

Securities Regulation Daily Wrap Up, ARBITRATION—M.D. La.: Arbitrability of Ponzi claims against Pershing to be decided by court, not FINRA, (Feb. 20, 2014)

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By Anne Sherry, J.D.

Pershing LLC, a Bank of New York Mellon subsidiary involved in the Stanford Ponzi scheme, may be freed from FINRA arbitration proceedings, at least with respect to 16 of the 100 claimants in the arbitration. Pershing filed a complaint seeking a declaratory judgment that it has no obligation to arbitrate those claims, along with a motion for preliminary injunction set for hearing on February 27. The court denied the defendants' motion to dismiss, holding that it has subject matter jurisdiction to decide the issue of arbitrability and that Pershing stated a cause of action upon which relief may be granted (*Pershing LLC v. Bevis*, February 19, 2013, Brady, J.).

Under FINRA rules, Pershing could be compelled to arbitrate if it had agreed in writing to arbitrate, if its membership agreement with FINRA required arbitration, or if the defendants qualified as customers of associated persons. The rules also state that the arbitration "panel has the authority to interpret and determine the applicability of all provisions under the Code [of arbitration]." The defendants construed these rules to mean that the arbitration panel alone has the authority to determine the arbitrability of claims. Pershing's position is that with respect to the 16 defendants named in its lawsuit, there is no written agreement requiring arbitration nor are the defendants Pershing's "customers" as required by FINRA rules.

The court clarified that under Fifth Circuit and Supreme Court jurisprudence, "the question of arbitrability is an issue undeniable reserved for judicial determination unless the parties clearly and unmistakably intend otherwise." There was no such agreement, the court found, and even if an agreement had been produced, the court could still determine whether or not that agreement required arbitration.

The case is No. 13-672-JJB.

Attorneys: Lana Davis Crump (Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman) for Pershing LLC. Phillip W. Preis (Preis Gordon) for Wanda Bevis.

Companies: Pershing LLC

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