pending in California.

Prudential then initiated this action to enjoin the arbitration proceedings now pending before the PSE, and to obtain a declaratory judgment barring all claims made by the Defendants. The gravamen of Prudential's action is that, because Defendants' claims arise out of investments purchased more than six years prior to the filing of their claims with the PSE, Defendants' claims cannot be arbitrated under the express language of Rule 12.4 of the PSE.<sup>1</sup> Prudential contends, that under Third Circuit precedent, courts, rather than arbitrators, decide whether Defendants' claims are time-barred. In the Ninth Circuit, where the arbitration is pending, arbitrators decide this issue. Thus, Prudential seeks to have this court, rather than the arbitrators, decide whether Defendants' claims are time-barred.

Defendants have moved to dismiss this action for improper venue under 28 U.S.C.A. § 1406(a). Defendants contend, that venue is controlled by section 4 of the Federal Arbitration

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1. Rule 12.4 of the PSE provides, in part, that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Rule in any instance where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy." PSE, Rule 12.4.

Act ("FAA") which mandates that, a legal challenge to a pending arbitration must be made in the district in which arbitration is pending; in this case, the Northern District of California.

### **Discussion**

Plaintiff contends that venue is proper in the Eastern District of Pennsylvania pursuant to the general venue provisions of 28 U.S.C.A § 1391.<sup>2</sup> Defendants contend, however, that the venue provisions of § 4 of the FAA, rather than 28 U.S.C.A. § 1391, is controlling in this case.

Section 4 of the FAA provides in relevant part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . The hearing and proceedings, under such agreement, shall be within the district in which the petition for the order directing such arbitration is filed.

9 U.S.C.A. § 4. The first sentence of § 4 does not prescribe a venue; rather it allows an aggrieved party to petition "any United States District Court" for an order compelling arbitration in accordance with the agreement. 9 U.S.C.A. § 4. Section 4, however, further provides that "[t]he hearing and proceedings [of the arbitration] . . . shall be within the district in which

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2. Under § 1391, in diversity actions, venue lies in the district in which all defendants reside. 28 U.S.C.A. § 1391(a). This is a diversity action and all defendants reside in the Eastern District of Pennsylvania.

the petition for an order directing such arbitration is filed." 9 U.S.C.A. § 4. Thus, § 4 requires that if a court directs or compels arbitration, then the arbitration must take place within that court's district.

While on its face § 4 only deals with motions to compel arbitration, several courts have concluded that it is equally applicable to motions to enjoin arbitration. In Merrill Lynch, Pierce, Fenner & Smith v. Lauer, 49 F.3d 323, 327 (7th Cir. 1995), for example, the Seventh Circuit has interpreted the language in § 4 to mean, that there must be a geographic link between the site of the arbitration and the district court which, by "compelling arbitration or directing its scope, exercises preliminary control". Id. (citation omitted) .

The Lauer Court noted that the statute was somewhat awkwardly worded for cases where the arbitration proceedings had already commenced. However, the Court reasoned that the logical implication of the statutory language is that, when the location of arbitration is preordained, the statute limits the district in which § 4 motions can be brought. Id. See also, Lawn v. Franklin, 328 F.Supp. 791, 793 (S.D.N.Y. 1971) ("[a]lthough [§4] appears to imply that the hearing and proceedings follow the District in which the petition for an order directing such arbitration is filed, the converse would seem to follow as well. The proper District within which the petition for such an order should be filed is the District where the ' proceedings' by virtue of the contract of the parties are to take place.").

While the Third Circuit has not yet expressly decided this issue, several other courts have concluded that under the plain language of § 4 of the FAA, "a district court lacks the authority to compel [or enjoin] arbitration in other districts, or in its own district if another has been specified for arbitration." Lauer 49 F.3d at 328; Bao v. Gruntal, 942 F. Supp. 978, 982 (D.N.J. 1996); Bosworth v. Ehrenreich, 823 F. Supp. 1175, 1177 (D.N.J. 1993); Alpert v. Alphagraphics Franchising Inc., 731 F.Supp. 685, 689 (D.N.J. 1990).

Prudential attempts to distinguish these cases on the ground that the instant case requests the court to enjoin rather than compel arbitration. However, Prudential has filed a motion in the Eastern District of Pennsylvania to enjoin arbitration proceedings in the Northern District of California, notwithstanding the fact that it has agreed to arbitration in California before the PSE. Prudential cannot evade its agreement and the general commands of § 4, by characterising this action as a request for injunctive relief rather than a motion to compel arbitration. Under Prudential's reading of § 4, motions to compel arbitration and the arbitration proceedings should occur in the same district, but motions to enjoin pending arbitration proceedings may be brought in any district. Prudential's argument merely advances the type of forum shopping condemned by the Lauer Court. Section 4 is aimed at streamlining arbitration proceedings and fostering judicial economy by "preventing scattershot attacks in various judicial [districts]." Lauer, 49 F.3d at 329.

Furthermore, Prudential has pointed to no case in which a district court from outside the forum selected for arbitration, has ordered injunctive relief affecting the arbitration proceedings itself.

In this case, Prudential has agreed to arbitrate pursuant to the rules of the PSE and the FAA and thus, is bound by the venue provisions of § 4. Even though venue may otherwise be proper in this district under 28 U.S.C.A § 1391 (a), since Prudential is seeking to direct the scope of a pending arbitration in another district, I conclude that the venue provisions of § 4 is controlling. I will therefore grant Defendants' motion to dismiss for lack of venue. Moreover, even if venue was proper in this district, I would dismiss this action to prevent the forum shopping condemned in Lauer.

For the above reasons, the Court will deny Plaintiff's Motion for an Order to Enjoin Arbitration Permanently and a Declaratory Judgment <sup>3</sup> barring all claims by Defendants. This

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3. The Federal Declaratory Judgment Act provides, in pertinent part, as follows:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28. U.S.C.A. § 2201 (emphasis added).

The Declaratory Judgment Act, because of its "purely remedial and equitable nature," "gives district courts statutory discretion to decide whether to entertain actions for declaratory  
(continued...)

case is dismissed in it's entirety, without prejudice subject to the right of Plaintiff to refile in federal court in California.<sup>4</sup> An appropriate order follows.

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3. (...continued)  
judgments." Terra Nova Insurance Co., Ltd. v. 900 Bar, Inc., 887 F.2d 1213, 1222 (3d Cir. 1989)) (citations omitted). District courts possess such discretion "even when the suit otherwise satisfies subject matter jurisdictional prerequisites." Wilton v. Seven Falls Co., 515 U.S. 277, 280, 115 S.Ct. 2137, 2140 (1995).

4. 28 U.S.C.A. § 1406 (a) authorizes the transfer or dismissal of an action brought in the wrong venue. See, 28 U.S.C.A. § 1406 (a). Since neither party has requested a transfer, this action will be dismissed without prejudice.