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New Jersey Narrows Right to Compel Arbitration of Non-Signatories

On August 7, 2013, the New Jersey Supreme Court limited the right to compel arbitration between a non-signatory and a signatory, overturning the earlier decisions of the trial and appellate courts. In *Hirsch v. Amper Financial Services LLC*. (A-9-12), a unanimous supreme court ruled in favor of plaintiff investors and rejected defendants' theory that "intertwinement of the parties in a dispute" was sufficient to warrant application of equitable estoppel to compel the non-signatories to arbitration.

Plaintiffs Michael and Robyn Hirsch and Hirsch LLP, purchasers of defaulted securities in an alleged Ponzi scheme, sued their former financial services firm, Amper Financial Services LLC (AFS), and their former accountant, EisnerAmper LLP, for allegedly violating New Jersey's Consumer Fraud Act, breach of fiduciary duties and other claims, by facilitating their faulty investment. In April, the New Jersey appellate division relied upon agreement to arbitrate issues "concerning any account, order, or transaction" between plaintiffs and their broker-dealer in the disputed transactions, Securities America Inc. (SAI), to compel arbitration of plaintiffs' civil suit against AFS and EisenAmper, under which plaintiffs had already commenced an arbitration against SAI in 2010.

While recognizing that New Jersey law allows arbitration to be compelled by a non-signatory against a signatory to a contract on the basis of agency principles, the supreme court rejected the use of equitable estoppel as a basis to do so, when its application is "untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or, at a minimum, an oral agreement between the parties to submit to arbitration." By so stating, the supreme court rejected the "intertwinement" theory -- compelling a non-signatory to arbitrate on the basis that claims and parties were substantially interconnected -- adopted by the appellate division in *Hirsh*.

Turning to plaintiffs' agreement, the supreme court first found that while the arbitration clause at issue was sufficiently broad to cover all disputes related to the business transactions between plaintiffs and SAI, the clause did not expressly include claims involving any other parties. Thus, no express contractual arbitration obligation, written or otherwise, existed with respect to either AFS or EisenAmper. Second, the supreme court found no evidence in the record that either AFS or EisenAmper expected to arbitrate their disputes in detrimental reliance on plaintiffs' conduct, or even that they knew about the existence of the arbitration clause in plaintiffs' agreement with SAI prior to the filing of the lawsuit. Finally, the supreme court held that when parties have not expressly agreed to arbitrate their disputes, "careful scrutiny is necessary to determine whether arbitration is nonetheless appropriate." In this case, the supreme court concluded with a resounding no that arbitration was unwarranted.

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