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# The P I A B A Quarterly

The Newsletter of the Public Investors Arbitration Bar Association

September 1995 Volume 2 Number 3

**In This Issue...**

# The PIABA Quarterly

The Newsletter of the Public Investors Arbitration Bar Association

September 1995

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## Editor's Note

Included in this issue is the program schedule for the 1995 PIABA Annual Meeting which will be held October 26-28 at the La Costa Resort in San Diego, California. Once again, Seth Lipner and Herb Deutsch have done a great job and put together an outstanding seminar. We hope to see you all there.

The deadline for receiving submissions for the October issue of the Quarterly is October 5th. All submissions, regardless of length, should be accompanied by a computer disk of the submitted material.

A special thanks to Bob Dyer and Seth Lipner for their submissions to this issue.



## Letter From the President


Seth Lipner, DEUTSCH & LIPNER, Garden City, New York


Spring has been a busy time for PIABA. The Board met in Naples, Florida on April 29, 1995. The discussions ranged from the upcoming annual meeting at La Costa in San Diego to a discussion of goals for PIABA in the coming year.

In June, a committee of the Board met with representatives from the SIA to discuss securities arbitration issues. First, we heard a presentation from Ken Andreczek, the NASD's new director for their mediation project. The NASD is getting ready to go full steam into mediation, so you can expect to hear a lot more about it. (We will have a panel on mediation at the October meeting.) Then the discussion turned to punitive damages, as it often does, and the SIA presented us with a highly unrealistic, one-sided rule proposal that would effectively retain punitive damages in name only. The proposal was quickly rejected by us; Boyd likened it to PIABA proposing a rule that the investor should get punitive damages in every case. PIABA expressed its view that the status quo, as expressed in Mastrobuono, was appropriate. The discussion will no doubt continue, but we again expressed the view that punitive damages represent so small a portion of the total awards that lengthy discussion is unwarranted - we want to talk about the real problems with arbitration, like the eligibility rule, arbitrator selection, and discovery. Unfortunately, no real progress was made in these areas.

## In This Issue...

# PIABA BOARD OF DIRECTORS



# PIABA Officers Elected

At the Board of Directors meeting held in Naples, Florida, in April, the following were elected as officers of PIABA for 1995-96:

L. Jerome Stanley - President
Seth E. Lipner - Secretary
J. Boyd Page - Treasurer

# Upcoming PIABA Board Of Directors Elections

Elections for PIABA Directors will be held at the Annual Meeting at La Costa in October. The terms of three existing directors will have expired: Dick Leavitt, Harvey Bell, and Seth Lipner.

Dick Leavitt has resigned as a director based on his other interests and his regrettable inability to devote the time required as a director.

Harvey Bell has asked not to be renominated.

At the Board Meeting held in Chicago on July 31, 1995, the Board nominated the following individuals to fill these three positions on the Board: Seth E. Lipner, Cary S. Lapidus, and Joseph C. Long.

## Letter From the President (con't.)

In fact, the SIA and PIABA agreed that the new NASD policy of not "tolling" the time to challenge arbitrators when information requests are sent was unfair and unduly burdensome, and the NASD agreed to begin the process of amending their rules to give everyone ten (10) days to challenge arbitrators, in lieu of the tolling, and to provide hearing advance sheets no less that 15 business days before the hearing (instead of the current 8 days). We also both complained about the increased burden of the new "20" day pre-hearing disclosure, but the NASD argued it was necessary to cut down on complaints of delay. The NASD noted, however, that the parties could agree to modify the rule amongst themselves if they wished, easing the burden in cases where it was appropriate.

The NASD also agreed to give the parties the option of self-scheduling initial hearing sessions, rather than the old assignment system. The assignment system would remain in place if the parties, after a reasonable time, failed to agree on dates. A notice from the NASD on this mater will accompany new filings. Watch for it.

The SIA-NASD meeting behind us, we are now looking forward to our own Annual Meeting, coming up on October 26-28. The Board met in Chicago on July 31st to finalize the program, and we are pleased to print it for you in this edition of the Quarterly. We think it will be our best program to date, and urge you to register. In addition to the program itself, this year we are planning some social activities for the members, like golf and tennis, some excursions to local attractions, and a complimentary, welcome breakfast for spouses on Friday (with a guest speaker from La Costa to talk about the resort). You will be receiving information soon by mail. If you haven't registered yet, send in your form soon! Don't miss the meeting!!!

We look forward to seeing you in San Diego.

Best wishes,

Seth

The PIABA QUARTERLY is published quarterly in the interest of the members of The Public Investors Arbitration Bar Association. Editor-In-Chief - Jerry Stanley; Associate Editor - Seth Lipner. The PIABA QUARTERLY welcomes information on cases or articles that would be of interest to PIABA members. Contributions should be mailed to:
The PIABA QUARTERLY, 7909 Wrenwood Boulevard, Suite C, Baton Rouge, Louisiana 70809; FAX (504) 926-4348. All copy is subject to the approval by the publisher. Any material accepted is subject to such revision as is deemed appropriate in the publisher's discretion.

# Statutes Of Limitations Don't Always Apply In Arbitrations

## ... And That Just May Be the New Rule in Florida Courts

Robert Dyer, ALLEN DYER, DOPPELT, FRANJOLA & MILBRATH, Orlando, FL

When Tom Grady won Miele v. Prudential-Bache Securities, Inc., 1995 WL 337998 (Fla.) (on certification from the 11th Cir.), Florida arbitration claimants may have received a bonus. Just recently Professor Joe Long pointed out that there is quite a bit of respectable authority holding that many statutes of limitations don't apply in arbitration. See, generally, Annotation, Statute of Limitations as Bar to Arbitration Under Agreement, 94 A.L.R. 3d 533.

In Miele the issue was whether an arbitration award (after judicial confirmation), was subject to the Florida statute requiring a portion of punitive damages be remitted to the state treasury. Both sides relied on *Black's Law Dictionary*. As the court pointed out, "Black's definition of 'action' clearly contemplates a proceeding filed in a court." The language of the statute in question clearly did not support application to arbitration. Similarly, the court said that it could find "no clear legislative intent that the statute apply to arbitration proceedings." The Court recognized that arbitration was considered "an alternative to the court system" and therefore it could not be presumed that the "same legislative objectives underlying section 768.73 are applicable to arbitration proceedings."

Although the Florida court may not have been aware of the cases collected in the above A.L.R. annotation, those cases provide several examples of similar analyses. See, e.g., Lewiston Firefighters Ass'n. v. City of Lewiston, 354 A.2d 154 (Me. 1976), where the court simply said,

> "Arbitration is not an action at law and the statue is not, therefore, an automatic bar to the Firefighters recovery [in arbitration]."

The court in Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 218 NW 2d 751 (Minn. 1974), relied on an early Connecticut case holding that arbitration was not a common law action and that the "'institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitation.'"

Most of Florida's statute of limitations are found in Chapter 95 Fla. Stat., where §95.011 reads in relevant part:
"Applicability.— A civil action or proceeding, called 'action' in this chapter, ... shall be barred unless begun within the time prescribed in this chapter ... "

On the other hand, §95.051, which deals with when the statute is tolled, provides that the relevant statute of limitations is tolled by "the pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action." The general section setting forth specific statutes of limitations is §95.11, and each subsection — whether dealing with 20 year, 5 year, 4 year or shorter statutes of limitations, utilizes the word "action."

As spelled out specifically in §95.011, an action is a civil action. And clearly an arbitration is not a civil action. Thus, between the new ruling in Miele, the prior cases and the specific language of most state statutes of limitations, a strong case can be made in Florida and many other states to the effect that statutes of limitations simply don't apply to arbitration.

# Proposed Discovery Rules Changes

As you know, the PIABA Board of Directors has appointed a committee to prepare and submit discovery rules changes to the NASD.

Members of the committee are:

Joel A. Goodman
Philip M. Aidikoff
Robert A. Uhl
David E. Robbins
Seth E. Lipner
J. Boyd Page

On January 16, 1995, at the request of the NASD, three PIABA members of the discovery committee spoke to the NASD Arbitration Policy Task Force (the "Ruder Commission") in New York. Seth Lipner addressed a range of concerns including arbitrator selection and the six-year eligibility provisions. Mark Maddox discussed punitive damages. Rosemary Shockman spoke to the discovery issues. She presented the discovery rule changes proposed by the PIABA Discovery Committee.

The proposed rules are intentionally brief, and were designed to be palatable to claimants and respondents. The proposed rules are:

A. MANDATORY DISCOVERY PROCEDURES

1. Within forty-five (45) days after a request by any party, the documents listed below must be produced.

By the brokerage firm:

i. Relevant parts of compliance manual for brokers and supervisors.

ii. Client agreements, opening account documents, and any record of the Claimant's financial back ground or profile.

iii. Registered representatives' ("RRs") commission runs and holding pages for customer account(s) and investments.

iv. Correspondence between the firm, the RRs, any supervisor, and Claimant.

v. Supervisory logs and reports (i.e., exception reports, concentration reports, activity reports) that refer to Claimant's account(s).

vi. Missing monthly statements and confirmation slips.

vii. Marketing materials (including any firm re search and missing prospectuses).

viii. Notes or recordings created by the firm and its agents (including RRs and supervisors) relating to the customer's dispute, that are non-privileged.

By the Claimant:

i. Income tax returns (can be limited to Form 1040, pages 1 and 2, and Schedules B, D and E) for the period two years prior to the dispute at issue in the case through the present.

ii. Customer copies of monthly statements and confirmation slips.

iii. Statements for accounts at other brokerage firms for the period two years prior to the dispute a issue in the case through the present.

iv. Any analysis or account reconciliation prepared by the customer that are non-privileged.

v. Notes or recordings made by the customer relat ing to the dispute that are non-privileged.

vi. Correspondence between the customer, the brokerage firm, the RRs and any supervisor.

2. If either the customer or the brokerage firm does not produce the documents and information within forty-five (45) days after requested (unless there is a written agreement between the parties for an extension), an automatic monetary sanction will be imposed. (A suggested sanction is $500.00 per day against the brokerage firm and $50.00 per day against the customer, given the normal disparity of the financial resource between them.) Sanctions must be paid within seven (7) days after the forty-five (45) day period to produce the "automatic" documents has expired, and must continue to be paid on a daily basis by the non-producing party.

3. If any party does not timely produce the documents and information (notwithstanding any monetary sanctions), the party requesting the documents and information may request a pre-hearing arbitration conference with the discovery referee as identified in Section 4, below, wherein issue, evidence or terminating sanctions shall be imposed upon the non-producing party, unless the arbitrator finds

that there is "substantial justification" for not producing same. Issue, evidence and terminating sanctions shall generally take the form of an order precluding the offending party from introducing any evidence to support any of the issues for which it has not produced documents and information that is relevant, and or a sanction terminating the offending party's right to prosecute or defend the action. If a terminating sanction is imposed, the only remaining issue would be the amount of damages, which would be determined at the arbitration hearing.

4. The NASD shall appoint a permanent discovery referee in each of its local offices. The referee would be empowered to issue subpoenas, and to hear and rule on discovery disputes, including privilege. All parties would thus have immediate access to discovery dispute resolution, rather than having to wait for the panel's appointment.

B. VERIFICATION OF DOCUMENT SEARCHES

We believe there is a need for a procedure to ensure that a brokerage firm is, in fact, accurate when it states it has no documents or information responsive to a request. The appropriate person in the brokerage firm who has actual personal knowledge (i.e., has conducted a physical search) should be required to state in an affidavit that a good faith search for the requested documents has been made, describing the search, including physical locations searched, and that based upon the search, no documents or information exist. The affiant could be called as a witness at any arbitration in order to be cross-examined about the affidavit.

C. WHEN ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT OBJECTIONS ARE INVOKED

We suggest the procedure as described as follows, which is required in state courts in Arizona, and generally followed in California discovery practice. The party claiming any privilege must identify specifically the document, its date, its author, its recipients and the general subject matter. This identification allows the party who has requested the information to evaluate whether or not the privilege was properly invoked.

D. CONFIDENTIALITY ORDERS

Confidentiality orders should be imposed only in limited circumstances. The party seeking such an order shall establish: (a) by sworn testimony, which may be by affidavit, that the documents for which the confidentiality order is sought have not been produced elsewhere without such an order; and (b), exceptional circumstances require such an order.

## More Securities Legislation Proposed In Congress

Fresh from their victory in the Private Securities Litigation Reform Act, the securities industry has fostered another major reform of this country's securities laws, this time in legislation sponsored by Rep. Jack Fields (R-TX). The proposed legislation, euphemistically entitled "The Capital Markets Deregulation and Liberalization Act of 1995", would curtail brokerage firm's liability to large institutional investors, allow the SEC the broad authority to change outdated rules, and, most notably, blunt the power of the states by preempting states securities laws.

As expected, several consumer-oriented groups have expressed opposition to the bill, including NASAA, the organization of state securities regulators, and the Consumer Federation of America (CFA), an association of 240 pro-consumer groups with a combined membership of 50 million.

For information on what you and your clients can do to oppose the passage of this bill, call Maureen Thompson, NASAA Legislative Advisor, at (703) 276-1116 or Barbara Roper, Director of Investor Protection at CFA, at (719) 543-9468.

## Update On Luckie\Manhard

Seth Lipner, DEUTSCH & LIPNER, Garden City, New York

The motion for reargument to the Court of Appeals was denied. Manhard filed for cert. in the U.S. Supreme Court in April. The case is on the Justices' conference calendar for Sept. 26. Light a candle.

Doris Kahn, the investor in Luckie, did not join the Cert. Petition. Bob Dyer had a better idea. He moved in Florida to confirm the award Mrs. Kahn received in October, while the New York Court of Appeals was hearing argument.

It worked. The Southern District of Florida confirmed the award!!! Smith Barney moved for reconsideration, which is now sub judice. Meanwhile, in New York, Smith Barney filed a brief on remand, with a motion for "expedited briefing." Mrs. Kahn cross-moved in New York for a stay pending the outcome of Florida litigation, and that motion is sub judice.

Back on the offensive in Florida, Dyer then moved to enjoin Smith Barney from proceeding in Florida. Smith Barney has not yet responded.

And you thought the war between the states ended in 1865.

## "New York Law" Requires Consumer Transaction Contracts To Be Clear and Legible

Robert Dyer, ALLEN DYER, DOPPELT, FRANJOLA & MILBRATH, Orlando, FL

There are still some instances where going to court is preferable to arbitration — and where the customer agreement is fuzzy at best. In those cases it pays to keep in mind the following language from New York's CPLR §4544:

"The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who causes said agreement or contract to be printed or prepared."

The court in Hacker v. Smith Barney, Harris Upham & Co., Inc., 501 N.Y.S. 2d 977 (1986), would not enforce an arbitration agreement because it did not meet the provisions of CPLR §4544. Sometimes insistence on New York law as it pertains to formal contract requirements can work to the investor's advantage.

## NASD Arbitrator Pool

The NASD has set up a program in an effort to increase its pool of arbitrators. In furtherance of that goal the NASD has appointed Regional Arbitrator Recruitment Counsel. PIABA Director Rosemary Shockman is a member of that counsel. Rosemary reports that the NASD is in particular need of public chairpersons (usually an attorney).

Qualifications to be a public arbitrator are:

- A 10-year job history
- Two letters of recommendation [Note: The applicant need not be a college graduate].

The proposed arbitrator needs to:

1. Fill out an NASD Arbitrator Application;
2. Obtain two letters of recommendation; and
3. Submit this information to the NASD.

[Note: It is not advisable for a participating attorney to write the letter of recommendation].

The letter of recommendation should be addressed to:

Ms. Margaret Dugant
NASD Arbitration
33 Whitehall St., 8th Floor
New York, NY 10004

The letter of recommendation should address the following:

1. How long the person making the recommendation has known the applicant and under what circumstances;

2. A description of the applicant's experience which would qualify him or her as an arbitrator;

3. An attestation to the applicant's character and fitness to serve.

PIABA has also set up its own committee to begin an effort to add arbitrators to the NASD pool. The committee consists of:

| | |
|---|---|
| Rosemary Schockman | Seth Lipner |
| Boyd Page | Bob Dyer |
| Cary Lapidus | Jerome Stanley |

Any questions or suggestions regarding our efforts to increase the number of arbitrators should be addressed to a member of that committee. You may also obtain arbitrator applications from these committee members.

## PIABA Files Amicus Brief In Painewebber v. Bybyk

Seth Lipner, DEUTSCH & LIPNER, Garden City, New York

In July, PIABA filed an amicus brief in PaineWebber v. Bybyk, a "who decides eligibility" case on appeal the United States Second Circuit Court of Appeal. The case is noteworthy, not just because it is in the influential 2nd Circuit, but also because it will be the first federal appellate case to integrate Mastrobuono, First Options, and Luckie-Manhard.

The case is also important because it will be the first federal test of whether the New York choice-of-law clause renders attorneys fees claims "non-arbitrable." The investors, California residents, did business with PW in California. PW (and the SIA, as amicus) claim that, under NY law, arbitrators can't award attorneys fees, regardless of whether they would be permissible in California. Interestingly, PW is making no attempt to stay arbitration of punitive damages. Looks like surrender on that, at least for now. (But see Dean Witter v. Trimble, discussed infra.)

So stay tuned. The investors are in the very capable hands of PIABA members John Lawlor and Mike Gilmore. Remember Mike wrote the PIABA amicus brief in the identical case Smith Barney v. Boone (U.S. 5th Cir.) We won there, so we're optimistic.

## U.S. Eighth Circuit Weighs In In Favor Of Arbitrators Determining The Eligibility Rule

The Eighth Circuit has rejected the argument that arbitrators exceeded their authority by making a Section 15 determination.

In FSC Securities v. Freel 14 F.3d 1310 (8th Cir. 1994), the brokerage firm argued that the District Court should have invoked its authority under 9 U.S.C. 10(a)(4) to vacate the award and cited Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649 (6th Cir. 1993); PaineWebber, Inc. v. Hoffman, 984 F.2d 1372 (3rd Cir. 1993); and Edward D. Jones v. Sorrells, 957 F.2d 509 (7th Cir. 1992) for the proposition that NASD Section 15 is not a procedural "statute of limitations" which would be left to the arbitrators' interpretation, but rather a substantive limitation of what disputes are "eligible for submission" to the arbitrators in the first place.

The Eighth Circuit affirmed the confirmation of the award, and, in doing so, took on Sorrells head on. Citing AT&T Technologies Inc. v. Communications Workers of America, 106 S.Ct 1415 (1986)(wherein the U.S. Supreme Court reaffirmed that the question of arbitrability is usually an issue for the courts "unless the parties clearly and unmistakably provide otherwise"), the Eighth Circuit stated that of the cases relied on by FSC, only Sorrells specifically addressed NASD Code Section 35, which provides that the arbitrators are empowered to interpret and determine all of the provisions of the NASD Code of Arbitration.

The Eighth Circuit conceded that the Sorrells court said that Section 35 was not a clear and unmistakable expression that the parties intended for the arbitrators to determine which disputes the parties agreed to submit to arbitration. In spite of Sorrells, the Freel court came down in favor of the investor and found that the language of Section 35 was, in fact, such an unmistakable expression of the parties' intention. The Court said:

In no uncertain terms, Section 35 commits interpretation of all provisions of the NASD Code to the Arbitrators.

...we see no reason not to apply Section 35 to the arbitrators' decision regarding the application of Section 15.

(Case submitted by Gail E. Boliver).

## Rendering Arbitration Agreements Unenforceable

Christopher T. Vernon, GRADY & ASSOCIATES, Naples, Florida

As of September 7, 1989, Section 21 of the NASD Code limits the way in which brokerage firms can draft arbitration agreements. This was confirmed in NASD Notice to Members 95-16, issued in March 1995, on the heels of the Mastrobuono decision. I Believe the arbitration agreements currently used by some brokerage firms reduce the rights of investors in violation of Section 21 of the Code.

To prevent enforcement of these onerous arbitration agreements, you might well argue to a court that the brokerage firm cannot force your client into a forum such as the NASD if the agreement on which the firm relies is in violation of the forum's rules. In Mueske v. Piper, Jaffray, & Hopwood, Incorporated, 859 P.2d 444 447 (Mont. 1993), the investor argued that it was inconsistent for Piper, Jaffray to contend that the arbitration agreement requiring SRO arbitration should be enforced when the agreement was in violation of those very same SRO rules. The Mueske Court agreed with the investor and held that Piper, Jaffray's "Failure to comply with [SRO] rules it had incorporated into the contract to govern arbitration disputes rendered [the] arbitration clause invalid". The Supreme Court of Montana reiterated its position on this issue in Chor v. Piper, Jaffray, & Hopwood, Incorporated, 862 P.2d 25 (Mont. 1993).

The Piper Jaffray cases support the proposition that a brokerage firm cannot enforce an arbitration agreement unless that agreement is in strict compliance with the rules of the arbitration forum in which the firm is trying to force the case. By combining the NASD's rules and rule interpretations with the Piper, Jaffray cases and Mastrobuono, you may be able to render agreements such as those drafted by Smith Barney completely unenforceable. Of course, brokerage firms will likely argue that NASD's Notice to Members 95-16 is essentially a new rule and should not be applied retroactively. However, as the Supreme Court indicated in Lampf, you cannot avoid being subjected to a law [or rule] simply because you relied on an inaccurate interpretation. Brokerage firms regularly violate Section 21 of the NASD Code (as well as Section 6) and the NASD is simply beginning to enforce its rules. Therefore, Notice to Members 95-16 is not a new rule.

## Punitive Damages Update

Seth Lipner, DEUTSCH & LIPNER, Garden City, New York

### "WE'LL APPEAL TO THE U.S. SUPREME COURT, AND IF WE LOSE THERE, WE'LL GO HIGHER"

Or so the old joke goes. Only now we know where higher is. N.Y. Supreme Court, Part 23, Justice Jane Solomon presiding.

In Dean Witter v. Trimble, Justice Solomon ruled that you still can't get punitive damages in New York. In an unusual case (AMEX Window, no agreement, no New York choice of law, arbitration under the FAA in NY), Justice Solomon said that the investor voluntarily chose to arbitrate in NY (remember there was no pre-dispute agreement), and by doing so, the investor voluntarily chose to arbitrate under New York's arbitration law, i.e. Garrity. The result-oriented decision was not appealed because the investors settled - it was a small case. Expect the industry to run with this decision, but as such a weird duck that it won't get far.

In the meantime, a motion was made in NY to confirm a Utah punitive damages award against Stratton-Oakmont. *[Ed. note: See Jeppsen v. Piper, Jaffray & Hopwood, Inc., reported at CCH 98,772 (DC Utah).* It didn't go to Solomon because it wasn't a motion to stay or compel. Its sub judice. We'll keep you informed. Expect appeals.

The foregoing demonstrates an important principle - stay out of NY, and if you have to come here for punitives, you're better off in federal court. But keep an eye on Bybyk for eligibility and attorneys fees.

## Illinois Court Rules That Arbitrators Erred In Considering Evidence Regarding Untimely Claims

An arbitration award based in part on evidence of the broker's alleged wrongdoing with respect to investments purchased more than six years before the arbitration complaint was filed was beyond the arbitration panel's authority, ruled a U.S. district court (ND Ill). The customers asserted misrepresentation and unsuitability claims against the firm and account representative based on 17 investments, 11 of which were made prior to the six-year period. The arbitration panel had rejected the broker's motion to dismiss the arbitration as untimely under Section 15 of the NASD Code of Arbitration Procedure. Noting that there were allegations of wrongdoing that ostensibly occurred within the six-year period relating to purchases that occurred prior thereto, the panel permitted the customers to present evidence concerning the earlier purchases.

Refusing to confirm the arbitration award, the court found that the panel exceeded its authority in considering the evidence relating to the earlier purchases. Section 15 of the NASD Code of Arbitration Procedure makes ineligible for arbitration claims filed more than six years after "the occurrence or event" giving rise to the claim. The judge rejected the customers' argument that claims based on events occurring within the six-year period could be arbitrated, even though the securities themselves were purchased more than six years before. The occurrence or event, for purposes of Section 15, was the date of investment, not the firm's alleged breach of its continuing duty to evaluate the suitability of the investments. Because the panel exceeded its authority when it considered evidence of wrongdoing relating to the first 11 purchases, the award was vacated in its entirety. Mutual Service Corp. v. Paulding, ¶ 98,654 (ND Ill).

## Seventh Circuit Finds That A Price Decline Did Not Put Purchasers On Notice Of Fraud

A precipitous decline in a pharmaceutical company's stock price and the Food and Drug Administration's recall of a company product were insufficient to cause a reasonable investor to suspect fraud. Since these events did not begin the running of the statute of limitations, stock purchasers were able to maintain a securities fraud suit based on allegations that the company represented that FDA approval of a product was imminent, when in actuality the application was in "serious trouble."

The company was essentially a one-product company, and its right to market its one product depended on the vagaries of the bureaucratic process within the FDA as well as the uncertainties inherent in the manufacture and sale of a new product in the rapidly changing, highly competitive, pharmaceutical industry. The Court held that a steep decline in the price of a stock cannot, without more, be considered evidence of fraud sufficient to start a statute of limitations running. Had the company represented that the stock had no appreciable downside risk, that the FDA's approval was certain to be forthcoming on or before a particular date or that the manufacturing operation was flawless, in that instance, the inconsistencies with the company's representations may have led investors to begin investigation the possibility of fraud. LaSalle v. Medco Research, Inc., CCH ¶ 98,721 (CA-7).

## N.Y. Federal Court Holds Inquiry Notice Triggers One Year Limitations Period For Fraud Action

Securities fraud claims against a brokerage firm were barred by the one-year limitations period for Rule 10b-5 actions since the investors, with reasonable diligence, could have acquired full knowledge of the alleged fraud with regard to the speculative quality of some of the investments. In so ruling, a federal judge (SD NY) noted that the one-year statute of limitations commences on the

date investors had either actual or inquiry knowledge of the alleged securities fraud. The court defined inquiry notice as knowledge of facts that, in the exercise of reasonable diligence, should have led to actual knowledge.

In addition, the Court held that the receipt of confirmation slips and account statements detailing the trades notified the investors of investments allegedly contrary to the safe, low-risk objectives they alleged to have had desired. The investors did not have to be aware of all aspects of the alleged fraud, emphasized the Court; it was enough that they had knowledge of facts that triggered a duty of inquiry into the particular aspects of the claimed fraud, including an alleged failure to disclose the level of risk. Kosovich v. Thomas James Associates, Inc., CCH ¶ 98,663 (SD NY).

## NYSE Symposium On Arbitration

PIABA has sent our membership copies of the April 1995 issue of the Fordham Law Review which contains the New York Stock Exchange, Inc. Symposium on Arbitration.

We are also in the process of sending our members copies of the New York Stock Exchange's Report on the Symposium which you should expect to receive within the next three to four weeks.

## Annual Meeting CLE Credit

One major reason for solidifying the annual meeting program in advance is so we could pre-qualify for CLE credits. A committee has been formed, consisting of Bill Lapp, Bob Dyer and Brooke Geiger to coordinate CLE. WE NEED VOLUNTEERS IN EACH STATE TO ASSEMBLE AND SUBMIT THE FORMS FOR CLE CREDITS IN EACH STATE. Please call Brooke at PAGE & BACEK if you would like to be your state's representative, or if you want to help the Committee.

## The BULLETIN BOARD

Gerald E. Marcus is interested in hearing from anyone who submitted an employee/former employee claim against PSI in Expedited Arbitration Process and the claim was rejected on the basis of final order Section III(D)(I). Gerald is also interested in hearing from anyone now before a self-regulatory organization on such a claim. Please contact: Gerald E. Marcus, 2832A Whitney Avenue, Hamden, Connecticut 06518; (203) 248-5444.

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Bob Rex would appreciate hearing from anyone who has any information of the following DREXEL LIMITED PARTNERSHIPS: Drexel Phoenix Land Limited Partnership, Drexel Chandler Land L.P. (Arizona), Drexel San Francisco L.P. and Drexel Orlando Land L.P. or any other Drexel Limited Partnership. Please contact: Bob Rex, DICKENSON, MURDOCH, REX AND SLOAN, 980 N. Federal Highway, Suite 410, Boca Raton, FL 33432; (407) 391-1900.

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Kurt Eichenwald, a reporter for the *New York Times*, has authored a fascinating account of the Prudential Bache Securities limited partnership debacle of the 1980's in his recently published book *Serpent on the Rock* (HarperBusiness; August 2, 1995). If you look closely in the photograph section you will find a picture of the founding directors of PIABA. The book makes for compelling reading.

## Note From Kent Travel - Extended Stay At La Costa - TWA Discount

If you are considering a longer stay at La Costa, you can stay Monday and Tuesday nights, October 23 and 24th, for $149/night including the spa. (It goes up to $175/night on the 25th).

Also, you can fly TWA (to the annual meeting or anytime) and receive a 10% corporate discount by identifying yourself as a PIABA member.