

# Can You Be Forced to Arbitrate Even If You Didn't Sign the Underlying Arbitration Agreement?

by Joel N. Kreizman on January 16, 2013

To the surprise of many New York and New Jersey businesses, the answer may be yes. Based on the theory of “intertwinement,” at least one New Jersey court has held that parties who did not sign the underlying arbitration agreement can be forced to arbitrate their claims.

In an April 23, 2011, unreported Opinion, the Appellate Division held that Michael and Robyn Hirsch were required to submit their claims against Amper Financial Services (“Amper”) to a Financial Industry Regulatory Agency (“FINRA”) arbitration panel even though the Hirsches had no agreement to arbitrate disputes between themselves and Amper. The ruling appeared to be contrary to the generally accepted principle that arbitration is a creature of contract and parties may be required to arbitrate only with persons with whom they have contracted to arbitrate their disputes.

The Honorable Anthony Parillo, writing for a two judge appellate panel, held that intertwinement is an exception to that general rule. While the Hirsches didn't have an agreement to arbitrate with Amper, they did have an agreement to arbitrate disputes with Securities America, Inc. (“SAI”). SAI was the brokerage firm through which securities recommended to the Hirsches by Amper were purchased.

When the Hirsches, who lost their entire investment to a Ponzi scheme, sought to arbitrate their claims against SAI and to litigate against Amper, first the Trial Court and then the Appellate Division held that the claims were so intertwined that the arbitration agreement with SAI required the Hirsches to submit their claims against Amper to FINRA as well.

A different appellate panel had rejected “intertwinement” as an exception to the arbitration is strictly a creature of contract rule. In that case, *Agrisani v. Financial Technology Ventures*, 402 N.J. Super. 138 (App. Div. 2008) the Honorable Stephen Skillman wrote:

If the cases relied upon by FT Ventures actually held that a party to a contract containing an arbitration clause could be forced to arbitrate a claim against a nonsignatory to the contract simply because his claim was “inextricably intertwined” with that contract, those cases could not be reconciled with the fundamental principle that a party can be forced to arbitrate only those issues it has specifically agreed to submit to arbitration.

The Supreme Court has now accepted the Hirsches' petition for certification. It is expected to decide in 2013 whether to support Judge Skillman's strict construction of the rule that only parties to an arbitration agreement may be forced to arbitrate, or whether intertwinement is a legitimate exception to that long established rule.

*If you have any questions about this case or would like to discuss the use of arbitration agreements, please contact me, Joel Kreizman, or the Scarinci Hollenbeck attorney with whom you work.*