PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION VOL. 11 NO. 3 FALL 2004

PIABA Bar Journal

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THE BAR JOURNAL OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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President's Message

Charles W. Austin, Jr.

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I write this after ending my term as PIABA President. I have had every opportunity during the preceding year, including three previous pieces in this journal, to say everything I wanted to say which I felt was worth saying and suitable for public consumption. Nonetheless, I was told in no uncertain terms by the folks who really run things that I owed the *Bar Journal* one more "President's Message", so I'd better come up with something. This is no small feat when the reservoir of original thought - which was small to begin with - has run dry, so I opted instead for the words of others.

For equity is regarded as just; it is, in fact, the sort of justice which goes beyond the written law . . .It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to litigation - for an arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity.

2 Aristotle, *The Complete Works of Aristotle* 2188-89 (Jonathan Barnes ed., 1991).

It is this constant struggle for equity which PIABA has always been about. I am happy to be a part of it and thankful for the opportunity to play a substantive role in advancing its cause.

ProfLipner's I Love New York Law column: Investment Managers, Fiduciary Breaches and Over-Concentrated Accounts

Seth Lipner

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Tech-wreck cases are not limited to the usual broker-dealer arrangement. Investment managers, who act with discretion, also fell under the spell of the profits seemingly attainable in the tech stock run up. When they did, and they deviated from the client's investment goals by loading up on risk, the advisor is liable for the loss under a fiduciary theory.

Professor Norman Poser, in his treatise on securities regulation, writes "[t]he 'clear weight of authority' is that, at least when a customer maintains a discretionary account with a broker, the broker is in a fiduciary relationship with the customer." *See Poser, Broker-Dealer Law & Regulation* (3d ed.) §2.02 [A] *citing McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 766 (3d Cir. 1990). The same point is made in Professor Hazen's text, *Law of Securities Regulation*, the second major treatise: ". . . it is clear that when a broker exercises discretion over an account, he or she will be subject to fiduciary obligations. In such a case the broker is acting as a trustee with regard to the customer's investments. At ¶ 14.15. (updated through July 2004)

Thus, when an investment firm steps out of the role as mere broker-dealer, and becomes an investment advisor acting with discretion, the investment manager becomes a ***fiduciary***. As Prof. Poser explains:

> A fiduciary . . . is subject to duties that go beyond mere fairness and honesty; they oblige him to act to further the beneficiary's best interests. A fiduciary owes his principal an obligation of diligent and faithful service similar to that of a trustee. Like a trustee, he is held to rigorous duties of loyalty and care: . . . his duties must be exercised with the utmost good faith and integrity; and he must employ such skill and judgment as might reasonably be expected of a person skilled in his calling.

See also N.Y. Estates Powers and Trusts Law, sec. 11-2.2 ("The Uniform Prudent Investor Act")[1].

A mere stockbroker or NASD registered representative owes his customer a more limited duty. *See DeKwiatkowski v. Bear Stearns*, 306 F.3rd 1293 (2d Cir. 2002). An ordinary broker/rep owes the investor no duty of constant vigilance, and he owes his customer no "duty to act" at any given point. The law only requires a broker to give competent advice when called on by the investor for such advice.

But an investment manager vested with ***discretion***, like a trustee, must act prudently

[1] The act technically only applies to fiduciaries appointed in a Will, a Trust, or in a court proceeding, but no court would doubt that it applies to discretionary investment accounts.

and carefully at all times. And a fiduciary is liable not only for assets negligently purchased, but also for assets negligently held. See *Matter of Janes*, 90 N.Y.2d 41, 54; 659 N.Y.S.2d 165, 172 (1997)("in determining whether a fiduciary has acted prudently, a court may examine a fiduciary's conduct throughout the entire period during which the investment at issue was held.")

In *Matter of Janes*, the fiduciary failed to address the risk created by concentrated stock positions was a breach of fiduciary duty. The New York Court of Appeals was highly critical of a fiduciary's disregard for such risk:

> [M]aintaining a concentration in Kodak stock, under the circumstances presented, violated certain critical obligations of a fiduciary in making investment decisions under the prudent person rule. First, [the fiduciary] failed to consider the investment in Kodak stock in relation to the entire portfolio of the estate [citation omitted], *i.e.*, whether the Kodak concentration itself created or added to investment risk. The [beneficiary's] experts testified that even high quality growth stocks, such as Kodak, possess some degree of volatility because their market value is tied so closely to earnings projections [citation omitted]. They further opined that the investment risk arising from that volatility is significantly exacerbated when a portfolio is heavily concentrated in one such growth stock.
> Second, the evidence revealed that, in maintaining an investment portfolio in which Kodak represented 71% of the estate's stock holdings, and the balance was largely in other growth stocks, petitioner paid insufficient attention to the needs and interests of the testator's 72-year-old widow, the life beneficiary of three quarters of his estate, for whose comfort, support and anticipated increased medical expenses the testamentary trusts were evidently created.

A similar formulation was offered by the court in *Lieb v. Merrill Lynch*, 461 F.Supp. 951, 953 (E.D.Mich 1978):

> The broker handling a discretionary account becomes a fiduciary of his customer in the broadest sense. Such a broker, while not needing prior authorization for each transaction, must (1) manage the account in a manner directly comporting with the needs and objectives of the customer as stated in authorization papers or as apparent from the customer's investments and trading history [citation omitted]; . . . (5) explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged [citation omitted]. Although no particular type of trading is required of brokers handling fiduciary accounts, most concentrate on conservative investments with few trades usually in blue chip growth stocks.

A firm acting with discretion cannot reasonably defend a case by trying to blame the investors for not monitoring the fiduciary's activity more carefully. As the Seventh Circuit Court of Appeals explained in *Henricksen v. Henricksen & Smith Barney*, 640 F.2d 880 (7th Cir. 1981), such a defense fails as a matter of law when dealing with discretionary accounts:

> Having entrusted her investments to Smith Barney's management through . . . their agent, [the investor] was entitled to rely on Smith Barney's fiduciary obligation to manage the investments in accordance with her recorded investment objectives and [the manager's] best professional judgment subject to the review and ultimate control of Smith Barney's supervisory personnel. It is true, of course, as Smith Barney argues, that had [the investor] not authorized discretionary accounts or had she herself

> supervised [the manager's] investment decisions, she might have discovered and prevented the fraud. But [the investor] had no obligation to supervise [the manger]. . . . She was entitled to rely on [the manager's] representations of the status of her account and to assume therefrom that the account was being properly managed by [the manager] and Smith Barney. Indeed, the whole point of a client's establishing a discretionary account is to turn over to the investment firm management and investment responsibilities that the client either does not want to have or feels inadequate to handle. Broker-dealers do not have to accept discretionary accounts. . . . But having accepted [the investor's] trust and the concomitant fiduciary burdens, Smith Barney cannot now disclaim liability by arguing that [the investor] should not have been so trusting. [2]

THE MEASURE OF DAMAGES

In cases where a fiduciary makes undiversified investments or negligently retains assets, the measure of damages is equal to the loss incurred. The New York Court of Appeals ruling in *Matter of Janes* is clear:

> Where . . . a fiduciary's imprudence consists solely of negligent retention of assets it should have sold, the measure of damages is the value of the lost capital [citation omitted]. . . . In imposing liability upon a fiduciary on the basis of the capital lost, the court should determine the value of the stock on the date it should have been sold, and subtract from that figure the proceeds from the sale of the stock or, if the stock is still retained by the estate, the value of the stock at the time of the accounting [citations omitted] Whether interest is awarded, and at what rate, is a matter within the discretion of the trial court. [citations omitted]. Dividends and other income attributable to the retained assets should offset any interest awarded [citation omitted].

Damages for fiduciary breach are not, under New York law, subject to any "market-adjustment" theory. In *Matter of Janes*, the Court expressly rejected the "market index" approach to damages that had been used by the lower court. The investors had advocated an approach which gave them the benefit of appreciation in the manager's mutual funds, but the Court rejected it, substituting the simple "capital loss" formula. The Court then stated that interest on that amount was discretionary with the court.

The measurement of damages for fiduciary breach is thus the difference between "the value of the stock ***on the date it should have been sold***, . . . and the [ultimate] proceeds from the sale of the stock. . . ." *[emphasis added]. See also Matter of Estate of Donner*, 82 N.Y.2d 574, 606 N.Y.S.2d 137 (1993). The date on which an investment should be sold is a question of fact.

The argument that damages can only be awarded if an account was "unprofitable" over its entire life is not permitted. That precise argument was recently rejected by the federal District Court for the Southern District of New York in *Hughes v. J.P. Morgan Chase & Co.*, 2004 U.S.Dist.Ct. LEXIS 11497 (S.D.N.Y. June 21, 2004):

[2] In *Hughes v. J.P. Morgan Chase*, *infra*., the court stated "Defendants managed Plaintiff's account continuously through the time period at issue and Plaintiff was entitled to rely on their professional expertise to correct any potential malpractice they might have committed."

Defendants argue that all of Plaintiff's causes of action should be dismissed because he has not suffered any damages. Specifically, [Defendants] argue that the Court should evaluate Plaintiff's damages claim by looking at his account from 1990, when Chase began buying REITs, through November 1999, when Plaintiff closed the account. In response, Plaintiff argues that Defendants' calculation of damages is an attempt at "exoneration by historical performance," and that it is unfair to cover up damages suffered in later years by mismanagement with the account's gains in the previous years. Plaintiff asserts that the Court should calculate damages from January 1998, the time that Plaintiff contends REITs became "unsuitable," till the close of the account. Both parties cite the case *Matter of Janes*, [citation omitted] . . . The [*Janes*] Court stated that the measure of damages "for a **fiduciary's** negligent retention of assets" is the value of the securities at the time that they should have been sold, minus their value when ultimately sold, minus dividends or other income earned on the assets. . . . . . . [T]he date on which the breach or breaches occurred is a question of fact.

In cases of fiduciary breach, damages includes the disgorgement of advisory fees charged. *See e.g. In re Quattrocchi*, 293 A.D.2d 481, 739 N.Y.S.2d 642 (2d Dept. 2002)(fees denied because of failure to diversify real estate investment). .

An additional element of damages in an arbitration involving a fiduciary is attorneys fees. When one is suing in court, attorneys fees are usually available only if authorized by statute or by agreement. But when a case is in arbitration, that rule does not apply. Arbitrator awards of attorneys fees are routinely upheld by courts as within the sound discretion of the arbitration panel.

The reason for this rule has been expressed by numerous courts. For example, in *Willoughby Roofing & Supplies, Inc. v. Kajima International, Inc.*, 598 F.Supp. 353 (N.D. Ala. 1984), affirmed, 776 F.2d 269 (11th Cir. 1985) the district judge wrote that:

> an arbitrator steeped in the practices of a given trade is often better equipped than a judge not only to decide what behavior transgresses the limits of acceptable commercial practice in that trade so as to warrant a[] award, but also to determine what amount of [] damages [are] needed . . .

The New York Court of Appeals in *Silverman v. Benmor Coats*, 61 N.Y.2d 299, 473 N.Y.S.2d 774 (1983) put it thusly:

> [A]n arbitrator . . . may do justice as he sees fit, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the [law], . . .

Statutorily, the New York General Business Law authorizes a judgment for attorneys fees in cases where a deceptive trade practice existed. While there are few cases because of the virtually-mandatory system of industry-run securities arbitration, *Scalp & Blade v. Advest,* 722 N.Y.S.2d 639 (4th Dept. 2001), applied NY General Business Law §349 to an investor's claim:

Plaintiffs have sufficiently alleged consumer-oriented misconduct on Defendants' part [citation omitted]. Given the statute's explicit prohibition of '[d]eceptive acts or practices in the furnishing of any service', and given the Court of Appeals' characterization as 'applying to virtually all economic activity' (*Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55, 698 N.Y.S.2d 615), we see no basis for invoking any blanket exception under the statute for securities transactions [citation omitted] or for limiting the statute's applicability to the sale of

'goods'.

Scalp and Blade v. Advest has been cited approvingly by state courts, and by judges in the District Court for the Southern District of New York.

There is absolutely no logical reason for excluding the financial services community from the ambit of businesses which must abide by New York State's statutes requiring honesty in business. GBL 349(a), which itself bears no exceptions, provides:

> Deceptive Acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful

As the Scalp & Blade case shows, the services provided by Respondent here fall within the clear and broad terms of the statute. The statute refers to **any** business, and to **any** service.

CONCLUSION

Caselaw on fiduciary breaches in New York (and elsewhere) are very strong. Many defenses often used by brokerages, such as blame-the-customer, "market adjusted damages" and "the account was profitable, so ignore the breaches" all fail in the context of fiduciary breach. A fiduciary's duty is the highest known to the law. The duty must be discharged properly at all times – no excuses.

Practitioner's Column: "DID I SAY THAT?" Taped Conversations In Securities Arbitration

David E. Robbins

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INTRODUCTION

Reaching out to touch someone has become a two-edged sword. While the ubiquitous cell phone has made it more difficult to convince arbitrators, in authorized trading cases, that customers were as inaccessible as they used to be, more and more customers are taping their brokers in telephone conversation, either in the act of "solicitation with intent to sell" or, thereafter, when they call to relive the nightmare that took place in their accounts. Customers are hoping that registered reps will slip and fall, making admissions against interest. Emboldened with the 18 minutes of tape that Rosemary Woods would have erased for her beloved president, customers seek counsel, asking whether their prized possession is admissible in a securities arbitration hearing. This article will help you answer that question, an answer that may even include the admonition that the customer has violated the law and now faces civil and even criminal penalties. Who knew? You will.

EXAMPLES

Here are two examples that illustrate the issues involved in the admissibility or inadmissibility of tape recordings in arbitration hearings:

Example 1: A customer knows unauthorized trades took place in her account and but also recognizes that, if push comes to shove, it will be her word against the broker's. So she tapes subsequent conversations with the broker (who is unaware of the taping) and, at the hearing, attempts to get the tapes into evidence. The brokerage firm objects that they should be inadmissible because the state in which the broker was doing business (as opposed to where the customer resides) prohibits them unless both parties consent. The firm also argues that the tapes appear to have been "doctored," without going into any specifics. Should they come in?

Example 2: A broker is concerned about the risks involved with the unsolicited trading of his customer but believes he has an obligation to take whatever unsolicited orders he receives from customers, as long as he explains the possible ramifications. To be safe, he records the conversations, one or two of which are received on the customer's cell phone. The customer loses all his money and sues the brokerage firm for "economic suicide." At the arbitration, he attempts to get the tapes into evidence. Should they come in?

STATE SCOREBOARD

Whether the tapes should be admitted into evidence depends on the state in which

the tapes were made, perhaps the location of the hearing and the accuracy of the recording. Which states require the consent of the person being taped and which do not?

1. **"Two-party consent" laws** — California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington require the consent of all the individuals on the phone conversation (not just two of them) for the tapes to be admissible.
2. **"One-party consent" laws** — The rest of the 38 states, the District of Columbia and federal law permit you to tape record phone conversations and get them admitted into evidence without the consent or knowledge of the person being taped. However, federal law does not protect the taping if it is done for a criminal or tortuous purpose.
3. **Interstate phone calls** — However, federal law and most states prohibit you from disclosing the contents of an illegally intercepted call (i.e., one in which all parties must consent). So, if you tape the call in a "one-party consent" state and seek to introduce it into evidence at an arbitration hearing which takes place in a "two-party consent" state or the person being taped is in a "two-party consent" state and you try to introduce it at a hearing in a "one-party consent" state, you are probably out of luck. Depending on the state, you can possibly subject yourself to trouble if you play the tape or introduce a transcript of the conversation at the hearing.

EXAMPLES OF STATE STATUES

California[1]— It is a crime in California to intercept or eavesdrop on any confidential communication, including a phone call, without the consent of all parties. It is a crime to disclose such information, punishable by a fine and imprisonment. In addition, anyone so injured can recover civil damages of $5,000 or three times actual damages, whichever is greater.[2]

Florida[3]— All parties must consent to the recording or the disclosure of the contents of any wire, oral or electronic communication in Florida. It is a felony to record or disclose such communication without the consent of all parties, unless it is a first offense without any illegal purpose and not for personal gain. In that instance, it is a misdemeanor. Anyone whose communications have been illegally intercepted may recover actual damages of $100 per day or $1,000, whichever is greater. He or she can also recover punitive damages, attorneys' fees and court costs.[4]

Illinois[5]— Eavesdropping devices, including telephones, cannot be used to record a conversation without the consent of all parties to the conversation. It is a crime to disclose information one knows to have been obtained by such devices, punishable as felonies. Civil liability for actual and punitive damages are also available,[6]

Massachusetts[7]— In this state, it is a crime punishable

up to a fine of $5,000 and a jail sentence of up to five years to record any conversation without the consent of all parties. If you knew the conversation was recorded illegally and you disclose its contents nevertheless, you can be charged with a misdemeanor, be fined up to $5,000 and be imprisoned for up to two years. Like Florida, you subject yourself to civil damages in favor of the ``aggrieved person'' of $100 for each day of violating the statute, or $1,000, whichever is greater. Punitive damages and attorneys' fees are also provided.

New Jersey[8]— While the taping of a phone conversation, or disclosing its contents, is a crime in this state, exceptions are made for individuals who are parties to the communication or one of the parties to the communication has given prior consent to the interception. However, these exceptions do not apply if the communication is intercepted or used for the purpose of committing any criminal or tortuous act in violation of the Constitution or laws of the United States or of New Jersey or for the purpose of committing any other injurious act. The civil penalties are similar to those in Florida and Massachusetts.

New York[9]— If one is not the sender or receiver or does not have the consent of either the sender or receiver, it is a felony to overhear or record a phone communication. In *New York v. Fata*[10] it was held that cordless telephone conversations that were partially broadcast over ordinary radio waves were protected by the wiretapping and eavesdropping law, requiring the same consent for recording as any other communication.

Pennsylvania[11]— Unless you get the consent of all participants, it is a felony to record a phone conversation in this state, just as it is a felony to disclose its contents. Civil damages are similar to Florida, Massachusetts and New Jersey.

Texas[12]— As long as a taped phone conversation is not done for a criminal or tortuous purpose, anyone who is a party to the phone call, or who has the consent of a party, can lawfully record the conversation and disclose its contents. While the civil and punitive damages and attorneys' fees are similar to the states cited above, criminal penalties are harsher. It is punishable as a felony by two to 20 years in jail and a fine of up to $10,000. [13]

For a summary of all applicable state laws, go to the web site of The Reporters Committee for Freedom of the Press: www.rcfp.org/taping

THE COURT TEST

What is the test courts generally use before admitting sound recordings into evidence, especially

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[6] Under 720 Ill. Compiled Stat. Ann. 5/14-6 (1999).

[7] Mass. Ann. Laws ch. 272, § 99 (1999)

[8] N.J. Stat. §§ 2A:156A- 3 and 4 (1999)

[9] N.Y. Penal Law §§ 250.00, 250.05 (Consol. 1999)

[10] N.Y.S. 2d 348 (N.Y. App. Div. 1990)

[11] 18 Pa. Cons. Stat. § 5703 (1999)

[12] Texas Penal Code §§ 16.02, 18.20 (2000)

[13] Texas Penal Code § 12.33 (2000).

where there is an objection? It is found in the oft-cited case of *United States v. McKeever*[14] which has been adopted by many federal circuits, such as the Eight Circuit. The party introducing sound recordings must establish the following facts:

1. The recording device was capable of taking the conversation now offered into evidence.
2. The operator of the device was competent to operate it.
3. The recording is authentic and correct.
4. Changes, additions or deletions have not been made.
5. The recording has been preserved in a manner that is shown to the court.
6. The speakers are identified.
7. The conversation elicited was made voluntarily and in good faith, without any kind of inducement.

THE ABA SPEAKS

What is the American Bar Association's position on an attorneys tape recording conversations? In 2001, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 01-422 (June 24, 2001), entitled, ``Electronic Recordings by Lawyers Without the Knowledge of All Participants." Reversing an earlier opinion[15] , the ABA stated that:

1. "Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules [of Professional Conduct] merely by recording a conversation without the consent of the other parties to the conversation."
2. If nonconsensual recording is illegal in any state in which the recording occurs, such action may subject the attorney (whether he records or authorizes others to record) to civil liability to persons whose conversations were secretly recorded.
3. A lawyer who records a conversation in violation of a state statue ``likely" has violated various provisions of the Model Rules, because doing so violates an individual's right not to have his conversations recorded without consent.
4. These restrictions do not apply to ``lawyers engaged in law enforcement whose activities are authorized by state or federal law."
5. A lawyer's recording a conversation with another person without that person's knowledge and consent does not mean that a lawyer may falsely state that the conversation is not being recorded. To do so ``would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person."

TROUBLING EXAMPLES – STRADDLING STATE LINES

Two Connecticut courts – in non-securities cases - were presented with the situation of telephone taping done in "one-party consent" states (New York and Utah) of individuals in Connecticut , where its statute[16] requires the consent of both parties. In both cases, the evidence was held to be inadmissible. In *Lord v. Lord*[17], the person

[14] 169 F.Supp. 426 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F. 2d 669 (2nd Cir. 1959

[15] Formal Opinion 337, Aug. 10, 1974.

[16] General Statues §52-570d(a).

who did the taping argued that in New York (where the taping was done), there is no common law right to privacy and no private right of action under is penal law, as opposed to Connecticut, which provides for a right of action for recording phone conversations without the consent of both parties. Relying on Section 152 of the Restatement (Second) of Conflict of Laws, the Superior Court of Connecticut ruled that Connecticut was where the recorded person's seclusion was violated and thus where the invasion of privacy occurred. Section 6 of the Restatement (Second) then required the court to determine whether New York had a more significant relationship than Connecticut and concluded that, "If she were allowed to apply New York law, she would be able to take advantage of New York law and invade a privacy right of a Connecticut citizen simply because she recorded the conversation in New York or because she lives in New York. ..[T]his factor leads to Connecticut having a more significant relationship."

And in *Tarbox v. Tarbox*[18] - where the recording was done in Utah - the Superior Court of Connecticut, Judicial District of New Haven found that its state had a more significant relationship than any other jurisdiction since it was in that state that the plaintiff brought suit, seeking to enforce its laws, and the alleged torts were committed within Connecticut. In making its ruling, the court looked at the legislative purpose of its telephone tape recording statute, citing the following from *Washington v. Meachum*[19]: "In 1990, the legislature adopted the recording statute, § 52-570d, in an effort to strengthen the privacy protections afforded to Connecticut's citizens."

Thus, it is possible that in an effort to substantiate allegations that could possibly come down to "he said/ she said", a party in a one-consent state could find the strategy back-firing if the person being recorded is in a two-consent state. Indeed, in *In the Matter of the Arbitration Between Intercity Company Establishment v. Shearson Lehman Brothers, Inc. et al.*,[20] a customer filed an arbitration alleging losses of $1.2 million and, in discovery, produced tape recordings of the broker, prompting the brokerage firm to assert a counterclaim against the customer for violating Connecticut's General Statues §52-570d. The arbitrators denied all of the customer's claims and awarded the Respondents almost $80,000 in attorney's fees, citing the Connecticut General Statute.

CONCLUSION

Once is a blue moon, a tape recorded conversation will be of assistance to substantiate your client's recollection of events. Usually it will contain 95% of tangential chatter with maybe 5% of sentence fragments dealing with potential wrongdoing. I have found that if the tapes would be admissible under your particular state's statute, they are a more effective tool in settlement discussions than at a hearing, often making the filing of an arbitration unnecessary.

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[17] 2002 WL 31125621 (Conn.Super.), 33 Conn. L. Rpt. 88 (Aug. 2002).

[18] 2004 WL 1326824 (Conn.Super.), 37 Conn. L.Rptr. 187 (June 2004).

[19] 238 Conn. 692, 709-10, 680 A.2d 262 (1996).

[20] Case No. 92-00768 (Aug. 8, 1977), *affirmed*, 13 F.Supp.2d 253 (D.Conn. 1998).

Caveat Emptor, Haruspexs and Industry - SEC and NASD Enforcement Actions for the Failure to Supervise

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Introduction

Often the investor names in his Statement of Claim only the brokerage firm and not the individual broker. In these cases the quality of supervision frequently becomes an issue. This article seeks to aid practitioners with these types of claims by listing the numerous instances where a brokerage firm has been sanctioned for the failure to supervise its employees. [1] These cases are relevant because stare decisis does not exist in the arbitration process. Thus enforcement actions provide a valuable dynamic description of the obligations owed investors as they evolve. [2]

The SEC has noted "'(t)he need for central control increases, not decreases, as branch offices become more numerous, dispersed and distant.' *In re Shearson, Hamill & Co.*, Exchange Act Release No. 34,7743, 42 S.E.C. 811, 843 (Nov. 12, 1965)(sic)." *In re NY Life Securities, Inc.*, Securities Exchange Act Release No. 34,40459, 1998 SEC LEXIS 2000 (Sept. 23, 1998), <http://www.sec.gov/litigation/admin/3440459.txt>. [3]

The advent of the 1990 Bull market caused an explosion in the number of brokers and branch offices in the

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[1] These enforcement actions are a matter of public record, but hardly a matter of which the public can find a record. We researched and issued subpoenas to stock exchanges and multiple sources available from the NASD and SEC together with searching Westlaw and Lexis data bases. We often found that a citation would be in one place but not appear in another. In almost all cases, it was very difficult to find these citations. Thus we seek to make these citations available to the practitioner in an easy format. PIABA has established a website in its members data base wherein these numerous citations may be cut and pasted from a web browser so as to avoid lengthy typing. Please consult the PIABA website for more information.

[2] In the arbitration process brokerage firms regularly try to discount disciplinary decisions by predecessor and successor entities in interest as well as subsidiaries. As a matter of law liability is inherited through purchase or merger. In reference to subsidiaries major brokerage firms commonly advertise their own capabilities as a collection of companies operating globally to the benefit of their customers. When it comes disciplinary actions for the failure to supervise its employee brokerage companies habitually complain that any one entity is not responsible for disciplinary actions of the employees of another. They cannot have it both ways. In addition brokerage firms subpoena every document associated to every trade a claimant ever made to prove risk tolerance. The reverse should also apply.

[3] *See also In re Prospera Financial Services,* Securities Exchange Act Release No. 34,43352, 2000 SEC LEXIS 2034 (Sept. 26, 2000), <http://www.sec.gov/litigation/admin/34-43352.htm> and *In re Quest Capital Strategies, Inc., and David Chen Yo, SEC* Initial Decision Rel. No. 141 (Apr. 12, 1999) *(quoting In re Shearson, Hamill & Co.)* <http://www.sec.gov/litigation/aljdec/id141lam.txt>.

brokerage industry.[4] From 1990 until 2001 there was a 261% increase in the number of branch offices and a 62% increase in Registered Representatives. NASD Five-Year Statistical Review, *at* <http://www.nasdr.com/2380.asp> (last updated on: May 5, 2004). The industry did not expand its supervisory capabilities as quickly as it expanded its sales capabilities.

Growth of Industry 1998-present

year	member firms	branch offices	reg. reps
2003-Oct	5,338	94,847	664,259
2002	5,392	91,473	662,311
2001	5,499	88,168	673,822
2000	5,579	82,126	672,489
1999	5,482	80,035	620,387
1998	5,592	70,752	589,120
1997	5,597	62,966	556,024
1996	5,553	60,151	534,989
1995	5,451	58,119	505,647
1994	5,426	57,105	485,548
1993	?	?	?
1992	5,254	33,484	426,979
1991	5,401	29,137	406,106
1990	5,827	24,457	417,048
1989	6,141	29,998	438,701
1988	6,432	22,714	457,330

Data obtained from NASD and Securities Industry Association.

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[4] NASD, Reminder to Members That Their Supervisory Systems and Written Supervisory Procedures Must Be Periodically Amended (Spring 2003) ("NTM 98-38 reminds members of their obligation to supervise associated persons located in Offices of Supervisory Jurisdiction (OSJs), branch offices, and all other offices, and to inspect these offices. NTM 99-45 provides guidance on establishing supervisory systems and written supervisory procedures. NTM 99-45 also explains the differences between compliance procedures and supervisory procedures. NTM 98-96 elaborates on member firms' responsibilities for supervision for trade reporting and market making activities...NTM 97-19 lays out the elements of a comprehensive supervisory program with special emphasis on the supervisory issues related to registered representatives requiring heightened supervision.") <http://www.nasdr.com/rca_spring03_rst.asp>.

"Broker-dealers must not only adopt effective procedures for supervision, but must also 'provide effective staffing, sufficient resources and a system of follow up and review to determine that any responsibility to supervise delegated to compliance officers, branch managers and other personnel is being diligently exercised.' *In re Mabon, Nugent & Co.*, 47 S.E.C. 862, 867 (Jan. 13, 1983)." *In re NY Life Securities, Inc.*, Securities Exchange Act Release No. 34,40459, 1998 SEC LEXIS 2000 (Sept. 23, 1998) <http://www.sec.gov/litigation/admin/3440459.txt>. *See also In re Prospera Financial Services, Inc.* Securities Exchange Act Release No. 34,43352, 2000 SEC LEXIS 2034 (Sept. 26, 2000), <http://www.sec.gov/litigation/admin/34-43352.htm>.

"The system must provide sufficient checks 'to insure that the first line of compliance, the branch manager, [is] functioning adequately.' *In re Shearson Lehman Brothers, Inc.*, SEC Rel, No. 23640, 36 SEC Docket 1075, 1083 (Sept. 24, 1986)." *Id.*

Use of SEC and NASD rules as a standard by which to evaluate a broker and brokerage firm

The use of disciplinary actions and other administrative violations to prove liability is well recognized in other areas of law. Because the arbitration process lacks stare decisis, a similar body of law is not well developed.

It must be remembered that much of the precedent and state statutes that require suitability and fiduciary obligations in securities investments found their genesis in SEC and NASD regulations. "Federal and state courts established precedents in civil actions, which corresponded to federal enforcement doctrines." Cheryl Goss Weiss, *A Review of the Historic Foundations of Broker-Dealer Liability for Breach of Fiduciary Duty*, 23 Iowa J. Corp. L. 65, 68 (1997).

Similarly a number of courts have held that NASD and SEC regulations establish a standard by which to judge the actions of a broker or brokerage. (From this it clearly follows that a violation of these standards helps establish a violation of a duty to an investor). Courts and arbitration panels have looked to NASD and SEC standards of conduct as a touchstone for liability.

The court in *Cash v. Frederick & Co.* [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,967, at 93,868 (E.D. Wis. 1972). held that "although a violation of this rule may not provide a basis for liability, it is relevant in this antifraud action to suggest what duty the broker-dealer owed [its customer]." See also, In *Kirkland v. E.F. Hutton & Co*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,470 (E.D. Mich. 1983). (NASD rule violations can be probative of securities fraud claims). *See also Charter House, Inc. v. First Tenn. Bank, N.A.,*, 693 F. Supp. 593 (M.D. Tenn. 1988).

In *Miley v. Oppenheimer & Co.*, 637 F. 2d 318, 333 (5th Cir. Unit A 1981) the court allowed the jury to consider the violation of securities regulations as a factor in determining whether Miley's account had been excessively traded. NASD and NYSE rules are "excellent tools against which to assess in part the reasonableness or excessiveness of a broker's handling of an investor's account,"[5] *Id* at 333 the court also ruled that "admission of testimony relating to those rules was proper precisely because the rules reflect the standard to which all brokers are held." *Id.* (*quoting Mihara v. Dean Witter & Co.*, 619 F.2d 814, 824 (9th Cir. 1980)). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng,* 697 F. Supp. 1224, 1227 (D.D.C.) (Violation of a NASD or SEC rule to be considered by a jury as to reasonableness of conduct. The Cheng court made a point of distinguishing the case from federal causes of action).

A search of decisions in most states finds citation to SEC and NASD rules as a

[5] This quote has been cited by other courts with approval. Geisenberger v. John Hancock Distribs., 774 F. Supp. 1045 at 1053; Peacock v. Oppenheimer & Co., No. 78 C 4956., United States District Court for the Northern District of Illinois., 1981 U.S. Dist. LEXIS 13544; Fed. Sec. L. Rep. (CCH) ¶ 98,212, June 25, 1981. "We agree with these courts that the rules of the stock association(s) of which a broker-dealer like Camphausen is a member reflect the standard to which all brokers who trade on that exchange are held. While conduct which violates a stock association rule is obviously not always a violation of the federal securities laws, it is equally clear that "violations of those rules under certain circumstances amounts to fraud under the federal securities laws...." *Clark v. Lamula Inv* ., 583 F.2d at 601 (quoting from district court judge's instructions to the jury, Tr. 1139-40). The standards are "**excellent tools against which to assess in part the reasonableness of excessiveness of a broker's handling of an investor's account.**" *Miley v. Oppenheimer* , 637 F.2d at 333. (Emphasis in original)."

standard by which to judge brokers and brokerage firms. *E.g., Dean Witter Reynolds v. Hammock*, 489 So.2d 761 (Fla. 1st DCA 1986) (evidence of violation of industry standards admissible as evidence of negligence).

List of enforcement actions against Brokerage firms (and their related subsidiaries, predecessors and associated companies) for the failure to Supervise

A.G. Edwards & Sons

A.G. Edwards & Sons, Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05040056 (Aug. 2004) (firm $5,000 for several violations and required to provide updated copy of supervisory procedures relating to determination of fair market value of municipal securities bought or sold from public customers) (report on file with NASD and authors); *A.G. Edwards & Sons, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990062 (Feb. 2000) (firm fined $9,500 for several violations including failure to establish maintain, and enforce written supervisory procedures to comply with applicable securities rules, regulations and laws) (report on file with NASD and authors); *A.G. Edwards & Sons, Inc.* NASD Letter of Acceptance, Waiver, and Consent, 1997 NASD LEXIS 66 (Aug. 1997) (firm fined $15,000 jointly and severally with registered representative for violations including failure to supervise), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007582.pdf>; *A.G. Edwards & Sons, Inc.* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C3A970045 (June 1997) (firm fined $15,000 jointly and severally with registered representative for failure to supervise representative in manner to achieve compliance with NASD rules pertaining to private securities transactions) (report on file with NASD and authors).

In re A.G. Edwards & Sons, Inc., No. 02-196, 2002 NYSE Disc. Action LEXIS 183 (Oct. 2, 2002) (firm fined $400,000 for several violations including failure to maintain appropriate procedures for supervision and control), <http://www.nyse.com/pdfs/02-196.pdf>.

American Express Financial Advisors

American Express Financial Advisors, Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case # CAF020057 (Nov. 2002) (firm fined $350,000 for multiple violations including failure to provide representatives with proper suitability guidelines and failure to establish adequate procedures for review of customer account activity on periodic basis for handling customer complaints) (on file with NASD and authors).

Bank of America (Currently merging with Fleet)

In re Banc of America Securities LLC, Securities Exchange Act Release No. 49386, 2004 SEC LEXIS 548 (Mar. 11, 2004) (firm fined $10 Million for numerous serious violations including supervisory deficiencies), <http://www.sec.gov/litigation/admin/34-49386.htm>; *In re NationsSecurities*, Securities Exchange Act Release No. 33,7532, 1998 SEC LEXIS 833, 53 S.E.C. 556 (May 4, 1998) (firms fined $4 Million for various violations including failure to supervise registered representatives), <http://www.sec.gov/litigation/admin/337532.txt>.

Banc of America Securities LLC, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C10040080, 2004 NASD LEXIS 58 (Sep. 2004) ("...firm fined $7,500, and required to pay $7,163.10, plus interest in restitution to a public customer. In addition, the firm will update its written supervisory procedures as they relate to the determination of the fair market value of municipal securities being bought or sold from a public customer."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_010474.pdf>; *Banc Of America Securities LLC*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS030021, 2003 NASD LEXIS 19 (Mar. 2003) (firm

fined $80,000 for violations including the finding that firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws and regulations concerning the reporting of short interest positions to NASD), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007450.pdf>; *Banc of America Securities LLC*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS010113 (Apr. 2003) (firm fined $110,000 for numerous violations relating to reporting of short sales and ordered to revise firm's written supervisory procedures in this area) (report on file with NASD and authors); *NationsBanc Montgomery Securities LLC*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990039, 1999 NASD LEXIS 134 (June 1999) (firm fined 15,000, and required to pay restitution to public customers for violations including failure to provide documentary evidence that it performed the supervisory reviews set forth in its written supervisory procedures with respect to applicable securities rules, regulations and laws), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007544.pdf>; *BancAmerica Robertson Stephens*, NASD Letter of Acceptance, Waiver, and Consent, 1999 NASD LEXIS 6 (May 1999) (firm fined $13,000 for violations reporting to certain reporting requirements and for failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007545.pdf>; *NationsBanc Investments, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, 1998 NASD LEXIS 59 (July 1998) (firm was fined $5,000, jointly and severally with an individual, and fined an additional $11,000 for several violations including failure to prepare and maintain written procedures reasonably designed to achieve compliance with all applicable rules and regulations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007557.pdf>; *Nations Securities*, NASD Letter of Acceptance, Waiver, and Consent, 1998 NASD LEXIS 36 (June 1998) (firm fined $2 Million for numerous violations related to term trust sales including failure to establish, maintain, and enforce reasonable supervisory procedures), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007558.pdf>; *NationsBanc Investments, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C07980030 (May 1998) (firm and representative fined $13,5000 for numerous violations including failure to provide an adequate supervisory systems with respect to principal registrations and failure to prepare and maintain written supervisory procedures) (report on file with NASD and authors); *Robertson, Stephens & Co LLC*, NASD Letter of Acceptance, Waiver, & Consent, NASD Case #CO1970007 (June 1997) (firm fined $1,000 for failure to establish, maintain, and implement written supervisory procedures relating to failures to report certain prohibited contributions) (report on file with NASD and authors); *Banc of America Securities LLC*, NASD Letter of Acceptance, Waiver and Consent, NASD Case #CMS980009 (Mar. 1997) (firm fined $7000 for numerous violations including failure to establish, maintain, and enforce written supervisory procedures relating to trade various reporting obligations) (report on file with NASD and authors).

In re Banc of America Securities LLC, No. 01-198, 2001 NYSE Disc. Action LEXIS 140 (Nov. 7, 2001) (firm fined $290,000 for numerous violations relating to firm conduct surrounding Special Reserve Bank Accounts and for failure to provide for, establish and maintain adequate procedures to ensure compliance with applicable rules), <http://www.nyse.

com/pdfs/01-198.pdf>.

Bear, Stearns, & Co

SEC v. Bear, Stearns, & Co., Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *SEC v Bear, Stearns & Co.*, Litigation Release 18109, 2003 SEC LEXIS 1011 (S.D.N.Y. Apr. 28, 2003) (settled several serious violations of SEC, NASD, NYSE & N.Y. laws, rules, and regulations laws, including failure to maintain appropriate supervision, for $25 Million in penalties and $25 Million as disgorgement), <http://www.sec.gov/litigation/litreleases/lr18109.htm>; *In re Bear, Stearns Securities Corp.*, Securities Exchange Act Release No. 34,41707, 1999 SEC LEXIS 1551 (Aug. 5, 1999) (firm fined $5 Million dollars in fines and $30 Million restitution for numerous violations including seriously deficient supervision and supervisory procedures), <http://www.sec.gov/litigation/admin/34-41707.htm>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40901, 1999 SEC LEXIS 47 (Jan. 11, 1999) (firm fined $225,000 for numerous violations including failure to reasonably supervise its Nasdaq market making activities with a view to preventing future violations), <http://www.sec.gov/litigation/admin/34-40901.txt>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>.

Bear, Stearns & Co., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C8A030093, 2004 NASD LEXIS 10 (Feb. 2004) (firm fined $10,000 for various violations including failure to establish, maintain, and enforce written supervisory procedures and failure to supervise), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007437.pdf>; *Bear, Stearns & Co.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C8A030094 (Dec. 2003) (firm fined $10,000 for various deficiencies including failure to supervise a general securities representative) (on file with NASD and authors); *Bear, Stearns & Co.*, Settlement Agreement with Multiple Enforcement Agencies, 2003 NASD LEXIS 39 (June 2003) (firm fined with ten other investment firms for violations related to independence of research departments and failure to supervise), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *Bear, Stearns & Co.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CAF030023 (Mar. 2003) (firm sanctioned for numerous violations including failure to maintain and establish adequate supervisory procedures and ordered to pay total of $80 Million as part of multi-agency settlement) (on file with NASD and authors); *Bear, Stearns Securities Corp.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990105 (June 2000) (firm fined $9,500 for failure to establish, maintain and enforce written supervisory procedures) (on file with NASD and authors); Bear, Stearns & Company, NASD Letter of Acceptance, Waiver, and Consent, 1998 NASD LEXIS 96 (Sep. 1998) (firm fined $33,500 for several violations including failure to establish, maintain, and enforce adequate written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws and regulations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007554.pdf>; *Bear, Stearns & Co.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980063 (July 1998) (firm fined $33,500 for numerous violations related to failing to honor published quotes and failure to establish, maintain and enforce written supervisory procedures) (on file with

NASD and authors).

In re Bear, Sterns & Co., No. 03-63, 2003 NYSE Disc. Action LEXIS 71 (Apr. 22, 2003) (firm fined total of $80 Million for violations related to inappropriate relations between research and investment banking sections and for failure to establish and maintain adequate policies, systems, and procedures for supervision), <http://www.nyse.com/pdfs/03-063.pdf>; *In re Bear, Sterns & Co.,* No. 00-78, 2000 NYSE Disc. Action LEXIS 76 (May 18, 2000) (firm fined $400,000 for numerous violations relating to the failure to reasonably discharge duties and obligations in connection with supervision and control and provision of separate systems of follow-up and review), <http://www.nyse.com/pdfs/00-078.pdf>.

Citigroup

SEC v. Citigroup Global Markets Inc, Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *SEC v. Citigroup Global Markets Inc.*, Litigation Release No. 18111, 2003 SEC LEXIS 1009 (S.D.N.Y. Apr. 28, 2003) (settled claims arising from numerous violations of market rules and regulations including failure to establish and maintain adequate procedures to protect research analysts from conflicts of interest and its employees engaged in "spinning."), <http://www.sec.gov/litigation/litreleases/lr18111.htm>; *In re Deutsche Bank Securities, Inc.*, Securities Exchange Act Release No. 34,46937, 2002 SEC LEXIS 3083 (Dec. 3, 2002) (firm fined for failure to preserve electronic communications and failure to have supervisory system), <http://www.sec.gov/litigation/admin/34-46937.htm>; *In re Certain Market Making Activities on NASDAQ,* Securities Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (omnibus order instituting proceedings and findings of the commission which individuals and brokerage firms settled detailing violations in addition to the failure to supervise and the adequacy of supervisory procedures), <http://www.sec.gov/litigation/admin/34-40900.txt>; *In re Certain Market Making Activities on NASDAQ*, Securities Exchange Act Release No. 34,40924, 1999 SEC LEXIS 37 (Jan. 11, 1999) (order making findings and assessing sanctions against Salomon Smith Barney for numerous violations including failure to reasonably supervise its Nasdaq market making activities), <http://www.sec.gov/litigation/admin/34-40924.txt>; *In re Certain Market Making Activities on NASDAQ*, Securities Exchange Act Release No. 34,40925, 1999 SEC LEXIS 38, 53 S.E.C. 1187 (Jan. 11, 1999) (finding that Smith Barney and other individuals failed in several key areas including failure to reasonably supervise Nasdaq trading activity), <http://www.sec.gov/litigation/admin/34-40925.txt>; *In re Smith Barney, Inc.*, Securities Exchange Act Release No. 34,39118, 1997 SEC LEXIS 1973 (Sept. 23, 1997) (firm fined $250,000 and ordered to pay disgorgement for violations including lack of express written supervisory procedures and failure to reasonably supervise) (on file with NASD and authors).

Citigroup Global Markets Inc., NASD Letter of Acceptance, Waiver, and Consent, 2004 NASD LEXIS 55 (Aug. 2004) (firm fined $486,000 for rule violations relating to trading in corporate high-yield bonds and required to revise deficient written supervisory procedures within 60 days), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007429.pdf>; *Citigroup Global Markets Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS040113 (July 2004) (firm fined over $4 Million, required to pay restitution, and revise written supervisory procedures to address serious supervisory deficiencies) (on file with NASD and authors); *Citigroup Global Markets Inc.,* Settlement Agreement with Multiple Enforcement

Agencies, 2003 NASD LEXIS 39 (June 2003) (firm, along with nine other investment houses, were assessed $875 million in penalties and disgorgements for numerous violations including serious supervisory deficiencies), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *Citigroup Global Markets Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05030021 (Apr. 2003) (firm fined $225,000 for multiple violations including failure of certain retail branches to follow firm's supervisory procedures) (on file with NASD and authors); *Citigroup Global Markets Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CAF030016 (Apr. 2003) (firm fined $8,000 for failure to provide timely information regarding municipal securities trades and failure to adopt, maintain, and enforce written procedures regarding the processing of trades executed through unaffiliated money managers for firm's clients and the supervision by a principal of the firm's processing such trades) (on file with NASD and authors); *Citistreet Equities LLC,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C9B030015 (Mar. 2003) (firm fined $20,000 for multiple violations including failure to enforce written supervisory procedures regarding review of mutual funds and variable annuity transactions) (on file with NASD and authors); *Citistreet Equities LLC*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C9B020012, 2002 NASD LEXIS 25 (Apr. 2002) (firm fined $12,500 for failure to submit timely filings required to be reported under NASD rules and for failed to establish, maintain, and enforce procedures reasonably designed to ensure compliance with applicable NASD rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007466.pdf>; *Smith Barney Inc.,* NASD Letter of Acceptance, Waiver, and Consent, 1999 NASD LEXIS 109 (Mar. 1999) (firm fined $15,000 for failure to enforce written supervisory procedures and failure to supervise adequately and properly a registered representative), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007548.pdf>; *Smith Barney Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980107, 1999 NASD LEXIS 108 (Feb. 1999) (firm fined $17,000. for several violation relating to reporting requirements and failure to establish, maintain, and enforce adequate written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws, regulations, and rules regarding trade reporting and record keeping), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007549.pdf>; *Citicorp Financial Services Corp.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C07970003 (Mar. 1997) (firm fined $9,500 for multiple violations including failure to establish adequate written procedures concerning political contributions by firm personal including limitations on such contributions and the principal responsible for supervision) (on file with NASD and authors).

In re Citigroup Global Markets Inc., No. 04-91, 2004 NYSE Disc. Action LEXIS 108 (June 7, 2004) (firm fined $250,000 for violations including failure to supervise and implement adequate supervisory procedures), <http://www.nyse.com/pdfs/04-091.pdf>; *In re Citigroup Global Markets Inc.*, No. 03-182, 2003 NYSE Disc. Action LEXIS 199 (Oct. 1, 2003) (holding fine of $1,000,000 for failure to adequately ensure that certain activities were reasonably supervised), <http://www.nyse.com/pdfs/03-182-183.pdf>; *In re Citigroup Global Markets Inc.*, No. 03-72, 2003 NYSE Disc. Action LEXIS 80 (Apr. 22 2003) (holding payment of $400,000,000 for numerous violations in addition to the failure to establish and maintain adequate policies, systems, and procedures for supervision and control of its research and investment banking departments), <http://www.nyse.com/pdfs/03-072.pdf>; *In re Salomon*

Smith Barney Inc., No. 03-9, 2003 NYSE Disc. Action LEXIS 12 (Feb. 4, 2003) (imposing $90,000 fine for preparing and maintaining inaccurate records for orders and for failing to maintain appropriate procedures for the supervision of its order entry system and its block trading desk), <http://www.nyse.com/pdfs/03-009.pdf>; *In re Salomon Smith Barney Inc.*, No. 02-226, 2002 NYSE Disc. Action LEXIS 208 (Nov. 15, 2002) (firm fined $1.65 Million fine for multiple violations including failure to reasonably supervise and control the activities of its employees to assure compliance with Exchange Rules and federal securities laws relating to retention of electronic communications), <http://www.nyse.com/pdfs/02-223-227.pdf>.

Credit Suisse First Boston

In re Donaldson, Lufkin & Jenrette Securities Corp., Exchange Act Release No. 34,50272, 2004 SEC LEXIS 1878 (Aug, 26, 2004) (successor in interest firm fined $1 Million for failure to supervise employee who systematically defrauded over 60 customers), <http://www.sec.gov/litigation/admin/34-50272.htm>; *SEC v. Credit Suisse First Boston LLC,* Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *SEC v. Credit Suisse First Boston LLC*, Litigation Release 18110, 2003 SEC LEXIS 1010 (S.D.N.Y. Apr. 28, 2003) (firm fined $75 Million and assessed $75 Million as disgorgement for numerous serious violations including failure to maintain appropriate supervision over its research and investment banking operations), <http://www.sec.gov/litigation/litreleases/lr18110.htm>; *SEC v. Credit Suisse First Boston Corp.*, Litigation Release 17327, 2002 SEC LEXIS 147 (D.D.C. Jan. 22, 2002) (firm fined $100 Million and required to institute new supervisory system for multiple violations related to Initial Public Offerings), <http://www.sec.gov/litigation/litreleases/lr17327.htm>; *In re Certain Market Making Activities on Nasdaq*, Exchange Act Release No. 34,40906, 1999 SEC LEXIS 61 (Jan. 11, 1999) (firm fined $260,000 for failure to supervise its Nasdaq market making activities with a view to preventing future violations), <http://www.sec.gov/litigation/admin/34-40906.txt>; *In re Certain Market Making Activities on Nasdaq*, Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>; *In re CS First Boston Investment Management Corp.*, Exchange Act Release No. 34,40465, 1998 SEC LEXIS 2031 (Sep. 23, 1998) (firm fined $500,000 for numerous violations including serious supervisory infringements), <http://www.sec.gov/litigation/admin/337583.txt>; *In re Credit Suisse First Boston Corp.*, Exchange Act Release No. 33,7498, 1998 SEC LEXIS 137 (Jan. 29, 1998) (firm fined $800,000 for numerous serious violations and failure to reasonably supervise by not establishing adequate policies and procedures relating to disclosure in municipal securities transactions), <http://www.sec.gov/litigation/admin/337498.txt>.

Donaldson, Lufkin & Jenrette Securities Corp., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990063 (Aug. 2004) (firm fined $100,000 for failures when setting up a company including failure to establish and maintain a supervisory system) (on file with NASD and authors); Credit Suisse First Boston LLC, Settlement Agreement with Multiple Enforcement Agencies, 2003 NASD LEXIS 39 (June 2003) (agreement between ten top investment firms and multiple enforcement agencies assessing fines and penalties of $487.5 million for conflicts of interest between research and investment banking and finding that supervisory deficiencies existed at every firm), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_00744

6.pdf>; *Credit Suisse First Boston Corp*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CAF020001 (Feb. 2002) (firm fined 100 Million for taking millions of dollars from customers in inflated commissions in exchange for allocations of "hot" Initial Public Offerings which violated NASD supervisory requirements), *at* <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007468.pdf>; *Credit Suisse First Boston Corp.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS010063 (Jan. 2002) (firm fined 7,500 for numerous violations including absence of an adequate supervisory system) (on file with NASD and authors); *Credit Suisse First Boston Corp*., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS970009 (Dec. 2001) (firm fined 7,5000 for failure to honor published quotations and establish, maintain, and enforce adequate supervisory procedures) (on file with NASD and authors); *Credit Suisse First Boston Corp.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990030, 2000 NASD LEXIS 28 (Apr. 2000) (firm fined $40,000 for numerous violations related to short sale and failure to establish, maintain, and enforce adequate written supervisory procedures), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007534.pdf>; *Donaldson, Lufkin & Jenrette Securities Corp*., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990063, 1999 NASD LEXIS 127 (Aug. 1999) (firm fined $11,000 for violations and failed to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws, regulations, and NASD rules relating to transaction reporting of high yield corporate bonds), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007542.pdf>; *Credit Suisse First Boston Corp.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #MRD199700101 (Oct. 1998) (firm fined $40,000 for several violations related to short sale transactions and failure to establish, maintain and enforce adequate written supervisory procedures) (on file with NASD and authors); *CS First Boston Corp*., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS970007(A) (July 1997) (firm fined $6,000 for failure to report transactions within the allotted time and enforce supervisory procedures) (on file with NASD and authors).

In re Credit Suisse First Boston LLC, No. 03-138, 2003 NYSE Disc. Action LEXIS 131 (July 22, 2003) (firm fined $100,000 for violations related to release of material non public information and failure to provide appropriate procedures of supervision and control), <http://www.nyse.com/pdfs/03-138.pdf>; *In re Credit Suisse First Boston LLC*, No. 03-64, 2003 NYSE Disc. Action LEXIS 72 (Apr. 22, 2003) (firm fined $200 Million for violations related to the inappropriate influence by investment banking over research analysts and failure to establish and maintain adequate policies, systems, and procedures for supervision of such departments), <http://www.nyse.com/pdfs/03-064.pdf>.

Deutsche Bank

SEC v. Deutsche Bank Securities Inc., Litigation Release No. 18854, 2004 SEC LEXIS 1860 (S.D.N.Y. Aug. 26, 2004) (firm settled numerous violation relating to research analyst conflict of interest and failure to maintain appropriate supervision over its research operations for total payment of $87.5 Million), <http://www.sec.gov/litigation/litreleases/lr18854.htm>; *In re Deutsche Bank Securities, Inc.*, Securities Exchange Act Release No. 34,46937, 2002 SEC LEXIS 3083 (Dec. 3, 2002) (firm fined for failure to preserve electronic communications and failure to have supervisory system), <http://www.sec.gov/litigation/admin/34-46937.htm>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act

Release No. 34,40926, 1999 SEC LEXIS 44 (Jan. 11, 1999) (firm fined $1 Million for multiple violations including failure to reasonably supervise market making activities with a view to preventing future violations), <http://www.sec.gov/litigation/admin/34-40926.txt>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>.

Deutsche Bank Securities, Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS040117 (Sept. 2004) (firm fined $15,000 for reporting and supervisory deficiencies) (on file with NASD and authors); Deutsche Bank Securities, Inc., NASD Letter of Acceptance, Waiver, and Consent, 2004 NASD LEXIS 55 (Aug. 2004) (firm fined $486,000 for rule violations relating to trading in corporate high-yield bonds and required to revise deficient written supervisory procedures within 60 days), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007429.pdf>; *Deutsche Bank Securities, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS040105 (Aug. 2004) (firm cited for numerous violations including serious supervisory violations and ordered to pay total of $5 Million) (on file with NASD and authors); *Deutsche Bank Securities, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS040065, 2004 NASD LEXIS 44 (June 2004) (firm censured and fined $10,000 for inaccurate short interest position reports and failure of firm's supervisory system to comply with applicable securities rules, regulation and laws), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007430.pdf>; *Deutsche Bank Securities, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS040066, 2004 NASD LEXIS 44 (June 2004) (firm censured and fined $225,000 for numerous violations including failure of firm's supervisory system to comply with applicable securities rules, regulation and laws), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007430.pdf>; *Deutsche Bank Securities, Inc.*, Letter of Acceptance, Waiver, and Consent, NASD Case #CMS000104, 2000 NASD LEXIS 104 (Sept. 2000) (firm fined $25,000 and required to revise written supervisory procedures for multiple violations including failure of firm to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with pertinent securities laws, regulations, and NASD rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007529.pdf>; *Deutsche Morgan Grenfell/C.J. Lawrence, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990004 (Feb. 1999) (firm fined $7,500 for serious supervisory deficiencies) (on file with NASD and authors); *Deutsche Morgan Grenfell/C.J. Lawrence, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS960225, 1998 NASD LEXIS 38 (Apr. 1998) (firm censured and fined $12,500 for several violations including failure to establish, maintain and enforce sufficient written supervisory procedures with respect to trade reporting), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007561.pdf>.

In re Deutsche Bank Securities Inc., No. 04-128, 2004 NYSE Disc. Action LEXIS 113 (Aug. 2, 2004) (firm consented to censure and total payment of $87,5000,000 for numerous violations including failure to establish and maintain adequate policies, systems, and procedures for supervision), <http://www.nyse.com/pdfs/04-128.pdf>; *In re Deutsche Bank Securities, Inc.*, No. 03-221, 2003 NYSE Disc. Action LEXIS 243 (Dec. 18, 2003) (firm fined $725,000 for many serious violations including

failure to reasonably supervise and control the actions of employees, and failure to establish a separate system of follow-up and review), <http://www.nyse.com/pdfs/03-221.pdf>; *In re Deutsche Bank Securities, Inc.*, No. 02-223, 2002 NYSE Disc. Action LEXIS 208 (Nov. 15, 2002) (firm fined $1,650,000 for failure to store electronic communications and failure to reasonably supervise and control the activities of its employees), <http://www.nyse.com/pdfs/02-223-227.pdf>; *In re Deutsche Banc Alex. Brown Inc., No. 01-148* (Aug. 9, 2001) (firm fined $100,000 for numerous violations including failing to reasonably supervise and provide appropriate supervisory procedures to determine that delegated authority is being properly exercised), <http://www.nyse.com/pdfs/01-148.pdf>; *In re Deutsche Bank Securities Inc.*, No. 99-70, 1999 NYSE Disc. Action LEXIS 40 (June 23, 1999) (firm fined $175,000 for numerous violations including failure to supervise), <http://www.nyse.com/pdfs/99-070.pdf>; *In re BT Alex. Brown Inc.*, No. 98-09, 1998 NYSE Disc. Action LEXIS 39 (Jan. 27, 1998) (firm fined $90,000 for failing to make and preserve required records and failing to supervise and control employees), <http://www.nyse.com/pdfs/98-009.pdf>.

In re Deutsche Bank Securities Inc., AMEX Disciplinary Panel Decision, No. 02-12 (June 15, 2004) (firm filed inaccurate reports of short interest positions and failed to establish and maintain policies, systems, and procedures of supervision) (on file with NASD and authors).

Fleet Bank (Currently merging with Bank of America)

In re Fleet Specialist, Inc., Securities Exchange Act Release No. 34,49499, 2004 SEC LEXIS 744 (Mar, 30, 2004) (firm fined for multiple violations including failure to supervise), <http://www.sec.gov/litigation/admin/34-49499.htm>;

Robertson Stephens, Inc., NASD Letter of Acceptance, Waiver, and Consent, 2004 NASD LEXIS 34 (Feb. 2003) (firm fined a total of $28 Million for numerous violations including failure to supervise), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007434.pdf>; *Robertson Stephens, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, 2003 NASD LEXIS 9 (Feb 2003) (firm fined $28 Million for multiple violations including lack of adequate supervisory system), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007451.pdf>; *Robertson Stephens, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS020119, 2002 NASD LEXIS 68 (Sept. 2002) (firm fined $72,5000 for numerous violations including lack of appropriate supervisory procedures reasonable designed to achieve compliance with applicable securities laws and regulations concerning), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007459.pdf >; *Quick & Reilly, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C02020018, 2002 NASD LEXIS 38 (June 2002) (firm fined $50,000 for failure to have and maintain adequate supervisory procedures with respect to the detection and prevention of mutual fund sales practice abuses), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007462.pdf>; *Fleet Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS010005, 2001 NASD LEXIS 21 (Mar. 2001) (holding that firm pay $55,000 and revise written supervisory procedures within 60 days for several violations including the failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with applicable NASD rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007523.pdf>; *Fleet Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS000189, 2000 NASD LEXIS 103 (Oct. 2000)

(holding that firm pay $41,000 for firm's failure too establish, keep up, and implement written supervisory procedures reasonably designed to achieve compliance with applicable securities rules and regulations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007528.pdf>; *Fleet Securities, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990112 (Aug. 1999) ("...failed to establish, maintain and enforce written supervisory procedures reasonable designed to achieve compliance for the sort sales rule.") (on file with NASD and authors); *Robertson, Stephens & Company*, NASD Letter of Acceptance, Waiver, and Consent, 1998 NASD LEXIS 96 (Sept. 1998) (firm fined $12,500 for violations related to honoring published quotation and failure to establish, maintain, and enforce written supervisory procedures designed to achieve compliance with the applicable securities laws), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007554.pdf>; *Nash, Weiss & Co.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #ETR109700178 (June 1998) (firm fined $4,000 for violations regarding limit order protections, best execution, act reporting and written supervisory procedures) (on file with NASD and authors); *Nash, Weiss & Co.*, NASD Letter of Acceptance, Waiver, and Consent (Feb. 1998) (firm fined $16,000 for illegal trade reporting and failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable rules), *at* <http://www.nasdr.com/pdf-text/9802dis.txt>; *Nash, Weiss & Co.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS970014 (Aug. 1997) (firm fined $6,000 for multiple violations including failure to establish, maintain, and enforce written supervisory procedures) (on file with NASD and authors); *Robertson Stephens, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C01970007 (Jan. 1997) (firm fined $1,000 for failure to establish and implement written supervisory procedures regarding MSRB rules) (on file with NASD and authors).

In re Fleet Specialist, Inc., No. 04-49, 2004 NYSE Disc. Action LEXIS 44 (Mar. 29, 2004) (firm sanctioned for numerous deficiencies including failure to establish adequate policies, procedures, or systems to detect fraudulent conduct and failure to reasonably supervise certain specialists), <http://www.nyse.com/pdfs/04-049.pdf>; *In re Quick & Reilly, Inc.*, No. 03-206, 2003 NYSE Disc. Action LEXIS 221 (Nov. 12, 2003) (firm fined $175,000 for several violations including failure to establish and maintain appropriate procedures for supervision and control), <http://www.nyse.com/pdfs/03-206.pdf>; *In re BancBoston Robertson Stephens Inc.*, No. 99-153, 1999 NYSE Disc. Action LEXIS 124 (Nov. 15, 1999) (firm fined $125,000 for failure to establish an adequate separate system of follow-up and failure to properly register certain supervisory personnel), <http://www.nyse.com/pdfs/99-153.pdf>.

Goldman, Sachs & Co.

In re Goldman, Sachs & Co., Securities Exchange Act Release No. 34,49953, 2004 SEC LEXIS 1397 (July 1, 2004) (firm fined $2 Million for violations related to four international public offerings for which Goldman served as underwriter including failure to reasonably supervise its employees), <http://www.sec.gov/litigation/admin/33-8434.htm>; *SEC v. Goldman, Sachs & Co.,* Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *In re Goldman, Sachs & Co.,* Securities Exchange Act No. 34,48436, 2003 SEC LEXIS 2100 (Sept. 4, 2003) (firm fined $5 Million for various deficiencies including failure to maintain policies and procedures specifically

addressed to the possibility of non-public information obtained form outside consultants), <http://www.sec.gov/litigation/admin/34-48436.htm>; *SEC v. Goldman, Sachs & Co.*, Litigation Release 18113, 2003 SEC LEXIS 1007 (S.D.N.Y. Apr. 28, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including failure to maintain appropriate supervision over its research and investment banking operations.), <http://www.sec.gov/litigation/litreleases/lr18113.htm>; *In re Deutsche Bank Securities, Inc.*, Securities Exchange Act Release No. 34,46937, 2002 SEC LEXIS 3083 (Dec. 3, 2002) (firm fined for failure to preserve electronic communications and failure to have supervisory system), <http://www.sec.gov/litigation/admin/34-46937.htm>.

Goldman, Sachs & Co., NASD Letter of Acceptance, Waiver, and Consent, 2004 NASD LEXIS 55 (Aug. 2004) (firm fined for rule violations relating to trading in corporate high-yield bonds and required to revise deficient written supervisory procedures within 60 days), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007429.pdf>; *Goldman, Sachs & Co.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS040106 (July 2004) (firm ordered to pay $4,656,425 in fines and disgorgements for multiple violations including failure of the supervisory system to achieve compliance) (on file with NASD and authors); *Goldman, Sachs & Co.,* Settlement Agreement with Multiple Enforcement Agencies, 2003 NASD LEXIS 39 (June 2003) (agreement between ten top investment firms and multiple enforcement agencies assessing fines and penalties of $487.5 million for conflicts of interest between research and investment banking and finding that supervisory deficiencies existed at every firm), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *Goldman, Sachs & Co.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS000016, 2000 NASD LEXIS 28 (Apr. 2000) (firm fined $17,500 for several violations related to reporting requirements including failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws, rules, and regulations), http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007534.pdf.

In re Goldman, Sachs & Co., No. 03-65, 2003 NYSE Disc. Action LEXIS 73 (Apr. 22 2003) (firm ordered to pay total of $110 Million for multiple violations related to inappropriate influences on research division and failure to establish and maintain adequate policies, systems and procedures for supervision and control of its research and investment banking divisions), <http://www.nyse.com/pdfs/03-065.pdf>; *In re Goldman, Sachs & Co.*, No. 02-224, 2002 NYSE Disc. Action LEXIS 208 (Nov. 15, 2002) (firm fined for failure to preserve electronic communications relating to the business of the firm and failure to reasonably supervise and control the activities of its employees), <http://www.nyse.com/pdfs/02-223-227.pdf>.

HSBC

HSBC Securities Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case # C10030122 (Jan. 2003) (firm fined $7,500 for reporting violations and failure to establish and maintain an adequate supervisory system) (on file with NASD and authors); *HSBC Securities Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS020140, 2002 NASD LEXIS 83 (Oct. 2002) (firm fined $10,000 and required to revise its written supervisory procedures for multiple failures including failure of the supervisory system), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007458.pdf>; *HSBC Securities Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case

#C8A990038 (May 1999) (firm fined $7,500 several deficiencies including failure to establish and maintain an adequate supervisory system) (on file with NASD and authors); HSBC Securities Inc., NASD Regulation Settlement, NASD Case #MRD 199801874 (Oct. 1998) (firm fined $8,000 for multiple violations including failure to establish and maintain an adequate supervisory system) (on file with NASD and authors).

In re HSBC Securities, Inc., No. 99-24, 1999 NYSE Disc. Action LEXIS 24 (Mar. 17, 1999) (firm fined $50,000 for multiple violations including failure to provide appropriate supervisory control, follow-up, and review), <http://www.nyse.com/pdfs/99-024.pdf>.

J.P. Morgan

SEC v. J.P. Morgan Securities Inc., Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *SEC v. J.P. Morgan Securities Inc.*, Litigation Release 18114, 2003 SEC LEXIS 1006 (S.D.N.Y. Apr. 28, 2003) (multi-million dollar fine for violations related to research analyst conflict of interest and failure to maintain appropriate supervision over its research and investment banking operations), <http://www.sec.gov/litigation/litreleases/lr18114.htm>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64; 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40910, 1999 SEC LEXIS 59 (Jan. 11 1999) (firm fined $1,275,000 for multiple violations including failure to reasonably supervise its Nasdaq market making activities), <http://www.sec.gov/litigation/admin/34-40910.txt>.

J. P. Morgan Invest, LLC, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS030140, 2003 NASD LEXIS 53 (Aug. 2003) ("[T]he firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations concerning locked and crossed markets."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007443.pdf>; *J.P. Morgan Securities Inc.,* Settlement Agreement with Multiple Enforcement Agencies, 2003 NASD LEXIS 39 (June 2003) (agreement between ten top investment firms and multiple enforcement agencies assessing fines and penalties of $487.5 million for conflicts of interest between research and investment banking and finding that supervisory deficiencies existed at every firm), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *J. P. Morgan Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CAF030006 (Feb. 2003) (firm fined $1 Million for several violations including failure to establish, maintain and enforce a supervisory system reasonably designed to achieve compliance with applicable federal securities, laws and NASD rules) (on file with NASD and authors); *J. P. Morgan Securities, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS020184 (Oct. 2002) (firm fined $7,500 for multiple deficiencies including serious supervisory procedures) (on file with NASD and authors); *J. P. Morgan Securities, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS010052, 2001 NASD LEXIS 96 (July 2001) ("The NASD also determined that the firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to applicable securities laws and regulations concerning OATS reporting and the firm failed to report to Fixed Income Pricing SystemSM (FIPSSM) transactions in FIPS securities within five minutes after execution."), <http://

www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007519.pdf>; *J. P. Morgan Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, 2000 NASD LEXIS 107 (July 2000) (firm fined $200,000 for violations related to SEC Limit Order Display Rule and for failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007531.pdf>; *Chase Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS000012, 2000 NASD LEXIS 28 (Apr. 2000) (firm $12,500 for several violations including failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws, regulations, and NASD rules concerning transaction reporting), http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007534.pdf.

In re J.P. Morgan Invest, LLC. No. 04-113, 2004 NYSE Disc. Action LEXIS 92 (July 8, 2004) (firm fined $120,000 for various violations including failure to ensure compliance with rules relating to financial and operational areas through adequate supervision), <http://www.nyse.com/pdfs/04-113.pdf>; *In re J.P. Morgan Securities Inc.*, No. 03-68, 2003 NYSE Disc. Action LEXIS 76 (Apr. 22 2003) (firm fined $80 Million for deficiencies related to research analysts' conflict of interests and failure to establish and maintain adequate policies, systems, and procedures for supervision), <http://www.nyse.com/pdfs/03-068.pdf>.

Lehman Brothers

SEC v. Lehman Brothers, Inc., Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *In re Lehman Brothers, Inc.,* Securities Exchange Act No. 34,48336, 2003 SEC LEXIS 1950 (Aug. 14, 2003) (firm fined $2.55 Million for failure to reasonably supervise employee broker who defrauded customers by lying about purchases and sales of securities, misappropriating funds and securities, and sent falsified account documents), <http://www.sec.gov/litigation/admin/34-48336.htm>; *SEC v. Lehman Brothers Inc.*, Litigation Release 18116, 2003 SEC LEXIS 1004 (S.D.N.Y. Apr. 28, 2003) (settled several serious violations of SEC, NASD, NYSE rules, regulations and laws including failure to maintain appropriate supervision over its research and investment banking operations), <http://www.sec.gov/litigation/litreleases/lr18116.htm>; *In re Findings Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40913, 1999 SEC LEXIS 56 (Jan. 11, 1999) (firm fined $212,500 for a variety of deficiencies including failure to reasonably supervise its Nasdaq market making activities with a view to preventing future violations), <http://www.sec.gov/litigation/admin/34-40913.txt>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64; 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>; *In re Lehman Brothers Inc.,* Securities Exchange Act Release No. 34,37673, 1996 SEC LEXIS 2453, 52 S.E.C. 982 (Sept. 12, 1996) (firm $50,000 for multiple violations including failure to reasonably supervise registered representative), <http://www.sec.gov/litigation/admin/3437673.txt>.

Lehman Brothers, Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS040140 (Sept. 2004) (firm fined $13,000 and required to revise written supervisory procedures for multiple violations including failure of supervisory system to achieve compliance with applicable securities rules,

regulations and laws) (on file with NASD and authors); *Lehman Brothers, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS040098, 2004 NASD LEXIS 58 (Sept. 2004) (firm fined $20,000 for multiple violations including failure of firm's supervisory procedures to achieve compliance with respect to applicable securities laws and regulations and NASD rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_010474.pdf>; *Lehman Brothers Inc.,* Settlement Agreement with Multiple Enforcement Agencies, 2003 NASD LEXIS 39 (June 2003) (agreement between ten top investment firms and multiple enforcement agencies assessing fines and penalties of $487.5 million for conflicts of interest between research and investment banking and finding that supervisory deficiencies existed at every firm), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *Lehman Brothers, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS030022 (Feb. 2003) (firm fined $5,000 and ordered to revise written supervisory procedures top address several violations) (on file with NASD and authors); *Lehman Brothers, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS000158, 2000 NASD LEXIS 103 (Oct. 2000) ("[F]irm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations..."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007528.pdf>; *Lehman Brothers, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C3B990021, 1999 NASD LEXIS 132 (July 1999) (firm fined $100,000 for violations related to short sales, confirmation disclosures, free-riding violations and multiple instances of inadequate supervision), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007543.pdf>; *Lehman Brothers, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980094 (Oct. 1998) (firm $7,500 for multiple violations including failure to establish and enforce written supervisory procedures) (on file with NASD authors); *Lehman Brothers, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980059 (July 1998) (firm fined $9,500 for multiple violations including failure to establish, maintain and enforce adequate written supervisory procedures reasonably designed to achieve compliance with NASD conduct rules) (on file with NASD and authors); *Lehman Brothers, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS970020 (July 1997) (firm fined $9,000 for failure to honor quotations disseminated on Nasdaq system and failure to establish, maintain and enforce adequate supervisory procedures) (on file with NASD and authors); *Lehman Brothers, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS960023 (July 1996) (firm fined $2,000 for passive market making conduct and failure to enforce supervisory procedures) (on file with NASD and authors).

In re Lehman Brothers Inc., No. 04-65, 2004 NYSE Disc. Action LEXIS 57 (Apr. 27, 2004) (firm fined $175,000 for several deficiencies including failure to reasonably supervise and implement adequate controls), <http://www.nyse.com/pdfs/04-065.pdf>; *In re Lehman Brothers Inc.*, No. 03-157, 2003 NYSE Disc. Action LEXIS 145 (Aug. 6, 2003) (firm fined $2.5 Million for failure to adequately implement policies and procedures to supervise branch office manager who engaged in fraudulent conduct), <http://www.nyse.com/pdfs/03-157.pdf>; *In re Lehman Brothers Inc.*, No. 03-66, 2003 NYSE Disc. Action LEXIS 74 (Apr. 22 2003) (firm fined $80 Million for violations relating to inappropriate influences by investment banking over research analysts and failures to establish and maintain adequate policies, systems

and procedures for supervision and control), <http://www.nyse.com/pdfs/03-066.pdf>; *In re Lehman Brothers Inc.*, No. 02-62, 2002 NYSE Disc. Action LEXIS 35 (Mar. 21 2002) (firm fined $250,000 for violations relating to allowing persons with inactive registrations to perform in capacities which required registration and failure to provide appropriate supervisory procedures), <http://www.nyse.com/pdfs/02-062.pdf>; *In re Lehman Brothers Inc.*, No. 00-165, 2000 NYSE Disc. Action LEXIS 180 (Sept. 28, 2000) (firm fined $250,000 for violations related to short sales, inaccurate book keeping, and failure to establish and maintain adequate supervisory procedures), <http://www.nyse.com/pdfs/00-165.pdf>; *In re Lehman Brothers Inc.*, No. 96-81, 1996 NYSE Disc. Action LEXIS 85 (Aug. 8, 1996) (firm $125,000 for various deficiencies including failure to provide appropriate supervision of financial and operational requirements), <http://www.nyse.com/pdfs/96-081.pdf>.

Merrill Lynch, Pierce, Fenner & Smith

SEC v. Merrill Lynch, Pierce, Fenner & Smith Incorporated, Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *SEC v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, Litigation Release No. 18115, 2003 SEC LEXIS 1005 (S.D.N.Y. April 28, 2003) (settling numerous claims including failure to maintain appropriate supervision over its research and investment banking operations and assessing $100 million in fines), <http://www.sec.gov/litigation/litreleases/lr18115.htm>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40915, 1999 SEC LEXIS 48, 53 S.E.C. 1169 (Jan. 11, 1999) (holding that Merrill Lynch failed to reasonably supervise Nasdaq trading personnel and ordering a fine of $472,500), <http://www.sec.gov/litigation/admin/34-40915.txt>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>.

Merrill Lynch, Pierce, Fenner & Smith Incorporated, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05040022, 2004 NASD LEXIS 44 (June 2004) (firm fined $75,000 for failure to institute, maintain, and enforce adequate systems to supervise and monitor activities in connection with the sale of variable life insurance products), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007430.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS030251 (Dec. 2003) ("[T]he firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws and regulations concerning the reporting of options positions to NASD."), *at* <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007439.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS030142, 2003 NASD LEXIS 53 (Aug. 2003) (finding that supervisory systems did not provide for supervision reasonably designed to achieve compliance with applicable securities laws and regulations and requiring a revisions of supervisory procedures concerning obtaining and documenting three quotations in non-NASDAQ securities, <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007443.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS030108, 2003 NASD LEXIS 39 (June 2003) ("[T]he firm's supervisory system did

not provide for supervision reasonably designed to achieve compliance with applicable securities laws and regulations concerning SEC Rule 15C2-11 and NASD Marketplace Rule 6740."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Incorporated*, Settlement Agreement with Multiple Enforcement Agencies, 2003 NASD LEXIS 39 (June 2003) (agreement between ten top investment firms and multiple enforcement agencies assessing fines and penalties of $487.5 million for conflicts of interest between research and investment banking and finding that supervisory deficiencies existed at every firm), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C10020077, 2002 NASD LEXIS 83 (Oct. 2002) ("[T]he firm was censured, fined $65,000, and required to provide to NASD within 60 days a copy of the firm's written procedures regarding the accurate and prompt submission of all Form U-5 filings pertaining to the termination of persons for whom the firm has maintained a registration with NASD...."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007458.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case # CMS000225, 2000 NASD LEXIS 101 (Dec. 2000) (announcing a fine of $97,000 for multiple violations including the failure to implement a reasonably designed supervisory system), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007526.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C11000026, 2000 NASD LEXIS 101 (Dec. 2000) ("[T]he firm failed to reasonably enforce its written supervisory procedures concerning trading activity and the detection of potentially unsuitable and excessive trading."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007526.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990035, 1999 NASD LEXIS 6 (May 1999) ("[T]he firm failed to establish and maintain written procedures reasonably designed to achieve compliance with the applicable securities laws and regulations SEC and NASD firm quote rules."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007545.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, 1997 NASD LEXIS 11, (Feb. 1997) ("[T]he firm failed to establish, maintain, and enforce written supervisory procedures...."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007590.pdf>; *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C8A970014 (Mar. 1997) ("[T]he firm...failed to establish, maintain and/or enforce written supervisory procedures and/or failed to otherwise properly supervise....") (case on file with NASD and authors).

In re Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 04-30, 2004 NYSE Disc. Action LEXIS 28 (Mar. 8, 2004) (ruling that the firm construct and implement supervisory and control policies for employees and fined $625,000), <http://www.nyse.com/pdfs/04-030.pdf>; *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 03-99, 2003 NYSE Disc. Action LEXIS 12 (June 4, 2003) (fining firm $900,000 for failing to establish and maintain appropriate supervisory procedures necessary for numerous specified practices), <http://www.nyse.com/pdfs/03-099.pdf>; *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 03-67,2003 NYSE Disc. Action LEXIS 75 (Apr. 22, 2003) (firm was censured and fined $200 million for numerous

violations including inadequate and unreasonably supervisory systems), <http://www.nyse.com/pdfs/03-067.pdf>; *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 02-228, 2002 NYSE Disc. Action LEXIS 209 (Nov. 15, 2002) (holding a fine of $300,000 and censure for several violations including a lack of adequate supervisory systems ensuring compliance with Exchange Rules and federal securities laws related to employment of statutorily disqualified individuals), <http://www.nyse.com/pdfs/02-228.pdf>; *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 00-109, 2000 NYSE Disc. Action LEXIS 108 (June 29, 2000) (assessing a $250,000 fine and finding that the firm had numerous violations including failure to reasonably supervise and implement appropriate supervisory procedures and controls over certain accounting functions), <http://www.nyse.com/pdfs/00-109.pdf>; *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 98-89, 1998 NYSE Disc. Action LEXIS 96 (Aug. 26, 1998) ("The Firm failed to have appropriate procedures of supervision and control and follow-up and review to assure that orders entered and executed...in accordance with Exchange Rules and Federal securities regulations."), <http://www.nyse.com/pdfs/98-089.pdf>.

In re Merrill Lynch, Pierce, Fenner & Smith, Inc., AMEX Disciplinary Panel Decision No. 02-02 (Nov. 4, 2003) (firm fined $30,000 and censured for several violations including a failure to develop, maintain or enforce supervisory procedures reasonably designed to detect or prevent the multiple entry of odd-lot orders through the Firm's PER system) *at* <http://www.amex.com/atamex/regulation/discipline/ml_pierce_fenner_smith_decision_110403.pdf>.

Morgan Stanley

SEC v. Morgan Stanley & Co. Inc., Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *SEC* v. Morgan Stanley & Co. Inc., Litigation Release 18117, 2003 SEC LEXIS 1003 (Apr. 28, 2003) (firm fined $50 Million and assessed $75 Million over five years to provide clients with independent research for multiple violations including failure to maintain appropriate supervision over research and investment banking operations), <http://www.sec.gov/litigation/litreleases/lr18117.htm>; *In re Deutsche Bank Securities, Inc.*, Securities Exchange Act Release No. 34,46937, 2002 SEC LEXIS 3083 (Dec. 3, 2002) (firm fined for failure to preserve electronic communications and failure to have supervisory system), <http://www.sec.gov/litigation/admin/34-46937.htm>; *In re Dean Witter Reynolds Inc.*, Securities Exchange Act Release 34,46578, 2002 SEC LEXIS 2489 (Oct. 1, 2002) (firm fined $500,00 for myriad of violations including failure to supervise registered representative to prevent and detect violations of the federal securities laws), <http://www.sec.gov/litigation/admin/34-46578.htm>; *In re Dean Witter Reynolds Inc.*, Securities Exchange Act Release 34,43215, 2000 SEC LEXIS 1772 (Aug. 28, 2000) (firm fined $200,00) and ordered to remit over $276,000 to customers for multiple supervisory violations including failure to supervise registered representative and failure to implement written supervisory procedures), <http://www.sec.gov/litigation/admin/34-43215.htm>; *In re Certain Market Making Activities on Nasdaq* Securities Exchange Act Release No. 34,40916, 1999 SEC LEXIS 50 (Jan. 11, 1999) (firm fined $350,000 for multiple violations including failure reasonably to supervise its Nasdaq market making activities with view to preventing future violations), <http://www.sec.gov/litigation/admin/34-40916.txt>; *In re Certain Market Making Activities on Nasdaq* Securities Exchange Act Release No. 34,40905, 1999 SEC LEXIS 46 (Jan. 11, 1999) (firm fined $187,500 for multiple violations including failure to reasonably supervise Nasdaq trading activity with a view to preventing future violations), <http://www.sec.gov/litigation/

admin/34-40905.txt>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64; 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>.

Morgan Stanley DW Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C9A040034 (July 2004) (firm fined $2.2 Million for multiple violations including serious defects in supervisory systems) (on file with NASD and authors); Morgan Stanley DW Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C10030077, 2003 NASD LEXIS 73 (Oct. 2003) (firm fined $2 Million for prohibited mutual fund sales contests and failure to have any supervisory systems or procedures in place to detect and prevent widespread misconduct), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007441.pdf>; *Morgan Stanley & Co. Inc.*, Settlement Agreement with Multiple Enforcement Agencies, 2003 NASD LEXIS 39 (June 2003) (agreement between ten top investment firms and multiple enforcement agencies assessing fines and penalties of $487.5 million for conflicts of interest between research and investment banking and finding that supervisory deficiencies existed at every firm), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *Morgan Stanley DW Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS030113 (Apr. 2003) (firm fined $6,000 for several violations including failure of firm's written supervisory system) (on file with NASD and authors); *Morgan Stanley DW, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS020050, 2002 NASD LEXIS 31 (May 2002) (firm fined $25,500, and required to revise its written supervisory procedures for several violations related to reporting of short interest and options position including failure of supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws and regulations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007464.pdf>; *Dean Witter Reynolds, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS010034, 2001 NASD LEXIS 9 (May 2001) (firm fined $15,000 and required to revise its written supervisory procedures for violations relating to firm quote rules including failure of firm's supervisory system to provide for supervision reasonably designed to achieve compliance with applicable securities laws and regulations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007521.pdf>; *Morgan Stanley & Co. Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS000199, 2001 NASD LEXIS 2 (Jan. 2001) (firm fined $200,000 for multiple violations including failure to provide reasonable supervision of business and failure to establish and maintain adequate procedures and controls to ensure compliance with reporting obligations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007525.pdf>; *Morgan Stanley & Co., Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990084, 1999 NASD LEXIS 124 (Sept. 1999) (firm $40,000 for multiple violations including failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws, regulations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007541.pdf>; *Morgan Stanley & Co., Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980090, 1999 NASD LEXIS 137 (Jan. 1999) (firm fined $60,000 for several violations including failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with

applicable securities laws and regulations concerning SEC and NASD firm quote rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007550.pdf>; *Morgan Stanley & Co., Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980004, 1998 NASD LEXIS 38 (Apr. 1998) (firm fined $26,000 for reporting transactions to ACT in violation of applicable securities laws and regulations and failure to establish, maintain, and enforce adequate written supervisory procedures), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007561.pdf>; *Dean Witter Reynolds, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980010 (Feb. 1998) (firm fined $6,000 for several violations including failure to establish, maintain and enforce written supervisory procedures reasonably designed to achieve compliance with order protection obligations) (on file with NASD and authors); *Dean Witter Reynolds, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS970035, 1997 NASD LEXIS 117 (Dec. 1997) (firm fined $13,000 for several violations including failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws and regulations regarding trade reporting and the limit order protection interpretation), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007567.pdf>; *Morgan Stanley & Co. Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS960248 (Jan. 1997) (firm fined $35,000 for multiple violations including failure to reasonably supervise) (on file with NASD and authors); *Morgan Stanley & Co. Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS960235 (Oct. 1996) (firm fined $1 Million for numerous violations including serious supervisory deficiencies) (on file with NASD and authors); *Dean Witter Reynolds, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05960037 (June 1996) (firm fined $5,000 for multiple violations including failure to establish, maintain and enforce proper supervisory procedures) (on file with NASD and authors).

In re Morgan Stanley & Co., Inc., No. 04-66, 2004 NYSE Disc. Action LEXIS 56, (Apr. 27, 2004) (firm fined $140,000 for multiple violations including failure to provide appropriate supervision and control of business activities and establish a separate system of follow up and review to ensure compliance with rules and regulations), <http://www.nyse.com/pdfs/04-066.pdf>; *In re Morgan Stanley & Co. Inc.*, No. 03-224, 2003 NYSE Disc. Action LEXIS 240 (Dec. 18, 2003) (firm fined $800,000 for multiple violations including failure to reasonably supervise and control the business activities of firm and provide for appropriate procedures of supervision and control to ensure compliance with securities laws and regulations), <http://www.nyse.com/pdfs/03-224.pdf>; *In re Morgan Stanley & Co., Inc.*, No. 03-69, 2003 NYSE Disc. Action LEXIS 77 (Apr. 22, 2003) (firm assessed total payment of $125 Million for multiple violations including failure to establish and maintain adequate policies, systems and procedures for supervision and control of research and investment banking departments), <http://www.nyse.com/pdfs/03-069.pdf>; *In re Morgan Stanley & Co., Inc.*, No. 02-225, 2002 NYSE Disc. Action LEXIS 208 (Nov. 15, 2002) (firm fined $1,650,000 for several violations including failure to reasonably supervise and control the activities of employees to assure compliance with Exchange Rules and federal securities laws relating to retention of electronic communications), <http://www.nyse.com/pdfs/02-223-227.pdf>; *In re Morgan Stanley & Co. Inc.*, No. 00-166, 2000 NYSE Disc. Action LEXIS 181 (Sept. 28, 2000) (firm fined $200,000 for submitting inaccurate reports of short positions, failure to report violations, and failure to maintain appropriate procedures of supervision

and control), <http://www.nyse.com/pdfs/00-166.pdf>; *In re Dean Witter Reynolds, Inc.*, No. 00-134, 2000 NYSE Disc. Action LEXIS 130 (Aug. 16, 2000) (firm fined $750,000 for multiple violations including failure to provide supervisory procedures and controls), <http://www.nyse.com/pdfs/00-134.pdf>; *In re Morgan Stanley & Co. Inc.*, No. 99-135, 1999 NYSE Disc. Action LEXIS 117 (Sept. 23, 1999) (firm fined $75,000 for multiple violations including failure to establish and maintain policies, systems and procedures for supervision and control of its trading activities), <http://www.nyse.com/pdfs/99-135-136.pdf>.

In re Morgan Stanley & Co. Inc., AMEX Disciplinary Panel Decision No. 99-14 (June 21, 2000) (firm fined $200,00 for multiple violations including failure to establish and maintain appropriate policies, systems and procedures of supervision and control including written supervisory procedures) (on file with NASD and authors).

Oppenheimer

In re Josephthal & Co. Inc., Exchange Act Release No. 34,46039, 2002 SEC LEXIS 1515 (June 6, 2002) (firm forced to pay civil penalty of $75,000 for failure to reasonably supervise and provide appropriate procedures of supervision and control over numerous activities, including failing to conduct, and to make a written record of, annual branch office inspection), <http://www.sec.gov/litigation/admin/34-46039.htm>; *In re Fahnestock & Co. Inc.*, Exchange Act Release No. 34,43054, 2000 SEC LEXIS 1483 (July 19, 2000) (firm fined $20,000 for failure to supervise registered representative who misappropriated customer funds), <http://www.sec.gov/litigation/admin/34-43054.htm>; *In re Certain Market Making Activities on Nasdaq*, Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>; *In re Certain Market Making Activities on Nasdaq*, Exchange Act Release No. 34,40918, 1999 SEC LEXIS 53 (Jan. 11, 1999) (CIBC Oppenheimer fined $225,000 for multiple violations including Oppenheimer Corp. Corp. failed reasonably to supervise its Nasdaq market making activities with a view to preventing future violations), <http://www.sec.gov/litigation/admin/34-40918.txt>.

Josephthal & Co., Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS020084, 2002 NASD LEXIS 38 (Apr. 2002) (firm fined $21,500 for multiple violations including failure of firm's supervisory system to provide for supervision reasonably designed to achieve compliance with respect to applicable securities laws and regulations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007462.pdf>; *CIBC Oppenheimer*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CAF000020, 2000 NASD LEXIS 107 (July 2000) (firm fined $50,000 for failure to have adequate supervisory systems to oversee and monitor several transaction types and failure to establish and maintain a system to supervise the activities of each registered representatives and associated persons), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007531.pdf>; *Fahnestock & Company, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990129, 1999 NASD LEXIS 114 (Dec. 1999) (firm fined $14,000 for multiple violations including failure to establish and maintain written supervisory procedures reasonably designed to achieve compliance in a variety of areas), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007538.pdf>; *Oppenheimer & Co., Inc.*, NASD Letter of Acceptance, Waiver, and Consent, 1997 NASD LEXIS 117 (Dec. 1997) (firm fined $14,000 for several violations including failure to establish, maintain, and enforce written

supervisory procedures reasonably designed to achieve compliance with the applicable securities laws and regulations regarding trade reporting, the limit order protection interpretation, and record keeping), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007567.pdf>; *Fahnestock & Company, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS960226, 1997 NASD LEXIS 49 (June 1997) (firm fined $10,000 for several deficiencies including failure to establish, maintain, and enforce written supervisory procedures reasonably designed to detect and deter trade reporting violations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007586.pdf>.

In re Josephthal & Co., Inc., No. 03-126, NYSE Disc. Action LEXIS 138 (July 9, 2003) (firm fined $150,000 for numerous violations including failure to establish and maintain appropriate procedures for supervision and control), <http://www.nyse.com/pdfs/03-126.pdf>; *In re Fahnestock & Co., Inc.*, No.03-100, 2003 NYSE Disc. Action LEXIS 123 (June 4, 2003) (firm fined $500,000 for multiple violations including failure to supervise and control and provide for appropriate procedures of supervision and control over its business activities), <http://www.nyse.com/pdfs/03-100-101.pdf>; *In re Josephthal & Co., Inc.*, No. 00-123, 2000 NYSE Disc. Action LEXIS 124 (July 25, 2000) (firm fined $200,000 for multiple violations including failure to supervise certain business activities and failure to have adequate supervisory procedures), <http://www.nyse.com/pdfs/00-123.pdf>; *In re Fahnestock & Co., Inc.*, No. 98-48, 1998 NYSE Disc. Action LEXIS 21 (May 12, 1998) (firm fined $100,00 for various deficiencies including failure to provide for adequate supervisory controls to assure compliance with certain financial and operational rules and regulations of the Exchange and the SEC and failed to establish adequate controls, including a system of follow-up and review to assure compliance with rules and regulations regarding), <http://www.nyse.com/pdfs/98-048.pdf>; *In re Josephthal Lyon & Ross Inc.*, No. 97-33, 1997 NYSE Disc. Action LEXIS 95 (Mar. 26, 1997) (firm fined $350,000 for failure to reasonably supervise a wide variety of business activities), <http://www.nyse.com/pdfs/97-033.pdf>; *In re Oppenheimer & Co., Inc.*, No. 97-32, 1997 NYSE Disc. Action LEXIS 96 (Mar. 26, 1997) (firm fined $60,000 for several deficiencies including failure to maintain appropriate procedures of supervision for reporting and registration requirements), <http://www.nyse.com/pdfs/97-032.pdf>.

Prudential (Currently merging with Wachovia)

In re Prudential Securities, Inc., Securities Exchange Act Release No. 34,48149, 2003 SEC LEXIS 1614 (July 10, 2003) (firm fined $300,00 for both failure to supervise employee who engaged in improper sales and for lacking effective systems to monitor and enforce firm's policies and procedures) <http://www.sec.gov/litigation/admin/34-48149.htm>; *In re Prudential Securities Inc.*, Securities Act Release No. 33,7945, 2001 SEC LEXIS 155 (Jan. 29, 2001) (firm fined $800,000 for several serious violations including failure to reasonably supervise employee) <http://www.sec.gov/litigation/admin/33-7945.htm>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (Prudential and numerous other firms were sanctioned for several other violations including failure to reasonably supervise) <http://www.sec.gov/litigation/admin/34-40900.txt>; *In re Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 34,40921, 1999 SEC LEXIS 41 (Jan. 11, 1999) (firm fined $1 million for several abuses include failure to reasonably supervise the firm's Nasdaq market making activities with a view to preventing future violation of relevant statutes and regulations) <http://www.sec.gov/litigation/admin/34-40921.txt>.

Prudential Equity Group, LLC, NASD Letter of Acceptance,

Waiver, and Consent, NASD Case #CMS040128, 2004 NASD LEXIS 62 (Oct. 2004) (firm fined $30,000 for multiple violations failure of supervisory system to provide for supervision reasonably designed to achieve compliance with applicable securities laws and regulations) (on file with NASD and authors); *Prudential Investment Management Services LLC*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05040008/ C9B040005 (Jan. 2004) (firm fined $2 Million for multiple violations including failure to adequately supervise the activities of its associated persons) (on file with NASD and authors); *Prudential Securities Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CAF030048, 2003 NASD LEXIS 82 (Nov. 2003) ("[F]irm failed to establish and maintain a supervisory system reasonably designed to achieve compliance with federal securities laws, regulations, and NASD rules with respect to the sale of unregistered securities."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007440.pdf>; *Pruco Securities*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C9B010051, 2001 NASD LEXIS 95 (Aug. 2001) (holding fine of $50,000 for failure to file customer complaints with NASD and failing to create, preserve, and enforce procedures designed to comply with the NASD customer-complaint-reporting requirement), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007518.pdf>; *Prudential Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C06010005, 2001 NASD LEXIS 99 (Apr. 2001) (firm was censured, fined and settled both charges of deficient supervisory procedures with respect to suitability reviews and failure to enforce firm's written procedures relating to sale of annuities), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007522.pdf>; *Prudential Securities Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05000050, 2001 NASD LEXIS 21 (Mar. 2001) ("The findings also stated that the firm failed to establish, maintain, and enforce written supervisory procedures that would ensure the proper registration of all persons actively engaged in the management of the firm's investment banking or securities business."), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007523.pdf>; *Pruco Securities Corp. Inc.*, NASD Letter of Acceptance, Waiver, And Consent, NASD Case #CAF990010, 1999 NASD LEXIS 127 (Aug. 1999) (fining firm $20 million for several violations relating to the sale of variable life insurance policies including a failure to create, uphold, and enforce reasonable supervisory procedures), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007542.pdf>.

In re Prudential Securities Inc., No. 00-124, 2000 NYSE Disc. Action LEXIS 125 (July 25, 2000) (firm fined $175,000 for failure to reasonably supervise and control the actions of its employees in certain circumstances and failed to establish adequate controls in certain respects), <http://www.nyse.com/pdfs/00-124.pdf>; *In re Prudential Securities Inc.*, No. 98-88, 1998 NYSE Disc. Action LEXIS 95 (Aug. 26, 1998) (firm fined $500,000 for numerous serious violations including failure to reasonably supervise its business operations and persons under its management and control with a view to compliance with pertinent securities laws, rules and regulations), <http://www.nyse.com/pdfs/98-088.pdf>; *In re Prudential Securities, Inc.*, No. 96-65, 1996 NYSE Disc. Action LEXIS 70 (July 2, 1996) (firm fined $125,000 failed to reasonably supervise employee telemarketers and account designation changes and block order records), <http://www.nyse.com/pdfs/96-065.pdf>.

Putnam Investment Management

In re Putnam Investment

Management LLC, Investment Advisors Act Release 40,2226, 2004 SEC LEXIS 803 (Apr. 28 2004) (firm censured for numerous violations including failure to supervise and payment ordered of $50 Million in civil fine and $5 Million in restitution), <http://www.sec.gov/litigation/admin/ia-2226.htm>; *In re Putnam Investment Management, LLC*, Investment Company Act Release No. 40,26255, 2003 SEC LEXIS 2712 (Nov. 13, 2003) (firm censured and ordered to pay restitution for multiple violations including failure to take adequate steps to detect and deter prohibited trading activity through its internal controls and its supervision of investment management professionals), <http://www.sec.gov/litigation/admin/ia-2192.htm>.

Raymond James

In re Raymond James Financial Services Inc., Exchange Act Release No. 33,8499, 2004 SEC LEXIS 2248 (Sept. 30, 2004) (firm accused of failure to reasonably supervise registered representative who engaged in fraudulent conduct), <http://www.sec.gov/litigation/admin/33-8499.htm>; *In re Certain Market Making Activities on Nasdaq*, Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>; *In re Certain Market Making Activities on Nasdaq*, Exchange Act Release No. 34,40922, 1999 SEC LEXIS 35 (Jan. 11, 1999) (firm fined $400,000 for multiple violations including failure to create, maintain and enforce adequate policies and procedures to prevent violations of the rules and regulations and failure to reasonably supervise its Nasdaq market making activities), <http://www.sec.gov/litigation/admin/34-40922.txt>.

Raymond James and Associates, Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990080 (July 1999) (firm fined $7,000 for several violations including failure to establish, maintain and enforce written supervisory procedures reasonably designed to achieve compliance with SEC order execution rules and NASD rules relating to Locked and cross markets) (on file with NASD and authors); *Raymond James & Associates, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980069 (July 1998) (firm fined $5,500 for several deficiencies including failure to establish, maintain and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws and regulations) (on file with NASD and authors); *Raymond James and Associates, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS970065, 1998 NASD LEXIS 48 (Mar. 1998) (firm fined $17,500 for failure to designate as late to ACT transactions in Nasdaq National Market and SmallCap securities and failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws, regulations, and rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007562.pdf>; *Investment Management & Research, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, 1997 NASD LEXIS 119 (Oct. 1997) (firm fined $10,000 and required to submit satisfactory written supervisory procedures for multiple violations including failure to have supervisory procedures that were reasonably designed to detect highly questionable conduct of registered representative), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007569.pdf>.

In re Raymond James & Associates, Inc., No. 01-207, 2001 NYSE Disc. Action LEXIS 149 (Nov. 20, 2001) (firm fined $150,000 for multiple violations including failure to establish and maintain appropriate procedures for supervision and control), <http://www.nyse.com/pdfs/01-207-

208.pdf>; *In re Raymond James & Associates, Inc.*, No. 01-118, 2001 NYSE Disc. Action LEXIS 104 (June 28, 2001) (firm fined $250,000 for multiple violations related to foreign office including failure to provide Exchange with written assurances that it supervised and controlled registered representatives and violations related to supervisory deficiencies), <http://www.nyse.com/pdfs/01-118.pdf>; *In re Raymond James & Associates, Inc.*, 2000 NYSE Disc. Action LEXIS 22 (Feb. 1, 2000) (firm fined $165,000 for various deficiencies including failure to reasonably supervise its business activities), <http://www.nyse.com/pdfs/00-011.pdf>; *In re Raymond James & Associates, Inc.*, No. 97-157, 1997 NYSE Disc. Action LEXIS 10 (Nov. 24, 1997) (firm fined $35,000 for multiple violations including serious supervisory deficiencies), <http://www.nyse.com/pdfs/97-157.pdf>.

UBS

SEC v. UBS Securities LLC, Litigation Release 18438, 2003 SEC LEXIS 2601 (S.D.N.Y. Oct. 31, 2003) (settled several serious violations of NASD, NYSE rules and applicable securities laws including supervisory deficiencies), <http://www.sec.gov/litigation/litreleases/lr18438.htm>; *In re UBS PaineWebber, Inc.*, Exchange Act 34,48371, 2003 SEC LEXIS 1990 (Aug. 20, 2003) (firm fined $500,000 for failure to reasonably to supervise former registered representative who defrauded million's of client funds and failed to establish procedures to supervise trades in certain client accounts), <http://www.sec.gov/litigation/admin/34-48371.htm>; *SEC v. UBS Warburg LLC*, Litigation Release 18112, 2003 SEC LEXIS 1008 (S.D.N.Y. Apr. 28, 2003) (firm settled claims with the SEC, NASD, and NYSE for multiple violations including failure to establish and maintain adequate procedures over research analysts to prevent or manage conflicts of interest and fined $25 Million and order to pay $25 Million disgorgement), <http://www.sec.gov/litigation/litreleases/lr18112.htm>; *In re Findings Certain Market Making Activities on Nasdaq*, Exchange Act 34,40929, 1999 SEC LEXIS 43 (Jan. 11, 1999) (firm fined $3.5 Million for violations related to activities on the Nasdaq market including failure to reasonably supervise its Nasdaq market making activities with a view to preventing future violations), <http://www.sec.gov/litigation/admin/34-40929.txt>; *In re Certain Market Making Activities on Nasdaq*, Exchange Act 34,40919, 1999 SEC LEXIS 63 (Jan. 11. 1999) (firm fined $6.3 Million for multiple violations including failure to reasonably supervise its Nasdaq market making activities with a view to preventing future violations), <http://www.sec.gov/litigation/admin/34-40919.txt>; *In re Certain Market Making Activities on Nasdaq*, Exchange Act Release No. 34,40900, 1999 SEC LEXIS 64, 53 S.E.C. 1150 (Jan. 11, 1999) (firm fined for numerous violations including failure to reasonably supervise Nasdaq trading), <http://www.sec.gov/litigation/admin/34-40900.txt>; *In re Paine Webber, Inc.*, 33,7257, 1996 SEC LEXIS 143, 52 S.E.C. 613 (Jan. 17, 1996) (firm fined millions for multiple violations including serious supervisory deficiencies), <http://sec.gov/litigation/admin/3-8928.txt>.

UBS Securities, L.L.C., NASD Letter of Acceptance, Waiver, and Consent, 2004 NASD LEXIS 62 (Oct. 2004) (firm fined $10,000 for submitting inaccurate and/or incomplete OATS data and for supervisory deficiencies) (on file with NASD and authors); *UBS Financial Services, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05040044 (June 2004) (firm fined $100,000 and ordered to update written supervisory procedures for multiple violation) (on file with NASD and authors); UBS *Financial Services, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS030238 (Oct. 2003) (firm fined $5,000 for failure of supervisory system to provide for supervision reasonably designed to achieve compliance with respect to short sales transactions) (on file with NASD and authors); *UBS*

Warburg LLC, Settlement Agreement with Multiple Enforcement Agencies, 2003 NASD LEXIS 39 (June 2003) (agreement between ten top investment firms and multiple enforcement agencies assessing fines and penalties of $487.5 million for conflicts of interest between research and investment banking and finding that supervisory deficiencies existed at every firm), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007446.pdf>; *UBS Securities LLC*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS020077 (May 2002) (firm fined $7,500.00 for multiple violations including failure off the firm's supervisory system to provide for supervision reasonably designed to achieve compliance with respect to applicable securities laws and regulations concerning short interest reporting) (on file with NASD and authors); *Brinson Advisors*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS020098, 2002 NASD LEXIS 49 (July 2002) (firm fined $10,000 for failure to submit required information to the Order Audit Trail SystemSM (OATSSM) and failure to follow its written supervisory procedures concerning OATS and thus failed to maintain a system reasonably designed to achieve compliance with Marketplace Rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007461.pdf>; *UBS PaineWebber, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS010162, 2002 NASD LEXIS 2 (Jan. 2002) (firm fined $12,500 for several violations related to Fixed Income Pricing SystemSM including failure to have supervisory system that provided for supervision reasonably designed to achieve compliance with respect to the rules concerning the reporting of transactions in high-yield corporate debt securities to the NASD), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007470.pdf>; *Warburg Dillon Read, LLC*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990089 (July 1999) (firm fined $8,000 for several deficiencies including failure to establish and maintain appropriate procedures for supervision) (on file with NASD and authors); *Warburg Dillon Read, L.L.C.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS990031, 1999 NASD LEXIS 6 (May 1999) (firm fined $17,500 for failure to report transactions to ACT and failure to establish and maintain adequate written supervisory procedures reasonably designed to achieve compliance with the short-sale rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007545.pdf>; *PaineWebber, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05990005 (Apr. 1999) (firm fined $50,000 for violations including failure to ensure that certain employees held proper registrations required for the functions they performed and failure to establish, maintain, and enforce written supervisory procedures), *at* <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007546.pdf>.

In re UBS PaineWebber Inc., No. 03-98, 2003 NYSE Disc. Action LEXIS 125 (June 4, 2003) (firm fined $175,000 for violations related to recommending and selling callable CDs which were unsuitable for certain customers and failure to establish and maintain appropriate procedures for supervision and control of the marketing and sales of callable CDs), <http://www.nyse.com/pdfs/03-098.pdf>; *In re UBS Warburg LLC*, No. 03-70, 2003 NYSE Disc. Action LEXIS 78 (Apr. 22, 2003) (firm fined $80 Million for violations related to engaging in acts and practices that created or maintained inappropriate influence by investment banking department over research analysts and failure to establish and maintain adequate policies, systems, and procedures for supervision and control), <http://www.nyse.com/pdfs/03-070.pdf>; *In re UBS Securities LLC*, No. 00-86, 2000 NYSE Disc. Action

LEXIS 85 (May 25, 2000) (firm fined $60,000 for several violations including supervisory deficiencies), <http://www.nyse.com/pdfs/00-086-087.pdf>.

Wachovia Securities (Currently merging with Prudential)

Wachovia Securities LLC, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05040043 (June 2004) (firm fined $20,000 and ordered to update written supervisory procedure relating to the determination of the fair market value of municipal securities being bought by public customers for multiple violations) (on file with NASD and authors); *Wachovia Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C07020001, 2002 NASD LEXIS 23 (Mar. 2002) (firm fined $35,000 for findings that its supervisory system failed to detect unsuitable activity in accounts of customers because firm failed to follow its written supervisory procedures pertaining to the review and monitoring of customer account activity), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007467.pdf>; *Corporate Securities Group, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C11010029, 2001 NASD LEXIS 93 (Nov. 2001) (firm fined $50,000 and found it failed to create an adequate supervisory system of follow-up and review to ensure review of active accounts and failed to apply sufficient resources to its supervisory system to detect and prevent unsuitable activity in customer accounts), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007516.pdf>; *First Union Brokerage Services, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C05010010, 2001 NASD LEXIS 99 (Apr. 2001) (holding that the firm failed to establish and maintain adequate written procedures to supervise several aspects of the sale of variable annuity contracts), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007522.pdf>; *Wheat First Union*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS000184, 2000 NASD LEXIS 103 (Oct. 2000) (firm fined $19,500 for multiple violations including failure to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws, regulations, and applicable NASD rules concerning SEC order handling rules), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007528.pdf>; *Wachovia Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C8A000039 (July 2000) (firm fined $7,500 for multiple violations related to purchases of Initial Public Offerings (IPO) including failure to establish, maintain and enforce written supervisory procedures) (on file with NASD and authors); First Union Securities, Inc., NASD Letter of Acceptance, Waiver, and Consent, 2000 NASD LEXIS 107 (July 2000) (firm fined $350,000 for books and records violations and supervisory violations arising from inaccurately recorded municipal securities payments made to another company), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007531.pdf>; *Everen Securities, Inc.*, NASD Letter of Acceptance, Waiver, and Consent, 1998 NASD LEXIS 35 (May 1998) (firm fined $18,50 for violations related to trade reporting and limit orders and firm's failure to establish, maintain, and enforce written supervisory procedures designed to achieve compliance with applicable securities laws and regulations), <http://www.nasd.com/stellent/groups/enforcement/documents/monthly_disciplinary_actions/nasdw_007559.pdf>; *Everen Securities, Inc.,* NASD Letter of Acceptance, Waiver, and Consent, NASD Case #CMS980025 (Mar. 1998) (firm fined $18,500 for multiple violations including failure to establish, maintain and enforce written supervisory procedures reasonably designed to achieve compliance with applicable securities laws and regulations) (on file with NASD and authors);

Corporate Securities Group, Inc., NASD Letter of Acceptance, Waiver, and Consent, NASD Case #C3A960009 (Mar. 1996) (firm fined $5,000 for several deficiencies revolving around failure to supervise and failure to establish and maintain written supervisory procedures) (on file with NASD and authors).

In re First Union Securities, Inc., No. 04-115, 2004 NYSE Disc. Action LEXIS 90 (July 8, 2004) (firm fined $250,000 for multiple violations including failure to reasonably supervise with respect a variety of areas), <http://www.nyse.com/pdfs/04-115.pdf>; *In re First Union Securities, Inc.*, No. 01-232, 2001 NYSE Disc. Action LEXIS 16 (Dec. 26, 2001) (firm fined $145,000 for failures to make and preserve records, record customer complaints, and reasonably supervise and provide appropriate procedures of supervision and control), <http://www.nyse.com/pdfs/01-232.pdf>.

Conclusions

Several observations are in order. Despite the fact that this information is advertised as a matter of public record, the reality is contrary. First, the search functions on the NASD and SEC websites are cumbersome and garner weak results. Second, not all of these disciplinary actions are reported on Lexis. Our research found some disciplinary actions reported on Lexis are not on the NASD website and vice versa. [6] Furthermore the disciplinary histories available from the NASD are surprising incomplete and sometimes confounding. Finally, we searched several prominent stock exchanges. The American Stock Exchange refused to produce the disciplinary actions voluntarily. When subpoenaed in the context of pending arbitrations, two brokerage firms objected to the productions. Interestingly the American Stock Exchange failed to respond in a timely manner pursuant to the subpoenas, though recently said it is working on gathering the materials. [7] The American Stock Exchange, along with several other exchanges, are currently being investigated by the SEC for the failure to discipline its members. [8] Considering the sharp rise in securities arbitrations an analysis and summation or relevant disciplinary decisions is long overdue. In the final analysis the hurdles associated with finding these materials meant that we cannot claim that all relevant disciplinary decisions were included. However the final aggregate is impressive and shows serious deficiencies concerning the brokerage industries' failure to supervise its employees (not exclusively brokers) continue to exist as a matter of course.

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[6] James Null did the majority of the research needed to find these disciplinary actions. Many thanks must also go to Leah Tatelman for invaluable contributions.

[7] If these documents are produced, the additional citations to disciplinary actions will be added to the string cites available for download at the PIABA website.

[8] Kate Kelly, *SEC Plans to Punish Exchanges*, Wall St.J., Oct. 8, 2004, at C1.

From the Lone Star State – So Happy Together: Fighting Motions to Sever Claimants in Group Cases

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I. Introduction

Brokerage firms are acutely aware that one of the advantages they have in arbitration is that cases often revolve around the conflicting testimony of a broker and his customer. After days of testimony in arbitration, the arbitrators are often confused as to who is telling the truth. Avoiding any evidence that shows a pattern of conduct also allows the brokerage industry to perpetuate this inherent advantage. Additionally, brokerage firms continue to depend on the growing costs of arbitration through increased filing fees, arbitrator costs and expert witnesses to preclude certain claimants from filing cases. To combat some of these and other issues, many attorneys are joining the cases of similarly situated claimants, allowing each to testify for the other while sharing the costs of arbitration. [1]

The increased use of group claims to combat inherent disadvantages in securities arbitration has caught the attention of the brokerage industry. As a result, motions to sever have become much more common in securities arbitration practice. This article focuses on the arguments supporting joinder and strategies in fighting motions to separate claimants.

II. SRO Rules Concerning Joinder and Separation of Claimants

Anticipating the need for parties in similar situations to be able to file a joint claim, the NASD Code of Arbitration (the "Code") provides a very liberal standard for the joinder and consolidation of multiple parties. Rule 10314(d)(1) of the Code states in relevant part:

> All persons may join in one action as claimants if they assert any right to relief jointly, severally or arising out of the same transaction, occurrence or series of occurrences and if any questions of law or fact common to all these claimants will arise in the actions … A claimant or respondent need not assert rights to or defend against all the relief demanded. Judgment may be given for one or more of the claimants according to their respective rights to relief, and against one or more respondents according to their respective liabilities.

NASD Code of Arbitration Procedure Rule 1314(d)(1). [2]

[1] Of course, corroborating testimony, pattern evidence and cost sharing are just a few of the reasons to join similar claimants in a single action. This article is generally limited to fighting motions to sever claimants. For a detailed analysis of the advantages and disadvantages of group claims, strategy and additional authority in fighting motions to sever, review the excellent article published in the *13th Annual Meeting Materials*, pages 333 – 364, by Rhett Traband, Jeffrey R. Sonn and Jacob Zamansky.

Under NASD rules, the Director of Arbitration is authorized to "determine preliminarily whether such parties should proceed in the same or separate arbitrations … subsequent to the filing of all responsive pleadings." NASD Code of Arbitration Procedure Rule 1314(d)(2).

However, assuming the Director of Arbitration preliminarily rules in favor of joinder, claimants must still convince the panel that joinder is proper. [3] "Further determinations with respect to joinder, consolidation, and multiple parties … shall be made by the arbitration panel and shall be deemed final." NASD Code of Arbitration Procedure Rule 1314(d)(3).[4] Therefore, in preparing your argument for joinder, the true audience will be the arbitrators empanelled to hear the case.

The Arbitrator's Manual gives arbitrators some guidance on ruling on motions to sever stating, "When deciding such motions, arbitrators should consider commonality of time, parties, transactions, issues, or prejudice to any party." *The Arbitrator's Manual (August 2004) at Page 10, published by the Securities Industry Conference on Arbitration.* In applying this broad standard, attorneys should first note to the panel that the requirement is for commonality, not that the claims of each party be identical. Ultimately, the focus is on the commonality of the claims, not their differences.

Under this guideline, it is clear that it is unnecessary to have common ground on all of the factors, but as a general rule, attorneys should be able to prove more than half of the common requirements are met. As to commonality of time, this issue is likely one of the most important to the arbitrators. Since the recommendation of a particular security may be suitable at a certain time and not another, it is a fair requirement that the time period of the claims is similar. Of course, there can be some differences in time, and there is no requirement to have opened accounts with the firm at the exact same time.

As to commonality of parties, it is paramount that the claimants all pursue claims against the same defendant(s). Ultimately, arbitrators are not likely to be convinced joinder is proper if there are multiple defendants who are liable to some of the claimants but not the others. Such a claim does not appear, even on its face, to be a proper claim for joinder. In a more difficult situation, filing a joint claim against a common brokerage firm, even though the claimants had different brokers (who are not named), is a difficult, but not impossible claim to join. If the claims include allegations of a pattern of conduct at the branch office or within the firm that each of the claimants argue resulted in damages, there is a strong argument for joinder. Of course, if all of the claimants used the same broker, the argument for joinder is much stronger and should, with rare exceptions, be upheld.

Commonality of transactions and issues can be one of the more difficult barriers in unrelated claims or an easy argument with a "one size, fits all" broker. The facts of each case will be necessarily different, but as long as there are at least a minority of common securities held in the

[2] The NYSE has an identical provision concerning joinder contained in Rule 612(d)(1) entitled "Joining and Consolidation-Multiple Parties."

[3] In practice, the NASD Director of Arbitration almost always sends the issue of joinder to the panel without opinion.

[4] The NYSE has identical provisions for allocating power for ruling on motions to sever contained in Rule 612(d)(2-3).

accounts and the claims among the parties relative to those securities are the same, i.e., such stocks were too speculative, the commonality of transactions and issues should be met.

Another important issue is that, unlike the federal and state rules, the arbitrator is asked to weigh the "prejudice to any party," not just the opposing party. Members should focus the attention of the arbitrators on the general goals of arbitration -- efficient, fair and inexpensive resolution of claims -- and **the prejudice that results to claimants if the cases are separated**. By forcing claimants to each individually assert their claims, many of the goals of arbitration are lost. Moreover, because of the great expense of arbitration in the form of filing fees, expert costs and other litigation expenses, it is actually prejudicial to claimants to preclude joinder of claims. Furthermore, it is prejudicial to claimants and inefficient if there are similarities that will require parties and witnesses to testify in multiple arbitrations. Lastly, it is prejudicial to claimants to ask them to go forward in multiple cases, resulting in the requirement that each testify in multiple arbitrations, including their own, and essentially giving the respondent multiple opportunities to depose the customers.

In arguing for joinder under SRO rules, it is also important to keep in mind the goals of the SROs themselves. The SROs, just like the judiciary system, have a strong interest in avoiding repetitive litigation which squanders the limited resources of each regulatory body. The SROs also have an interest in the avoidance of inconsistent judgments which undermine the process and public faith that the arbitration panels are fairly administering justice. [5]

Ultimately, in applying the broad rules of joinder and the inclusive language of the arbitrator's manual, attorneys should be able to effectively argue that joinder is proper in many cases.

III. Federal Rules of Joinder and Separation of Plaintiffs

As originally promulgated in 1938 and in their 1966 revisions, the Federal Rules of Civil Procedure ("FRCP") abandoned the narrow notions of common law and code pleading in favor of unlimited claim joinder and expanded party joinder. [6] FRCP 20(a), entitled *Permissive Joinder of Parties*, states in relevant part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action … A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective right to relief, and against one or more defendants according to their respective liabilities.

FED. R. CIV. PRO. 20(a). [7]

The purpose of the joinder rules is "to promote trial

[5] *See* Hazard & Moskovitz, *An Historical and Critical Analysis of* Interpleader, 52 CALIF. L. REV. 706, 752 (1964) (arguing that inconsistent decisions "is not only a grave matter, it is a subversion of the very basis of the legal order ….").

[6] *See* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Rolde in Defining the Legislative Unit,* 50 U. PITT. L. REV. 809, 815 (1989).

[7] The similarities between the Federal Rule and the SRO rules are undeniable. As a result, arguments that the law interpreting 20(a) support joinder should be compelling to an arbitration panel seeking to interpret the meaning of the SRO rules.

convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." *Wright & Miller*, 7 Fed. Prac. & Proc. Civ. 3d § 1652. Additionally, Rule 20(a) seeks to prevent "extra expense to the parties, and loss of time to the court as well as the litigants appearing before it." *M.K., et al. v. Tenent, et al*., 216 F.R.D. 133, 137 (D.D.C. 2002). As a result, Rule 20(a) is meant to be read very broadly. According to *Wright & Miller*, "[t]he transaction and common-question requirements prescribed by Rule 20(a) are not rigid tests. They are flexible concepts used by the courts to implement the purpose of Rule 20 and therefore are to be read as broadly as possible whenever doing so is likely to promote judicial economy." *Wright & Miller*, 7 Fed. Prac. & Proc. Civ. 3d § 1653. Agreeing, the Supreme Court noted, "the impulse [under Rule 20] is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 38 U.S. 715, 724 (1966).

A review of the rule shows it "imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence; and (2) some question of law or fact common to all the parties will arise in the action." *Wright & Miller*, 7 Fed. Prac. & Proc. Civ. 3d § 1653. Both tests must be passed to validly join a party.

a. Transaction or occurrence

Known as the "transactional test," the first prong of Rule 20(a) requires that at least one right to relief must arise from the "same transaction, occurrence, or series of transactions or occurrences." There are no hard and fast rules defining what encompasses "the same transaction, occurrence, or series of transactions or occurrences." Rather, "[i]n ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, a case by case approach is generally pursued." *Mosley v. General Motors*, 497 F.2d 1330, 1333 (8th Cir. 1974).

The majority of jurisdictions have applied the "logical-relationship test" which was developed in interpreting the same language under FRCP 13(a).[8] Under that standard, "all 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence." *Mosley*, 497 F.2d at 1333. The logical relationship test is essentially a "smell test," in which the court determines, on a case by case basis, whether the claims are related enough that the transactions and occurrences should be called a "series."

Courts have also often held that allegations of a "pattern of conduct" are sufficient to meet the transaction requirement of 20(a). For example, in *M.K. v. Tenent*, a group of employees sought to jointly claim damages against former CIA director George Tenent and the Central Intelligence Agency for conspiring to obstruct the plaintiff's efforts to obtain assistance of counsel, a violation of the employees' rights. *See M.K.,* 216 F.R.D. at 133. While the denial of rights occurred at different times and were highly individualized, the Court held that the allegations were part of the same series of transactions because the claims collectively establish

[8] For an early example of this analysis, *see Moore v. New York Cotton Exchange*, 46 S.Ct. 367, 371, 270 U.S. 593, 610, 70 L.Ed. 750 (1926) (arguing "Transaction is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.").

"an overall pattern of policies and practices…." *Id*. at 142.

The Court went further to state, "[i]ndeed, the question of law or fact that is common to all may be whether the 'defendants have engaged in a common scheme or pattern of behavior ….'" *Id*.; *see also*, *Puricelli v. CNA Ins. Co.*, D.C.N.Y. 1999, 185 F.R.D. 139 (holding that a group of employees asserting an age-discrimination complaint satisfied the "same transaction or occurrence" prong of 20(a) when they alleged a pattern of conduct that resulted in damages to each which had a logical relationship).

According to *Wright & Miller*, "courts are inclined to find that claims arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the court." *Wright & Miller*, 7 Fed. Prac. & Proc. Civ. 3d § 1653.

In practice, courts do not want to require multiple trials that will necessitate the same testimony of the same witness on numerous occasions. Such a result would certainly overburden the courts as well as cause an undue burden to parties and witnesses. As a result, in securities arbitrations, attorneys should be able to successfully argue that since separation will almost surely result in delay, wasted resources and necessitate that the parties and their witnesses testify to exactly the same events on numerous occasions, the "logical relationship" has been proven to exist and the case should remain joined.

b. Common Questions of Law or Fact

The second prong of Rule 20(a) requires a party to demonstrate a common question of law or fact. Of note in this prong is the requirement is to demonstrate a single common question of law **or** fact, rather than a showing that the cases are identical or even substantially similar. "Rule 20(a) does not require that every question of law or fact in the action be common among the parties; rather, the rule permits party joinder whenever there will be at least one common question of law or fact." *Wright & Miller*, 7 Fed. Prac. & Proc. Civ. 3d § 1653. In fact, "[b]y its terms, Rule 20(a) only requires a single basis of commonality, in either law or fact, for the joinder to be acceptable." *Doughterty v. Mieczkowski*, 661 F.Supp. 267, 279 (D. Del., 1987). Additionally, the Rule 20(a) does not "establish any qualitative or quantitative test for commonality." *Mosley*, 497 F.2d at 1334. Given the flexibility of this requirement, it is not a surprise that courts rarely have difficulty in finding at least one common question of law or fact.

The one exception to easily meeting this requirement is fraud cases. In fraud or misrepresentation cases, respondents often argue that the facts attendant to each case are so different as to what was said, when it was said, who said it and whether the claimant relied on the statement as to make such claims unjoinable. While that argument has been successful on occasion, courts have also rejected it. For example, in *Hohlhein v. Heritage*, a fraud case related to employment promises, the District Court in Wisconsin was faced with this exact issue. *See Hohlhein v. Heritage Mut. Ins. Co.,* 106 F.R.D. 73 (D.C. Wis. 1985). In *Hohlhein*, it was agreed between the parties that "the particular circumstances under which each of the four plaintiffs was allegedly misled to his disadvantage are unmistakably different." *Id*. at 75. Nevertheless, plaintiffs argued that the similarities among the claims were sufficient to justify joinder. *Id*. After evaluating the entire set of claims, the Court denied the defendant's motion to sever holding that the claims were "sufficiently similar to overcome the peculiar temporal and factual dissimilarities that might otherwise justify severance." *Id* at 78. Therefore, in cases alleging fraud or misrepresentations, it is essential that the claimants prove the misrepresentations were substantially similar in

nature as to justify the joinder of claimants.

c. Judicial Efficiency v. Prejudice

Along with the legal standard for joinder, courts often weigh the judicial efficiency which could be achieved through joinder with the prejudice to the party opposing joinder. Under FRCP 20(b), the court has the discretion to separate claims joined under 20(a), even if the standard is met, to "prevent a party from being embarrassed, delayed or put to [undue] expense … and … to prevent … prejudice." FED. R. CIV. PRO. 20(a).

The most basic argument for prejudice is that joining the claims together will ultimately confuse the jury who will not be able to decipher the different facts of the multiple cases. *See, e.g., Kendar v. City of Philadelphia*, 454 F.Supp. 652, 662 (D.C. Pa., 1978) (defendants argued "potential prejudicial effect of joinder" upon the jury). Additionally, defendants often argue that the filing of joint claims will allow certain plaintiffs to "bootstrap" their claims to the stronger cases, thus resulting in a finding of liability based on the sheer number of cases rather than the particular facts of each plaintiff's case. *See, e.g., Flower Cab Co. v. Petitte*, WL 14715 (N.D. Ill., 1987) (whereby defendants argued it was prejudicial to allow plaintiff to "bootstrap" his claims together with others). While these arguments certainly have some merit in jury trials, attorneys should distinguish between asking an unsophisticated jury to assimilate such information with a very educated and sophisticated arbitration panel often comprised of one or more attorneys.

Additionally, a strong argument for efficiency and relatedness of claims is that the claims of each of the parties depend on the same witnesses and other evidence. Requiring claimants to try essential the same case several times, burdening many of the witnesses to appear in several arbitrations, rather than one, and requiring numerous panels to hear and decide the same evidence, turns the notion of judicial economy on its head. *See Avita v. Metropolitan Club of Chicago, Inc.,* 49 F.2d 1219, 1224 (7th Cir. 1995) (holding the court should deny severance if multiple trials would duplicate time and work in each case).

d. Securities Cases Addressing Joinder

There are a number of federal cases which address joinder of plaintiffs in securities cases. The great weight of the law supports that those claims are often properly joined.

1. *Russo v. Bache Halsey Stuart Shields, Inc*

In 1982, the District Court in Illinois was among the first to address the issue of joinder of plaintiffs in a security case. *See Russo v. Bache Halsey Stuart Shileds, Inc*., 554 F.Supp. 613 (N.D. Ill., 1982). In *Russo*, three investors filed a joint complaint against a brokerage firm alleging the firm "engaged in a variety of acts and omissions, such as, *inter alia*, failing to deliver a prospectus, churning plaintiffs' accounts and making false misrepresentations …." *Id*. at 616. The brokerage firm argued to the court that joinder was improper in this case because "the facts and the circumstances concerning the three plaintiffs are substantially different …." *Id*. Specifically, the brokerage firm alleged that the plaintiffs differed in "their level of investment sophistication, financial positions, trades and losses…." *Id*.

The Court explicitly rejected that these differences in sophistication, financial wherewithal, etc. favored separating the cases. In finding that the plaintiffs were properly joined, the court relied greatly on the fact that each of the plaintiffs "dealt with the same executive …." *Id*. Additionally, the court reasoned that common questions of law and fact existed since plaintiffs were suing under the same "statutes, regulations and rules." *Id*. at 617. As a result, on its face, the *Russo* decision appears to strongly support the argument that joinder is proper as long as the claimants used the same

broker and are suing under the same causes of action.

2. *Jolley v. Welch*

Shortly after the market crash of the late 1980's, the Fifth Circuit was faced with the issue of joinder of plaintiffs in a security case. *See Jolley v. Welch*, 904 F.2d 988 (5th Cir. 1990). In *Jolley*, a District Court in Louisiana consolidated the claims of "eight individuals who received investment services from PaineWebber." *Id.* at 990. Those individuals, who all used the same broker, Welch, filed a cause of action alleging both Welch and PaineWebber "purchased and sold stock, traded on margin and traded options without their authorization, and that they had invested in speculative and unsuitable stocks [and] churned the plaintiff's accounts …." *Id*. After the consolidation, PaineWebber moved the court to compel arbitration. *See* I*d*. The District Court granted PaineWebber's motion as to all but one of the plaintiffs, Mills. *See* I*d*. The Court then ordered the case of all the plaintiffs to go forward in court in a single action against Welch, who could not compel arbitration, as well as Mills' claim against PaineWebber. PaineWebber subsequently filed a motion to sever Mills. *See* I*d*.

In its motion, PaineWebber argued it was prejudicial to allow Mills' complaint to go forward with the others because she was being allowed to "use 'unrelated evidence' of Welch's acts against the other plaintiffs and thereby bolster her case against PaineWebber." *Id*. at 994. In rejecting this argument for prejudice, the Court noted that the "fact that a defendant may be involved in one case and not the other is not sufficient to avoid consolidation." *Id., citing St. Bernard Gen. Hospital, Inc. v. Hospital Serv. Ass'n*, 712 F.2d 978, 989 (5th Cir. 1983). The Court further held "[i]n addition, Mills correctly points out that all plaintiffs alleged the same acts committed by the same broker during roughly the same period of time." *Id*.

While the *Jolley* decision is based on a consolidation, as opposed to joinder, it nevertheless contains the appropriate standard for joining customer complaint, *i.e.*, those complaints involving the same broker, the same alleged acts and roughly the same time period, are properly joinded. In securities cases, this standard should be easily met with group complaints of retirees who received substantially similar investment recommendations from the same broker.

3. *Hanley v. First Investors Corp*.

In one of the strongest decisions supporting joinder in securities cases, the District Court in the Eastern District of Texas denied a brokerage firm's motion to sever and held that joinder of a group of similarly situated customers in a securities matter was appropriate. *See Hanley v. First Investors Corp.,* 151 F.R.D. 76 (1993). In *Hanley*, nineteen individual plaintiffs joinded together to file a petition complaining of the wrongful sale of various mutual funds. *Id*. at 77. Defendants filed a motion to sever with the District Court arguing that plaintiffs' claims were not appropriate for joinder and, even if properly joined, fairness dictates severance.

The *Hanley* Court considered all of the relevant standards for evaluating appropriate joinder. Under the "transaction test," the Court evaluated whether the action consisted of the same or series of transactions or occurrences under both the logical relationship standard and the pattern of conduct test.

The Court initially noted, "[i]n the case at bar, it is clear that all plaintiffs' claims do not arise out of one transaction or occurrence." *Id*. at 79, FN.3. As a result, the Court recognized "the only inquiry is whether they arise out of or respect [to] the same 'series' of transactions or occurrences." *Id*. In accepting the logical relationship test as an appropriate standard for evaluating if a "series" exists, the Court stated "[i]f the phrase 'series' is to have any real meaning whatsoever, it necessarily must entail some

'logical relationship' between the specific transactions or occurrences. Thus, Rule 20 itself contemplates a 'logical relationship' definition." *Id*. at 79. After reviewing the facts related to all of the cases, the Court held that "while application of the test may be more intuitive than cerebral, the claims seem logically related." *Id*. at 80.

The Court came to the same conclusion when applying the pattern of conduct test. Largely depending on the language in *Jolley*, the Court found that the "alleged common pattern of oral misrepresentations" was similar to the claims made in the Eastern District of Texas. *Id*. at 78. As a result, the Court followed the rationale of *Jolley* and held the common pattern of conduct showed that the action arises "out of the same 'series of transactions or occurrences.'" *Id*.

In evaluating whether there were any common issues of law or fact, just as the court in *Jolley*, the *Hanley* Court placed great weight on the fact that "each plaintiff alleges the same cause of action … the same types of culpable acts … [and] the same pattern of culpable conduct." *Id*. at 77. Additionally, the Court essentially suggested that if the logical relationship test can be met, the case will easily "give rise to common questions of both fact and law." *Id*. at 80.

The *Hanley* Court also addressed the issue of weighing the judicial efficiency of joining Plaintiffs claims versus any prejudice to Defendants. The *Hanley* Defendants argued they would be unduly prejudiced if the cases were joined "in that the jury might find liability based on the sheer number of claims presented …." *Id*. at 80. Additionally, Defendants feared "the jury might be confused by the large number of claims and would be unable to distinguish the varying facts associated with each individual claim or might award damages without considering the individual damages each plaintiff bore." *Id*. The Court dismissed these concerns based on a belief that an appropriate jury instruction could easily cure the potential of jury bias. *See Id*. Additionally, the Court rejected the notion that jurors were not intelligent enough to decipher the differences between the cases and give appropriate weight to the facts of each plaintiffs' claims. "Based on the court's experience, it seems well within the jury's abilities to distinguish between the idiosyncrasies of each case." *Id*.

In ultimately denying Defendants' motion to sever, the Court stated "[h]ere there is a common pattern of claims alleging the same culpable conduct against the same defendant over the same period of time. The claims are much more similar than dissimilar." *Id* at 80. Once again, the Court has acknowledged the basic premise that claims filed against the same broker, concerning many of the same securities and the same basic time period, are properly joined.

4. *Other cases*

In *Nor-Tex Agencies v. Jones*, a Fifth Circuit opinion allowing a plaintiff to be added to a case where the claims were based on a series of false representations made by the defendant and where all parties presented common questions of law concerning the definition of a security and common questions of fact as to whether defendant's statements were false. *See Nor-Tex Agencies, Inc. v. Jones*, 482 F.2d 1093 (1973), cert den. 415 U.S. 977, 39 L.Ed. 2d 873, 94 S. Ct. 1563 (1974).

Additionally, in *Doughterty v. Mieczkowski,* the Delaware District Court held that joinder was at least preliminarily acceptable since "[e]ach plaintiff asserts Mieczkowski entered into a series of unauthorized and excessive transactions on their accounts and mislead them about the value of their respective investments, all in violation of Rule 10b-5. Each Plaintiff also sues Prudential-Bache, Camp and Kane for failing to adequately supervise Mieczkowski, as controlling persons under Securities Exchange Act § 20(a)." *See Doughterty v. Mieczkowski*,

661 F.Supp. 267, 279 (D. Del., 1987).

e. Federal Law Conclusion

Federal courts have consistently extended the broad language of Rule 20(a) by evaluating the requirements of group claims with the guiding principle that joinder should be encouraged. As a result, the case law often supports joinder as an efficient and fair manner of proceeding in litigation. Application of these joinder principles has often led the federal courts to rule those plaintiffs alleging securities violations should be joined. Therefore, in applying federal law, claimants in securities arbitration can effectively argue group claims are encouraged and claimants meet the requirements established by both the SRO's and the federal courts.

IV. <u>Texas Rules of Joinder and Separation of Plaintiffs</u>

The joinder rules under the Texas Rules of Civil Procedure ("TRCP") mirror the federal rules.

a. Basic Joinder Principles Under the Texas Rules

The public policy surrounding joinder in Texas is similar to that of the federal courts. According to *McDonald & Carlson*, "[t]he theory is that questions of permissive party joinder are to be handled as a matter of trial convenience, allowing litigants virtually unlimited freedom to bring controversies before the court so long as they are sufficiently interrelated …." 1 MCDONALD & CARLSON TEX. CIV. PRAC. § 5:30. . Under Texas law, "[t]he plaintiff has the burden of establishing proof of each joinder element." *A.O. Smith v. John Adair*, 96 S.W.3d 700, 705 (Tex. App. – Texarkana 2003, no pet.). The Texas judiciary appears to follow the logical relationship test for determining if there has been a "series of transactions or occurrences" sufficient to justify joinder. *See* 1 MCDONALD & CARLSON TEX. CIV. PRAC. § 5:34 *citing Jack H. Brown & Co., Inc. v. Northwest Sign Co., Inc.,* 718 S.W.2d 397, 399-400 (Tex. App. – Dallas 1986, *writ ref'd n.r.e.*).

Additionally, just like the federal rules, TRCP 40(b) gives courts the discretion to order separate trials of joined plaintiffs to "prevent a party from being embarrassed, delayed or put to expense … and … to prevent … prejudice." In light of these similarities, application of the rules established in the federal courts is generally acceptable. However, as demonstrated below, Texas courts have frequently been more liberal in their interpretation of standards for joinder.

***b. Surgitek, Inc. v. Adams* and the broadening of joinder rules**

In 1997, the Corpus Christi Court of Appeals, issued an opinion broadening the scope of the joinder rules. *See Surgitek, Inc. v. Adams*, 955 S.W.2d 884 (Tex. App. – Corpus Christi 1997, no writ). In *Surgitek*, a group of seventy-five plaintiffs sued various defendants, including forty-two different doctors and three manufacturers, claiming damages arising from breast implants. *See id*. at 886. Defendants filed a motion to separate the plaintiffs arguing that they were improperly joined. *See id.*[9]

In evaluating the issue of joinder, the Court noted that joinder "involves a series of legal tests which evaluate needs, prejudice, and convenience to the parties. The ultimate determination of whether joinder is proper thus depends upon both (1) factual determinations concerning the nature of the underlying lawsuit and the situation of the various parties before the trial court, and (2) application of the legal tests …." *Id*. at 888. In determining whether there were common questions of law or fact, the Court asserted "we find questions of law or fact common to the plaintiffs. These include the admissibility of evidence … the qualification of experts … and the adequacy of warnings

[9] Defendants also argued that the case should be separated since the plaintiffs' actions arose in multiple jurisdictions around Texas and therefore venue was improper to many of the plaintiffs.

to the plaintiffs. Furthermore, each jury will have to make a basic determination regarding whether the breast implants were defective." *Id*. at 889-890.

The Court then turned its attention to the issue of "same transaction, occurrence or series of transactions or occurrences." *Id*. at 889. Defendants argued that since all of the plaintiffs had received their implants at different times and many from different doctors, there was no logically related "series of transactions or occurrences." Moreover, since plaintiffs were suing three different manufacturers, many of the plaintiffs did not even receive the same defective product. *See Id*. The Court responded to this argument in a very unique manner. According to the Court,

> Appellants argue the plaintiffs cannot show the action arose out of the same transaction, occurrence or series of transactions or occurrences. Appellants have improperly interpreted rule 40. A showing of the same transaction or occurrence is not ***required***, it is ***permitted*** in the alternative, *i.e.*, if the plaintiff cannot assert a right to relief jointly or severally.

Id. at 890 (*emphasis in original*)

As a result, the Court ruled a joint request for relief absolved the responsibility of the plaintiffs to demonstrate the claims arise out of the "same transaction, occurrence or series of transactions or occurrence." In this case, the Court argued there was no need to make a showing of compliance with the transaction test since "plaintiffs asserted the same right to relief – compensation for damages suffered as a result of appellants' negligence in implanting them with defective and/or dangerous silicone gel breast implants." *Id*. at 899.

The reasoning in the *Surgitek* case clearly extended the ability of claimants to file joint cases. First, according to the Court, a common question of law or fact includes questions of admissibility of evidence and qualification of experts. Of course, this would allow almost all securities case to be joined. Second, according to the Court, there is no need to meet the transaction test if the request for relief is filed jointly. According to *Surgitek*, for purposes of joinder, the mere fact that claimants are asserting the "same right to relief," *i.e.*, losses from a brokerage account, is sufficient to bypass the requirements of the transactions test. Ultimately, the *Surgitek* case greatly broadens the ability of claimants to join cases.

c. *Tomerlin v. Mittendorf* and the application of joinder principles to securities cases

In a 1926 decision, the Austin Court of Civil Appeals addressed the issue of joinder of securities claims under Texas law. *See Tomerlin v. Mettendorf*, 286 S.W. 477 (Tex. Civ. App. – Austin, 1926). In *Tomerlin*, thirteen plaintiffs filed a joint case against a broker who sold interests in a defunct bank alleging fraud.[10] *See Id*. According to the plaintiffs, defendant fraudulently represented to each that the bank was solvent, that their investment was insured and that a local branch office would be opened. *See id*. In evaluating the joinder of the claims, the Court noted "[i]t is uncontroverted that substantially the same false representations were made to each and all of said subscribers for stock, and that same induced them to buy the stock, though the sale to each of them was a separate and distinct transaction." *Id*. Therefore, the question for the Court was whether these separate transactions were part of a series of occurrences that could warrant joinder.

[10] Ultimately, all other plaintiffs ass orf, wh

In determining that joinder was proper, the Court reasoned that although "this case grew out of separate transactions … there was nevertheless a common element relating to all." *Id*. at 478. According to the Court, that common element was that "[s]ubstantially the same material false representations were made to each, and induced the purchase of stock by each." *Id*. The Court therefore held, "[h]ence such claims were to that extent all parts of the same transaction." *Id*.

In addition, the Court was concerned about the public policy supporting joinder of claims to avoid wasting the judiciary's resources. "In view of these common elements, the law's abhorrence of a multiplicity of suits, and the failure of appellants to show that any injury was done them by joining said claims in a single suit, we think the trial court did not err in permitting appellee to do so." *Id.*

d. Texas Law Conclusion

It is clear that Texas courts, like the federal judiciary, err on the side of allowing joinder rather than separating plaintiffs' claims. In fact, Texas courts have often used an even more liberal standard to promote efficient joinder of claims. As a result, for those attorneys in Texas, arguments supporting joinder are even more flexible and more inclusive.

V. Practice Tips for Fighting Motions to Separate Claimants

The most important element of fighting opposing counsel is to make sure not check your common sense at the door. While arbitrators may listen to the law, they are mostly interested in whether the parties' arguments are rational.

1. **Focus on the Similarities**: Respondents' tactic for urging separation in virtually every case is to stress the differences between the clients. This strategy can be especially effective when claimants are asserting unsuitability claims, which by their nature acknowledge that the claimants are different. However, don't get caught in the trap of arguing every single difference between the claimants. This will almost certainly leave the panel with the impression that there are many more differences between the parties instead of understanding the similarities that require joinder. Moreover, it allows respondents to define the debate over joinder instead of you. Rather than engage in that argument, it is perfectly acceptable to simply acknowledge these differences while pointing out to the panel the similarities of the clients and reminding the panel that the requirement is to have only a single common fact or legal issue. Then challenge respondents to demonstrate to the panel that these similarities do not exist. If respondents cannot make such a showing, argue to the panel that the requirement has been met and Respondents' motion should be denied.

2. **Use Specific Examples**: When discussing the similarities between the clients, point to specific examples where the facts of each client are identical. If all of the clients were placed in a particular product, be sure to point that out to the arbitration panel. If respondents made the same misrepresentation to all of the parties, clearly articulate that misrepresentation to the panel. If the facts support it, this is actually a good opportunity to turn the tables and rebut respondents' defense that suitability claims should not be joinded by pointing out that despite the obligation to treat each client as an individual, respondents engaged in a "one size fits all" strategy that was unsuitable itself. As a result, rather than the differences between the clients precluding joinder, the differences mandate it.

Caveat: Be careful that the examples you use are common to all clients and not just a majority of them as the rules specifically require commonality of the entire group on at least one issue.

3. **Challenge Respondent to Articulate a Specific Prejudice in maintaining a Joint Claim**: In the majority of motions seeking to separate

claimants, respondents baselessly assert that allowing the claimants to go forward in a single action will result in a prejudice to the respondents. However, most respondents and their counsel are reluctant to describe the specific prejudice. The reason for this lack of specificity is that the generally accepted arguments for prejudice such as “confusion” or “bootstrapping” suggest that the panel is incompetent and unable to deal with complicated information. Of course, respondents would prefer not to tell the panel that they fear the arbitrators are not intelligent enough to make a fair ruling. Additionally, if respondents are willing to specifically articulate this prejudice, it should be easy to play to the ego of the panel that, unlike an unsophisticated juror, the panel in your case is much more capable of assimilating the evidence of multiple claimants.

VI. Conclusion

Application of the liberal standard articulated in the SRO’s rules should allow for joinder of many claimants’ cases. Additionally, both Federal and Texas state law support the conclusion that claims raised alleging similar wrongdoing, of the same broker and during the same time period, are properly joined. Moreover, considering the sophisticated triers of fact in arbitration cases, the efficiency of joinder should virtually always outweigh any potential prejudice as the arbitrators should be sufficiently sophisticated to distinguish between the facts of each case and refrain from any prejudice based on the sheer number of claimants. As a result, motions to sever should often be defeatable under both the law and basic equitable principles.

Judge Pollack's Merrill Lynch Research Analyst Decisions – Lost in [Info]Space

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Judge Pollack's Merrill Lynch research analyst decisions are an anachronism which are out of step with the majority of courts that have considered research analyst issues. "Warp speed" cannot bring Judge Pollack's decisions in line with 21st century thought.

Judge Pollack follows the now misplaced concept of blaming the victim. He concluded that victims from across the country were aware of the scattered articles of general interest that appeared in some newspapers. Apparently, Judge Pollack believed that each victim had the obligation to "google" Merrill Lynch 24/7 to protect their investments. This unrealistic burden was laid to rest by the New York Attorney General's office which had to resort to its vast arsenal of legal resources to unmask the fraud. Other federal courts have questioned Judge Pollack's analysis, since the articles were only of general interest and not specific to any particular fraud.

The remainder of this article compares Judge Pollack's legal analysis with the contrary views of his colleagues. It is elementary that only the legendary investigatory skills of a Sherlock Holmes (or the subpoena power of the New York Attorney General's office) could have uncovered what Judge Pollack erroneously assumed everyone knew – that brokers offered fraudulent positive research coverage for investment banking fees. Other federal courts had less difficulty understanding that victims were not detectives and that victims made their investment decisions without the benefit of hindsight.

The Pollack Decisions

Judge Pollack dismissed research analyst cases against Merrill Lynch, because the Class "Plaintiffs have failed to adequately plead that defendant and its former chief internet analyst **caused** their losses." *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 273 F.Supp.2d 351, 358 (S.D.N.Y. 2003)(dismissing the 24/7 and Interliant claims) (emphasis in original); *see In re Merrill Lynch*, 289 F.Supp.2d 416 (S.D.N.Y. 2003)(dismissing claims based on research reports covering eToys, Homestore.com, iVillage, Lifeminders, LookSmart, Openwave Systems, Pets.com, and Quokka Sports*); see also In re Merrill Lynch*, 272 F.Supp.2d 243 (S.D.N.Y. 2003)(dismissing claim against proprietary mutual fund based on misrepresentations and omissions).

The Class Plaintiffs failed to adequately plead with the particularity required under Fed. R. Civ. P. 9(b) and the Private Investors Securities Litigation Reform Act of 1995 ("Reform Act"). The Class

Plaintiffs did not see or read the research reports alleged to be fraudulent, but relied on allegedly inflated prices when deciding to purchase. The Class Plaintiffs claimed that Merrill Lynch and its star research analyst, Henry Blodget, artificially inflated the price of stock in order to win investment banking fees from issuers. As part and parcel of the alleged fraud on the market, Merrill Lynch maintained a skewed three-point rating system. That system maintained ratings of Strong Buy or Buy for the covered stock, even when the prices fell. The Class Plaintiffs alleged they would not have purchased had Merrill Lynch disclosed its fraudulent scheme. As a result, Merrill Lynch caused the Class Plaintiffs' losses.

According to Judge Pollack, the Class Plaintiffs failed to show:

> (1) that Merrill Lynch **intended to defraud** them;
>
> (2) that the research reports and rating system were **actionable misstatements of opinion**;
>
> (3) that the conflicts of interest and the three-point rating system were **material**; and
>
> (4) that the Class Plaintiffs could prove the alleged misrepresentations and omissions **caused their losses**.

August Decision at 358 (". . . the federal securities laws at issue here fault those who, **with intent to defraud**, make a **material** misrepresentation or omission of **fact** (not opinion) in connection with the purchase or sale of securities that **causes** a plaintiff's losses" (emphasis in original)). In sum, Judge Pollack was "utterly unconvinced" that the facts alleged in the complaints could state a cause of action under 10b-5. Judge Pollack also concluded that the Class Plaintiffs' complaint was not timely filed, because they were on inquiry notice more than two years prior to the date of filing.

Despite Judge Pollack's conclusions in these decisions, his decisions stand apart from other research analyst cases considering similar materials. Faced with research analyst cases involving different brokerage firms, other judges have held that the plaintiffs did sufficiently allege a cause of action under Rule 10b-5. *See In re WorldCom ("WorldCom"),* 294 F.Supp.2d 294 (S.D.N.Y.); *In re WorldCom Public Employees Retirement System of Ohio ("WorldCom Ohio"),* 2003 WL 22790942 (S.D.N.Y.); *Fogarazzo v. Lehman Bros., Goldman Sachs & Morgan Stanley*, 2004 WL 1151542 (S.D.N.Y.); *DeMarco v. Lehman Bros. et al. ("DeMarco I")*, 309 F.Supp.2d 631 (S.D.N.Y. 2004); *DeMarco v. Robertson Stephens ("DeMarco III"),* 318 F.Supp.2d 110 (S.D.N.Y. 2004); *see also In re Initial Public Offerings ("IPO"),* 297 F.Supp.2d 668 (S.D.N.Y. 2003); *Norman v. Salomon Smith Barney*, 2004 WL 1287310 (S.D.N.Y.)(denying motion to dismiss claim against trading program based on SSB research); *La Grasta v. First Union*, 358 F.3d 840 (11th Cir. 2004)(reversing motion to dismiss for statute of limitations); **but compare** *Podany v. Robertson Stephens*, 318 F.Supp.2d 146 (S.D.N.Y. 2004)(granting motion to dismiss research analyst case).

The Distinct Facts Alleged in the Merrill Lynch Class Actions

Motions to dismiss generally review the sufficiency of the complaint to determine whether the allegations state a cause of action on which relief may be granted. Judge Pollack dismissed his securities class actions at the pleading stage, but did not rule on the underlying merits. The cases reviewed by Judge Pollack alleged distinct facts in the pleadings – revealed largely before discovery.

The Class Plaintiffs faced a tough challenge to allege facts sufficient to survive a motion to dismiss. The NASD found Merrill Lynch published fraudulent research on *Goto.com* and *InfoSpace*. "As a result, Merrill Lynch effected transactions in, or

induced the purchase or sale of, securities by means of acts deemed to be manipulative, deceptive or otherwise fraudulent devices or contrivances." NASD, Letter of Acceptance, Waiver and Consent ("AWC"), No. CAF030028 at 24 (Apr. 21, 2003).

The NASD found Merrill Lynch "only" violated NASD Advertising Rules for its coverage of 24/7 Real Media ("24/7"), Lifeminders, and Homestore.com, but did not find violations of federal anti-fraud laws.[1] The AWC does not mention *Interliant, eToys, iVillage, LookSmart, Openwave Systems, Pets.com*, or *Quokka Sports* at all.

Judge Pollack decided the motions to dismiss these securities class actions under 10b-5 where the Class consisted of non-clients who did not allege to have purchased the securities through Merrill Lynch. Claimants need to distinguish their facts from the allegations in the complaints before Judge Pollack, because respondents are insisting that Judge Pollack's decision protects brokerage firms from liability. Judge Pollack was hardly the only judge presiding over research analyst cases in the Southern District of New York ("S.D.N.Y."). This article details their decisions and demonstrates the facts judges in the S.D.N.Y. have accepted as sufficiently pleading a 10b-5 cause of action.

Intent to Defraud – Scienter and the Millions of Dollars in Bonuses

Plaintiffs cannot "second guess" analysts after the fact and conclude that the analyst's statement was fraudulent. *Podany* 318 F.Supp.2d at 154. Analysts could review the same information about an issuer and arrive at different conclusions. "A statement is objectively misleading. . . simply by virtue of being false. . . . A statement can also be misleading, though not technically false, if it amounts to a half-truth by omitting some material fact." *Fogarazzo* at *14. "But a statement does not become fraudulent simply by virtue of being false (or otherwise misleading) – the other elements of fraud, such as scienter and reliance, must also be present." Id.

A party pleads scienter by "establish[ing] a 'strong inference' of fraudulent intent 'either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.'" *Suez Equity v. The Toronto-Dominion Bank,* 250 F.2d 87, 99-100 (2d Cir. 2001), *quoting Shields v. Citytrust Bancorp*, 25 F.3d 1124, 1128 (2d Cir. 1994). "In general, a strong inference of scienter 'may arise where the complaint sufficiently alleges that the defendants: (1) benefitted in a concrete and personal way from the purported fraud, (2) engaged in deliberately illegal behavior, (3) knew facts or had access to information suggesting that their public statements were not accurate, or (4) failed to check information they had a duty to monitor.'" *Fogarazzo* at *15, *quoting Novak v. Kasaks*, 216 F.3d 300, 310-11 (2d Cir. 2000).

The various, well-documented settlements offer clear evidence of scienter as to the existence of "wide-spread conflicts of interest between the analyst and investment banking departments. . . ." *Fogarazzo* at *16. Many, if not all, of the Research Analyst AWC's have shown that firms compensated analysts based on their ability to generate investment banking fees. Further, brokerage firms entered AWC's which found the firms

[1] Contrary to Judge Pollack's decisions, Merrill Lynch accepted findings that its coverage of 24/7, Lifeminders, and Homestore.com "were not based on principles of fair dealing and good faith and did not provide a sound basis for evaluating facts, contained exaggerated or unwarranted claims about these companies, and/or contained opinions for which there was no reasonable basis." *AWC* at 24-25. In light of this AWC entered into **prior to Judge Pollack's granting dismissal**, Judge Pollack's holding that these Class Plaintiffs could not prove what Merrill Lynch admitted is inexplicable.

were engaged in deliberately illegal behavior.

The plaintiffs in *Fogarazzo* ". . . certainly alleged scienter by showing that the Banks had both the motive and opportunity to commit the fraud – they were the entities that released the allegedly fraudulent analyst reports." *Id.* at *15. The Banks did not contest opportunity, but did contest motive.

Judge Scheindlin held that plaintiffs "show[ed] motive by alleging concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." *Id.* (internal citation omitted). As in most research analyst cases, ". . . the motive prong is . . . satisfied because the Banks allegedly doctored their analyst reports in order to win investment banking business from RSL." *Id.* at 16. Additionally, the *Fogarazzo* plaintiffs alleged the Banks exchanged favorable research coverage business. Even where ". . . there are no explicit allegations of a deal to trade research coverage for business, . . . there are remarkable coincidences that, viewed in the light most favorable to the plaintiffs, suffice to suggest [a] *quid pro quo." Id., citing WorldCom*, 294 F.Supp.2d at 425. The illicit arrangement need not only to have involved the security covered in the research reports. In *Fogarazzo*, for instance, "**some** of the most specific allegations of scienter in the complaint" pertained to securities other than RSL. "Taken together," Judge Scheindlin found he could "easily infer that the Banks' relationships with RSL were subject to the same conditions as with other companies." *Id.* (emphasis in original).

Judge Rakoff concluded that "the stark difference" between what an analyst recommended to the public and what he recommended to institutional investors "supports a reasonable inference of an intent to mislead and defraud the former." *DeMarco* I at 635.

Misrepresentations of Opinion are Actionable under Rule 10b-5

The Supreme Court announced in *Virginia Bankshares* that statements of opinion may be actionable as fraudulent where the statements are objectively and subjectively false. *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1095-96 (1991); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F.Supp.2d 1248 (N.D. Cal. 2000). "A statement is objectively misleading . . . simply by virtue of being false." *Fogarazzo* at *14. Cases decided under *Virginia Bankshares* have concluded that "[t]o prove that [ ] statements were subjectively false the plaintiffs must show that, at a minimum, the [speaker] made their statements in reckless disregard as to whether they were false." *In re Reliance Sec. Litig.*, 135 F.Supp.2d 480, 515 (D.Del. 2001).

"Forward-Looking" Statements

The Class Plaintiffs conceded that the research reports and ratings were opinions, which "necessarily" contained forward-looking statements. *August Decision* at 372, 376. "[T]he only challenge that may be made to a statement of opinion is that the speaker did not actually hold the opinion." *August Decision* at 372-73, *citing Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1095-96 (1991).[2]

[2] Courts have demonstrated confusion as to the proof required to show a speaker does not "actually" hold the opinion stated. Under *Virginia Bankshares*, to prove a misstatement of opinion, a plaintiff must show that the misstatement was both objectively and subjectively false. "Statements regarding projections of future performance may be actionable under Section 10(b) or Rule 10b-5 . . . if the speaker does not genuinely **or reasonably** believe them." *In re International Business Machines*, 163 F.3d 102, 107 (2d Cir. 1998). Yet, Judge Lynch held that proving unreasonableness of an opinion could not satisfy the requirement that the speaker did not actually believe in what she said. *Podany*,

Judge Pollack found that the Class Plaintiffs' allegations relating to conflicts of interest and the ratings were irrelevant to the determination of whether the statements were genuinely held – "undisclosed motivations are not actionable." *Id.* at 374. Without that evidence, "plaintiffs [were] left with just the e-mails." *Id.* The emails, according to Judge Pollack, were not contemporary with the alleged fraudulent reports and concerned other securities. Therefore, the Class Plaintiffs failed to show Merrill Lynch did not actually hold the opinions contained in the research reports and ratings.

Judge Pollack's rulings rest on the insufficiency of evidence alleged in the complaints before him. Judge Pollack did not dismiss the complaints because an aggrieved party has no legal remedy for a misrepresentation of opinion. As revealed in other research analyst cases, opinions contained in research reports may well be actionable.

In contrast to Judge Pollack's holding, Judge Scheindlin determined that "[t]here is no question that plaintiffs have identified the allegedly misleading statements: **they are the buy recommendations and price targets contained in the Banks' research reports**." *Fogarazzo* at *14. As a statement of opinion, Judge Scheindlin held that evidence that the statement was objectively false and that the speaker deliberately misrepresented her actual opinion was sufficient to render a misstatement of opinion actionable.

Judge Rakoff came to the same conclusion: **"The primary statements here alleged to be misleading are the ratings themselves and the accompanying 'bullish' analysis."** *DeMarco I*, 309 F.Supp.2d at 634. Contrary to Judge Pollack's decision, the Court held that two e-mails written in July 2000 and January 2001 sufficiently supported a reasonable inference that the analyst did not believe in his Strong Buy rating for RealNetworks "throughout the period that he continued to give RealNetworks his very highest rating (i.e. through July 2001)." *Id.*

Judge Cote denied SSB's argument that the research reports "were simply statements of opinion and expressions of optimism held in good faith." *WorldCom*, 294 F.Supp.2d 392 at 427. In that case, plaintiffs "alleged with particularity that, at a minimum, **Grubman was not functioning as an independent analyst**, but had been corrupted, and withheld from his readers his serious concerns about the accuracy of the WorldCom financial information that he was conveying to them and about the reliability of his

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318 F.Supp.2d at 155-56. "A securities fraud action may not rest on allegations that amount to second-guesses of defendants' opinions about the future value of issuers' stock – second-guesses made all too easy with the benefit of hindsight." *Id.* at 154.

In *Podany*, Judge Lynch also stated that ". . . proving the falsity of the statement 'I believe this investment is sound' **is the same as proving scienter**, since the statement (unlike a statement of fact) cannot be false at all unless the speaker is knowingly misstating his truly held opinion." *Id.* On the other hand, Judge Pollack claimed "the pleading of a false statement [of opinion] does not 'dovetail' with scienter." *August Decision* at 373. "These are independent pleading requirements and the pleading of a motive to issue false statements does not establish that defendants made materially false statements." *Id.* In *Fogarazzo*, Judge Scheindlin stated: "[T]he Supreme Court has confirmed that misstatements of opinion are actionable, so long as the speaker deliberately misrepresented her actual opinion. **Whether a misrepresentation is deliberate is, of course, a question of scienter, not of whether the plaintiffs have identified the alleged misstatements and explained why they are misleading.**" *Fogarazzo* at *14 n.123.

advice to them." *Id.*

The mere fact that research analysts produce forward-looking opinions cannot immunize them from liability where they did not actually hold the opinions they published. **"Critical to the value of these reports was that the Banks held them out to be based on accurate information and to contain independent and unbiased recommendations on which the investing public could rely."** *Fogarazzo* at *2. In reality, many research analysts were not independent, were biased, and passed along inaccurate information.

Materiality of Misrepresentations and Omissions and The Bespeaks Caution Doctrine

In spite of these showings, Banks have argued that the mixture of cautionary language in the research reports and disclosures in newspaper articles successfully warned the public about risks associated with the stocks they recommended. The bespeaks caution doctrine "is essentially shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law." *In re Donald Trump Casino Sec. Litig.,* 7 F.3d 357, 364 (3d Cir. 1993). In the situation of the *Merrill Lynch* research analyst cases, Judge Pollack decided that the conflicts of interest and fraudulent rating system were immaterial. *August Decision* at 376-78.

"The doctrine of bespeaks caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows the Grand Canyon lies one foot away." *In re Prudential Securities Inc. Ltd. Partnerships Lit.,* 930 F.Supp. 69, 72 (S.D.N.Y. 1996)(Pollack, J.). Judge Pollack concluded that the "[Class] Plaintiffs' 'Grand Canyon' is the bursting of the Internet bubble and the concomitant drop in the stock price of Interliant and 24/7." *August Decision* at 376. In research analyst cases in the S.D.N.Y., Judge Pollack's colleagues have found similar cautionary language and newspaper articles offered no protection in spite of the bursting of the bubble.

Cautionary Language Investment Banks Provided in Research Reports

The bespeaks caution doctrine offers protection only when a forward-looking statement "contain[s] extensive and specific warnings about the riskiness of investments." *In re Prudential Ltd. Partnerships,* 930 F.Supp. at 72. General warnings and boilerplate do not constitute bespeaks caution language; neither are disclaimers which are not "explicit or specific as to the fraud alleged." *La Grasta*, 358 F.3d at 851. Cautionary language cited to justify application of the doctrine must precisely address the substance of the specific statement or omission that is challenged. *In re Trump Casino*, 7 F.3d at 371-72**. Cautionary language does not protect material misrepresentations or omissions when defendants know of their falsity when made.** *Huddleston v. Hermon & MacLean*, 640 F.2d 534 (5th Cir. 1981), modified on other grounds, 459 U.S. 375 (1983).

The cautionary language must address the misrepresentations and/or omissions alleged to have been fraudulent. In the Pollack Decisions, as evidenced by excerpts provided by Judge Pollack, Merrill Lynch provided (at least) some warning concerning risk. As a matter of law, Judge Pollack held that this language rendered any allegation of misrepresentation or omission based on the conflicts and rating system immaterial.

Merrill Lynch included allegedly skeptical language which Judge Pollack found should have sufficiently cautioned investors. This skepticism included statements that:

> -potential problems of financial controls "makes accurate forecast of results difficult;"

-"the stock is likely to be extremely volatile;"
-"the stock's valuation is aggressive in light of the company's relatively early stage of development and the risk associated with the consolidation strategy;"
-"we expect [the company] to develop 'in fits and starts;'"
-". . . we continue to have concerns about low revenue visibility and volatile margins."

August Decision at 377. Thus, claims that Merrill Lynch exaggerated their enthusiasm about the stocks were immaterial due to cautionary language contained in the reports.

Additionally, each security "carried a 'D' rating, which was published on the first page of every report and signified that the stocks have '**high potential for price volatility**.'" *August Decision* at 377 (emphasis in original). However, as Judge Pollack demonstrated, Merrill Lynch assigned a "D" rating to **all Internet companies***. Id.* at 361. The "D" rating offered investors no guidance as to the riskiness among Internet companies.

Judge Pollack did not discuss Merrill Lynch's numerical ratings, which provided what Merrill Lynch considered as the potential for appreciation. A "D-1-1" rating, which Merrill Lynch maintained for InfoSpace during almost all of 2000, meant that Merrill Lynch recommended a stock as appreciating by more than 20% within the first 12 months, another 20% within 12-24 months, but with a high potential for volatility. Consistency of a single recommendation along with the absence of cautionary language or scant cautionary language may nevertheless render a misrepresentation or omission material.

Analysis under the bespeaks caution doctrine necessitates a close reading of the context of the statements made*. In re Trump Casino* 7 F.3d at 369, **passim**. As other judges have shown, contrary to Judge Pollack, inclusion of cautionary language does not end the discussion. Cautionary language cannot overcome what the analyst knows is false, and an analyst's unwavering support for a security tells investors to throw caution to the wind.

Judge Cote rejected the bespeaks caution doctrine as a defense in her decision in *WorldCom,* 294 F.Supp.2d 392, 427: "[t]he cautionary language on which the defendants rely does not come close to providing a sufficient warning of Grubman's skepticism about the WorldCom data he was presenting to his readers and his skepticism about his own repeated, forceful recommendations that investors should buy WorldCom securities." *Id.*

Judge Rakoff agreed: "[T]he very fact that, notwithstanding the skeptical language, the reports gave RealNetworks its highest possible 'buy' rating is tantamount to a statement that the reader of the reports should discount the skeptical language*." DeMarco* I, 309 F.Supp.2d at 634. In that case, the bespeaks caution defense "fail[ed] because a reasonable fact-finder could conclude that Lehman, in repeatedly and disingenuously giving RealNetworks its highest 'buy' rating, was effectively representing that it did not believe the risks involved should deter a prudent investor from purchasing RealNetworks . . . ." *Id.*

Newspaper Articles Did Not Sufficiently Warn the Public

Merrill Lynch, as other defendant-respondents have done since, pointed to supposedly wide-spread knowledge of conflicts of interest between research and investment banking. Judge Pollack agreed: "The plethora of public information would have required even a **blind, deaf, or indifferent** investor to take notice of the purported alleged 'fraud.'" *August Decision* at 389 (emphasis in original). Judge Pollack assumed this position by taking judicial notice of newspaper articles. He justified his decision, because "[t]he Court may take judicial notice of newspaper articles for the fact of their publication without transforming the motion into one for summary judgment." *August Decision* at 383, n.3. However, Judge

Pollack did not take judicial notice for the fact of their publication, but for their contents.

After reviewing these newspaper articles, Judge Pollack stated: "Thus, well before the internet bubble burst in March and April 2000, abundant material was in the public domain regarding the existence of widespread investment banking conflicts of interest and allegedly inflated buy ratings in Wall Street stock research*." Id.* at 388. "Every investor of reasonable intelligence would have been absolutely on inquiry notice. Plaintiffs overlook the 'uncontroverted evidence [that] irrefutably demonstrates' the inquiry notice." *Id.* at 389 (alteration in original). Judge Pollack concluded that "[t]he market could not have been defrauded by the alleged failure to disclose the conflicts or the supposed three-point rating system. Plaintiffs' own allegations and the articles upon which they rely evidence that the market was apprised of the very conflicts and ratings issues raised by them." *Id.* at 375.

The courts have disagreed with Judge Pollack. The Eleventh Circuit recently denied a motion to dismiss in a case similar to *Merrill Lynch* based on First Union's coverage of Ask Jeeves. *La Grasta*, 358 F.3d at 849. In that case, the Eleventh Circuit determined from the pleadings that the time of inquiry notice started based on a June 2000 *Smart Money* magazine article. *Id.* at 846. But the Court questioned the propriety of taking judicial notice of a dozen newspaper articles for the purposes of hearing a motion to dismiss. *Id.* at 849-50.

Unlike the articles of which Judge Pollack took judicial notice, the June 2000 *Smart Money* article **"featured [the First Union analyst] and her coverage of Ask Jeeves, and disclosed that, since January of 2000, First Union had been 'in the running' to be selected as the underwriter for Ask Jeeves' secondary stock offering, with a 'potential seven-figure payday.'"** *Id.* at 844. By contrast, the "Merrill Lynch" newspaper articles barely mentioned either Merrill Lynch or Henry Blodget. The articles also did not discuss the specific securities the plaintiffs purchased. *August Decision* at 383-88.

Judge Cote rejected the same newspaper article argument. The articles presented by the SSB Defendants in that case detailed a "friendship" between SSB analyst, Grubman, and WorldCom's CEO, Ebbers. Another discussed "Grubman's 'dual role' as an analyst and deal broker.'" *WorldCom Ohio* at *6. Yet another revealed how research analysts derived their compensation based on the amount of investment banking fees generated. *Id.* Nonetheless, Judge Cote held that "the press reports on which the SSB Defendants rely are simply too vague to support a conclusion that, as a matter of law, plaintiffs were on notice as early as September 2000, of their potential claims that an illicit relationship between the SSB Defendants and WorldCom had tainted financial reporting about WorldCom in the analyst reports." *Id.*

Similarly, Judge Scheindlin has held that such newspaper articles failed to disclose "allegations that investment bankers were requiring analysts to issue certain recommendations, that analysts' compensation was derived from the amount of investment banking revenue that they generated, or that the analysts' views of the securities they covered were the exact opposite of what they recommended to the public." *Fogarazzo* at *18.

Judge Lynch distinguished the case before him from the *August Decision*: "It is one thing to be aware that an analyst might have a conflict of interest that could cloud his judgment, and quite another to be aware that the analyst believes the exact opposite of what he is saying, and that he is saying it precisely in order to induce the unwary to buy the very stock the analyst is trying to unload before others realize, as he has, that the stock is wildly overvalued." *DeMarco III*, 318 F.Supp.2d at 122.

Judge Cote also disagreed with Judge Pollack as to what

legally constituted inquiry notice. According to Judge Pollack, the newspaper articles placed the Class Plaintiffs on inquiry notice, because they disclosed the "**potential** for the conflicts." *August Decision* at 379. Judge Pollack cited this as "the language used by the Second Circuit in" *LC Capital Partners v. Frontier Ins. Group*, 318 F.3d 148 at 153-54, 157 (2d Cir. 2003). Judge Pollack's summary rejection of the Class Plaintiffs' insistence on "**probability of the fraud**" is unfounded.

In *LC Capital*, the Second Circuit stated that the **district court** determined inquiry notice based on the potential of the fraud. The Second Circuit's discussion upheld prior Second Circuit language: "As we have explained, '[w]hen the circumstances suggest to an investor of ordinary intelligence the **probability** that she has been defrauded, a duty of inquiry arises.'" *Id.* at 154, *quoting Dodds v. Cigna Securities*, 12 F.3d 346, 350 (2d Cir. 1993); *see also Newman v. Warnaco Group*, 335 F.3d 187, 193 (2d Cir. 2003)(storm warnings "must be probable, not merely possible"). In contrast to Judge Pollack, Judge Cote held: "[Press reports] must be sufficiently revealing to make the existence of the fraud **probable**." *WorldCom Ohio* at *6.

These newspaper articles could not have apprised the investing public of the conflicts of interest and the fraudulent rating system, because the articles were not specific or explicit to the actual fraud alleged. General statements about the possibility of conflicts, for instance, would not have warned investors that a particular research report was false.

The Individual Claimant and What the Investing Public Knew

The newspaper article defense is a variation of the "truth on the market" defense. *See Demarco I,* 309 F.3d at 634-35. Individual investors who were clients of the publishing brokerage firm need not plead fraud on the market. The individual claimant may prove direct reliance on the broker's statements. In this situation, the truth on the market defense is inapplicable. Evidence of what a newspaper might have written concerning general conflicts is irrelevant unless a respondent can show the claimant knew or should have known of the article. General articles about conflicts cannot apprise a claimant of the specifics of a respondent's fraud, because they do not warn the investor of the probability their broker is defrauding them. *See WorldCom Ohio* at *6; *Fogarazzo* at *17 ("Available information must establish 'a probability, not a possibility' of fraud to trigger inquiry notice"), *quoting Newman*, 335 F.3d at 193.

Side Note: The Duty to Speak Doctrine

Respondents have also presented a defense related to the bespeaks caution argument in the Pollack Decisions. They contend "that the analyst reports disclosed [the conflicts] to the extent required by NASD and NYSE regulations, and Section 10(b) does not require anything beyond such compliance." *WorldCom* at 429-30 ("Where the SEC has decided what type of disclosure is necessary to reveal to the public a particular conflict of interest, and has enacted regulations to enforce that decision, courts will not impose greater disclosure obligations under the rubric of Section 10(b) or Rule 10b-5"). They have also argued that Claimants cannot hold brokers to present regulations retroactively and that imposing liability on anything beyond what was required would constitute an *ex post facto* taking.

Judge Cote found this argument "unavailing" and "wrong." *Id.* at 430. "Having chosen to speak to the investing public through the issuance of the analyst reports, they had an obligation to communicate in good faith and to disclose material information." *Id.* at 431. "Those who choose to speak . . . must speak honestly – not in half-truths, in bad faith, or without a reasonable basis for their statements. When a person speaks, but chooses to omit

information, the liability for that omission will be judged by its materiality. The SSB Defendants were in the business of speaking to the public about stock values. They spoke forcefully and frequently about the value of WorldCom. Having spoken, the SSB Defendants may be held accountable for any material omissions in those statements." Id. at 428.

Transaction Causation

"Transaction causation is generally understood as reliance." *Castellano v. Young & Rubicam*, 257 F.3d 171, 186 (2d Cir. 2001). "Pleading that defendants perpetrated a fraud on the market . . . fulfills a plaintiff's transaction causation pleading requirement." *Fogarazzo* at *8. Under the fraud on the market doctrine, "misleading statements defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Basic v. Levenson*, 485 U.S. 224, 241-42 (1988). Reliance is presumed under the fraud on the market doctrine. "In such a case, individual investors are relieved of the burden of showing direct reliance on the fraudulent statement because it is assumed that in an efficient market, all public information is reflected in share price, including any misrepresentations concerning the value of the company or its stock. . . ." *DeMarco III*, 318 F.Supp.2d at 119.

The Class Plaintiffs had no choice but to argue fraud on the market, because they had not seen or read the research reports. *August Decision* at 359. Judge Pollack ruled that the Class Plaintiffs had failed to allege any misleading statements on which the Class Plaintiffs could have relied or which could have artificially inflated the price; thus, "[t]he market could not have been defrauded by the alleged failure to disclose the conflicts or the supposed three-point rating system." *Id.* at 375. [3]

Plaintiffs in similar research analyst cases have sufficiently alleged transaction causation solely on the fraud on the market doctrine. "An underwriter . . . that has a research department engaged in the business of analyzing companies in order to disseminate to the public information and opinions about specific securities clearly intends that the market take into account its recommendations to buy or sell such securities." *DeMarco III*, 318 F.Supp.2d at 120.

The SSB Defendants claimed in *WorldCom* that it would be inappropriate to apply the fraud on the market presumption in a research analyst case. However, Judge Cote rejected SSB's argument:

> At no point in their briefs do [the SSB Defendants] acknowledge Grubman's alleged role as the premier analyst in the telecommunications industry. Nothing in the defendants' briefs address why Grubman was paid approximately $20 million a year in compensation by SSB to be its telecommunications analyst if his analyst reports were irrelevant to the market. Nothing in the defendants' briefs addresses why Grubman issued reports announcing that WorldCom was his favorite stock, offering the opinion that 'we would be aggressive buyers at these prices,' and 'strongly' reiterating his 'Buy rating on WorldCom,

[3] Failure to disclose compensation arrangements is fraudulent conduct under Securities Act §17(b): "It shall be unlawful for any person . . . to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication, which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof."

> if his views were not likely to affect the decisions made by WorldCom investors. The plaintiffs have shown that it comports with both common sense and probability to apply the presumption here.

In re WorldCom, 219 F.R.D. 267, 299 (S.D.N.Y. 2003)(internal citations omitted).

Judge Rakoff agreed with Judge Cote in rejecting Lehman's argument that the **basic** presumption does not apply to research reports. *DeMarco I*, 309 F.Supp.2d at 635-6. Judge Rakoff also did not follow Judge Pollack's conclusion that general market awareness rebuts the Basic presumption: "Simply establishing the media had reported on some generalized conflicts between investment banking and research departments in a variety of investment banks is not the equivalent to market awareness of Stanek's misrepresentations." *Id.* at 636.

As mentioned above, individual claimants need not plead fraud on the market to prove reliance. Investment banks "widely distributed" research reports "directly to the Banks' clients" and represented them as accurate, independent, and unbiased. *Fogarazzo* at *2. Claimants relied on this research when choosing to purchase or sell securities covered by the brokerage firm. Brokerage firms failed to disclose conflicts of interest and misrepresented their true opinions about stock values.

Loss Causation

Loss causation poses one of the most elusive elements of securities fraud for the practitioner, often because of the confusion with transaction causation. *See Emergent Capital v. Stonepath Group*, 343 F.3d 189, 198-99 (2d Cir. Sept. 4, 2003). Following the Second Circuit decision in *Emergent Capital*, "[i]t is *now* clear that allegations of artificial inflation, without more, do not suffice to plead loss causation in securities fraud cases involving material misrepresentations and omissions." *IPO*, 297 F.Supp.2d at 672 (emphasis in original).[4] "The inference to be drawn [from *Emergent Capital*] is that allegations of artificial inflation *plus* something else (described only as a 'second, related loss') suffice." *Fogarazzo* at *9.

The Class Plaintiffs failed to allege that Merrill Lynch's coverage of 24/7, Interliant and other companies caused their losses. They claimed that "the so-called 'disparity of investment quality' or 'price inflation' theory" sufficed to plead loss causation. *August Decision* at 363. "[I]n a fraud on the market putative class action, price inflation is typically used as a surrogate for reliance and the closely related concept of **transaction** causation*." Id., citing Robbins v. Koger Props., Inc.,* 116 F.3d 1441 (11th Cir. 1997). According to Judge Pollack, fraud-on-the-market is not a surrogate for loss causation.

Intervening Cause: The Market Bubble

Loss causation is comparable "to the tort concept of proximate cause, meaning that in order for the plaintiff to recover it must prove the damages it suffered were a foreseeable consequence of the misrepresentation." *Suez Equity* at 96. As such, "when factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the

[4] Judge Scheindlin determined a plaintiff need not plead loss causation for a claim based on market manipulation. Market manipulation is "virtually a term of art when used in connection with securities markets. . . . Market manipulation refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *IPO*, 297 F.Supp.2d at 674 n.30. These activities are distinct from the misconduct in the research analyst cases.

defendant's actions." *Castellano*, 257 F.3d at 189.

In the case of the Pollack Decisions, Judge Pollack pointed to the bursting of the bubble as an intervening cause. In other words, despite omissions of conflicts of interest and fraudulent rating systems, the collapse of the Internet market served as an intervening cause. The Class Plaintiffs did not "allege a factual link between that decline and defendants' conduct." *August Decision* at 365. The absence of evidence of such a cause for the losses as a result of defendants' conduct necessitated the legal conclusion that the conduct could not have caused the Class Plaintiffs' losses.

As stressed elsewhere, the Class Plaintiffs' complaints suffered from a lack of evidence. The legal conclusion Judge Pollack reached is limited to the complaints before him. "Of course, if the loss was caused by an intervening event, like a general fall in the price of Internet stocks, the chain of causation will not have been established. **But such is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss.**" *Emergent Capital*, 343 F.3d at 197. If a plaintiff shows that defendant caused at least a portion of its losses, the intervening extraneous market forces serve only to limit damages.

Direct Relation to the Stock's Intrinsic Investment Characteristics

In order to plead loss causation, a plaintiff must show that the misrepresentation and/or omission relied upon caused the plaintiff's losses. This is the "something more" beyond price inflation required to prove loss causation. In the Pollack Decisions, the Class Plaintiffs based their complaint, in large part, on Merrill Lynch's conflicts of interest and rating system. The conflicts of interest and rating system the Class Plaintiffs alleged to have caused their losses were misrepresentations and/or omissions extraneous to the intrinsic value of 24/7 and Interliant. *August Decision* at 364-66. Without "something more," the Class Plaintiffs could not prove loss causation as a matter of law. The problem arises as to the meaning of "something more." "The loss causation inquiry typically examines how directly the subject of the fraudulent statement caused the loss, and whether the resulting loss was a foreseeable outcome of the fraudulent statement." *Suez Equity*, 250 F.3d at 96. A plaintiff must show that the alleged misrepresentation or omission "was 'directly related to the stock's intrinsic investment characteristics.'" *Fogarazzo* at *10. "It [is] enough that (1) the misrepresentation artificially inflated the value of the security, or otherwise misrepresented its investment quality, and (2) the *subject* of the misrepresentation *caused* the decline in the value of the security." *Id.* (emphasis in original).

In *Suez Equity*, "the misrepresentation . . . led plaintiffs to appraise the value of [the] securities incorrectly by assuming the competency of . . . the [company's] principal." *Suez Equity*, 250 F.3d at 96. Defendants' omission related directly to the intrinsic value of the stock: "Under this chain of factual allegations, it would have been foreseeable to defendants that facts concealed in the Modified Report would have indicated Mallick's inability to run the Group, and would have forecast its (eventual fatal) liquidity problems." *Id.* at 97. Similarly, in *Emergent Capital*, the Second Circuit found plaintiffs adequately alleged transaction and loss causation, where company insiders engaged in a "pump and dump." *Emergent Capital*, 343 F.3d at 197. The allegation of the scheme showed that the value was driven up in order for corporate insiders to sell at inflated prices. It was reasonably foreseeable that investors who purchased unaware of the scheme would lose money when defendants sold. *Id.* at 197-98.

In *Fogarazzo*, defendants Lehman, Goldman Sachs, and Morgan Stanley moved to dismiss based, in part, on failure to plead loss causation

adequately.

> "Applying the standard of *Emergent Capital*, there is no doubt that plaintiffs here have adequately alleged that the Banks' misrepresentations caused their loss. . . . RSL ultimately failed because of the very facts that the Banks misrepresented: that RSL was in financial trouble and that the entire 'internet telephony sector' was collapsing.
>
> "It is true that the Banks did not *conceal* any facts regarding RSL. . . . Nor did they conceal it when RSL earnings came in below estimates. What the banks did do, however, was manipulate these objective facts by misstating the Banks' true opinions of the impact of these events on the investment quality of RSL securities. Rather than identify these events for what they really were – the first warning[ ] signs of the demise of RSL – the Banks instead injected bullish reports into the market suggesting that RSL was being drastically under priced, that events such as the restructuring charge were aberrations, and that this was the perfect time to buy RSL stock because it was far cheaper than it ought to have been. The Banks' purportedly expert opinions thus concealed the actual financial state of RSL. In other words, even though the true facts were available for the world to see, by affirmatively opining on the meaning of those facts the Banks obscured the logical conclusion that RSL was failing.

Fogarazzo at *11.

The facts of *Fogarazzo* are not isolated. Similar misrepresentations and omissions appear in WorldCom (undisclosed loans collateralized by WorldCom stock, subject to massive margin calls), InfoSpace (misrepresenting the value of contracts and the "reach" of InfoSpace in the marketplace), and others. In this regard, contrary to Judge Pollack, there were factual predicates to show that these defendants artificially inflated the price through fraud and that these misrepresentations and omissions caused losses when the market became aware with corrective disclosure.

Conclusion

Judge Pollack's Merrill Lynch Decisions represent an extreme viewpoint that has not become the majority view. Other federal judges have provided common sense answers to Judge Pollack's arguments. Judge Pollack's decisions should have very little precedential value. At best, Judge Pollack's decisions are limited to their facts. Realistically, they have been discredited by the decisions of other Federal District Courts who intentionally chose not to follow Judge Pollack. His narrow view of the federal securities laws contradicts the plain intent of the federal securities laws – investor protection. At law, caveat emptor ended with the passage of the Securities Exchange Act of 1934. It is unfortunate that a distinguished jurist lost sight of those basic principles.

Theories of Recovery Against Investment Advisers and Their Sponsors

By: Jeanne Crandall

Since 1996, Jeanne Crandall has been representing Claimants exclusively from her downtown Dallas law firm. Her single-handed investigation into the criminal activity referenced in this article was prosecuted on behalf of 17 elderly men and women, and is described in the 2000 book by Mark Dempsey, Robbing you Blind. Subsequently, she successfully represented a class of 70 individuals who invested over $14 million in long-term, "Medicare-backed" promissory notes. With a degree in financial accounting, together with 24 years of experience in complex commercial litigation, she has developed an uncanny ability for uncovering financial fraud. She represented the "beneficiary" point of view at ALI/ABA seminars on fiduciary standards held in Chicago and Boston in 1999 and 2000. She is also an adjunct professor of law at Texas Wesleyan University in Ft. Worth. Her address is 1201 Elm, Suite 3850, Dallas, TX 75270, 214-760-8100, 214-760-8109 fax, e-mail: jcrandall@att.net.

Fact: Investment Advisers are Commodities Purchased and Sold Among Firms

Annable Turner & Company, Inc., Grand Prairie, Texas, was a "registered investment adviser," which means nothing more than the fact that it paid $50.00 to the SEC to be "registered." Its owner, Roger E. Turner, only 33 when he went to jail, executed transactions through multiple, well-known firms, with the full knowledge of his registered broker-dealer firm. He was affiliated with a dozen insurance companies, a CPA, and a company that touted him as a "retirement specialist" to major corporations in the Dallas-Ft. Worth area. His office was considered an "OSJ"–Office of Supervisory Jurisdiction, for the New York-based broker-dealer firm that listed him as a "registered representative." He had over $50 million in assets under his control. In addition, he owned and managed a series of private corporations, including:

> *Carl A. Johnson & Sons, Inc.*: a farm implements manufacturing company in Thrall, Texas, which Turner purchased in 1988;
>
> *R.E. Turner & Company*: a "private investment firm";
>
> *RET Express Tax Refunds, Inc.:* an electronic tax return processor engaged in business in 1990-1991;
>
> *Manufacturers Acceptance Corporation*: a factoring company formed by Turner in 1990 to factor the receivables of Carl A. Johnson & Sons, Inc. (the elderly clients of Annable Turner & Company were solicited to buy "MAC Bonds"–an undocumented loan to Turner's company, Manufacturers Acceptance Corporation); and
>
> *Physicians Billing & Bookkeeping, Inc. d/b/a HealthTeamm Management*: a medical billing company acquired by Turner in 1993 to process insurance claims for physicians.

The SEC, which examined Annable Turner periodically, was aware of Turner's numerous outside business interests, and found nothing objectionable in its 1995 examination of Annable Turner. Turner's retail broker-dealer actually encouraged its representatives to engage in other lines of business, stating:

> Representatives may develop a business that is a conglomerate of several related business entities. For example, a Representative may be an investment adviser and offer investment or

financial planning advice through a corporate Registered Investment Adviser entity, perform accounting services through a corporation or as a member of a partnership and be affiliated with an insurance company as an agent or underwriter.

The New York firm had a fee-based referral plan called an "advisory services program" under which it received fees from other broker-dealers and investment management firms in return for referring "advisers" from its nationwide network of over 3000 registered representatives. With the firm's knowledge, Annable Turner was clearing its transactions through multiple firms. Using pre-printed "self-directed IRA" kits from non-bank trust companies, Turner made a convincing case that the IRA funds he misappropriated were carefully preserved in qualified IRA plans.

When Annable Turner was finally shut down in 1997, it had misappropriated over $2.1 million in retirement funds from dozens of largely elderly men and women. The federal district court sent Turner to a low-security prison for one and a half years, and ordered restitution of the $2 million he embezzled at the rate of $200 a month.

This article addresses some of the theories of recovery utilized to obtain recovery from firms that prosper from part-time and other "independent" financial advisers without adequate controls to protect customers from fraud and abuse.

Liability Under Federal and State Securities Laws

Investment advisers are regulated by the Securities and Exchange Commission under the Investment Advisor's Act of 1940, and regulations promulgated thereunder. 15 U.S.C. §80b. Although the Act contains an anti-fraud provision, 15 U.S.C. §80b-6, it is well-established that the Act does not create a basis for a private right of action for damages suffered by defrauded investors. *Transamerica Mortgage Advisors Inc. v. Lewis,* 444 U.S. 11, 19-20 (1979). It does, however, create "federal fiduciary standards" which modify the elements of a traditional 10b-5 case. *Id. at 17*; *S.E.C. v. Capital Gains Bureau,* 375 U.S. 180, 194 (1963)("Nor is it necessary in a suit against a fiduciary, which Congress recognized the investment adviser to be, to establish all the elements required in a suit against a party to an arm's length transaction"). The Act also provides a limited private right of action for rescission of investment adviser contracts and recovery of compensation paid to investment advisers. 15 U.S.C. §80b-15.

Both the federal securities acts and the Uniform Securities Act provide for liability of "any person" who makes a false or misleading statement in connection with the purchase or sale of a security, and joint and several liability for "controlling persons." 15 U.S.C. §77(l); 15 U.S.C. §78j(b); 15 U.S.C. §78t; Uniform Securities Act, § 410(b); Tex. Rev. Civ. Stats, art. 581-33(F). These statutes clearly apply to communications made by an investment adviser for the purpose of inducing the purchase or sale of securities. In addition, a few states have enacted legislation specifically creating a basis for civil liability by "investment advisers" and "investment adviser representatives." Tex. Rev. Civ. Stats., art. 581-33-1(A)(2)(damages against investment adviser or representative "who commits fraud or engages in a fraudulent practice in rendering services as an investment adviser"); N.C.G.S.A. §78C-38(a). Both of these statutes contain provisions for joint and several liability for persons or entities who "materially aid" the investment adviser in his misconduct or who "directly or indirectly control the investment adviser." Tex. Rev. Civ. Stats., art. 581-33-1(E); N.C.G.S.A. §78C-38(b)(1); (2).

Although aiding and abetting liability is no longer a viable theory under the federal securities laws after the U.S. Supreme Court's decision in *Central Bank of Denver, N.A.*

v. First Interstate Bank of Denver, NA, 511 U.S. 164 (1994), aiding and abetting is a basis for liability under state blue sky laws. Uniform Securities Act, §410. Promoting unregistered representatives and unregistered securities can be the basis of aiding and abetting liability. *See SEC v. National Bankers Life Insurance Co.*, 324 F.Supp. 189, 193 (N.D. Tex. 1971), *aff'd*, 448 F.2d 652 (5th Cir. 1972)(defendant can be held liable as an aider and abettor "merely for taking steps necessary to the distribution."); *Morris v. Commodity Futures Trading Comm.*, 980 F.2d 1289, 1292, n.1 (9th Cir. 1992) ("The fact that the individual making the solicitation is unregistered, and is thereby acting unlawfully, is a material fact because it is substantially likely that a reasonable investor would consider the matter important in making an investment decision.")

Given the pleading requirements, discovery restrictions, and mandatory sanctions imposed by Congress in the Private Litigation Securities Reform Act ("PLSRA"), 15 U.S.C. 78u-4(b); (c)(2), it may be more expedient to allege violations of state anti-fraud provisions and omit parallel violations of federal law.

Vicarious Liability Under Section 877 of the Restatement (Second) of Torts

Section 877 of the Restatement (Second) of Torts provides the following legal standard for vicarious liability:

> Directing or Permitting Conduct of Another: For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:
>
> (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or
>
> (b) conducts an activity with the aid of the other and is **negligent in employing him**, or
>
> (c) **permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously, or**
>
> (d) controls, or **has a duty to use care to control,** the conduct of the other, who is likely to do harm if not controlled, and **fails to exercise care in the control**, or
>
> (e) has a duty to provide **protection for**, or to have care used for the protection of, third persons or their **property and confides the performance of the duty to the other**, who **causes or fails to avert** the harm by failing to perform the duty.

(Emphasis supplied) *See also* Restatement (Second) of Trusts, §224(2) (liability as co-fiduciary where there is improper delegation or lack of reasonable care). For states that have adopted this section of the Restatement, it should be clear that the broker dealer firm owes a duty to investors to protect them from the wrongful conduct of affiliated investment advisers.

Finally, the Restatement recognizes a duty to act for the protection of others in any "relation of dependence or of mutual dependence." Restatement (Second) of Torts, §314A (Comment b).

Negligent Supervision

Section 15(b)(4)(E) of the Securities and Exchange Act of 1934 imposes a duty on broker-dealer firms to establish a reasonable system of supervision over persons subject to their supervision. 15 U.S.C. §78o(b)(4)(E). The system must be designed to prevent violations of securities laws, rules, and regulations, and include an established procedure for the detection of abuses. *Id.* Violations of SRO rules concerning such supervision are not, in themselves, actionable but constitute evidence of the standard of care applicable in

the industry, if the customer can establish a duty owed to him or her by the broker dealer firm. *Javitch v. First Montauk Financial Corp, 279 F. Supp 2d 931, 938 (N. D. Ohio 2003), and cases cited therein. But see Star-Tech Liquidating Trust v. Fenster, 981 F. Supp. 1325, 1335 (D. Colo. 1997)(mere negligence insufficient to apply NASD rules); Baden v. Craig-Hallum, Inc., 646 F. Supp. 483, 91 (D. Minn. 1986)(no private cause of action for violation of NASD supervisory rules).* "Duty" is normally established through the opening of a customer account with the broker-dealer firm.

The NASD rules applicable to supervision of independent registered investment advisers are explained in the following. Notices to Members: 91-32, 94-44, and 96-33.

In NTM 91-32, the NASD announced that Article III, Section 40 (now NASD Manual §3040) applies to the investment advisory activities of registered representatives, regardless of whether the activity takes place outside of the scope of their association with the member firm, and that "members that allow their registered persons to conduct such activities are fully subject to the requirements of Section 40, and must, therefore, record all such transactions on their books and records and supervise them as if these transactions had occurred at the member."

In NTM 94-44, however, the NASD "clarified" its prior notice by excluding from the supervisory duty of oversight "arrangements where the account is 'handed off' to unaffiliated third-party advisers."

Finally, in NTM 96-33, the NASD issued another "clarification." Where a member has approved the representative's advisory activities, it must develop and maintain a record keeping system that provides sufficient information to understand the nature of the service being provided by the representative, the scope of his authority to conduct such services, and the suitability of the transactions being recommended. If the member firm has no procedure for tracking the activities of its representatives at another firm, it will be in violation of the NASD's rules of supervision.

Vicarious Liability Based On Actual, Implied or Apparent Authority

Generally, a principal who authorizes conduct of an agent which constitutes a tort to a third person is subject to liability to the third party. Restatement (Second) of Agency, §215. Even where the tortious activity is unauthorized, the principal is liable for matters which, under the agreement creating the relation, he has a right to direct. Restatement (Second) of Agency, § 216, com. a.

"A person who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such persons for the fraud." Restatement (Second) of Agency, §261. *See also Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 837 (Tex. App.-Amarillo 1993, writ denied) ("It is a general rule that an agent's authority is presumed to be coextensive with the business entrusted to his care."). In *Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995), the Colorado Supreme Court applied section 261 of the Restatement of Agency to a corporate officer that abused his position by securing a loan for a "new corporation" when in fact he used the money for his personal benefit. In holding the corporation liable for the misappropriation of the officer, the Court reasoned:

> Our decision recognizes the legal principle that "when one of two innocent persons must suffer from the acts of a third, he must suffer who put it in the power of the wrongdoer to inflict the injury."

Id. at 476.

Section 128 of the Restatement (Second) of Agency provides the following standard concerning apparent authority of a specially accredited agent:

> Unless otherwise agreed, if the principal has specially accredited an agent to a third person, the apparent authority thereby created is not terminated by the termination of the agent's authority by causes other than incapacity or impossibility, unless the third person has notice thereof.

Restatement (Second) of Agency, §128. *See also* Restatement (Second) of Agency, §130 (when principal entrusts an agent with writings or other instruments manifesting his authority and this is retained by the agent and exhibited to third persons, the termination of actual authority does not terminate apparent authority to persons to whom he exhibits the document and who have no notice of the termination of authority).

Participation in Breach of Fiduciary Duty

An investment adviser, based on his status as such, is a fiduciary to his client and thereby owes fiduciary duties of loyalty, full disclosure, and care. *Folger Adam v. PMI Industries,* 938 F.2d 1529 (2d Cir.), *cert. denied,* 502 U.S. 983 (1991); *SEC v. Blavin,* 760 F.2d 706 (6th Cir. 1985); *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank,* 731 F.2d 112 (2d Cir. 1984); *Zweig v. Hearst Corp.,* 594 F.2d 1261, 1268 (9th Cir. 1979); *Miltland Raleigh-Durham v. Myers,* 807 F. Supp 1025 (S.D.N.Y. 1992). The duty of care owed by an investment adviser includes a duty to provide only suitable investment advice. "This duty generally requires an investment adviser to determine that the investment advice it gives to a client is suitable for the client, taking into consideration the client's financial situation, investment experience, and investment objectives." *SEC Release No. 1406* (March 16, 1994); *In re Joseph A. Lago, Adm. Proc. No. 3-6740, summarily aff'd, SEC Release No. 34-25982* (August 8, 1988); *Batterman,* 46 SEC at 310-11. *See also, Association for Investment Management and Research, Standards of Practice Handbook, at 88 ("The manager in these situations has the responsibility to ensure that the client's objectives and expectations for the performance of the account are realistic and suitable to the client's circumstances and that the risks involved are fully understood and appropriate.").*

Most states recognize a separate tort of "participation in breach of fiduciary duty" or "aiding and abetting a breach of fiduciary duty" which can be the basis of liability against those outside a fiduciary relationship that assist a fiduciary in breaching his duty, with knowledge of the breach. *See Mertens v. Hewitt Associates,* 508 U.S. 248, 253-54 (1993); Restatement (Second) of Trusts, §326.

Negligent Failure to Warn

Despite the erosion of the duty of ordinary care owed to all persons, cases still hold that a duty exists to exercise care when referring a professional to a prospective client. . *See Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 291 (Tex. 1996) (duty to not negligently refer an individual to another). In addition, a representation made on a U-5 form may create a duty to correct a misleading representation or disclose those facts revealing an unreasonable risk of harm to investors.

Broker-Dealers Which Hold Out Their Employees as "Financial Advisers"

As most of us know, the major broker-dealer firms no longer call their salesmen "stockbrokers"; they are now known by the more respectable term of "financial consultant" or "financial adviser." Although one would assume that the Investment Advisor's Act of 1940 would apply to a Merrill Lynch or Morgan Stanley service that promises to provide "investment advice" by

"financial advisers[1] , " the SEC, under heavy lobbying by Merrill Lynch, has issued a no-action position that at least temporarily exempts these services from the Act.[2] The impact of the rule on cases determining whether a fiduciary duty exists by "financial advisers" offering their services under a wrap fee program is not known. At least one arbitration case relied on the proposed rule in determining that Merrill Lynch did not owe a fiduciary duty to a customer under the Merrill Lynch Unlimited Advantage service despite marketing brochures promising to provide traditional advisory services. *Ransom v. Merrill Lynch, NASD No. 02-01719.*

In Release Number 1845, dated November 4, 1999, the SEC proposed a new rule, SEC Rule 275.202(a)(11)-1, which would exclude certain asset-based fee accounts from coverage of the Act, with limitations involving strict disclosure of the non-fiduciary nature of the account. The Rule was vigorously opposed by investor and financial planning groups, and it has never been finalized. Pending adoption of a final rule, however, the SEC staff took a no-action position, informing broker-dealer firms that they could operate as if the proposed rule were in effect.

In July 2004, the Financial Planning Association filed an action against the SEC with the District of Columbia Court of Appeals, asserting that the no-action position adopted by the staff was a violation of the Administrative Procedures Act. The case was stayed until January 2005 to give the SEC a chance to finalize its position on the rule. On August 18, the SEC requested additional comments on the proposed rule and stated that it would take final action on the rule by year end.

Given the SEC's poor record in regulating the conduct of investment advisers, regulation of broker-dealers acting as investment advisers is unlikely to improve the situation. In this writer's view, the SEC and Congress need to recognize federal fiduciary standards for broker-dealers who give investment advice regardless of the manner in which they are compensated. The only effective means to enforce fiduciary standards is to recognize the customer's right to damages from "financial advisers" who breach those standards.

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[1] *Merrill Lynch Pierce Fenner & Smith, Inc.* is registered as an "investment adviser" under the Investment Advisor's Act of 1940, but it does not disclose which services are offered under the Act. Although Merrill markets the Merrill Lynch Unlimited Advantage service as a fee-based investment service, Merrill denies in arbitration proceedings that it owes any duty to monitor investments or advise its customer concerning the securities in a MLUA account.

[2] *The Investment Advisor's Act of 1940,* 15 U.S.C. §80b-2(a)(11)(C), known as the "broker-dealer exclusion," exempts the following from coverage of the Act: "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." The SEC no-action letter was an interpretation of this exclusion. In the Release, the SEC states that it had already ruled that wrap fees constitute "special compensation" under the Advisers Act. *Id. at 82,698, n.12, citing 59 Federal Register 21657).* According to the SEC, "the compensation in the new fee-based programs is indistinguishable from wrap fee compensation." *Id.*

Top Ten Specious Reasons Why Securities Lawyers Won't Mediate

Philip S. Cottone

Philip S. Cottone is an experienced arbitrator and mediator in the real estate and securities industries. He is a mediator for the NASD, NYSE, The Counselors of Real Estate, and the US Bankruptcy Court, Southern District of New York. He has served as an arbitrator for JAMS, the NYSE, and for the NASD since the mid 1970's. He served as a mediator-arbitrator for the Claims Administrator in SEC v. Prudential Securities in the 1990's, handling cases in eastern Pennsylvania and New Jersey.

Mr. Cottone is a former Governor (1990-1993) and Vice Chairman of the Board of the NASD. He served three years as Chair and five years as a member of the NASD National Arbitration Committee (1993 – 1998), and chaired the subcommittee that developed the mediation rules and procedures in 1995. He is a member of the Association of Conflict Resolution and the New Jersey Society of Professional Mediators. He is a panelist for the Pennsylvania Bar Institute course, "Prosecuting and Defending Claims Against Broker Dealers," and is a member of the Real Estate Institute faculty.

Mr. Cottone received a B.A. from Columbia College (1961) and an L.L.B. from New York University School of Law (1966).

Experienced mediators and counsel who participate regularly in ADR (alternative dispute resolution) hear lots of reasons to justify not mediating. Some lawyers are simply reluctant to try something that is new to them. Others don't want to settle cases but want to win them in a courtroom, a forum that is familiar. Yet, in the securities business, and in a growing number of industries throughout the country, mediation is a proven process used by litigators to save time and money, avoid the risk of trial, and obtain a fair and certain result, whether in court or arbitration. What are the top ten specious reasons often given for not mediating?

1. Saying I want to mediate will show weakness to the other side and telegraph I think I have a weak case.

First of all, the statement is not true. Mediation is now so widely accepted that many practitioners recognize it as being almost always in their client's best interests, weak case or strong. The only thing you can attribute to someone who wants to settle in advance of trial is wisdom, not weakness. Mediation is a voluntary, confidential process in which the parties are in charge, and it avoids the risk of some third party (whether judge or arbitration panel) making a decision that the parties cannot control, and sometimes cannot comprehend.

Moreover, a reluctant lawyer can sound out the other side's willingness to mediate by having an administrator for the ADR program make discreet inquiry. Case administrators for the NASD, the NYSE, and the Dispute Resolution Program of The Counselors of Real Estate, for example, routinely pitch mediation to both sides, often without a commitment from either. Where they do have one side expressing interest, it is usually not told to the other until both agree. Expressing an interest in mediation does not at all signal a weak case.

2. I have a slam dunk case and there is no point in mediating.

Lawyers are trained to be advocates of their client's point of view, and, in most instances, identify with their cases. This can result in an overestimation of what is truly a "slam dunk" case. In the experience of most mediators, they are rare indeed. Even if it is a "slam dunk," why not mediate? If you can get the other side to believe you have a strong case, even privately without acknowledging that to you, he or she will undoubtedly want to avoid the risk of trial and may well propose a resolution that is acceptable. If that happens you avoid the additional expense and time delay of a trial and appeal, and at least the theoretical risk that something could go awry when you put on your

case. You do not have to accept a settlement at mediation if you don't like it, and you might learn something that will cause you to conclude it is not such a "slam dunk" after all. Even very strong cases should be mediated unless there is some other compelling reason for going to trial, like the need for a legal precedent.

3. I don't want to show my case to the other side before trial.

Why keep your case in your briefcase if you can use it to get a settlement on your terms without the cost, time delay, and risk of a trial? Lawyers in their zeal usually overestimate the impact that their "smoking gun" or bombshell information will have at trial. Sometimes there is a simple explanation, and the information is disclosed before the tribunal with what turns out to be a whimper, not a bang, anyway. Usually that information can be more effectively used in a mediation session. Perhaps the mediator can obtain a more generous settlement using the bombshell information because he can impress the other side with its possibly devastating effect at trial. Or he can tell you why he does not think it will make the impression you intend. Mediators will sometimes ask parties who give them such information to authorize disclosure to the other side because, if it holds up, it may induce a quick settlement. But the tactical decision on whether to disclose it or not always remains with the lawyer.

Both sides remain in control of what they disclose and what they keep to themselves, and what is said and when is up to them. You only have to show the part of your case you want to show, although it is usually helpful to get the mediator's judgment on your entire case without holding back. Trial by ambush is increasingly looked on with disdain by tribunals, whether in court or arbitration, and the lawyer who withholds information runs the risk of it backfiring if the trier of fact thinks it should have been disclosed earlier.

4. The case is too complex.

Perhaps a number of years ago when mediation was just becoming accepted this might have been a reasonable position. It surely is not today. Huge cases, in both dollars claimed and in number of parties involved, have been successfully resolved in mediation in many different industries. Occasionally more than one mediator is used, or sessions are spread out over a number of days, and issues are separated so they can be treated seriatim. Most mediators do their homework, and before the session begins have talked to the parties, studied the documents, and understand the issues. They know what is involved beforehand, and usually have a plan for getting the job done. Experienced mediators are not troubled by complexity because the process is eminently flexible. It is a tried and true method for settling both simple and complicated cases.

5. The parties (or the lawyers) are too emotionally involved to sit down together.

This is another red herring because the mediation process is designed to help people deal with their emotions. An experienced mediator will let the parties vent and thereafter help them develop some objectivity about their case, and will help the lawyers work with their clients. They all have to understand what is going to decide the case is not what happened, or even what is necessarily fair and just, but what the proof shows. The key is what the trier of fact is likely to believe happened, and the legal and equitable conclusions that he or they believe flow from that.

From time to time mediators run into situations where the lawyers have been entrenched in their positions for so long that they cannot be objective and keep their own emotions in check. Mediators can deal with that as well. While rare, I have personally handled situations where I have excluded the lawyers and resolved the matter dealing with the parties themselves, subject to the eventual approval of their counsel. Strong emotions are a usual part of most

mediations, and the experienced mediator can diffuse them and redirect the energies of the parties toward a constructive outcome.

6. It will be a waste of time.

This comment usually results from inexperience with the process. In most industries, where the parties come to the table voluntarily, mediations result in settlements in about 80% of the cases. Individual mediators have much higher records of success than that. So the probability is you will not waste your time. In the relatively rare instances where the case in chief does not settle, the mediation helps refine the issues and resolve some matters, avoiding the necessity of spending time and money on them later at trial. It also helps make the parties themselves more comfortable with the process, and more familiar with the strengths and weaknesses of their case, making the lawyer's job easier when preparing for and conducting the trial. In those few cases that do not settle, the lawyers and the parties usually think it was worth the time and effort.

7. The case will not settle because the other side is unreasonable and will not listen until we get to the courthouse steps.

This comment is usually offered without knowing where the other side really stands on the matter. In most cases the parties and their counsel have not sat across the table for a full exchange of views, but have just exchanged curt phone calls. They certainly have not had the skills of an experienced mediator working in their behalf to get them together. If you haven't tried the mediation process you can't come to any reasonable conclusions as to the possible outcome. The mere fact that the other side may talk tough doesn't mean anything if they are willing to participate in a voluntary mediation. Despite their rhetoric, attendance at mediation speaks volumes about their desire to get the matter resolved. But, as we have seen, it does not mean they necessarily think they have a weak case.

There is always the theoretical possibility that the other side will go through the motions in bad faith, just to try to find out more about your case. In the experience of most mediators, this is rare indeed. Once a mediator finds out that the modus operandi of a particular lawyer or client firm is to agree to mediation just to size the number at which they might be able to settle on the courthouse steps, most professional mediators will not work for them again. Most parties and counsel approach mediation in good faith and not with an intention to suborn the process. Statistics show a settlement is reached in the large majority of the cases, well before getting to the courthouse steps.

8. My client doesn't want to mediate.

You have a responsibility to convince your clients that it is in their interest to mediate. In most cases when they are hesitant, it is because they are unfamiliar with the process and are unwilling to pay your for your time and the mediator's time to prepare for and attend a mediation. This is not as much of a problem where the counsel is being compensated on a contingency basis. It is up to you to show them it will be time well spent, that success is usual, and that even if the case is not entirely resolved, it will be a good use of the time and money to make the effort. You should point out that in a mediation a creative solution that meets the needs of the parties is possible, while a tribunal is limited in most cases to an award expressed in dollars and cents. In mediation, the imaginations of the parties and the mediator are the only barriers to resolution, and money may only be part of an ultimate settlement. The mediation process can dig beneath and go well beyond the issues on the table to fashion a result that both sides will accept, without something unreasonable to either being imposed by a court or panel.

9. I have to spend the time preparing for trial, and at trial I have the best chance of

getting a good award for my client.

Preparation for mediation is almost identical to preparation for trial. Advocates can do the best job for their clients in mediation if they know as much about the case as if they were going to trial the following day. The issues are identical, and it is a great dry run. It will ultimately save time in getting ready for trial in the rare instance where a case does not resolve in mediation.

You will have more clients and be able to do more productive work in your office if you get a reputation as a lawyer who effectively employs mediation as a resource. The results might not be much different from what you would have gotten in court, but without the time delay, trial cost, and risk of an unacceptable result. It is better for both your clients and you, and you will have more billable time available if you are able to clear your calendar of cases that do not have to be tried to get the best results for your client. You will be freed from the burdens of a trial, where you are subject to the whims of a tribunal as to time commitments and procedure.

WHAT IS THE TOP REASON FOR NOT MEDIATING?

10. I can do it better myself.

We lawyers are a proud bunch, and we fancy ourselves to be astute negotiators under any and all circumstances. Why do you have to pay a mediator to do what you can do yourself? The easy answer is because you cannot do it as effectively as a neutral mediator who has no stake in the outcome, and commands the trust and respect of both parties. While you may not be as close to your case as your client, if you have lived with it for a while, it is difficult being truly objective. We learn to be advocates in law school and because of that, whether we want to recognize it or not, we tend to develop a position that is tough to change. The old saw that a lawyer who represents himself has a fool for a client applies here to some degree. A trained mediator will help your client **and** you see the strengths **and** weaknesses of your case, and will help you both be more realistic as to the probable outcome if it goes to trial. Also, a trained mediator acting as go between can take a “devil's advocate” position with both sides and present your arguments more effectively than you can, because he will not be perceived, as you will, as an adversary who is positioning to sell a point of view. You cannot do it better yourself!

From the Professor - Statutes of Limitations Don't Apply In Arbitration

Joseph C. Long

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It is appropriate with the adoption of the new amendments to NASD Rule of Arbitration Procedure 10304 [1] to re-visit an issue which may make or break many arbitration claims. This issue is the application of statutes of limitations governing substantive claims in arbitration.

For example, Section 410(e) of the Uniform Securities Act provides: "No person may sue under this section more than two years after the contract of sale." [2] Does this mean that a claim under Section 410 which is brought within the six-year rule of Section 10304 of the NASD Code of Arbitration will be dismissed if it is brought more than two years after the original contract for sale?

This issue has been discussed by four other PIABA members in the past [3] and all of whom agree, contrary to popular belief, that statutes of limitations on substantive claims do not apply in arbitration. [4] This conclusion is unanimously supported by the limited case law on the subject. [5]

As our past president said in his PLI article:

> There is a significant body of law in support of the argument that statutes of limitations do not apply in arbitration on the theory that an arbitration is not an "action" within the meaning of that word as it is used in the time limitations placed on causes of actions found in most state codes. [6]

There are generally three

[1] *See* Approval of Proposed Rule Changes, 2004 WL 2699043 (SEC Nov. 29, 2004).

[2] Unif. Sec. Act (1957) §410(e), 7B Unif. Acts Annot. 643 (1985).

[3] *See* Charles W. Austin, "Having Their Cake and Eating It Too: Motion Practice and the Mongrelization of SRO Arbitration," available on WestLaw as 1399 PLI/Corp. 183, 192 (Dec. 2003); Kenneth R. Jones, "Applicability of Statutes of Limitation in AAA Arbitration," 5 *PIABA Quarterly* (No. 4) 8 (Dec. 1998); and Martin H. Aussenberg, "NASD Arbitrators Are Not Bound to Apply Statutes of Limitations," 5 *PIABA Quarterly* (No. 4) 10 (Dec. 1998). I also discussed the issue in Joseph C. Long, "FROM THE PROFESSOR", Dispositive Motions, 4 *PIABA Quarterly* (No. 4) 3, 5-6 (Dec. 1997).

[4] The issue here should not be confused with a similar, but different, issue dealing with enforceability of the agreement to arbitrate. *See e.g., World Brilliance Corp. v. Bethlehem Steel Co.,* 342 F.2d 362 (2d Cir. 1965); *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687 (2d Cir 1952). The agreement to arbitrate is a contract. Therefore, the statute of limitations on contract actions (frequently six years) controls the ability of a party to force arbitration. However, the statute of limitations here does not run from the date of the contract, but from the date the defaulting party breaches the contract by refusing to arbitrate.

[5] The case law, all non-securities cases, are collected in Annot. Statute of Limitations As Bar to Arbitration Under Agreement, 94 A.L.R. 3d 533 (1979).

non-securities cases cited to support this conclusion.[7] They are: (1) *Skidmore, Owings & Merrill v. Connecticut Gen. Life Ins. Co.*[8]; (2) *Lewiston Firefighters Assoc. v. Lewiston*;[9] and (3) *Har-Mar Inc. v. Thorsen & Thorshov, Inc.*[10] In *Skidmore,* the court said:

> Arbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitations. "Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice; and it is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation. When the submission is made a rule of court, the arbitrators are not officers of the court, but are the appointees of the parties, as in cases where there is no rule of court."[11]

Likewise, in *Lewiston Firefighters Assoc.,* the court held:

> Arbitration is not an action at law and the statute [of limitations] is not, therefore, an automatic bar ....[12]

Finally, in *Har-Mar Inc.,* the court concluded:

> Based upon the special nature of arbitration proceedings and both statutory and common-law meanings of the terms "action", we feel compelled to hold that [the statute of limitations] in §541.05(1) was not intended to bar arbitration of Thorsen's fee dispute solely because such claim would be barred if asserted in an action in court.[13]

Other cases also support this position[14] as does at least one state statute. The Tennessee

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[6] Charles W. Austin, "Having Their Cake and Eating It Too: Motion Practice and the Mongrelization of SRO Arbitration," available on WestLaw as 1399 PLI/Corp. at 192 (Dec. 2003).

[7] A similar conclusion has been reached as to the words "sue" or "suit." Cf. *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687 (2d Cir 1952)(There is no time bar because arbitration is not within the term "suit" as used in [the] statute). This holding would cover the language of Section 410(e) of the Uniform Act which talks in terms of "su[ing]".

[8] 25 Conn. Supp. 76, 197 A.2d 83 (Conn. Super. 1963).

[9] 354 A.2d 154 (Me. 1976).

[10] 300 Minn. 149, 218 N.W.2d 751 (1974).

[11] 25 Conn. Supp. at 84, 197 A.2d at 87. *Skidmore* was *cited with approval* in *Dayco v. Fred T. Roberts & Co.,* 192 Conn. 497, 472 A.2d 780 (1984).

[12] 354 A.2d at 166.

[13] 300 Minn. at 155, 218 N.W.2d at 754. See also *Independent School District v. Holm Bros. Plumbing and Heating , Inc.* 600 N.W.2d 146, 150 (Minn. App. 2003) and *Viking Ins. Co. v. Clayburn*, 1997 WL 396220 (Minn. App. July 15, 1997).

[14] See *NCR v. CBS Liquor Control, Inc.,* 874 F. Supp. 168 (S.D. Ohio 1993)("[T]he effect of a statute of limitations is to bar an action at law, not arbitration."); *Carpenter v. Pomerantz*, 56 Mass Ct. App. 627, 631, 634 N.E.2d 587, 590 (1994)("As used in statutes of limitation, the word 'action' has been consistently construed to pertain to court proceedings," *citing with approval Skidmore, Lewiston, and Har-Mar*).

statute of limitations which reads:

> The word "action" in this title [statutes of limitations] includes motions, petitions, and other legal proceedings **in judicial tribunals** for the redress of civil injuries. [15]

Unfortunately, the answer is not quite as simple in NASD arbitration. It is clear that the parties or, in this case, the forum can establish its own arbitrability rule or incorporate statutes of limitations by reference. The NASD has exercised this power in Section 10304 of the NASD Code of Arbitration. Section 10304 establishes a two-prong rule. The first sentence establishes the well recognized six-year rule. After stating the six-year rule, the second sentence incorporates some statutes of limitations: "This Rule shall not extend **applicable** statutes of limitations...." [16] The problem is that the language of the second sentence is enigmatic. It obviously incorporates some statutes of limitations but which ones? Most people **assume** that the statute of limitations covering the substantive claim is incorporated. I don't think so. I think the intent is to incorporate statutes of limitations **dealing with arbitrability**.

The key word is "applicable." But what statutes of limitations are "applicable"? It should be clear that statutes of limitations like the Tennessee statute, quoted above, by it own words, would not be "applicable".[17] Likewise, the above cited cases would indicate statutes of limitations governing the underlying substantive causes of action are also not "applicable." Yet, the term should be accorded some meaning.

I believe that the answer to which statutes are "applicable" lies in reading Section 10304 as a whole. Clearly, the first part of the section establishes a six-year rule of eligibility for claims which the NASD will entertain for arbitration under its system. It is now clear from the amendments to Section 10304 that this rule is in no way intended to bar the underlying substantive actions. If the claims are still viable under state law, the NASD's refusal to hear them does not prevent the claimant from subsequently filing an action in court.

I submit that the second sentence also goes to arbitrability rather than governing the viability of the underlying cause of action. If the local state statute of limitations covering arbitrations is shorter than six-years from the date of occurrence or event, then the shorter statute will control. Thus, "applicable" statutes of limitations under the second sentence are those statutes of limitations **which restrict the bringing of an arbitration**, not those effecting the underlying substantive cause of action.

For example, under New York law, the courts have held that the statute of limitations on contracts[18] controls the right to bring arbitration proceedings since the right to

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[15] T.C.A. §28-1-101 [Emphasis added], quoted in Martin H. Aussenberg, "NASD Arbitrators Are Not Bound to Apply Statutes of Limitations," 5 *PIABA Quarterly* (No. 4) 10 (Dec. 1998).

[16] [Emphasis added.]

[17] Martin H. Aussenberg, "NASD Arbitrators Are Not Bound to Apply Statutes of Limitation," 5 *PIABA Quarterly* (No. 4) 10 (Dec. 1998).

[18] McKinney's CPLR §213(2).

[19] *See e.g., Hammerstein v. Shubert,* 127 N.Y.S.2d 249 (N.Y. Sup. Ct., New York County, 1953). *See also* Annot. Statute of Limitations As Bar to Arbitration Under Agreement, §4, 94 A.L.R. 3d 533 (1979).

arbitration is purely contractual.[19]

Therefore, if an arbitration based upon a substantive claim is not brought within this period, it is barred. Barred not by the statute of limitations on the substantive claim, but rather by the **contract** limitation period.

In New York, the statute of limitations for enforcement of contracts is six years. In *Hammerstein v. Shubert*,[20] a contract to arbitrate disputes was made in 1938. No attempt to arbitrate was made until the early 1950's. The court held that no disputes more than six years old could be arbitrated.

Because the contract period in New York is six years and Section 10304 also provides for a six-year eligibility period, the second sentence of Section 10304 would have no operation. However, in Oklahoma, the contract statute of limitations is **five years**.[21] In such case, the second sentence of Section 10304 would come into play, and arbitration claims would be barred **after five years** rather than the six years provided by the first sentence of Section 10304.

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[20] 127 N.Y.S.2d 249 (N.Y. Sup. Ct., New York County, 1953).

[21] 12 Okla. Stat (2001) §95(1).

Recent Arbitration Awards

Keith Fraser

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James Bach et al. v. Charles Schwab & Co., NASD Case No.03-00092

This case involved a Registered Investment Advisor making unsuitable trades for Claimants through investment accounts held with Respondent Charles Schwab & Co. Claimants alleged, among other things, that Respondent was negligent in allowing the Registered Investment Advisor to maintain a pattern of unsuitable trading and in ignoring evidence of fraud.

Claimants asserted the following causes of action: breach of contract; breach of fiduciary duty; negligence; constructive fraud; aiding and abetting; violation of NASD and NYSE rules; control person liability; violation of common law; and violation of state and federal securities laws. Claimants requested compensatory damages, interest, costs, punitive damages and attorneys fees.

Respondent denied the allegations of wrongdoing set forth in the Statement of Claim, asserted various affirmative defenses and requested denial of Claimants' claims.

1. The panel found Respondent Charles Schwab & Co. liable on the claims of negligence and breach of contract and awarded Claimants $399,541.00 in compensatory damages.

2. The panel found Respondent Charles Schwab & Co. liable to Claimants for interest at a rate of 6% per annum from the date of the award to the date of payment. In addition, the panel assessed all forum fees as well as Claimants' filing fee against Respondent.

The award is significant because the panel rejected Respondent's argument that it had no duty to monitor third party accounts, *i.e.*, where there is a Registered Investment Advisor with a power of attorney.

Claimants' Counsel - Steven J. Gard, Esq., and Alison S.H. Ficken, Attorney at Law, of Gard, Smiley, Bishop & Dovin LLP, Atlanta, Georgia.

Respondent's Counsel - David D. Sterling, Esq., Baker Botts LLP, Houston, Texas.

Claimants' Expert - Mike Gold

Respondent's Expert - Katherine McGrath

Hearing Situs – Atlanta, Georgia

Arbitrators - W. William Harness, Esq., Public/Chairman; Fran L. Rothenberg, Esq., Public; David T. Maddux, Industry

Jane Doe v. SG Cowen Securities, NYSE Docket No. 2003-014698

This case against SG Cowen Securities involved the highly publicized activities of its former Cleveland, Ohio branch manager, Frank Gruttadauria. Mr. Gruttadauria is currently serving a seven year prison term for, among other things, stealing client funds.

Claimant, who wished to remain anonymous, asserted the following causes of action: breach of fiduciary duty; negligence; fraud; failure to supervise; and misappropriation. Claimant requested compensatory damages, as well as interest, costs, and attorney fees.

Respondents denied the allegations of wrongdoing set forth in the Statement of Claim and asserted the "cherry picking" defense stating that many trades made in Claimant's account were profitable and therefore those gains should offset any losses.

1. The panel found Respondent SG Cowen Securities liable to Claimant for $594,269.46 in compensatory damages which included $426,255.00 as a result of trading losses on unsuitable securities and $153,476.80 as a result of Respondent's liability for Mr. Gruttadauria's fraudulent transfer of funds.

The award is significant because the panel issued a written opinion with the award specifically rejecting Respondent's "cherry picking" defense stating: "[t]o do otherwise is to disregard a specific wrongful act because other proper or profitable trading occurred. In other words, lawful activity does not exonerate an unlawful act."

In addition, the arbitration panel used a "well managed account" analysis to determine the amount of damages related to the funds which were misappropriated from the account.

Claimants' Counsel - Anthony J. Hartman, Esq. of Hermann, Cahn & Schneider LLP, Cleveland, Ohio.

Respondents' Counsel - Linda Goldstein, Attorney at Law of Covington & Burling, New York, New York

Claimants' Expert - Tom Driscoll

Respondents' Expert - Michael G. Mayer

Hearing Situs - Cleveland, Ohio

Arbitrators - J Michael Gatien; Robert Lustig; T. Michael Hogan

Claimants(Names Withheld) v. Bank One Trust Co., NA, AAA Case No. 54 Y 199 016131

Claimants were two Detroit - area family trusts which owned large blocks of restricted stock in a publicly traded software company. Claimants alleged that Respondent did not follow correct procedures regarding prospectus delivery in connection with the proposed disposition of the stock and as a result Claimants were unable to effect sales of the stock during the active market in late 2000.

Claimants asserted the following causes of action: negligence; gross negligence; willful misrepresentation; breach of fiduciary duty; and breach of contract. Claimants requested compensatory damages, lost opportunity damages as well as interest, costs, and attorneys fees.

Respondent denied the allegations of wrongdoing set forth in the Statement of Claim and asserted various affirmative defenses.

1. The panel found Respondent Bank One Trust Co. NA. liable to Claimants for $3,500,000.00 in compensatory damages.

The award is significant because the panel recognized and validated Claimants' argument, supported through the testimony of Claimants' expert, Joseph Long, regarding the definitive measure of damages based on Claimants' inability to sell their stock in a volatile market.

Claimants' Counsel - Laurence S. Schultz, Esq. of Driggers, Schultz & Herbst, P.C., Troy, Michigan.

Respondents' Counsel - Kenneth F. Berg, Esq., and Michael N. Ungar, Esq. of Ulmer & Berne LLP
Claimants' Expert - Professor Joseph C. Long

Respondents' Expert - Robert Baron and John Martin

Hearing Situs - American Arbitration Association, Commercial Arbitration Tribunal, Detroit, Michigan

Arbitrators - Mark S. Bosler; Mauricio Kohn ; Mark L. Kowalsky

John F. Green IV and Karen Green v. Stifel, Nicolaus & Co., Inc and Kevin Fitzpatrick, NASD Case No. 03-01862

Claimants John and Karen Green alleged that they opened accounts with Respondent Stifel, Nicholas & Co and deposited approximately $800,000. They told Respondents their investment objectives were conservative income. Thereafter, Respondents transferred approximately half of the Green's funds to four outside money managers which pursued an aggressive growth strategy. Moreover, with the Green's remaining funds, Respondents engaged in the aggressive trading of technology and NASDAQ stocks on margin.

Claimants asserted the following causes of action: Violations of Sections 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and the Illinois Securities Act of 1953; violations of the Illinois Consumer Fraud and Deceptive Practices Act; breach of fiduciary duty; negligence; misrepresentations and omissions; breach of contract; failure to supervise; *Respondeat Superior*; control person liability; and violations of the NASD and NYSE rules by recommending unsuitable securities and engaging in excessive trading. Claimants requested compensatory damages, interest, costs, punitive damages and attorneys fees.

Respondents denied the allegations of wrongdoing set forth in the Statement of Claim and requested dismissal of Claimants' claims.

1. The panel found Respondent Stifel, Nicolaus & Co., Inc., solely liable to Claimants for $200,000.00 in compensatory damages.

The award is significant because the panel found the brokerage firm liable based on, among other things, its unsuitable recommendation of outside money managers.

Claimants' Counsel - James J. Eccleston, Esq., and Stephen S. Berkely, Esq., of Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C., Chicago, Ill.

Respondents' Counsel - Peter R. Sonderby, Esq. of Ulmer & Berne, LLP

Claimants' Expert - Jeffrey E. Schaff
Respondents' Expert - James Brucki

Hearing Situs - Chicago, Illinois

Arbitrators - Irving A. Chester, JD, Public/Chairman; Susanne J. Hollander, Public; Robert J. Larson, Industry

Jay Hoge et al. v. Sands Bros., LLC, et al., NYSE Docket No. 2001-009402

Claimant alleged that Respondent agreed to initiate a costless collar transaction to protect Claimant's concentrated position in restricted Finisar stock. Thereafter, Respondent failed to implement the hedging strategy. In addition, Claimant alleged that Respondent engaged in unauthorized and excessive trading of aggressive technology stocks.

Claimant asserted the following causes of action: breach of fiduciary duty; constructive fraud; failure to supervise; violations of federal and state securities laws and NASD and NYSE Rules. Claimant requested compensatory damages, consequential and lost opportunity damages as well as interest, costs, and punitive damages.

Respondents denied the allegations of wrongdoing set forth in the Statement of

Claim and requested dismissal of Claimant's claims and costs.

1. The panel found Respondent Sands Brothers & Co., Ltd. liable to Claimants for $1,855,000.00 in compensatory damages.

2. The panel found Respondents Sands Brothers & Co., Ltd. and Stephen Soler jointly and severally liable to Claimants for $311,000.00 in compensatory damages.

3. The panel found Respondent Sands Brothers & Co., Ltd. liable to Claimants for $1,000,000.00 in punitive damages.

4. Respondents Sands Brothers & Co., Ltd., and Stephen Soler were assessed $13,500.00 in forum fees.

This award was subsequently confirmed in the United States District Court for the Central District of California, Case No. CV04-5629 PA. The District Court denied Respondents' cross-petition to vacate the arbitration award. The award is significant because it represented a "make whole" award for Respondent's failure to implement a hedging strategy for a restricted, concentrated position. In addition, the panel awarded significant punitive damages.

Claimants' Counsel - Philip M. Aidikoff, Esq. and Orousha Brocious, Attorney at Law of Aidikoff & Uhl, Beverly Hills, California.

Respondents' Counsel - Richard Roth, Esq. of The Roth Law Firm, New York, New York

Claimants' Expert - Douglas Schulz

Respondents' Expert - Stanley Meyerson and Chad Statsney

Hearing Situs - Los Angeles, California

Arbitrators - Zachary Seff, Public/Chairman; Harry Miller, Public; David Holt, Industry

Susan P. Hyland et al. v. Edward D. Jones & Co., Estate of Jamie Jamison and Kip A. Hoover, NASD Case No.02-02626

Claimant Susan Hyland alleged that she inherited approximately $2 million worth of Proctor and Gamble stock from her father and agreed to deposit it with Respondents after Respondents agreed to manage her portfolio consistent with her objective of conservative growth and income. Thereafter, Respondents engaged in short term trading of aggressive technology stocks using margin. Within one year, the margin debt in the account exceeded $1.8 million.

Claimants asserted the following causes of action: negligence; breach of fiduciary duty; fraud and deceit; negligent misrepresentation; and violation of state and federal securities laws related to the unnecessary and unsuitable use of margin. Claimants requested compensatory damages, interest, costs, punitive damages and attorneys fees.

Respondents denied the allegations of wrongdoing set forth in the Statement of Claim, asserted various affirmative defenses and requested dismissal of Claimants' claims.

1. The panel found Respondents Edward D. Jones & Co., L.P. and Estate of Jamie Jamison jointly and severally liable to Claimants for $833,233.00 in compensatory damages.

2. The panel found Respondents Edward D. Jones & Co., L.P. and Estate of Jamie Jamison jointly and severally liable to Claimants for $200,000.00 in punitive damages pursuant to *Hatrock v. Edward Jones & Co.*, 750 F.2d 767 (9th Cir. 1984).

3. The panel found Respondents Edward D. Jones & Co., L.P. and Estate of Jamie Jamison jointly and severally liable to Claimants for interest at a rate of 8% per annum on the sum of $833,233.00.

The award is significant because the panel awarded a substantial compensatory damage award against

Respondent as well as punitive damages. In addition, the panel assessed all forum fees against Respondent.

Claimants' Counsel - Jeffrey S. Salisbury, Esq., of The Law Offices of Jeffrey S. Salisbury, Eugene, Oregon.

Respondents' Counsel - Lisa A. Nielson, Attorney at Law of Greensfelder, Hemker & Gale, PC, St. Louis, Missouri for Respondent Edward D. Jones & Co.; Robert C. McClelland, Esq. of Rademaker, Matty, McClelland & Greve LLP, Cleveland, Ohio for Respondent Estate of Jamie Jamison

Claimants' Expert - Bob Grosnoff

Respondents' Expert – None

Hearing Situs - Portland, Oregon

Arbitrators - Stephany A. Watson, Attorney at Law, Public/Chairman; Bert P. Krages, II, Public; William J. Chambers, Industry

William Larson v. UBS PaineWebber Inc., NYSE Docket No. 2003-014460

Claimant alleged that he deposited approximately $2 million in retirement savings with Respondent seeking moderate growth. Respondent placed approximately half of the funds in variable annuities and the other half with outside money managers. The variable annuities were invested in aggressive growth mutual funds and the outside money managers followed an aggressive growth strategy. Claimant asserted the following causes of action: breach of fiduciary duty; breach of contract; unsuitability; failure to supervise; violations of the securities laws and NYSE rules; negligence; failure to hedge; and control person liability pursuant to the Exchange Act. Claimant requested compensatory damages, interest, costs, triple damages pursuant to the Texas Deceptive Trade Practices Act, punitive damages and attorneys fees.

Respondent denied the allegations of wrongdoing set forth in the Statement of Claim, asserted various affirmative defenses and requested denial of Claimant's claims.

1. The panel found Respondent UBS PaineWebber liable to Claimant for $691,430.00 in compensatory damages.

2. The panel found Respondent UBS PaineWebber liable to Claimant for $230,476.66 in attorney fees.

3. The panel found Respondent UBS PaineWebber liable to Claimant for $29,663.00 in costs. In addition, the panel assessed all forum fees against Respondent.

The award represents a make whole award for Claimant and is significant because the panel awarded damages based on Respondent's unsuitable recommendation to place Claimant's retirement funds in variable annuities and unsuitable outside money managers. The award has further significance in that the panel awarded costs and attorneys fees to Claimant.

Claimants' Counsel - Debra Brewer Hayes, Attorney at Law of Woska & Hayes, Kingwood, Texas.

Respondent's Counsel - Jack Ballard, Esq., The Ballard Law Firm, Houston, Texas.

Claimants' Expert - Larry Green and Rob Shaff

Respondent's Expert - None

Hearing Situs - Dallas, Texas

Arbitrators - Lewis Sifford, Public/Chairman; Paul Edelbaum, Public; Maurice Bates, Industry

Graeme Donald McMillan v. Josephthal & Co., Inc. and L. Vincent Gallick, NASD Case No. 02-00957

Claimant asserted the following causes of action: unauthorized margin trading; unsuitability; breach of contract; fraud and negligent misrepresentation; violation of New Zealand Contractual Remedies of 1979; violation of federal securities laws; breach of fiduciary duty; malpractice; failure to

supervise; and *respondeat superior*. Claimant requested compensatory damages, interest, costs, attorneys fees and punitive damages. Respondents denied the allegations of wrongdoing set forth in the Statement of Claim and requested dismissal of Claimant's claims.

1. The panel found Respondents jointly and severally liable to Claimant for $90,000.00 in compensatory damages.

2. The panel found Respondents jointly and severally liable to Claimant for interest on the award of at a rate of 5% per annum from the date the Statement of Claim was filed to the date of payment of the award.

3. The panel found Respondent Josephthal & Co., Inc., liable to Claimant for $50,000.00 in attorneys fees pursuant to *Silvester Tafuro Design Inc., v. Sachs* (1996 WL 257668 (S.D.N.Y.)).

The New York panel awarded attorneys fees based on the *Silvester* case which states that if the parties include a demand for attorneys' fees in their submissions to the arbitrators, the parties placed that issue before the arbitrators regardless of the terms of the contract, and the arbitrators therefore have the authority to award attorneys' fees.

Claimants' Counsel - Ross B. Intelisano, Esq., of Rich Intelisano LLP, New York, New York.
Respondents' Counsel – Margarita L. Landaburu, Attorney at Law of Josephal & Co. Ltd., and Brian J. Neville, Esq., of Law Offices of Brian J. Neville, New York, New York.

Claimants' Expert - Howard Berg

Respondents' Expert - None

Hearing Situs - New York, New York

Arbitrators - Mark I. Roth, Chairman; Edward P. Harewood, MBA, Public; Jeffrey F. Friedman, Esq., Industry

Sylvia Schuyler, et al. v. Prudential Securities, Inc.,
NASD Case No. 3-03147

Claimants alleged that Respondent recommended unsuitable securities including the unsuitable recommendation of Unit Investment Trusts which were invested primarily in stocks concentrated in the technology sector.

Claimants asserted the following causes of action: breach of fiduciary duty; unsuitability; fraud; constructive fraud; elder abuse; unfair and deceptive trade practices against senior citizens; failure to supervise; and violations of federal and state securities laws and of NASD and NYSE rules.

Claimants requested compensatory damages, disgorgement and restitution, consequential and lost opportunity damages as well as interest, costs, and punitive damages.

Respondents denied the allegations of wrongdoing set forth in the Statement of Claim and requested dismissal of Claimants' claims.

1. The panel found Respondent Prudential Securities, Inc. liable to Claimants for $500,000.00 in compensatory damages.

2. The panel found Respondent Prudential Securities, Inc. liable to Claimants for $500,000.00 in punitive damages.

The award is significant because of the large punitive damage award and the panel's recognition of Respondent's wrongful conduct related to the solicitation and sale of Unit Investment Trusts.

Claimants' Counsel - Philip M. Aidikoff, Esq. and Orousha Brocious, Attorney at Law of Aidikoff & Uhl, Beverly Hills, California

Respondents' Counsel - Terry Ross, Esq., and Julie Mote, Attorney at Law, of Keesal, Young & Logan, Long Beach, California.

Claimants' Expert - Douglas Schulz

Respondents' Expert - None

Hearing Situs - Los Angeles, California
Arbitrators - Richard Rosenthal, Chairman; Kenneth Weinman, Esq., Public; Joy Diane Williams, Industry

John K. Wright et al. v. Morgan Stanley DW, Inc., et al., NASD Case No. 03-05723

Claimants were an elderly retired couple living in rural Oregon. They alleged that they placed their retirement savings with Respondent telling their broker that their investment objectives were conservative income and growth. Thereafter, Respondents recommended and purchased growth stocks which were primarily concentrated in the volatile technology sector. Respondents also failed to purchase any income producing securities in the accounts.

Claimants asserted the following causes of action: negligence; breach of fiduciary duty; fraud and negligent misrepresentation; and violation of the Oregon Securities Laws §59.115. Claimants requested compensatory damages, interest, costs, punitive damages and attorneys fees.

Respondents denied the allegations of wrongdoing set forth in the Statement of Claim, asserted various affirmative defenses and requested dismissal of Claimants' claims.

1. The panel found Respondents jointly and severally liable to Claimants for $59,787.00 in compensatory damages.

2. The panel found Respondents jointly and severally liable to Claimants for $2,101.36 in costs.

The panel found liability based on a negligence theory, concluding in their award: "Respondents were negligent in failing to advise the Claimants of the volatility and risks of certain recommended securities that were not consistent with their goals or suitable for them and their accounts. As a consequence of that negligence, Claimants suffered damages in the sum of $59,787.00." The panel rejected Respondent's argument that any damages should be offset by gains on securities that were transferred into the account.

Claimants' Counsel - Jeffrey S. Salisbury, Esq., of The Law Offices of Jeffrey S. Salisbury, Eugene, Oregon.

Respondents' Counsel - Helene Jepson, Attorney at Law, Morgan Stanley DW, Inc., San Francisco, California.

Claimants' Expert - Rick Welch

Respondents' Expert – None

Hearing Situs - Portland, Oregon

Arbitrators - William P. Bergsten, Esq., Chairman; G. E. Craig Doupe, Esq., Public; Joseph W. Cheek, Industry

Announcements From The PIABA Office

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Upcoming Events:

PIABA Board of Directors Meeting, February 25-27, 2005. Millenium Hilton. New York City, New York.

California Mid-Year Meeting, March 19, 2005. Los Angeles, California.

PIABA Board of Directors Meeting, July 16-17, 2005. Hyatt @ Coconut Pointe. Bonita Springs, Florida.

PIABA Board of Directors Meeting, March 5-6, 2005. (This is a date change.) Location to be announced.

For more information pertaining to upcoming PIABA meetings, contact the PIABA office or visit the PIABA website at www.PIABA.org.