STATE OF MICHIGAN

COURT OF APPEALS

EQ FINANCIAL CONSULTANTS, INC., f/k/a EQUICO SECURITIES, INC., EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, GREGORY LIPOSKY, and DONALD HOBLEY,

Petitioners-Appellants,

v

HARRY BLACKWARD,

Respondent-Appellee.

UNPUBLISHED
October 9, 1998

No. 205155
Oakland Circuit Court
LC No. 97-538667 CZ

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Petitioners, a securities brokerage firm and two of its agents, appeal as of right from a circuit court order remanding for arbitration before the National Association of Securities Dealers, Inc. (NASD) eight factual allegations contained in respondent's statement of claim. We remand.

In his statement filed with the NASD on November 13, 1996, respondent asserted a number of claims based on the common law and state statutes. A principal allegation is that in February 1989 he was induced by petitioners' inaccurate and misleading representations to make an unsuitable and speculative $100,000 investment in a limited partnership, PLM Equipment Growth Fund III (PLM). In addition, respondent asserted that following his PLM purchase, during a period that extended from 1991 to March 1996, an agent of the brokerage firm on several occasions advised him against selling the PLM investment and repeatedly provided respondent with reassuring representations concerning the value of the investment that were false and fraudulent. As a result, respondent maintains that he was deprived of timely opportunities to sell his PLM investment and he suffered a substantial loss.

In response, petitioners filed in circuit court and requested a declaratory judgment enjoining

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

arbitration and dismissing respondent's claims on the ground that they were barred by NASD Rule 10304 (formerly § 15 of the NASD Code). That rule precludes arbitration of claims not filed within six years of the "occurrence or event" giving rise to the claim. The circuit court entered an order dismissing claims "for misconduct which occurred more than six years before November 13, 1996" and remanded for arbitration "claims alleging misconduct in paragraphs 13, 15, 16, 17, 18, 19, 22 and 23 of the arbitration claim."[1] Petitioners now appeal.

I

As a preliminary matter, we reject the contention of petitioners that our review is governed by standards applicable to preliminary injunctions. Because this appeal presents questions of law concerning the arbitrability of respondent's claims, see *Kauffman v Chicago Corp*, 187 Mich App 284, 287-288; 466 NW2d 726 (1991), and the record reveals no dispute as to material facts affecting arbitrability, our review is de novo. See also *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Willis v State Farm Ins Co*, 222 Mich App 110, 114; 564 NW2d 488 (1997).

II

Petitioners contend that the merits of respondent's claims should be considered in this appeal. We disagree.

Fundamentally, arbitration is a matter of contract, and the function of a court in this setting is limited to a determination of the arbitrability of a disputed claim. *Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74-75; 492 NW2d 463(1992). It is for a court to decide whether a contract for arbitration exists between the parties and, if so, whether the disputed claim is arguably within the scope of the agreement. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982). However, in resolving arbitrability, the court does not address the merits of the underlying claim, even though the claim may appear to be frivolous. See *Paine Webber Inc v Hofmann*, 984 F2d 1372, 1377 (CA 3 1993); and MCR 3.602(B)(4). Moreover, a presumption exists in favor of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v Warrior & Gulf Navigation Co.*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). See also *Omega Construction Co, Inc v Altman*, 147 Mich App 649, 655; 382 NW2d 839(1985).

It is undisputed in the case at bar that the parties agreed to submit to arbitration "*any controversy* between us arising out of [the securities brokerage firm's] business or this agreement." (Emphasis added.) Moreover, since respondent elected to submit his claims to the NASD for arbitration, as he was entitled to do under the agreement, the parties are bound by NASD rules.

III

The thrust of petitioners' argument is that the NASD six-year eligibility period can accrue only on the date of purchase of securities, and that allegations of post-purchase misconduct put forth by respondent are merely discovery or tolling arguments designed to escape the rule's effect. NASD Rule 10304 (formerly § 15) provides:

> 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, dispute, claim or controversy*. This 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. [Emphasis added.]

It has been clear, at least since *Ohio Co v Nemecek*, 98 F3d 234 (CA 6, 1996), that tolling arguments offer no easy road around the rule. In *Nemecek* the Sixth Circuit Court of Appeals determined that the NASD rule "is a substantive temporal limitation" on an agreement to arbitrate, and as such "is not subject to equitable tolling." *Id.* at 237. This Court in *Chubb Securities Corp v Manning*, 224 Mich App 702, 707; 569 NW2d 869 (1997), adopted the reasoning in *Nemecek* and similarly declared that the NASD rule "is not a statute of limitations that can be tolled on the basis of a claim of fraudulent concealment." *Id.* at 709. In both *Nemecek* and *Chubb* the misconduct at issue occurred in connection with the purchase of securities, and in each case the court ruled that the six-year eligibility period began to run at the time of purchase.

However, in *Osler v Ware*, 114 F3d 91, 93 (CA 6, 1997), the court declined to interpret the "occurrence or event" language of NASD Rule 10304 as referring only to a purchase date. The court found that some of the investor's claims might remain viable and therefore arbitrable because "the claims appear to be based on wrongdoing occurring after the initial investments were made." *Id.* Because the statement of claim was not sufficiently specific concerning the challenged transactions, the court remanded to the district court to give the investor "the opportunity to list each claim and the occurrence or event giving rise to such claim." *Id.* The district court was instructed to analyze the amended list of claims and determine, after a hearing and the introduction of extrinsic evidence, if necessary, which claims were arbitrable. *Id.* See *Merrill Lynch, Pierce, Fenner & Smith, Inc v Cohen*, 62 F3d 381, 385 (CA 11, 1995).

We reject petitioners' argument that the six-year eligibility period imposed by this rule can accrue only on the date that the relevant securities are purchased. In so holding, we are guided by the ruling of the Sixth Circuit Court of Appeals in *Osler*, *supra*. Moreover, we do not read this Court's decision in *Chubb*, *supra*, as requiring a different result. In that case there were no allegations of wrongdoing after the alleged fraudulent concealment that occurred at the time of purchase.

The purpose of the six-year period in NASD Rule 10304 is to prevent the submission of stale disputes to arbitration. *Chubb*, *supra* at 708, citing *Dean Witter Reynolds, Inc v McCoy*, 853 F Supp 1023, 1030 (ED Tenn, 1994), aff'd 70 F3d 1271 (CA 6 1995). However, to hold "that the only

relevant date for determining whether a claim is time-barred is when the initial investment was made . . . would create situations in which certain claims would be barred before they even arose." *Osler*, *supra* at 93.

In the present case, respondent has made a series of allegations that do not comprise "a single, indivisible claim" but rather appear to be a number of claims that should be analyzed individually. *Hoffman*, *supra* at 1377. As in *Osler*, *supra*, some of respondent's claims are based on alleged wrongdoing that occurred after he purchased the investment. However, insofar as it relates to post-purchase conduct, respondent's statement of claim is "far from clear." *Osler*, *supra* at 92. With the exception of paragraph 22, the statement fails to identify with sufficient specificity the "challenged transactions, the dates of those transactions, or the occurrence or event giving rise to the act or dispute, claim, or controversy." *Id.* at 93. Such specificity is required to determine whether an alleged "occurrence or event" took place within the six-year eligibility period and whether the claim is otherwise arbitrable. Again, deciding whether the parties are bound to arbitrate and on which issues they must arbitrate are questions for the court and not the arbitrator. *Hofmann*, *supra* at 1377, citing *AT & T Technologies, Inc v Communications Workers of America*, 475 US 643, 649; 106 S Ct 1415; 89 L Ed 2d 648 (1986).

In its opinion and order, the circuit court determined that claims alleging misconduct in paragraphs 13, 15, 16, 17, 18, 19, 22, and 23 of respondent's statement of claim "are genuinely asserted causes of action which occurred within the six year statute of limitations" and "are remanded for arbitration."

We conclude, however, that respondent's statement of claim lacks sufficient specificity to support such a determination, and we decline to leave to the arbitrator the determination of what "occurrences or events" gave rise to the allegations as well as the date of those transactions. Because these are matters for a court to decide, we remand to the circuit court for further inquiry and determination concerning the arbitrability of respondent's remaining claims. On remand, the respondent should be afforded the opportunity to list and restate with specificity each independent claim based on post-purchase conduct, as well as the occurrence or event that gave rise to the claim. After a hearing, with the introduction of extrinsic evidence, if necessary, the court shall determine which, if any, of the claims are not arbitrable. See *Hofmann*, *supra* at 1380.

IV

The other arguments raised by petitioners fail to demonstrate legal error. In this regard, we find that *Birnbaum v Newport Steel Corp*, 193 F2d 461 (CA 2, 1952), does not provide persuasive authority for the proposition that respondent's legal theories are not subject to arbitration, given that *Birnbaum* involved an interpretation of federal securities law and was not an arbitration case. Respondent's legal theories do not include a claim based on federal securities law.

Further, we decline to address petitioners' argument that state statutes of limitation bar respondent's legal claims, because petitioners have not briefed the threshold issue: whether the

application of the statutes of limitation is an arbitrable issue under the terms of the arbitration agreement. See, e.g., *Nielsen v Barnett*, 440 Mich 1, 9-10; 485 NW2d 666 (1992) (broad authority granted to arbitrators by arbitration agreement empowered arbitrators to determine, in the first instance, if a claim was stale). A party may not merely announce a position and leave it to this Court to search for authority to sustain or reject the argument. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

Because in this appeal neither party has prevailed in full, neither party may tax costs pursuant to MCR 7.219. We also deny respondent's request for sanctions.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin

[1] The circuit court also dismissed respondent's claims for violations of Michigan's securities law on the ground that no purchases or sales of securities were made within the six-year period required by NASD Rule 10304. These claims are not before this Court in this appeal.