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The P I A B A Quarterly

The Newsletter of the Public Investors Arbitration Bar Association

June 1999 Volume 6 Number 2

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The

PIABA

Quarterly

The Newsletter of the Public Investors Arbitration Bar Association

June, 1999 Volume 6, Number 2

Editor's Notes

This issue of the *Quarterly* contains an article by "Visiting Professor," Robert Dyer on customer agreement choice of law clauses.

The deadline for receiving submissions for the October, 1999 issue of the *Quarterly* is September 10, 1999. All submissions, regardless of length, should be accompanied by a computer disk of the submitted materials in either word perfect or as a text file.

Please send change of address information to Robin Ringo at 1111 Wylie Road, #18, Norman, OK 73069. Toll Free: (888) 621-7484; Fax: (405) 360-2063; E-Mail: piabalaw@aol.com; Web site: www.piaba.org.

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Letter From the President

Mark E. Maddox, MADDOX KOELLER HARGETT & CARUSO, Indianapolis, IN

Dear Friends:

I have some exciting news to report to the PIABA membership relating to new services that we hope to offer by the Fall Conference. It is currently our plan to offer PIABA members a database service of all NASD available

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arbitration awards. We hope that by the fall conference all such awards for 1998 and 1999 should be online. We are currently in negotiations with the NASD in hopes of obtaining all prior available awards in an electronic format. We currently anticipate offering this service to PIABA members for an annual flat fee of approximately $250.00-$300.00 per calendar year. Many thanks to Robin Ringo and her technology consultant for bringing this program on-line so quickly.

Also by the fall conference, we plan to offer another free service to PIABA members. PIABA will be providing by state a summary of causes of action, statutes of limitations and damages typically requested in a securities arbitration proceeding. At this time, approximately 15 states have been completed. By the fall conference, we hope to have 20-25 states completed and on-line. We ask that PIABA members who practice in these jurisdictions please review the posted information for accuracy and completeness. Once again, there will be no additional charge for this service.

On July 20, PIABA will be participating in a national news conference with other consumer groups urging Congress to look at the problem of unpaid arbitration awards, particularly in the micro-cap area. Additionally, we will continue to fight for updating and modernizing of SIPC and its supporting legislation.

On the NASD rule-making front, it appears that the rule proposals relating to requirements for pre-dispute arbitration agreements and the revised eligibility rule will be administratively approved by the SEC. We have been unable to obtain any current information as to the status of the proposed discovery list guide. The punitive damage proposal appears to be headed for hearing before the full SEC at an as-yet undetermined hearing date. The vote on the punitive rule proposal is still expected to be quite close, possibly 3-2, with Chairman Arthur Levitt casting the deciding vote.

If you have not done so already, please make your reservations for the Fall Conference on October 21-23 in Palm Desert, California. This promises to be the best PIABA Fall Conference yet.

See you in the desert!

Mark Maddox

Notice of Election of PIABA Board of Directors

In accordance with Article VI of the PIABA Bylaws, the following notice is provided regarding the upcoming election of the Board of Directors to be held at the Annual Meeting October 21-23, 1999.

ARTICLE IV
BOARD OF DIRECTORS

Section 6. Members Holding Office. Being a member in good standing in PIABA shall be a prerequisite to holding any office or membership on any committee. Membership is a privilege and may be terminated by the Board of Directors at its discretion without prior notice.

ARTICLE V
BOARD OF DIRECTORS

Section 1. Composition.

(a) The Board of Directors shall consist of fifteen persons who are elected as provided by Article VI.

(b) No more than three (3) Directors shall serve on the Board from any State, Province or Territory, and no more than one (1) from any one law firm or association.

(c) Directors shall be elected for a three-year term, i.e., from November first of the year following their election through the Annual Meeting three years hence. To the extent possible, the terms of office of the Directors shall be arranged so that approximately one-third (1/3) or five (5) directors' terms expire each year.

ARTICLE VI
NOMINATION AND ELECTION
OF BOARD OF DIRECTORS

Section 1. Nominating Committee. The Nominating Committee shall be composed of the members of the Board of Directors.

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, 7910 Wrenwood Blvd., Ste. B, Baton Rouge, Louisiana 70809; FAX (225) 926-4348. E-Mail: stanlaw@premier.net. All copy is subject to the approval of the publisher. Any material accepted is subject to such revision as is deemed approprite in the publisher's discretion.

Section 2. Nomination and Election of Directors.

(a) The Nominating Committee shall be responsible for nomination of Directors who are to be placed on the ballot for election by the general membership. The nominations of the Nominating Committee shall be printed in the *PIABA Quarterly* or by special notice no less than 60 days prior to the Annual Meeting. Said notice shall be accompanied by a statement of the procedures by which nominations may be made by the membership.

(b) In addition to those candidates nominated by the Nominating Committee, additional nominees may be offered and placed on one ballot at the request of not less than five (5) members by letter received no later than thirty (30) days prior to the scheduled Annual Meeting.

(c) All nominees shall have been members in good standing for not less than two consecutive years at the time of taking office and shall have attended at least one annual meeting in the two years prior to his or her nomination. As further qualifications, nominees must manifest an abiding interest in the enhancement of Public Investors' rights, be willing to contribute time, talent, energy and resources to further the purposes and objectives of PIABA, be willing to actively participate in PIABA functions, fundraising and other activities, acknowledging that service as a Board member shall have a high priority in all of his or her endeavors, and meet any further qualifications determined by the Nominating Committee to be in the best interest of PIABA.

(d) If there are more nominations than vacancies open for the election, annual election of Directors shall be conducted by secret, written ballot of members at the Annual Meeting by those members who are present in person. There shall be no votes cast or allowed by proxy.

(e) The ballot shall list thereon the names of all nominees proposed by the Nominating Committee and as provided above in (b).

(f) A member desiring to vote shall clearly mark his or her ballot for choice of Directors. The member shall make the selection from the list of nominees printed on the ballot. Each voting member will be entitled to cast one (1) vote for each directorship up for election. In order for the ballot to be valid, it *the ballot* must not contain a total number of votes greater than the number of Directors to be elected. There shall be no cumulative voting. The President shall authorize the use of a person to tabulate ballots and supervise and validate the election. The nominee(s) receiving votes shall be ranked according to the number of votes cast for that nominee. The highest vote-getters, corresponding to the number of seats up for election, shall be deemed elected.

(g) A ballot shall be invalid if not cast on the official ballot form provided by PIABA.

Proposed 1999-2000 Board of Directors

Name	State	Term Expiration
Scot Bernstein	California	2000
Joel A. Goodman	Florida	2000
Diane A. Nygaard	Kansas	2000
J. Pat Sadler	Georgia	2000
Rosemary Shockman	Arizona	2000
Philip A. Aidikoff	California	2001
Allan Fedor	Florida	2001
James E. Beckley	Illinois	2001
Robert Dyer	Florida	2001
William Lapp	Minnesota	2001
Nominees for Terms Expiring 2002		
Seth E. Lipner	New York	2002
Joseph C. Long	Oklahoma	2002
Mark E. Maddox	Indiana	2002
L. Jerome Stanley	Louisiana	2002
Tracy Pride Stoneman	Colorado	2002

From the Professor

Guest Author: Robert Dyer, Esq.
ALLEN, DYER, DOPPELT, MILBRATH & GILCHRIST
Orlando, Florida

Reining in Customer Agreement Choice of Law Clauses

The choice-of-law issue will not go away, certainly not by NASD fiat. This article is an "approximation" of positions taken in recent briefs on the COL problem, particularly as it applies to statutory claims of any given state, although Florida is the jurisdiction under consideration in this article. The thread of the argument goes like this:

1) Statutes supported by articulated public policy — as is usually the case — simply are not displaced by COL provisions in private contracts; 2) firms with in-state offices waived any claim to have foreign law supplant Florida's securities statute because the offices and brokers are registered pursuant to Florida's securities statute; 3) at best, the foreign COL clause applies only to pure breach of contract claims and then only if respondent can show a knowing waiver of otherwise applicable statutory protections; and 4) the firm's attempted use of the foreign COL is prohibited by NASD Rule 3110(f)(4) (formerly 21(f)(4)) and the even more recent NASD "Notice to Members 95-16," which bars attempted use of a governing law provision to limit an arbitrator's award under otherwise applicable law.

A. The Statutory Causes of Action Reflect the Stated Public Policy of Florida; and the Protection and the Remedies of These Statutes Cannot be Voided in Whole or in Part by a COL Provision in a Private Contract

In earlier times, the issue often was whether a contemporaneous waiver could enable the seller to escape various blue sky statutes. For example, in *Foreman v Holsman*, 141 N E 2d 31, 61 ALR 2d 1303 (Ill. 1957), the waiver was clear and unambiguous. The court answered with a traditional analysis:

> "The Illinois Securities Act of 1919 was enacted for the protection and benefit of the public as a whole-'to protect the public from the dishonesty, incompetence, ignorance, and irresponsibility of persons engaging in the business of disposing of securities of uncertain value whereby the inexperienced and confiding are likely to suffer loss.'" *Id.* at 32.

The fact that one may recover attorney fees as well as damages, the court noted, "indicates that this civil remedy is intended to afford an additional punishment for an offending party." As the court saw it, to permit these remedies to be waived prior to or contemporaneously with the sale of unregistered securities

> ". . . would thwart the very objective of the statute and violate the declared public policy of this State. Such a holding would pave the way for the virtual nullification of this important legislative enactment...."

Accord, Starkenstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 572 F. Supp. 189 (M. D. Fla. 1983).

Another line of cases involves the question of whether the application of traditional conflicts of laws principles will favor application of one blue sky statute over another (usually over one providing more beneficial remedies). This issue was presented in spades in *Lintz v. Carey Manor Ltd.,* 613 F. Supp. 543 (W.D. Va. 1985), where defendant made the conflicts of law argument to defeat application of the Virginia Securities Act (which carried reasonable attorneys' fees). Defendant's summary judgment alleged that "Plaintiffs' claims for attorneys' fees is the major barrier to settlement of these suits." *Id.* at 547. The complaint based claims on the Federal securities acts as well as on three blue sky statutes, Virginia, Florida and New Jersey. The court found that the only discussion on whether "two or more state statutes can simultaneously provide civil liabilities for securities fraud or nonregistration" was in the 1965 Blue Sky Law Handbook by Professor Joseph Long. The court in *Lintz* agreed with Professor Long

> ". . . that there is no conflicts problem presented when two or more statutes reach the same transaction." *Id.* At 549.

The court subsequently quoted the policy conclusions of Professor Long:

> "'There would appear to be two policy bases that could be used by a state for enacting a state securities act. First, the state has a legitimate interest in protecting its citizens in the purchase or sale of securities. The state likewise has a legitimate interest in regulating and controlling securities activities deemed to have taken place at least partially within the borders of the state.'" *Id.*

The court went on to say that

> "These policy objectives support Professor Long's earlier assertion that so long as there is some territorial nexus to a particular transaction, the laws of two or more states may simultaneously apply." *Id.* at 550.

In short, the court concluded that there is no conflicts of law question presented by these overlapping statutes, and that the Virginia Act does apply." *Id.* at 551. The net effect of this holding enabled plaintiff to seek remedies, damages and attorneys' fees under the most favorable blue sky statute:

> " There is nothing inconsistent in trying a securities case on multiple theories, and determining liability under each statute that is applicable, so long as the plaintiff is prevented from multiple recoveries." *Id.*

The "conflicts of law" argument — to bypass an otherwise favorable blue sky statute — was again rejected in *Simms Investment Co. v. E.F. Hutton & Co.*, 699 F. Supp. 543 (M.D N.C. 1988). The matter came before the court on a motion to reconsider an earlier order favoring defendant by applying conflicts of laws principles. Plaintiff cited *Lintz, supra*, and recent articles by "Professors Long and [Louis] Loss, noted blue sky law authorities [who] have explicitly approved of the *Lintz* holding." *Id.* at 545. The court emphatically reiterated the two policy considerations identified by Professor Long, *supra:*

> "Overlapping state securities laws do not present a classic conflict of law question. Blue Sky laws protect [these] two distinct public policies." *Id.* The court characterized

the situation of two state securities laws applying to the same transaction "more as an election of remedies, rather than a potential conflict of laws problem."

"This characterization serves several public policy goals. First, the decision obviates the need to enter the labyrinth of ever-shifting conflict of laws jurisprudence. Second, the decision comports with legislative directives to apply state securities statutes in prescribed situations. Third, the 'territorial nexus' requirement eliminates any threat of forum shopping. Finally the decision provides a logical and coherent analysis which will provide both issuers and purchasers of securities notice of which state(s) law is applicable to a given transaction." *Id.* at 546.

Simms and *Lintz* were more recently cited in *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P 2d 522,530-31 (Ut.1994); and *Johnson-Bowles Co. v. Division of Securities*, 829 P 2d 101,110-11 (Ut.1992).

Finally, and closer to home, the court in *Barnebey v. E F Hutton & Co.*, 715 F. Supp. 1512, 1533 (M.D. Fla. 1989), relied upon the foregoing authorities in expressly holding that overlapping securities statutes simply do not present a conflict of laws problem:

". . . [T]his Court concludes that any decision to apply another state's securities law will inherently acknowledge the public policies which traditional conflicts of law doctrine seek to protect." *Id.* at 1535.

The court noted that when a transaction crosses a state line, the issue is not which is the better choice of statutes, but, "Rather, the issue is whether the plaintiffs' allegations show a sufficient nexus between the parties and the particular state law pleaded to justify applying that law." *Id.* at 1 536.

In *Boehnen v. Walston & Co.*, 358 F. Supp 537 (D.S.D. 1973), the customer agreement expressly provided that "The provisions of this agreement shall in all respects be construed according to . . . the laws of the State of New York." *Id.* at 540. The issue therefore was whether the South Dakota purchaser could convince the court to apply the South Dakota blue sky law. As the court pointed out, the COL

". . . simply does not apply to the alleged actions of the defendants in alleged violations of the South Dakota Blue Sky Laws.

"'Thus a stipulation by which the parties select the law to govern the contract is valid and *will be given effect only if it is not contrary to public policy generally, or to the public policy of the forum, . . ., or in violation of a statute of the forum enacted for the protection of its citizens*, ...'" *Id.* at 540-41. (Emphasis added.)

The court noted that the scope of the South Dakota Securities Act was self-evident.

"As a general rule remedial legislation, such as enacted here to protect the unwary buyer, should be liberally construed to effect that purpose." To the same effect is *Getter v. R. G. Dickinson & Co.*, 366 F. Supp. 559 (D. Ia. 1973). Once again, the customer agreement provided that it would be construed in accordance with, and governed by the laws of . . [New York State]." *Id.* at 574-75. In refusing to void application of the Iowa Securities Act the court said,

"In the present case, we have a protective statute for purchasers of securities in the State of Iowa. This Court concludes as a matter of law that under the circumstances of this cause of action that the plaintiffs did not waive the protection of the Iowa Securities Act." (See the relevant pages of this decision 574-77).

This principle obviously applies to many statutory claims, not just blue sky cases. See, *e.g.*, *United Dominion Ind., Inc. v. Overhead Door Corp.*, 762 F. Supp.126 (W.D.N.C. 1991). The action arose out of an asset purchase and bottomed liability on the North Carolina deceptive trade practices statute. The contract stipulated it was to "be governed by and construed in accordance with the laws of the State of Texas . . ." *Id.* at 127. The court ultimately decided the cause of action was governed by Texas law, but not because of the COL provision in the contract:

"The contractual provision here may govern the choice of laws as to the interpretation and construction of the contract; however, it does not provide the applicable law for a claim based on unfair and deceptive acts. . . . Therefore, North Carolina courts would ignore the contractual choice of law provision in determining whether N.C. Gen Stat. § 751 1 applies...."

The court's decision ultimately turned on the old lex loci test, because everything occurred in Texas.

Arbitration Agreement Held Binding Despite Earlier Agreement

The South Dakota Supreme Court Found that a subsequently signed customer arbitration agreement controlled even though the customer and the firm had earlier agreed that the customer's account would not be subject to arbitration. *Dinsmore v. Piper Jaffray*, 593 N.W. 2d 41 (1999).

Because of prior experience with brokers and pre-dispute arbitration provisions, the customer sought out a securities firm that would consent to an account without an arbitration agreement. Piper Jaffray orally agreed to waive the pre-dispute arbitration provisions and it was struck from the margin agreement the customer signed when he opened the account. However, two years later, the customer also signed two additional agreements, a cash account agreement and an options agreement, both which contained pre-dispute arbitration agreements. There was no discussion about the arbitration provisions at the time the subsequent agreements were signed.

When the customer brought suit, Piper moved the trial court to stay the action and compel arbitration. The trial court denied the motion, concluding that Piper owed the customer a fiduciary duty to advise the customer of the presence of the arbitration clause in the subsequent agreements and that it had breached this duty by failing to make an oral disclosure.

The Supreme Court reversed. First, it considered whether the broker owed a fiduciary duty to the customer. The court considered a recent South Dakota Supreme Court case where the court found a fiduciary relationship between a real estate broker and his client. The Court then reasoned that securities brokers are licensed professionals holding themselves out as trained and experienced to render a specialized service and that securities customers rely on the securities agent's expertise and expect the agent to act in their best interests. Securities brokers therefore owe their clients a duty of utmost good faith, integrity and loyalty. A fiduciary relationship, said the Court, is founded upon a "peculiar confidence" and "trust" placed by one individual in the integrity and faithfulness of another. When a fiduciary relationship exists, the fiduciary has a duty to act primarily for the benefit of another.

However, the Court found that there are limits to that duty, one being when the parties are dealing at arm's length. It found that, in the actual process of negotiating and executing the agreement, Piper was not acting as someone managing an asset for another, and Piper did not act for or on behalf of the customer. Even thought the customer did rely on the earlier oral agreement with Piper, that reliance was not justified since the subsequent agreements had notices of the arbitration provisions in large type directly above the signature lines. Because of these conspicuous notices, designed to alert the signer to the presence of the arbitration provisions, the Court found that Piper did not have to give the customer oral warnings of these provisions to discharge any duty owed to the customer.

U.S. District Court Refuses to Order Arbitration Without Written Agreement

A District Court in Louisiana was faced with a motion to compel arbitration where the movant brokerage firm conceded that the customer had not signed a written arbitration agreement. *Wood v. Royal Hutton Securities*, (1999 WL 225437 (E.D. La.)).

The firm contended that an agreement to arbitrate could be inferred by the conduct of the parties and cited a New York case for the proposition that evidence of a customer having routinely completing arbitration investor agreements is probative of whether such an agreement was contemplated between the parties even though a written agreement was not signed. *Blashka v. Greenway Capital Corp.*, No. 94 Cir. 5633 (SAS) 1995 WL 608284 (S.D.N.Y. Oct. 17, 1995). The firm argued that the customer was an experienced investor and should be held to possess constructive knowledge of the arbitration agreements common to the industry.

The *Wood* court distinguished its facts from *Blashka*. The *Blashka* investor had managed securities accounts and signed account agreements which contained arbitration agreements and was presumably aware that the firm he was suing had an arbitration agreement in its customer agreement which it required all clients to sign before conducting any trading.

Absent this knowledge from *Wood*, the Court found that there was no express or implied agreement to arbitrate.

Recent NASD Arbitration Awards

Ward v. Olde Discount, David Flanders and John Inferrera: No. 97-03459

Claimants alleged that the Olde broker convinced them to sell General Motors stock and invest in several volatile emerging growth stocks on margin, which were unsuitable. Claimants sought $127,000.00 in compensatory damages, $110,000.00 in lost opportunity costs, attorney's fees of 1/3, and punitive damages of $150,000.00

Respondent contended that the investors represented themselves as aggressive, short-term, speculative investors on their "updated" Olde account applications.

The arbitration panel awarded $90,000.00 in compensatory damages, and punitive damages totaling $125,000.00.

Chehebar v. D.H. Blair and Richard Molinsky: No. 98-00994

Claimants alleged that Blair recommended speculative securities in which it made a market for the purpose of generating profits for itself without regard to the investor's "blue chip" investment experience. Claimants sought $197,000.00 in damages.

Respondents contended that Claimant was a sophisticated investor whose first trade with Blair was in unsolicited IPO purchase of $100,000.00 in Skyline Multimedia, and that Claimant later invested in Video Update as his own selection.

The arbitration panel awarded $8,000.00 in compensatory damages.

Gutzmer v. Bear Stearns and Paul Fragakis: No. 98-02477

Claimants alleged breach of fiduciary duty and negligent misrepresentation. Claimant sought $300,000.00 in damages.

Respondents denied all wrongdoing and requested that the matter be expunged from Fragakis' CRD.

The arbitration panel awarded $150,000.00 in damages against Bear Stearns and ordered the matter expunged from Fragakis' CRD.

Jones v. Olde Discount and Mitchell A. Ronco; No. 97-02036

Claimants alleged that Respondents ignored her conservative investment objectives and traded the account for the purpose of generating commissions. She also alleged that Ronco forged her signature on a new account form and trading form. Claimants sought $250,000.00 in damages.

Respondents contended that the Claimant and her son who handled the account were knowledgeable investors who purchased investments which were not followed by Olde's research department and were not recommended by Ronco.

The arbitration panel awarded $250,000.00 in damages and found that Ronco had forged the Claimants signatures as alleged, but that the finding had no bearing on the damages awarded.

Corzine v. Gilford Securities and Nicholas Calapa; No. 97-00904

Claimant alleged that he first verbally and later in writing instructed that no stocks were to be brought on margin or without his authority and that Respondents disregarded these instructions. Claimant sought out-of-pocket losses of $500,000.00

Respondents requested the claim be dismissed in its entirety. (Calapa filed for Chapter 7).

The arbitration panel awarded $60,000.00 in damages.

Louvek v. Pershing and Carlos Otalvaro

Claimant alleged that Otalvaro made unsuitable investments and churned her account. Otalvaro was a broker for Winston Rodgers & Otalvaro (now into Chapter 7) which was the introducing broker clearing through Pershing. Claimants alleged neither Otalvaro nor his broker/dealer were licensed in Florida and that Pershing knew or should have known of the licensing deficiency. Claimant sought $236,000.00 in damages plus interest and attorney's fees.

Respondent Pershing contended that the Claimant gave full discretionary trading authority to Otalvaro and that the relationship between Otalvaro and his broker/dealer and Pershing as the clearing broker, was disclosed pursuant to NYSE Rule 382, and denied it knew that Otalvaro was not licensed.

The arbitration panel awarded $261,000.00 against Otalvaro and, by majority decision, awarded $100,000.00 against Pershing based on it's finding that discrepancies in Otalvaro's filings clearly signaled a lack of license in Florida.

Brown, Lesemann and McGillivray v. J.C. Bradford; No. 97-01126

Claimants alleged churning, fraud, RICO and Selling Away. McGillivray sought $497,000.00 in damages, $1,800,000.00 in *Miley* damages and attorney's

fees. Stevens sought damages of $379,000.00, $1,100,000.00 in *Miley* damages and attorney's fees.

Respondent requested a dismissal of all claims.

The arbitration panel awarded McGillivray $250,000.00 in damages plus $50,000.00 in attorney's fees and Stevens $75,000.00 plus $45,000.00 in attorney's fees.

Rose v. Wheat First Securities and William Dahm, Edward R. Plachter and Michael Boland: No. 97-04300

Claimant alleged that she placed her $800,000 portfolio with Respondents to be invested in quality growth investments. Claimant further alleged that Respondents purchased riskier, non-suitable securities without Claimant's authorization and sold Claimant a $230,000.00 annuity by misrepresenting her ability to get out of the annuity without penalty. Claimant asserted that, during a time when stocks increased in value, her account actually lost $3,000.00. Claimant sought damages of $310,000.00 and that Wheat First buy back the 200,000.00 units of Fidelity Select Advisor.

Respondent contended that all the trades (54 trades between October 1995 through March 1997) were authorized and that Claimant received confirmations of these trades and never complained. Respondents further alleged that Claimant's account increased in value by $140,000.00 during the time it was at Wheat First.

The arbitration panel awarded the Claimant $75,000.00 jointly against Wheat First, Plachter and Dahm. Claims against Boland were dismissed.

Pisaneschi v. Olde Discount and Edward A. Tracy: No. 98-00294

Claimant alleged that she was a 58 year old disabled widow and that her husband had handled their financial affairs until his death in 1989. Claimant further alleged that she invested $250,000.00 with Olde in 1993 and that the account value had fallen to $105,000.00 by October 1997, and that Tracy used discretion in the account without authority, purchased unsuitable investments, used margin to purchase unsuitable investments and secretly updated the customer profile to state theat Pisaneschi was an aggressive investor. Claimant requested damages of $300,000.00, punitive damages, and attorney's fees.

Respondents contended that: the losses that occurred in Claimant's account were a direct result of Claimant's own trading strategy and outside market forces; Olde does not permit discretionary accounts and Tracy did not use discretion and that Claimant received confirmations and did not complain; and that the account earned profits $24,000.00 during the five years it was opened.

The arbitration panel awarded Claimant $100,000.00 against Olde.

Koon v. Barron Chase Securities and Kioumars Hafezi: No. 98-01242

Claimants alleged that Respondents churned her account, made unsuitable investments, made unauthorized purchases of an IPO of the Orlando Predators, and recommended Claimant sell his blue chip stocks to invest in speculative stocks in order to earn higher fees and commissions. Claimant sought damages of $153,000.00 plus interest and attorney's fees.

Respondents contended that Claimant's investment objective was speculation and that Hafezi discussed with Claimant the risks presented in a speculative trading program.

The arbitration panel awarded $108,000.00 in damages and attorney's fees of $15,000.00.

About the PIABA 8th Annual Meeting and Securities 101

Mark your calendars now! The PIABA 8th Annual Meeting will be held October 21-23, 1999 at the Marriott Desert Springs in Palm Desert, California. *Securities 101: A Refresher Course for Securities Litigators* will be held at the Marriott Desert Springs on October 20, 1999. Brochures for both meetings have been mailed. If you have not received one, contact Robin Ringo at 1-888-621-7484 or by e-mail at *piabalaw@aol.com*. You may also find information regarding the meeting on the PIABA website at www.piaba.org. Go to PIABA 8th Annual Meeting. You may download the Meeting and Hotel Registration Forms.

If you plan to attend Securities 101 and/or the PIABA 8th Annual Meeting, you might consider making your hotel and airline reservations soon. All hotel reservations should be made no later than **September 6, 1999**. All hotel reservations must be made through Kent Travel. Kent Travel can also assist you with airline and car rental reservations. Contact Laurie Kramer toll free at (800) 537-8218, direct at (516) 368-8148 or by e-mail at *kramisok@email.msn.com*.

Securities 101 and 8th Annual Meeting Registratic should be received in the PIABA Office no later than Octobe 10, 1999. You may request a brochure by contacting the PIABA Office at 1-888-621-7484 or by e-mail at piabalaw@aol.com.

The

PIABA

Quarterly

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Editor's Notes

This issue of the *Quarterly* contains an article by "Visiting Professor," Robert Dyer on customer agreement choice of law clauses.

The deadline for receiving submissions for the October, 1999 issue of the *Quarterly* is September 10, 1999. All submissions, regardless of length, should be accompanied by a computer disk of the submitted materials in either word perfect or as a text file.

Please send change of address information to Robin Ringo at 1111 Wylie Road, #18, Norman, OK 73069. Toll Free: (888) 621-7484; Fax: (405) 360-2063; E-Mail: piabalaw@aol.com; Web site: www.piaba.org.

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Letter From the President

Mark E. Maddox, MADDOX KOELLER HARGETT & CARUSO, Indianapolis, IN

Dear Friends:

I have some exciting news to report to the PIABA membership relating to new services that we hope to offer by the Fall Conference. It is currently our plan to offer PIABA members a database service of all NASD available

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arbitration awards. We hope that by the fall conference all such awards for 1998 and 1999 should be online. We are currently in negotiations with the NASD in hopes of obtaining all prior available awards in an electronic format. We currently anticipate offering this service to PIABA members for an annual flat fee of approximately $250.00-$300.00 per calendar year. Many thanks to Robin Ringo and her technology consultant for bringing this program on-line so quickly.

Also by the fall conference, we plan to offer another free service to PIABA members. PIABA will be providing by state a summary of causes of action, statutes of limitations and damages typically requested in a securities arbitration proceeding. At this time, approximately 15 states have been completed. By the fall conference, we hope to have 20-25 states completed and on-line. We ask that PIABA members who practice in these jurisdictions please review the posted information for accuracy and completeness. Once again, there will be no additional charge for this service.

On July 20, PIABA will be participating in a national news conference with other consumer groups urging Congress to look at the problem of unpaid arbitration awards, particularly in the micro-cap area. Additionally, we will continue to fight for updating and modernizing of SIPC and its supporting legislation.

On the NASD rule-making front, it appears that the rule proposals relating to requirements for pre-dispute arbitration agreements and the revised eligibility rule will be administratively approved by the SEC. We have been unable to obtain any current information as to the status of the proposed discovery list guide. The punitive damage proposal appears to be headed for hearing before the full SEC at an as-yet undetermined hearing date. The vote on the punitive rule proposal is still expected to be quite close, possibly 3-2, with Chairman Arthur Levitt casting the deciding vote.

If you have not done so already, please make your reservations for the Fall Conference on October 21-23 in Palm Desert, California. This promises to be the best PIABA Fall Conference yet.

See you in the desert!

Mark Maddox

Notice of Election of PIABA Board of Directors

In accordance with Article VI of the PIABA Bylaws, the following notice is provided regarding the upcoming election of the Board of Directors to be held at the Annual Meeting October 21-23, 1999.

ARTICLE IV
BOARD OF DIRECTORS

Section 6. Members Holding Office. Being a member in good standing in PIABA shall be a prerequisite to holding any office or membership on any committee. Membership is a privilege and may be terminated by the Board of Directors at its discretion without prior notice.

ARTICLE V
BOARD OF DIRECTORS

Section 1. Composition.

(a) The Board of Directors shall consist of fifteen persons who are elected as provided by Article VI.

(b) No more than three (3) Directors shall serve on the Board from any State, Province or Territory, and no more than one (1) from any one law firm or association.

(c) Directors shall be elected for a three-year term, i.e., from November first of the year following their election through the Annual Meeting three years hence. To the extent possible, the terms of office of the Directors shall be arranged so that approximately one-third (1/3) or five (5) directors' terms expire each year.

ARTICLE VI
NOMINATION AND ELECTION
OF BOARD OF DIRECTORS

Section 1. Nominating Committee. The Nominating Committee shall be composed of the members of the Board of Directors.

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, 7910 Wrenwood Blvd., Ste. B, Baton Rouge, Louisiana 70809; FAX (225) 926-4348. E-Mail: stanlaw@premier.net. All copy is subject to the approval of the publisher. Any material accepted is subject to such revision as is deemed approprite in the publisher's discretion.

Section 2. Nomination and Election of Directors.

(a) The Nominating Committee shall be responsible for nomination of Directors who are to be placed on the ballot for election by the general membership. The nominations of the Nominating Committee shall be printed in the *PIABA Quarterly* or by special notice no less than 60 days prior to the Annual Meeting. Said notice shall be accompanied by a statement of the procedures by which nominations may be made by the membership.

(b) In addition to those candidates nominated by the Nominating Committee, additional nominees may be offered and placed on one ballot at the request of not less than five (5) members by letter received no later than thirty (30) days prior to the scheduled Annual Meeting.

(c) All nominees shall have been members in good standing for not less than two consecutive years at the time of taking office and shall have attended at least one annual meeting in the two years prior to his or her nomination. As further qualifications, nominees must manifest an abiding interest in the enhancement of Public Investors' rights, be willing to contribute time, talent, energy and resources to further the purposes and objectives of PIABA, be willing to actively participate in PIABA functions, fundraising and other activities, acknowledging that service as a Board member shall have a high priority in all of his or her endeavors, and meet any further qualifications determined by the Nominating Committee to be in the best interest of PIABA.

(d) If there are more nominations than vacancies open for the election, annual election of Directors shall be conducted by secret, written ballot of members at the Annual Meeting by those members who are present in person. There shall be no votes cast or allowed by proxy.

(e) The ballot shall list thereon the names of all nominees proposed by the Nominating Committee and as provided above in (b).

(f) A member desiring to vote shall clearly mark his or her ballot for choice of Directors. The member shall make the selection from the list of nominees printed on the ballot. Each voting member will be entitled to cast one (1) vote for each directorship up for election. In order for the ballot to be valid, it *the ballot* must not contain a total number of votes greater than the number of Directors to be elected. There shall be no cumulative voting. The President shall authorize the use of a person to tabulate ballots and supervise and validate the election. The nominee(s) receiving votes shall be ranked according to the number of votes cast for that nominee. The highest vote-getters, corresponding to the number of seats up for election, shall be deemed elected.

(g) A ballot shall be invalid if not cast on the official ballot form provided by PIABA.

Proposed 1999-2000 Board of Directors

Name	State	Term Expiration
Scot Bernstein	California	2000
Joel A. Goodman	Florida	2000
Diane A. Nygaard	Kansas	2000
J. Pat Sadler	Georgia	2000
Rosemary Shockman	Arizona	2000
Philip A. Aidikoff	California	2001
Allan Fedor	Florida	2001
James E. Beckley	Illinois	2001
Robert Dyer	Florida	2001
William Lapp	Minnesota	2001

Nominees for Terms Expiring 2002

Name	State	Term Expiration
Seth E. Lipner	New York	2002
Joseph C. Long	Oklahoma	2002
Mark E. Maddox	Indiana	2002
L. Jerome Stanley	Louisiana	2002
Tracy Pride Stoneman	Colorado	2002

From the Professor

Guest Author: Robert Dyer, Esq.
ALLEN, DYER, DOPPELT, MILBRATH & GILCHRIST
Orlando, Florida

Reining in Customer Agreement Choice of Law Clauses

The choice-of-law issue will not go away, certainly not by NASD fiat. This article is an "approximation" of positions taken in recent briefs on the COL problem, particularly as it applies to statutory claims of any given state, although Florida is the jurisdiction under consideration in this article. The thread of the argument goes like this:

1) Statutes supported by articulated public policy — as is usually the case — simply are not displaced by COL provisions in private contracts; 2) firms with in-state offices waived any claim to have foreign law supplant Florida's securities statute because the offices and brokers are registered pursuant to Florida's securities statute; 3) at best, the foreign COL clause applies only to pure breach of contract claims and then only if respondent can show a knowing waiver of otherwise applicable statutory protections; and 4) the firm's attempted use of the foreign COL is prohibited by NASD Rule 3110(f)(4) (formerly 21(f)(4)) and the even more recent NASD "Notice to Members 95-16," which bars attempted use of a governing law provision to limit an arbitrator's award under otherwise applicable law.

A. The Statutory Causes of Action Reflect the Stated Public Policy of Florida; and the Protection and the Remedies of These Statutes Cannot be Voided in Whole or in Part by a COL Provision in a Private Contract

In earlier times, the issue often was whether a contemporaneous waiver could enable the seller to escape various blue sky statutes. For example, in *Foreman v Holsman*, 141 N E 2d 31, 61 ALR 2d 1303 (Ill. 1957), the waiver was clear and unambiguous. The court answered with a traditional analysis:

> "The Illinois Securities Act of 1919 was enacted for the protection and benefit of the public as a whole-'to protect the public from the dishonesty, incompetence, ignorance, and irresponsibility of persons engaging in the business of disposing of securities of uncertain value whereby the inexperienced and confiding are likely to suffer loss.'" *Id.* at 32.

The fact that one may recover attorney fees as well as damages, the court noted, "indicates that this civil remedy is intended to afford an additional punishment for an offending party." As the court saw it, to permit these remedies to be waived prior to or contemporaneously with the sale of unregistered securities

> ". . . would thwart the very objective of the statute and violate the declared public policy of this State. Such a holding would pave the way for the virtual nullification of this important legislative enactment...."

Accord, Starkenstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 572 F. Supp. 189 (M. D. Fla. 1983).

Another line of cases involves the question of whether the application of traditional conflicts of laws principles will favor application of one blue sky statute over another (usually over one providing more beneficial remedies). This issue was presented in spades in *Lintz v. Carey Manor Ltd.,* 613 F. Supp. 543 (W.D. Va. 1985), where defendant made the conflicts of law argument to defeat application of the Virginia Securities Act (which carried reasonable attorneys' fees). Defendant's summary judgment alleged that "Plaintiffs' claims for attorneys' fees is the major barrier to settlement of these suits." *Id.* at 547. The complaint based claims on the Federal securities acts as well as on three blue sky statutes, Virginia, Florida and New Jersey. The court found that the only discussion on whether "two or more state statutes can simultaneously provide civil liabilities for securities fraud or nonregistration" was in the 1965 Blue Sky Law Handbook by Professor Joseph Long. The court in *Lintz* agreed with Professor Long

> ". . . that there is no conflicts problem presented when two or more statutes reach the same transaction." *Id.* At 549.

The court subsequently quoted the policy conclusions of Professor Long:

> "'There would appear to be two policy bases that could be used by a state for enacting a state securities act. First, the state has a legitimate interest in protecting its citizens in the purchase or sale of securities. The state likewise has a legitimate interest in regulating and controlling securities activities deemed to have taken place at least partially within the borders of the state.'" *Id.*

The court went on to say that

> "These policy objectives support Professor Long's earlier assertion that so long as there is some territorial nexus to a particular transaction, the laws of two or more states may simultaneously apply." *Id.* at 550.

In short, the court concluded that there is no conflicts of law question presented by these overlapping statutes, and that the Virginia Act does apply." *Id.* at 551. The net effect of this holding enabled plaintiff to seek remedies, damages and attorneys' fees under the most favorable blue sky statute:

> " There is nothing inconsistent in trying a securities case on multiple theories, and determining liability under each statute that is applicable, so long as the plaintiff is prevented from multiple recoveries." *Id.*

The "conflicts of law" argument — to bypass an otherwise favorable blue sky statute — was again rejected in *Simms Investment Co. v. E.F. Hutton & Co.*, 699 F. Supp. 543 (M.D N.C. 1988). The matter came before the court on a motion to reconsider an earlier order favoring defendant by applying conflicts of laws principles. Plaintiff cited *Lintz. supra*, and recent articles by "Professors Long and [Louis] Loss, noted blue sky law authorities [who] have explicitly approved of the *Lintz* holding." *Id.* at 545. The court emphatically reiterated the two policy considerations identified by Professor Long, *supra:*

> "Overlapping state securities laws do not present a classic conflict of law question. Blue Sky laws protect [these] two distinct public policies." *Id.* The court characterized

the situation of two state securities laws applying to the same transaction "more as an election of remedies, rather than a potential conflict of laws problem."

"This characterization serves several public policy goals. First, the decision obviates the need to enter the labyrinth of ever-shifting conflict of laws jurisprudence. Second, the decision comports with legislative directives to apply state securities statutes in prescribed situations. Third, the 'territorial nexus' requirement eliminates any threat of forum shopping. Finally the decision provides a logical and coherent analysis which will provide both issuers and purchasers of securities notice of which state(s) law is applicable to a given transaction." *Id.* at 546.

Simms and *Lintz* were more recently cited in *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P 2d 522,530-31 (Ut.1994); and *Johnson-Bowles Co. v. Division of Securities*, 829 P 2d 101,110-11 (Ut.1992).

Finally, and closer to home, the court in *Barnebey v. E F Hutton & Co.*, 715 F. Supp. 1512, 1533 (M.D. Fla. 1989), relied upon the foregoing authorities in expressly holding that overlapping securities statutes simply do not present a conflict of laws problem:

". . . [T]his Court concludes that any decision to apply another state's securities law will inherently acknowledge the public policies which traditional conflicts of law doctrine seek to protect." *Id.* at 1535.

The court noted that when a transaction crosses a state line, the issue is not which is the better choice of statutes, but, "Rather, the issue is whether the plaintiffs' allegations show a sufficient nexus between the parties and the particular state law pleaded to justify applying that law." *Id.* at 1 536.

In *Boehnen v. Walston & Co.*, 358 F. Supp 537 (D.S.D. 1973), the customer agreement expressly provided that "The provisions of this agreement shall in all respects be construed according to . . . the laws of the State of New York." *Id.* at 540. The issue therefore was whether the South Dakota purchaser could convince the court to apply the South Dakota blue sky law. As the court pointed out, the COL

". . . simply does not apply to the alleged actions of the defendants in alleged violations of the South Dakota Blue Sky Laws.

"'Thus a stipulation by which the parties select the law to govern the contract is valid and *will be given effect only if it is not contrary to public policy generally, or to the public policy of the forum, . . ., or in violation of a statute of the forum enacted for the protection of its citizens*, ...'" *Id.* at 540-41. (Emphasis added.)

The court noted that the scope of the South Dakota Securities Act was self-evident.

"As a general rule remedial legislation, such as enacted here to protect the unwary buyer, should be liberally construed to effect that purpose." To the same effect is *Getter v. R. G. Dickinson & Co.*, 366 F. Supp. 559 (D. Ia. 1973). Once again, the customer agreement provided that it would be construed in accordance with, and governed by the laws of . . [New York State]." *Id.* at 574-75. In refusing to void application of the Iowa Securities Act the court said,

"In the present case, we have a protective statute for purchasers of securities in the State of Iowa. This Court concludes as a matter of law that under the circumstances of this cause of action that the plaintiffs did not waive the protection of the Iowa Securities Act." (See the relevant pages of this decision 574-77).

This principle obviously applies to many statutory claims, not just blue sky cases. See, *e.g.*, *United Dominion-6-Ind., Inc. v. Overhead Door Corp.*, 762 F. Supp.126 (W.D.N.C. 1991). The action arose out of an asset purchase and bottomed liability on the North Carolina deceptive trade practices statute. The contract stipulated it was to "be governed by and construed in accordance with the laws of the State of Texas . . ." *Id.* at 127. The court ultimately decided the cause of action was governed by Texas law, but not because of the COL provision in the contract:

"The contractual provision here may govern the choice of laws as to the interpretation and construction of the contract; however, it does not provide the applicable law for a claim based on unfair and deceptive acts. . . . Therefore, North Carolina courts would ignore the contractual choice of law provision in determining whether N.C. Gen Stat. § 751 1 applies...."

The court's decision ultimately turned on the old lex loci test, because everything occurred in Texas.

Arbitration Agreement Held Binding Despite Earlier Agreement

The South Dakota Supreme Court Found that a subsequently signed customer arbitration agreement controlled even though the customer and the firm had earlier agreed that the customer's account would not be subject to arbitration. *Dinsmore v. Piper Jaffray*, 593 N.W. 2d 41 (1999).

Because of prior experience with brokers and pre-dispute arbitration provisions, the customer sought out a securities firm that would consent to an account without an arbitration agreement. Piper Jaffray orally agreed to waive the pre-dispute arbitration provisions and it was struck from the margin agreement the customer signed when he opened the account. However, two years later, the customer also signed two additional agreements, a cash account agreement and an options agreement, both which contained pre-dispute arbitration agreements. There was no discussion about the arbitration provisions at the time the subsequent agreements were signed.

When the customer brought suit, Piper moved the trial court to stay the action and compel arbitration. The trial court denied the motion, concluding that Piper owed the customer a fiduciary duty to advise the customer of the presence of the arbitration clause in the subsequent agreements and that it had breached this duty by failing to make an oral disclosure.

The Supreme Court reversed. First, it considered whether the broker owed a fiduciary duty to the customer. The court considered a recent South Dakota Supreme Court case where the court found a fiduciary relationship between a real estate broker and his client. The Court then reasoned that securities brokers are licensed professionals holding themselves out as trained and experienced to render a specialized service and that securities customers rely on the securities agent's expertise and expect the agent to act in their best interests. Securities brokers therefore owe their clients a duty of utmost good faith, integrity and loyalty. A fiduciary relationship, said the Court, is founded upon a "peculiar confidence" and "trust" placed by one individual in the integrity and faithfulness of another. When a fiduciary relationship exists, the fiduciary has a duty to act primarily for the benefit of another.

However, the Court found that there are limits to that duty, one being when the parties are dealing at arm's length. It found that, in the actual process of negotiating and executing the agreement, Piper was not acting as someone managing an asset for another, and Piper did not act for or on behalf of the customer. Even thought the customer did rely on the earlier oral agreement with Piper, that reliance was not justified since the subsequent agreements had notices of the arbitration provisions in large type directly above the signature lines. Because of these conspicuous notices, designed to alert the signer to the presence of the arbitration provisions, the Court found that Piper did not have to give the customer oral warnings of these provisions to discharge any duty owed to the customer.

U.S. District Court Refuses to Order Arbitration Without Written Agreement

A District Court in Louisiana was faced with a motion to compel arbitration where the movant brokerage firm conceded that the customer had not signed a written arbitration agreement. *Wood v. Royal Hutton Securities*, (1999 WL 225437 (E.D. La.)).

The firm contended that an agreement to arbitrate could be inferred by the conduct of the parties and cited a New York case for the proposition that evidence of a customer having routinely completing arbitration investor agreements is probative of whether such an agreement was contemplated between the parties even though a written agreement was not signed. *Blashka v. Greenway Capital Corp.*, No. 94 Cir. 5633 (SAS) 1995 WL 608284 (S.D.N.Y. Oct. 17, 1995). The firm argued that the customer was an experienced investor and should be held to possess constructive knowledge of the arbitration agreements common to the industry.

The *Wood* court distinguished its facts from *Blashka*. The *Blashka* investor had managed securities accounts and signed account agreements which contained arbitration agreements and was presumably aware that the firm he was suing had an arbitration agreement in its customer agreement which it required all clients to sign before conducting any trading.

Absent this knowledge from *Wood*, the Court found that there was no express or implied agreement to arbitrate.

Recent NASD Arbitration Awards

Ward v. Olde Discount, David Flanders and John Inferrera: No. 97-03459

Claimants alleged that the Olde broker convinced them to sell General Motors stock and invest in several volatile emerging growth stocks on margin, which were unsuitable. Claimants sought $127,000.00 in compensatory damages, $110,000.00 in lost opportunity costs, attorney's fees of 1/3, and punitive damages of $150,000.00

Respondent contended that the investors represented themselves as aggressive, short-term, speculative investors on their "updated" Olde account applications.

The arbitration panel awarded $90,000.00 in compensatory damages, and punitive damages totaling $125,000.00.

Chehebar v. D.H. Blair and Richard Molinsky: No. 98-00994

Claimants alleged that Blair recommended speculative securities in which it made a market for the purpose of generating profits for itself without regard to the investor's "blue chip" investment experience. Claimants sought $197,000.00 in damages.

Respondents contended that Claimant was a sophisticated investor whose first trade with Blair was in unsolicited IPO purchase of $100,000.00 in Skyline Multimedia, and that Claimant later invested in Video Update as his own selection.

The arbitration panel awarded $8,000.00 in compensatory damages.

Gutzmer v. Bear Stearns and Paul Fragakis: No. 98-02477

Claimants alleged breach of fiduciary duty and negligent misrepresentation. Claimant sought $300,000.00 in damages.

Respondents denied all wrongdoing and requested that the matter be expunged from Fragakis' CRD.

The arbitration panel awarded $150,000.00 in damages against Bear Stearns and ordered the matter expunged from Fragakis' CRD.

Jones v. Olde Discount and Mitchell A. Ronco; No. 97-02036

Claimants alleged that Respondents ignored her conservative investment objectives and traded the account for the purpose of generating commissions. She also alleged that Ronco forged her signature on a new account form and trading form. Claimants sought $250,000.00 in damages.

Respondents contended that the Claimant and her son who handled the account were knowledgeable investors who purchased investments which were not followed by Olde's research department and were not recommended by Ronco.

The arbitration panel awarded $250,000.00 in damages and found that Ronco had forged the Claimants signatures as alleged, but that the finding had no bearing on the damages awarded.

Corzine v. Gilford Securities and Nicholas Calapa; No. 97-00904

Claimant alleged that he first verbally and later in writing instructed that no stocks were to be brought on margin or without his authority and that Respondents disregarded these instructions. Claimant sought out-of-pocket losses of $500,000.00

Respondents requested the claim be dismissed in its entirety. (Calapa filed for Chapter 7).

The arbitration panel awarded $60,000.00 in damages.

Louvek v. Pershing and Carlos Otalvaro

Claimant alleged that Otalvaro made unsuitable investments and churned her account. Otalvaro was a broker for Winston Rodgers & Otalvaro (now into Chapter 7) which was the introducing broker clearing through Pershing. Claimants alleged neither Otalvaro nor his broker/dealer were licensed in Florida and that Pershing knew or should have known of the licensing deficiency. Claimant sought $236,000.00 in damages plus interest and attorney's fees.

Respondent Pershing contended that the Claimant gave full discretionary trading authority to Otalvaro and that the relationship between Otalvaro and his broker/dealer and Pershing as the clearing broker, was disclosed pursuant to NYSE Rule 382, and denied it knew that Otalvaro was not licensed.

The arbitration panel awarded $261,000.00 against Otalvaro and, by majority decision, awarded $100,000.00 against Pershing based on it's finding that discrepancies in Otalvaro's filings clearly signaled a lack of license in Florida.

Brown, Lesemann and McGillivray v. J.C. Bradford; No. 97-01126

Claimants alleged churning, fraud, RICO and Selling Away. McGillivray sought $497,000.00 in damages, $1,800,000.00 in *Miley* damages and attorney's

fees. Stevens sought damages of $379,000.00, $1,100,000.00 in *Miley* damages and attorney's fees.

Respondent requested a dismissal of all claims.

The arbitration panel awarded McGillivray $250,000.00 in damages plus $50,000.00 in attorney's fees and Stevens $75,000.00 plus $45,000.00 in attorney's fees.

Rose v. Wheat First Securities and William Dahm, Edward R. Plachter and Michael Boland: No. 97-04300

Claimant alleged that she placed her $800,000 portfolio with Respondents to be invested in quality growth investments. Claimant further alleged that Respondents purchased riskier, non-suitable securities without Claimant's authorization and sold Claimant a $230,000.00 annuity by misrepresenting her ability to get out of the annuity without penalty. Claimant asserted that, during a time when stocks increased in value, her account actually lost $3,000.00. Claimant sought damages of $310,000.00 and that Wheat First buy back the 200,000.00 units of Fidelity Select Advisor.

Respondent contended that all the trades (54 trades between October 1995 through March 1997) were authorized and that Claimant received confirmations of these trades and never complained. Respondents further alleged that Claimant's account increased in value by $140,000.00 during the time it was at Wheat First.

The arbitration panel awarded the Claimant $75,000.00 jointly against Wheat First, Plachter and Dahm. Claims against Boland were dismissed.

Pisaneschi v. Olde Discount and Edward A. Tracy: No. 98-00294

Claimant alleged that she was a 58 year old disabled widow and that her husband had handled their financial affairs until his death in 1989. Claimant further alleged that she invested $250,000.00 with Olde in 1993 and that the account value had fallen to $105,000.00 by October 1997, and that Tracy used discretion in the account without authority, purchased unsuitable investments, used margin to purchase unsuitable investments and secretly updated the customer profile to state theat Pisaneschi was an aggressive investor. Claimant requested damages of $300,000.00, punitive damages, and attorney's fees.

Respondents contended that: the losses that occurred in Claimant's account were a direct result of Claimant's own trading strategy and outside market forces; Olde does not permit discretionary accounts and Tracy did not use discretion and that Claimant received confirmations and did not complain; and that the account earned profits $24,000.00 during the five years it was opened.

The arbitration panel awarded Claimant $100,000.00 against Olde.

Koon v. Barron Chase Securities and Kioumars Hafezi: No. 98-01242

Claimants alleged that Respondents churned her account, made unsuitable investments, made unauthorized purchases of an IPO of the Orlando Predators, and recommended Claimant sell his blue chip stocks to invest in speculative stocks in order to earn higher fees and commissions. Claimant sought damages of $153,000.00 plus interest and attorney's fees.

Respondents contended that Claimant's investment objective was speculation and that Hafezi discussed with Claimant the risks presented in a speculative trading program.

The arbitration panel awarded $108,000.00 in damages and attorney's fees of $15,000.00.

About the PIABA 8th Annual Meeting and Securities 101

Mark your calendars now! The PIABA 8th Annual Meeting will be held October 21-23, 1999 at the Marriott Desert Springs in Palm Desert, California. *Securities 101: A Refresher Course for Securities Litigators* will be held at the Marriott Desert Springs on October 20, 1999. Brochures for both meetings have been mailed. If you have not received one, contact Robin Ringo at 1-888-621-7484 or by e-mail at *piabalaw@aol.com*. You may also find information regarding the meeting on the PIABA website at www.piaba.org. Go to PIABA 8th Annual Meeting. You may download the Meeting and Hotel Registration Forms.

If you plan to attend Securities 101 and/or the PIABA 8th Annual Meeting, you might consider making your hotel and airline reservations soon. All hotel reservations should be made no later than **September 6, 1999**. All hotel reservations must be made through Kent Travel. Kent Travel can also assist you with airline and car rental reservations. Contact Laurie Kramer toll free at (800) 537-8218, direct at (516) 368-8148 or by e-mail at *kramisok@email.msn.com*.

Securities 101 and 8th Annual Meeting Registratic should be received in the PIABA Office no later than Octobe 10, 1999. You may request a brochure by contacting the PIABA Office at 1-888-621-7484 or by e-mail at piabalaw@aol.com.