

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

BT ALEX. BROWN, INC. AND : CIVIL ACTION  
JAMES J. LENNON :  
 :  
 v. :  
 :  
 CAROL MONAHAN : NO. 97-7245

MEMORANDUM ORDER

Plaintiffs in this action seek to enjoin an arbitration, pursuant to NASD rules and procedures, of claims submitted for arbitration by defendant on December 6, 1996.

Defendant Monahan maintained an account with plaintiff Alex Brown from February 1988 through September 1991. Defendant's account was handled throughout that period by plaintiff Lennon, then a registered representative of Alex Brown. Defendant contends that Mr. Lennon treated her account as discretionary without authority to do so, consistently placed Ms. Monahan in risky investments which were unsuitable for her stated objectives and engaged in excessive trading to generate commissions. Ms. Monahan presented for arbitration claims for breach of contract, breach of fiduciary duty, common law fraud, securities fraud and RICO violations.

Defendant expended time, effort and money in preparing to arbitrate these claims at a proceeding scheduled for December 12, 1997. Plaintiffs consistently maintained, however, in submissions to the NASD and in correspondence to defendant's

counsel that they believed defendant's claims were barred by NASD Rule 10304 (formerly § 15). Plaintiff were told that this was an issue that would have to be presented and ultimately resolved at the arbitration proceeding. Plaintiffs made clear to defense counsel, including in correspondence as recent as November 19, 1997, that they would not waive their right to object to the arbitrability of defendant's claims and were contemplating a court action to stay or enjoin the arbitration.

Plaintiff then filed the complaint in the above action on November 26, 1997 and on December 5, 1997 filed a Motion for Preliminary Injunction. The court provided an opportunity to the parties for hearing and argument earlier this afternoon.

The Federal Arbitration Act (FAA) expressly provides that a party aggrieved by the failure or refusal of another to honor a written arbitration agreement may petition a court for an order compelling arbitration. See 9 U.S.C. § 4. Our Circuit Court has inferred a concomitant right of a party reluctant to arbitrate to obtain a judicial determination of his obligation to do so. See PaineWebber v. Hartmann, 921 F.2d 507, 515 (3d Cir. 1990). In either event, a court is not permitted to examine or determine the merits of an underlying claim. Rather, the only issues presented are whether a valid agreement to arbitrate exists and, if so, whether the particular claim or claims in question fall within the scope of the agreement. See Great Western Mortg. Corp. v. Peacock, 110 F.3d 222, 230 (3d Cir. 1997); Hartmann, 921 F.2d at 511. The court in Hartmann

concluded that a moving party who is denied such a judicial determination and is thereby compelled to submit to an arbitrator the determination of his own authority has per se suffered irreparable harm. Id. at 515.

The language of Rule 10304 (virtually identical to that of former § 15) makes eligible for submission to arbitration only such claims or disputes which arise from an event or occurrence within the prior six years. This language effectively constitutes "a substantive limit on the claims that parties have agreed to submit to arbitration." PaineWebber, Inc. v. Hoffmann, 984 F.2d 1372, 1379 (3d Cir. 1993). When adjudicating a petition to compel or enjoin arbitration, a court must determine whether a claim at least "arguably" involves a cause of action which arose from an event or occurrence within six years of the date arbitration was demanded. Id. at 1382.

Thus, defendants claims are arbitrable only insofar as they arise from acts or omissions which occurred after December 6, 1990 but before September 11, 1991 when Mr. Lennon left the employ of Alex Brown. Defendant points to a number of such acts and omissions including the mailing of monthly account statements which omitted material information, the premature sale of shares which should have been held, holding shares which were unsuitable for defendant's investment objectives and lulling telephone calls made by Mr. Lennon to Ms. Monahan in which misleading statements regarding the performance of her portfolio were made. If true, it would appear that such allegations could support timely claims

for each cause of action asserted by defendant in her submission to the NASD.

The court, however, need not and may not make determinations regarding the date of pertinent events underlying defendant's arbitration claims or defendant's assertion of laches in resisting the instant motion. This is because the court has concluded that it lacks subject matter jurisdiction in this action. "Federal courts have an ever-present obligation to satisfy themselves of their subject matter jurisdiction and to decide the issue sua sponte." Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir. 1995); American Policyholders Ins. v. Nyacol Products, 989 F.2d 1256, 1258 (1st Cir. 1993) ("a federal court is under an unflagging duty to ensure that it has jurisdiction"); Steel Valley Authority v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987) ("lack of subject matter jurisdiction voids any decree entered in a federal court").

While the FAA creates a body of substantive federal law regarding obligations to honor arbitration agreements, it does not create independent federal question jurisdiction. Section 4 does not confer federal question jurisdiction simply by virtue of the federal character of an underlying claim submitted for arbitration, even if a federal court would have original jurisdiction over such a claim if it had been asserted in a federal court complaint. Rather, federal question jurisdiction must be based on the court complaint or

petition itself and, in that regard, it is not sufficient that the petition may allude to the nature of the underlying arbitration claim. See, e.g., Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 267-69 (2d Cir. 1996) (petition to stay NASD arbitration of securities fraud claims properly dismissed for lack of subject matter jurisdiction where petition did not allege adequate independent basis for federal question or diversity jurisdiction); City of Detroit Pension Fund v. Prudential-Securities, Inc., 91 F.3d 26, 29 (6th Cir. 1996) (federal nature of claim submitted to arbitration insufficient basis for federal question jurisdiction in adjudication based on contractual duty to arbitrate); Prudential-Bache Securities, Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992) (jurisdiction for petition to compel arbitration must be determined from face of petition and federal question jurisdiction cannot be based on underlying dispute to be arbitrated); Klein v. Drexel Burnham Lambert, Inc., 737 F. Supp. 319, 322 (E.D. Pa. 1990) (federal jurisdiction under § 4 may not be predicated on federal character of underlying arbitration claim).

Plaintiffs acknowledge there is no diversity of citizenship between plaintiff Lennon and defendant Monahan. Plaintiffs made clear at the hearing that their assertion of subject matter jurisdiction is premised solely on the purported existence of a federal question by virtue of the federal character of some of the underlying claims which were submitted by defendant for arbitration.

**ACCORDINGLY**, this                    day of December, 1997,  
consistent with the foregoing, **IT IS HEREBY ORDERED** that  
plaintiffs' Motion for Preliminary Injunction is **DENIED** without  
prejudice to seek such relief from an appropriate state court or  
the NASD itself, and the above action is **DISMISSED** for lack of  
subject matter jurisdiction.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**