

LEXSEE 224 MICH APP 702

**CHUBB SECURITIES CORPORATION, CHUBB LIFE INSURANCE COMPANY OF AMERICA, FIRST FINANCIAL SERVICES, and WILLIAM FUREST, Plaintiff-Appellants, v MARY LOU JESUALE MANNING, Defendant-Appellee.**

No. 189097

## COURT OF APPEALS OF MICHIGAN

*224 Mich. App. 702; 569 N.W.2d 886; 1997 Mich. App. LEXIS 265*

**March 11, 1997, Submitted**

**July 25, 1997, Decided**

**PRIOR HISTORY:** [\*\*\*1]

LC No. 95-000746.

**DISPOSITION:**

Trial court's order granting summary disposition for defendant reversed and remanded so that an order granting summary disposition in favor of plaintiffs can be entered.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiffs, investment companies and financial advisor, sought review of a decision of the trial court (Michigan), which rendered summary judgment in favor of defendant investor in the plaintiffs' action to prevent the investor from arbitrating numerous claims relating to investments in limited partnerships.

**OVERVIEW:** The investor sought to arbitrate certain claims relating to investments in limited partnerships more than six years after the investments were made. Plaintiffs filed an action to bar the arbitration on the grounds that the claims were untimely under § 15 of the National Association of Securities Dealers (NASD) Code of Arbitration Procedure. The trial court rendered summary judgment in favor of the investor on the grounds that the six-year eligibility period for arbitration under § 15 had been tolled by plaintiffs' fraudulent concealment. The court reversed the decision of the trial court and found that the eligibility period in § 15 was not subject to tolling. The NASD Code of Arbitration Procedure was merely a contract, and contracts were susceptible to limitation in an almost infinite variety of ways. The six-year eligibility period of § 15 was not a statute of limitations, and actually granted more time than the state statute on securities fraud claims. Where the terms of the eligibility period were clear and not in violation of public policy, they had to be enforced as written.

**OUTCOME:** The court reversed the decision of the trial court in favor of the investor in an action by plaintiffs to prevent the investor from arbitrating various claims relating to certain investments.

**LexisNexis(R) Headnotes*****Contracts Law > Contract Conditions & Provisions***

[HN1] Like any contract, an agreement to arbitrate may be limited in its substantive scope in an almost infinite variety of ways. Limiting the time within which arbitration may take place is a substantive limitation.

***Securities Law > Bases for Liability > Civil Liability  
Contracts Law > Contract Interpretation >  
Interpretation Generally***

[HN2] The six-year eligibility period found in former § 15 of the National Association of Securities Dealers (NASD) Code of Arbitration Procedure cannot be tolled on the basis of a claim of fraudulent concealment. The arbitration agreement is a contract. A clear contract that does not contravene public policy must be enforced as written.

***Securities Law > Bases for Liability > Civil Liability***

[HN3] For purposes of § 15 of the National Association of Securities Dealers (NASD) Code of Arbitration Procedure, "the occurrence or event" giving rise to the act or dispute, claim, or controversy is the date of the investment. The date of the occurrence or event does not under any circumstances depend on the date when the aggrieved investor first discovers that he or she has suffered a financial loss.

**COUNSEL:** Bodman, Longley & Dahling, LLP (by Dennis J. Levasseur and Lydia Pallas Loren), for the plaintiffs. Detroit.

Weisman, Trogan, Young & Schloss, P.C. (by Anthony V.

Trogan and Joseph A. Starr), for the defendant. Bingham Farms.

**JUDGES:** Before: McDonald, P.J., and Griffin and Bandstra, JJ.

**OPINION:** [\*703]

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PER CURIAM.

Plaintiff's appeal as of right the trial court's order granting summary disposition for defendant. Plaintiffs sought to prevent defendant from arbitrating numerous claims relating to investments [\*704] in limited partnerships, claiming that the commencement of the arbitration proceeding was untimely pursuant to the National Association of Securities Dealers (NASD) Code of Arbitration Procedure. In this case, we are asked to decide whether the six-year eligibility period for arbitration contained in former § 15 of the NASD code is subject to tolling on the basis of a claim of fraudulent concealment. We conclude that it is not and, thus, reverse the trial court's order granting summary disposition to defendant.

Defendant invested a large amount of money in limited partnerships through plaintiff William Furest. Five of defendant's investments were made more than six years before defendant commenced a securities arbitration proceeding before the NASD. In filing for arbitration, defendant claimed that she had [\*\*887] been fraudulently induced into investing in the limited partnerships. Plaintiffs filed a declaratory action in the circuit court, arguing that former § 15 of the NASD code prevented arbitration of the five claims because the investments were made more than six years before the commencement of the arbitration. Defendant moved for summary disposition, claiming that she was entitled to arbitration because, even though the investments were made more than six years before the date that she commenced the arbitration proceedings, the six-year time limit set forth in former § 15 of the NASD code was tolled because of fraudulent concealment. The trial court granted summary disposition in favor of defendant, holding that the six-year limitation period could be tolled for fraudulent concealment and that defendant had sufficiently alleged fraudulent concealment to toll [\*\*\*3] the limitation period. [\*705] In reaching its decision that the six-year limitation period could be tolled, the trial court relied upon several federal cases: *Roney & Co v Kassab*, 981 F.2d 894 (CA 6, 1992), *Dean Witter Reynolds, Inc v McCoy*, 995 F.2d 649 (CA 6, 1993) (*McCoy I*), and *Davis v Keyes*, 859 F. Supp. 290 (ED Mich, 1994).

The provision at issue in this case, former § 15 of the NASD code, n1 stated:

No dispute, claim, or controversy shall be

eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

n1 It appears that § 15 of the NASD code has been renumbered as Rule 10304. No substantive changes were made to the provision when the renumbering occurred.

Although there are no Michigan precedents [\*\*\*4] on point, the Sixth Circuit Court of Appeals has recently addressed the exact issue presented here and held that the six-year eligibility period for bringing securities claims to arbitration is not subject to tolling. *Ohio Co v Nemecek*, 98 F.3d 234 (CA 6, 1996). We find the holding in *Nemecek* to be persuasive in this case.

In *Nemecek*, the Sixth Circuit Court of Appeals analyzed the cases relied upon by the trial court in the present case and determined that the decisions had been misinterpreted and that Rule 603 of the New York Stock Exchange (NYSE), which is equivalent to former § 15 of the NASD code, n2 is not subject to tolling. As argued by defendant in the present case, the investors [\*706] in *Nemecek*, *supra* at 235, also made the argument that the six-year eligibility period was tolled because of fraudulent concealment. The court in *Nemecek*, *id* at 235-236, first noted that no federal circuit court had ever held that Rule 603 of the NYSE was subject to tolling and that two circuit courts of appeals, those for the third and seventh circuits, had held that the identical provision of former § 15 of the NASD code was not subject to tolling. The court then stated that [\*\*\*5] Rule 603 and § 15 were interchangeable because the provisions were identical in test and application. *Nemecek*, *supra* at 236. The court adopted the reasoning of the Seventh Circuit Court of Appeals in *Edward D Jones & Co v Sorrells*, 957 F.2d 509, 512-513 (CA 7, 1992), which held that § 15 is an eligibility requirement, not a statute of limitations, and cannot be tolled. n3 *Nemecek*, *supra* at 236. The court recognized that "a separate section of the NASD Code, Section 18, provided the only instance in which 'the Section 15 six-year bar [is] lifted.'" *Id.*, quoting *Sorrells*, *supra* at 513. Former § 18 of the NASD code tolled the six-year eligibility period when the "dispute, claim, or controversy" is [\*\*888] before a court of competent jurisdiction. n4 *Nemecek*, *supra*. Because the only exception to the eligibility period was set out in the NASD code, the court

reasoned that no further exceptions were warranted. *Id.*

n2 See, also, *McCoy I*, *supra* at 651 (Rule 603 of the NYSE and § 15 of the NASD code are identical in both text and application).

n3 The Court in *Nemecek*, *supra* at 236, also relied on *PaineWebber, Inc v Hofmann*, 984 F.2d 1372 (CA 3, 1993), in concluding that the six-year eligibility period for bringing securities claims to arbitration is not subject to tolling. The Court in *Hofmann*, *id.* at 1381, concluded that "when the stated cause of action is patently nothing more than an attempt to toll the six year period, the court must enjoin the arbitration of that claim."

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n4 It appears that § 18 of the NASD code has been renumbered as Rule 10307. No substantive changes were made to the provision when the renumbering occurred.

[\*707] The court in *Nemecek supra* at 237, also adopted the reasoning of *PaineWebber, Inc v Hartmann*, 921 F.2d 507, 511 (CA 3, 1990), that [HN1] "like any contract, an agreement to arbitrate may be limited in its substantive scope in an almost infinite variety of ways." Limiting the time within which arbitration may take place is a substantive limitation. The Sixth Circuit Court of Appeals concluded:

We conclude, as the *Hartmann* court did, that Rule 603 is a substantive temporal limitation on the parties' agreement to contract and as such is not subject to equitable tolling. To rule otherwise not only would contravene *Hartmann*, *Sorrells*, and [*PaineWebber, Inc v Hofmann* [984 F.2d 1372 (CA 3, 1993)]], but also would thwart the intent of the parties' arbitration agreement which . . . we cannot do: "While Congress was no doubt aware that the [Federal Arbitration] Act would encourage the expeditious resolution of disputes, [\*\*\*7] its passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'" [*Nemecek, supra* at 237.]

In reaching its decision that § 15 could not be tolled, the Sixth Circuit Court of Appeals also noted that the six-year eligibility period contained in § 15 was more generous than *MCL 451.810(e)*, *MSA 19.776(410)(e)*, the Michigan statute barring securities fraud claims filed more than four years after the contract of sale. *Nemecek*,

*supra* at 237.

We find the above federal precedents to be persuasive and conclude that [HN2] the six-year eligibility period found in former § 15 of the NASD code cannot be tolled on the basis of a claim of fraudulent concealment. The arbitration agreement at issue in this case is a contract. See *Ehresman v Bultynck & Co, PC*, 203 Mich. App. 350, 353; 511 N.W.2d 724 (1994). A clear [\*708] contract that does not contravene public policy must be enforced as written. *Fitch v State Farm Fire & Casualty Co*, 211 Mich. App. 468, 471; 536 N.W.2d 273 (1995). In this case, defendant agreed to be bound by the NASD code, and it is clear that the contract provision regarding arbitration intended to [\*\*\*8] limit the time within which parties may submit to arbitration. That limitation is not contrary to public policy because it is more generous than the limitation provided by state statute.

We also conclude that the six-year eligibility period of former § 15 began to run at the time the investment purchases were made, rather than, as argued by defendant, when defendant decided that the purchases were no longer in her best interest. *Dean Witter Reynolds, Inc v McCoy*, 853 F. Supp. 1023, 1030 (ED Tenn. 1994), *aff'd* 70 F.3d 1271 (CA 6, 1995) *McCoy II* [HN3] (for purposes of § 15 of the NASD code, "the occurrence or event" giving rise to the act or dispute, claim, or controversy is the date of the investment); see, also, *Sorrells, supra* at 512 (claims ineligible for arbitration because more than six years had elapsed since the date the investment was made). We agree with the court in *McCoy II*, 853 F. Supp. at 1030-1031, that "the date of the occurrence or event does not under any circumstances depend on the date when the aggrieved investor first discovers that he or she has suffered a financial loss."

The purpose of the six-year period in former § 15 was to prevent the submission [\*\*\*9] of stale disputes to arbitration. *Id.* at 1030. Allowing investors to wait until they suffer a financial loss and then to file a stale claim for arbitration more than six years after the date the investment was made would circumvent [\*709] the purpose of § 15. *Id.* Furthermore, if the limited partnership investments were too speculative and not in the best interests of defendant, then the investments were not suitable on the dates that the investments were purchased. *Id.*

In summary, we hold that former § 15 of the NASD code is not a statute of limitations that can be tolled on the basis of a claim of [\*\*\*889] fraudulent concealment, but rather is a contractual eligibility provision that cannot be tolled, except during a period where the subject matter of the dispute to be arbitrated was the subject of a case before a court of competent jurisdiction. Furthermore, the six-year eligibility period of former § 15 of the NASD code

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began to run at the time the investment purchases were made. Because the six-year provision cannot be tolled in this case, the investments defendant made more than six years before the arbitration was requested are not subject to arbitration.

In light of our [\*\*\*10] disposition of the above issues, we need not address whether the trial court erred in concluding that defendant's allegations were sufficient

to state a valid fraudulent concealment claim. We reverse the trial court's order granting summary disposition for defendant and remand so that an order granting summary disposition in favor of plaintiffs can be entered.

/s/ Gary R. McDonald

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra