

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ONEBEACON INSURANCE GROUP, INC., and	:	AUGUST TERM, 2004
ONEBEACON INSURANCE CO.,	:	
	:	No. 02670
Plaintiffs,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	
LIBERTY MUTUAL INSURANCE CO., and	:	
PEERLESS INSURANCE CO.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Defendants, Liberty Mutual Insurance Co. and Peerless Insurance Co. (“Liberty”), appeal from several of the court’s Orders that led to the confirmation of an arbitration award against Liberty and in favor of plaintiff OneBeacon Insurance Company (“OneBeacon”). Liberty primarily objects to the court’s May 3, 2005 Order in which the court deemed OneBeacon’s appointment of its arbitrator to be timely and effective under the arbitration provisions of the parties’ Pre-Closing Administrative Services Agreement (“PCASA”).¹ Liberty argues that, because the court incorrectly allowed OneBeacon to appoint an arbitrator as provided in the PCASA, the decision by the three person arbitration panel, which included OneBeacon’s appointed arbitrator, Liberty’s appointed arbitrator, and a neutral arbitrator, was invalid and should have been vacated, not confirmed, by the court.² Liberty also argues that this court

¹ A copy of the court’s May 3, 2005 Order is attached hereto as Exhibit A

² A copy of the court’s December 12, 2007 Order denying Liberty’s Petition to Vacate Arbitration Award and granting OneBeacon’s Petition to Confirm Arbitration Award is attached hereto as Exhibit B.

should have granted Liberty's Motion to Stay, so that a federal district court in Massachusetts could determine whether this court properly allowed OneBeacon to appoint an arbitrator.³

This case arises out of a failed business relationship between OneBeacon and Liberty which was governed by the PCASA, among other documents. In this action, OneBeacon claimed that Liberty breached its duties to OneBeacon under the PCASA. Liberty demanded arbitration of OneBeacon's claims under the arbitration provisions of the PCASA. OneBeacon vehemently opposed arbitration, but it was eventually compelled to arbitrate its breach of contract claim against Liberty pursuant to the PCASA. Now that OneBeacon has emerged victorious from that arbitration, the parties' earlier positions are reversed, with OneBeacon lauding the fairness and propriety of the arbitration proceedings and Liberty arguing that they were improperly constituted and reached the wrong result.

The court's duty, when faced with a claim that is subject to a valid arbitration agreement between the parties, is to send that claim to the agreed upon arbitration.⁴ In this case, the parties agreed to have their dispute heard by a panel of three arbitrators. The PCASA provides a method for choosing the three arbitrators as follows:

. . . if any dispute shall arise between [OneBeacon] and Liberty with reference to the interpretation or performance of this Agreement, including the formation or validity thereof, or their rights with respect to any transaction involved, whether such dispute arises before or after the termination of this Agreement, such dispute upon the written request of either party, shall be submitted for resolution by arbitration. Within thirty (30) days after receipt of such written request, each party shall select one arbitrator (for a total of two), and such selected arbitrators shall select a third arbitrator within sixty (60) days after receipt of such written request for arbitration. If either party fails to select an arbitrator within such time period, the arbitrator that was timely selected by the other party shall serve as the sole arbitrator. . . .

³ A conformed copy of the court's October 4, 2007 Order denying Liberty's Motion for Stay of Proceedings is attached hereto as Exhibit C.

⁴ See Warwick Township Water and Sewer Auth. v. Boucher & James, Inc., 851 A.2d 953 (Pa. Super. 2004).

Liberty claims that it timely chose its arbitrator, but that OneBeacon did not. Therefore, Liberty's arbitrator should have served as the sole arbitrator and, presumably, the result of the arbitration would have been different.⁵

OneBeacon filed this action August 20, 2004. On November 3, 2004, Liberty submitted to OneBeacon its written request for arbitration. On November 29, 2004, the court ordered that "any arbitration proceedings between the parties hereto are stayed and all deadlines, if any, are extended pending the determination of preliminary objections." On January 21, 2005, the court decided the Preliminary Objections and ordered that "all arbitration proceedings between the parties are stayed until further order of this court." On March 22, 2005, the court "ordered that the stay of arbitration of [OneBeacon's] claim for breach of contract against [Liberty] is lifted." Liberty selected its arbitrator on March 24, 2005. OneBeacon selected its arbitrator on April 21, 2005. After Liberty objected to OneBeacon's selection, OneBeacon filed an Emergency Motion asking the court to declare that its selection of an arbitrator was timely and appropriate.

On May 3, 2005, the court granted OneBeacon's Emergency Motion based on the following grounds:

[P]laintiffs' arguably late appointment of their arbitrator is not a material breach of the parties' agreement, and it does not otherwise prejudice defendants, [so] such appointment was proper and must be respected by defendants. Furthermore, the court believes that the primary purpose of the arbitration selection provision in the parties' agreement, which permits each party to select an arbitrator and also provides for the appointment of a neutral arbitrator, is to ensure the fairness of the arbitration process and the parties' acquiescence in the results of that process. The court will not thwart this important purpose by applying the defendants' proposed policy of strict construction to the contractual provision governing the

⁵ Liberty apparently believes that each of the arbitrators appointed by one of the parties can be assumed to be biased in favor of the party that appointed him/her. If this is true, then the only fair and impartial arbitrator is the third one. If Liberty had its way, that arbitrator would never have been appointed in this case, and OneBeacon would not have received a fair and impartial hearing. Such an inequitable result is to be avoided, so as not to undermine the integrity of the parties' chosen form of dispute resolution.

time in which to select arbitrators where, as here, there has been only *de minimus* deviation from the terms of such provision.

The court believes this reasoning to be sound since OneBeacon's appointment of its arbitrator was, by Liberty's calculations, only 26 days late, if it was late all. As a review of the court's docket reveals, the record in this action is complicated enough that OneBeacon may be excused if it was misled as to when it was required to choose its arbitrator.

Liberty argues that the thirty day period within which OneBeacon was to choose an arbitrator ran from November 3, 2004 through November 29, 2004, when the court's stay went into effect, (26 days) and from March 22, 2005, when the stay was lifted, through March 26, 2005 (4 days). However, in its November 29th Order, the court stayed any arbitration proceedings and ruled that all deadlines "are extended pending the determination of preliminary objections," which extension would include the PCASA's deadline for selecting arbitrators. One possible interpretation of this Order makes both Liberty's and OneBeacon's selections of their arbitrators untimely, since the extension ended, and the selection should have been made, once the preliminary objections were decided in January, 2005. Given this potential confusion, the better course was to allow both parties to appoint their arbitrators and to have a neutral arbitrator chosen, all as agreed in the PCASA.

Liberty also argues that this court erred when it refused to defer to a federal district court in Massachusetts on the issue of whether to affirm or vacate the arbitration award entered by the three arbitrators. This case was filed in August, 2004. During the lengthy course of this action, the court was asked to decide whether OneBeacon's claims were arbitrable, whether OneBeacon's appointment of its arbitrator was timely, and numerous other issues regarding the arbitration. It was only after the arbitrators entered an award, in August, 2007, requiring Liberty

to pay money damages to OneBeacon that Liberty sought to involve the Massachusetts district court in the arbitration ordered by this court.⁶

Liberty claims that the federal court has exclusive jurisdiction to affirm or vacate an arbitration award made under the Federal Arbitration Act. The Federal Arbitration Act does not vest the federal courts with such exclusive jurisdiction.⁷ As this court held in its December 12, 2007 Order confirming the arbitration award:

This court previously ruled that the parties chose their arbitrators in a timely fashion, so this court has already addressed the primary issue that defendant raises in its Petition to Vacate and its opposition to the Petition to Confirm. It is a far more efficient use of federal and state judicial resources for this court to make its prior ruling final and subject to appeal by defendant, as it has done in this Order, than for defendant to attempt to obtain inconsistent rulings from this court and a federal court on the same issue.

It is for the Superior Court, rather than a court in another jurisdiction, to tell this court whether it ruled correctly or not. For all the foregoing reasons, this court respectfully submits that the Superior Court should affirm the court's prior Orders on appeal.

Dated: March 11, 2008

HOWLAND W. ABRAMSON, J.

⁶ The federal action was apparently filed in September, 2007.

⁷ 9 U.S.C.S. § 10 (“the United States court in and for the district wherein the award was made may make an order vacating [an arbitration] award.”). Several Courts of Appeal have held that this provision does not create independent federal subject matter jurisdiction, so it necessarily does not establish exclusive federal jurisdiction. See Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 882, 883 (9th Cir. 1993) (“The Supreme Court has consistently held that federal courts may hear claims under the Act only when there is an independent basis for federal jurisdiction.”); Harry Hoffman Printing, Inc. v. Graphic Communications, Int'l Union, Local 261, 912 F.2d 608, 611 (2d Cir. 1990) (“The primary defect is that section 10 of the Arbitration Act does not confer subject matter jurisdiction on a district court. . . . We have consistently held that Congress did not intend the Arbitration Act as a grant of jurisdiction. There must be an independent basis of jurisdiction before a district court may entertain petitions under the Act.”)