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The P I A B A Quarterly

The Newsletter of the Public Investors Arbitration Bar Association

December 1995 Volume 2 Number 4

In This Issue...

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Editor's Note

The deadline for receiving submissions for the first 1996 issue of the QUARTERLY is February 5, 1996. As always, we request that all submissions be accompanied by a computer disk of the submitted material.

Please review the Bulletin Board section and take the time to respond if you have any of the requested documents or information.

If you have any questions or comments, please fax them to us at (504) 926-4348.

The PIABA Quarterly is a publication of The Public Investors Arbitration Bar Association (PIABA) and is intended for the use of its members. Statements and opinions expressed are not necessarily those of PIABA or its Board of Directors. Information is from sources deemed reliable, but should be used subject to verification.

Letter From the President

L. Jerome Stanley, L. JEROME STANLEY, P.C., Baton Rouge, LA

Dear PIABA Members:

Looking forward into the next year and what our goals might be as an organization, the first and foremost project that comes to mind is the expansion of the NASD arbitration pool.

By now all PIABA members should have received our correspondence requesting that each of you contact 3 people who you think may be able arbitrators and forward the names of those who express an interest to Brooke Geiger.

Please take the time to make these contacts and respond to Brooke.

From talking to several members since La Costa, it is obvious that our Annual Meeting was both an enjoyable and informative event. We are in the process of investigating several cites for next years' meeting. In keeping with our east/west rotation, we are likely to choose an east coast location. If anyone has a particular suggestion as to location, please fax me the information.

Best wishes for another prosperous year.

Jerry

In This Issue...

New Documents on Customer Complaints Required by the NASD

Diane A. Nygaard, NYGAARD & MILLER, Overland Park, Kansas

The SEC has approved a new NASD rule under Article III, Section 50, of the Rules of Fair Practice. The rule, approved September 8, 1995, took effect October 1, 1995 and requires broker/ dealers to generate and file with the NASD two kinds of documents:

1) summaries of customer complaints, as defined by the occurrence of 10 specified events and, MORE IMPORTANTLY,

2) quarterly reports, which must include "statistical information and summaries" of all customer complaints. Members must report all customer complaints, and the reporting requirement is not limited by the amount in question, the status of the claim or the occurrence of disciplinary action (85-91(c)).

The new rule is designed to help the NASD "promptly identify problem members, branch offices and registered representatives in order to more aggressively investigate sales-practice violations".

Whether the NASD will be prompted to act on the information is debatable. What is not debatable is that documents must be generated by member firms that PIABA members will want to request in discovery of customer claims.

I have requested more details from the NASD and have learned that software and manuals to implement the new rule were sent to member firms the last week of September. The first quarterly report is due at the NASD January 15, 1996.

The 10 specific acts that must be immediately reported are:

(a) Each member shall promptly report to the Association whenever such member or person associated with the member:

(1) has been found to have violated any provision of any securities law or regulation, any rule or standards of conduct of any governmental agency, self-regulatory organization, or financial business or professional organization, or engaged in conduct which is inconsistent with just and equitable principles of trade; and the member knows or should have known that any of the aforementioned events have occurred;

(2) is the subject of any written customer complaint involving allegations of theft or misappropriation of funds or securities or of forgery;

(3) is named as a defendant or respondent in any proceeding brought by a regulatory or self-regulatory body alleging the violation of any provision of the Securities Exchange Act of 1934, or of any other federal or state securities, insurance, or commodities statute, or of any rule or regulation thereunder, or of any provision of the By-laws, rules or similar governing instruments of any securities, insurance or commodities regulatory or self-regulatory organization;

(4) is denied registration or is expelled, enjoined, directed to cease and desist, suspended or otherwise disciplined by any securities, insurance or commodities industry regulatory or self-regulatory organization or is denied membership or continued membership in any such self-regulatory organization; or is barred from becoming associated with any member of any such self-regulatory organization;

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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.

(5) is indicted, or convicted of, or pleads g···lty to, or pleads no contest to, any criminal c .nse (other than traffic violations);

(6) is a director, controlling stockholder, partner, officer or sole proprietor of, or an associated person with, a broker, dealer, investment company, investment advisor, underwriter or insurance company which was suspended, expelled or had its registration denied or revoked by any agency, jurisdiction or organization or is associated in such a capacity with a bank, trust company or other financial institution which was convicted of or pleaded no contest to, any felony or misdemeanor;

(7) is a defendant or respondent in any securities or commodities-related civil litigation or arbitration which has been disposed of by judgment, award or settlement for any amount exceeding $15,000. However, when the member is the defendant or respondent, then the reporting to the Association shall be required only when such judgment, award of settlement is for an amount e ·ding $25,000;

(8) is the subject of any claim for damages by a customer, broker, or dealer which is settled for an amount exceeding $15,000. However, when the claim for damages is against a member then the reporting to the Association shall be required only when such claim is settled for an amount exceeding $25,0000;

(9) is associated in any business or financial activity with any person who is subject to a "statutory disqualification" as that term is defined in the Securities Exchange Act of 1934, and the member knows or should have known of the association. The report shall include the name of the person subject to the statutory disqualification and details concerning the disqualification;

(10) is the subject of any disciplinary action taken by the member against any person associated wi·· the member involving suspension, termination, th ithholding of commissions or imposition of fines in excess of $2,500, or otherwise disciplined in any manner which would have significant limitation on the individual's activities on a temporary or permanent basis.

(b) Each person associated with a member shall promptly report to the member the existence of any of the conditions set forth in paragraph (a) of this rule. Each member shall report to the Association not later than 10 business days after the member knows or should have known the existence of any of the conditions set forth in paragraph (a) of the rule.

The quarterly report requirement, which is more inclusive, is in section C of the new rule:

(c) Each member shall report to the Association statistical and summary information regarding customer complaints in such detail as the Association shall specify by the 15th day of the month following the calendar quarter in which customer complaints are received by the member. For the purposes of this paragraph, "customer" includes any person other than a broker or dealer with whom the member has engaged, or has sought to engage, in securities activities, and "complaint" includes any written grievance by a customer involving the member or person associated with a member.

Additionally, the new rule requires that all complaints - even those not previously reported to the NASD - must be included in the quarterly reports, according to the NASD representative with whom I spoke. If I am successful in receiving the Customer Complaint System Software (CCSS) and manual I have requested from the NASD, I will provide the PIABA newsletter with more detailed information.

The NCII Takes Shape

The National Council of Individual Investors has been formed from start-up funds from the settlement of securities licensing actions brought against Drexel Bumham Lambert. As a part of the settlement with the state securities agencies, Drexel agreed to provide funding to establish nonprofit organizations to educate the investing public about the securities markets and securities regulation and to advocate for investor rights and improved securities regulation. PIABA member Brian Smiley, PAGE & BACEK, has been asked to serve as a founding member of the NCII Board of Policy Advisors.

Report from New York:

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

First Department in Retreat: Revisiting the NASD eligibility rule in light of the Court of Appeals' decision in Smith Barney v. Luckie, the Appellate Division, First Department took a major backward step. The court ruled on November 29 that the question of eligibility is for the arbitrators in the absence of an express agreement that New York law shall govern the agreement and its enforcement. The decision affirmed a ruling of Justice Paula Omansky in Goldberg v. Parker.

The arbitration was commenced pursuant to the NASD Code with regard to registered persons, because there was no arbitration agreement whatsoever. Justice Omansky had ruled that because the eligibility determination required a factual inquiry into what was the "occurrence or event," she exercised her discretion and sent the eligibility question off to the arbitrators.

The 2-paragraph decision of the Appellate Division does not adopt that reasoning - it instead turns of the interplay between the FAA and New York's arbitration law. One interpretation is that the Appellate Division viewed Luckie (which was a limitations case, not an eligibility case) as simply an interpretation and application of Volt, i.e. with a choice of law, you get New York law not the FAA, but without a choice of law, you get the broad scope of the FAA.

Industry lawyers will be very unhappy with this decision because it makes the "court decides eligibility" rule dependent upon state law, rather than federal law. (Recall that in cases like Edward Jones v. Sorrells there was no New York choice of law, by the (federal) court determined eligibility.

Goldberg v. Parker is an important decision. Aside from the retreat it signals (a retreat that we predict will continue), the case bodes well for investors who either have no agreement or investors whose agreement does not contain the "and its enforcement: language in the New York choice of law (e.g. Smith Barney v. Sacharow, still pending before the First Department.) It also may be a good sign for the Bybyks, who have the same situation in the 2nd Circuit Court of Appeals.

Still sub justice: Whether the AMEX eligibility rule applies to AMEX Window arbitrations; whether you can get punitive damages in arbitration past a New York State court; whether you can get attorneys fees in arbitration past state and federal courts in New York; the specific issue in Sacharow (above).

HAPPY NEW YEAR FROM NEW YORK

California Certifies Securities "Reform" Initiates for March 26, 1995 Ballot

The California Shareholder Limitations Initiative asks the public to vote away their right to sue those who defraud them in stock swindles. It imposes loser pays and a bonding requirement on shareholders who file those suits. The plaintiff's attorney may post a bond for the client; but when he or she does, the attorney becomes primarily responsible for the winner's costs and attorneys fees. Even when the client posts his or her own bond, the court may hold the plaintiff's attorney jointly and severally liable for costs and fees of the opponent.

The Contingent Fee Limit initiative sets up new practice parameters or contingent fee attorneys in any tort action and caps the attorney fees at 15% of any "early settlement offer" no matter whether the offer is accepted. The capping process is set in motion by a requirement that any contingent fee attorney send a demand to all "allegedly responsible parties, "i.e., the brokerage firm and all potential defendants. The contingent fee attorney must include all theories of liability, all witnesses (with address and telephone numbers), prove up all damages - essentially present the entire case -- in the demand. If the attorney mistakenly leaves any material information out of the demand, his or her entire fee is capped at 15% -- even if there is no settlement offer and the case goes to trial.

Reflections On LaCosta

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

The Board of Directors wants to once again thank all the individuals who participated in creating and delivering our best annual meeting to date.

It was wonderful to see so many dedicated lawyers there to participate in the discussions, and we are glad so many spouses and friends attended - all served to make the event very special. We hope that all those who participated in the spouses' breakfast, the golf tournament and the wild animal safari enjoyed these activities. We hope we can do even more next year.

We are in the process of determining the location of next year's meeting. You can expect to hear something definite after the 1st of the year.

Finally, we encourage anyone who wants to participate as a speaker in next year's meeting to call or write with suggested topics. Some of those that are already being considered are penny stock fraud cases, the use of private investigators, and preparing for a mediation. We welcome other ideas, and look forward to hearing from you.

BULLETIN BOARD

PIABA member John S. Yun has been appointed to serve as a mediator on the mediation panel that was recently established by the San Francisco Office of the NASD. Mr. Yun mediates broker/dealer, securities, employment, breach of contract, negligence, attorney's fees and insurance disputes. He also serves as on the arbitration panels of the NASD and PSE. Mr. Yun can be reached at the Law Offices of John S. Yun, One Sansome St., Suite 1450, San Francisco, California 94104, tel: (415) 986-6873, and is available for service as a mediator or as a consultant to counsel preparing for mediation.

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BOCHAT & KEENAN, P.C. is involved in a Prudential expedited arbitration involving the following partnerships: NRM 81 Drilling Fund; Apache Petroleum Company; IREX/1983 A Limited Partnership; Towner Petroleum Drilling Program 1981-1 and 1981-5; Woods 1981-1 Drilling Program and Towner Leveraged Private Program 1981-B, Ltd. Lawrence J. Bochat requests whether any PIABA member has been successful in obtaining Prudential's due diligence files concerning any of the limited partnerships sold by PSI. Lawrence J. Bochat would appreciate a call at (516) 742-5400.

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CALL FOR A "RIGHTS" OF SPRING MEETING
Robert Dyer, ALLEN DYER, DOPPELT, FRANJOLA & MILBRATH, Orlando, FL

If my antennae were reasonably tuned, the San Diego conference was a substantive success. Several PIABA members to whom I spoke support sounding out the membership during a long, one day meeting, say in March or April -- strictly business --.

One possible agenda might be to have three or four current subjects explored in depth by a panel, with questions from the floor not limited to a mere five minutes or so.

If you are interested in such a membership-wide meeting, please write or fax Jerry Stanley, our new president, and let him know what subjects might be of universal interest. You may be sure that the perineal problem of getting a better arbitrator mix will be one of the topics.

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The Famous PRU G-2 Releases

"Desperately Seeking Samples"

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

I have a G-2 (general) release case going on ... still. The initial goals of this arbitration are simply (a) to cancel the release and (b) to declare all time-bar per~ds suspended from October 1992 when the release wa. ɔtained. We know this was a fairly widespread practice ... of offering an investor a settlement on G-2 and then sending a one-page form release, later claimed to be a general release. Irving Pollack's offices early on said such releases would be limited to G-2 (or the particular LP settled).

Whether your claims are open or closed, please mail a copy of any release in this category and a brief factual story to my office: P.O. Box 3791, Orlando, FL 32802-3791. Thanks.

Is Merrill Lynch v. Cohen Really A Problem?

Bob Pearce, LERNER & PEARCE, P.A., Fort Lauderdale, Florida

Mr. and Mrs. Yianilos had just successfully fo' `t off Smith Barney for two years in New York cou..s and were finally going to arbitrate their limited partnership dispute. In the interim, the Eleventh Circuit broke from its longstanding precedent that arbitrators determine timeliness of claims. Merrill Lynch v. Cohen (holding that the courts rather than the arbitrators decide whether claims are timely under Section 15 of the NASD Code of Arbitration Procedure). Case No. 93-5125, 1995 WL 481016 (11th Cir. August 30, 1995). And so, Smith Barney filed another civil action in the Southern District of Florida to enjoin the arbitration proceeding. Smith Barney, Inc. v. John and Demetra Yianilos, Case No: 95-7072.

I thought that the Cohen decision was the deathknell to my clients claims. That is, until I read my clients' arbitration agreement and noted the important factual distinctions. I was enlightened by the Court opinion of Paine Webber, Inc. v. Landay, 1995 WL 598205 (D.Mass. 1995). I also realized that there were other provisions in the NASD Code of Arbitration Procedure (the "NASD Code") which were not argued to the Eleventh Circuit and made Cohen vulnerable.

Mr. and Mrs. Yianilos' margin agreement with Smith Barney was executed in 1992 and superseded the agreement my clients' signed when they opened the account. It was executed subsequent to the effective date of Section 21(f) of the NASD Rules of Fair Practice (the "NASD Rules"). On its face, the Yianilos' arbitration appeared to comply with the NASD Rule. It set out the Section 21 (f) (1) (ii) disclosure which reflects the parties intent concerning the scope of the parties agreement:

The parties are waiving their right to seek remedies in court, including the right to jury trial.

However, Smith Barney was acting contrary to the stated intent of the parties to the arbitration agreement and NASD Rule. Section 21 (f) (4) expressly prohibited Smith Barney from using its agreement to:

(a) Limits or contradicts the rules of the NASD or any other self-regulatory organization;

(b) Limits the ability of a party to file a claim in arbitration; or

(c) Limits the ability of the arbitrators to make any award.

The NASD interpretation of Section 21(f)(4) regarding "time limitation" issues confirmed that Smith Barney was prohibited from demanding "that a time limitation question be judicially determined instead of being submitted to a panel of arbitrators pursuant to a submission under the Code of Arbitration Procedure." NASD Notice to Members 95-16 (March 1995).

To my surprise, Judge Gonzales reached the same conclusion our case and Smith Barney's Motion for Temporary Restraining Order and Motion for Preliminary Injunction against my clients:

[U]nlike the case presented in [Cohen], the Court believes that the parties to this action "clearly and unmistakably" agree to arbitrate all of their disputes. In their initial Margin Agreement, the parties agreed to waive their rights to seek remedies in court. (citation omitted) Moreover, the parties did not originally agree to submit their disputes to arbitration before the NASD, but instead agreed to arbitrate before "any self-regulatory organization or exchange of which Smith Barney is a member." Thus, it appears that the parties agree to resolve all of their disputes through arbitration. [emphasis supplied]

Judge Gonzalez then notified Smith Barney to show cause why he should not enter a summary judgment in favor of my client, sua sponte. Smith Barney then dismissed their Declaratory Judgment and Injunction civil action against my clients.

The Eleventh Circuit believed it followed the Supreme Court in First Options of Chicago, Inc. v. Kaplan, holding "[c]ourts should not assume that the parties agree to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e] evidence that they did so"' and that it controlled their decision. 115 Sup. Ct. 1920 131 L.Ed.2d 985 (1995). The Court would not agree with the Cohens that Section 35 was "clear and unmistakable evidence" of the parties intent to allow the arbitrators to determine the timeliness of the claim:

"[a]t most Section 35 creates an ambiguity as to who determines arbitrability. Because an ambiguity is insufficient to override the presumption that courts determine arbitrability [citation omitted], we conclude that the District Court must determine whether the dispute between the Cohen's and Merrill Lynch is arbitrable.

Cohen, 1995 Wl 481016, at 4.

The Landay case well enlightened all as to how the Cohen Court misconstrues the First Options decision. 1995 WL 598205 (D. Mass. September 21, 1995)

[Cohen] misconstrue[s] the First Options distinction between A) disputes over whether there is any agreement to arbitrate in the first place ("arbitrability") and B) disputes where a valid arbitration agreement exists but there are secondary questions concerning scope. As First Options established, all doubts concerning the latter should be resolved in favor of arbitration, and, in fact, do not involve "arbitrability." (citation omitted) Under this reasoning, timeliness disputes generated between parties to valid arbitration agreements should presumptively be resolved through arbitration.

While Cohen conceded that Section 35 together with Section 15, creates an ambiguity, it found that "an ambiguity is insufficient to override the presumption that courts determine arbitrability." (citations omitted) I cannot agree. First Options clearly holds that ambiguity surrounding the scope of a valid arbitration agreement should be governed by a presumption that resolves doubts in favor of arbitration. (citations omitted) Moreover, in Mastrobuono, the Court observed that arguably ambiguous arbitration agreements, like other private contracts, ought to be construed against the drafter. (citations omitted)

The Landay court reasoned that because there was an existing arbitration agreement, the Section 15 issue was really a "scope" question as distinguished from the "arbitrability" question found in the First

Options case. There was no arbitration agreement whatsoever between the relevant parties in the First Options case. Hence, the Landay Court properly concluded that the Cohen court applied the wrong presumption to the case and held that the Section 15 issue was for the arbitrators.

Last, Section 6 of NASD Code prohibits parties from commencing any suit, action or proceeding against the other party touching upon any of the matter referred to arbitration pursuant to the NASD Code. Sections 1 and 12(a) of the NASD Code require members to arbitrate "any dispute, claim or controversy" with customers. These sections of the NASD Code were not brought to the Court's attention in the Cohen case. They are further evidence of the parties intent to submit all disputes to the arbitrators. Sections 1,6, and 12(a) should be coupled with Section 35 of the NASD Code to demonstrate that the parties intent to arbitrate all disputes is "clearly and unmistakably" evident within the NASD Code.

Hopefully, you will find this analysis of Cohen useful and argue that Cohen is really not a problem in your case.