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The P I A B A Quarterly

The Newsletter of the Public Investors Arbitration Bar Association

March 2000 Volume 7 Number 1

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The

PIABA

Quarterly

The Newsletter of the Public Investors Arbitration Bar Association

March 2000

Volume 7, Number 1

Editor's Notes

In this issue of the *Quarterly*, guest author, E. Scott Douglas, returns to discuss the Ten Greatest Myths About Mediation.

The deadline for receiving submissions for the June, 2000 issue of the *Quarterly* is June 10, 2000. 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.

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LETTER FROM THE PRESIDENT

Joseph C. Long
Norman, Oklahoma

It is appropriate in this my first letter to the membership after becoming your president, to outline the areas of my focus during my tenure as president. There are four areas that I will try to emphasize. They are: (1) making PIABA a pro-active organization; (2) establishing a continuing education program apart from the Annual Meeting; (3) increasing the services that PIABA provides to its members; and (4) making it possible for a wider membership base to participate in setting the policies and goals of the organization. Let me briefly outline my ideas in each of these areas.

The first area is making PIABA a pro-active rather than a reactive organization. There are two parts to my effort in this area. The first deals with SEC and NASD proposals concerning arbitration. In the past, PIABA has largely been reactive in this area. We have commented upon proposals and rule changes affecting arbitration, but have not suggested changes itself.

As many of you know, this changed a year or so ago when PIABA petitioned the SEC to make a number of rule changes, including the providing of a neutral arbitration forum independent of the SRO's. The SEC has not directly considered our proposal, and the SEC Staff and the SRO's would like us to withdraw it. Indirectly, the PIABA proposal caused the brokerage industry to create a pilot independent forum project. Under the pilot project, a number of major houses have agreed, under carefully controlled circumstances, to submit claims for adjudication by JAMS and to a lesser extent to the AAA.

PIABA was not consulted in the construction of this pilot project and finds it objectionable for a number of reasons. Among other things, it does not address the higher cost of independent fora. This cost is way out of line with the costs of filing in court. Second, the project does not eliminate the "industry" arbitrator, which is a very objectionable feature of SRO arbitration. PIABA does not support the pilot project beyond notifying our members and the general public of the availability of the program. The PIABA board is in the process of putting together a formal position as to the flaws in the pilot project.

In summary, rather than abandoning the PIABA SEC Petition, I hope PIABA will continue to press for the changes outlined therein, and, in the future, file similar petitions to improve arbitration for the investor.

Merely reacting to rule proposals by the SRO's and the SEC alone is not sufficient. Certainly, it is important to continue to participate in the comment process to seek a compromise position which is acceptable to all. However, in areas where consensus can not be reached, and the SEC and the SRO's adopt rules in spite of our objection, I believe that PIABA must stand ready to challenge the validity of these rules in court.

The PIABA QUARTERLY is published quarterly in the interest of the members of the Public Investors Arbitration Bar Association. Editor-in-Chief - L. Jerome 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 appropriate in the publisher's discretion.

There are, at least, two pending rule changes which I believe fit into the category. First, the NASD has proposed a punitive damages rule. Such rule, in my opinion, is not in the best interest of the investor and beyond the statutory authority of the SEC or the SRO's to adopt. Federal and most state laws do not presently impose such a cap on punitive damages. To try to impose such a cap by contract, absent statutory authority under either state or federal law, in my view, is against public policy and should be voided by the courts. This conclusion is especially true where the cap is imposed through an arbitrator clause where an investor has no realistic choice whether to accept or reject.

The second rule proposal is the NASD's proposed conflicts of law rule. From my extensive study of this area, I am convinced that again the NASD rule runs contrary to existing statutory provisions in most state securities acts. The states have an interest in seeing that their acts protect persons, either residents or others, located within the state at the time of the transaction. Further, the position taken by the current Uniform Securities Act is that this is not a choice of law issue, but rather a situation where the laws of several states may need to be complied with. The failure to comply with any one of the applicable laws will lead to civil liability. Again, any conflict of laws clause which runs contrary to the state securities acts should be void as against public policy.

The other half to my pro-active program will be to have PIABA file amicus curiae briefs in cases of importance to the membership. PIABA has done this in the past on a limited basis. I would like to see the number of filings increase. Areas that I would like to see increased filing in include, among others: (1) whether arbitrators must follow the law; (2) proper calculation of damages and attorneys' fees; and (3) cases where members are sued by brokerage firms in collateral litigation. I realize that the membership may have differing opinions on several of these topics and other possible amicus issues. For that reason, I do not want PIABA leadership making decisions on amicus issues without broad support from the membership. The leadership tail of the President and Board should not wag the membership dog.

The second major area of focus will be on establishing a continuing education program separate from the Annual Meeting program. As you are aware, we did a separate Securities 101 on the Wednesday before the annual meeting started. The program was well received and was financially successful for PIABA. I have appointed a separate CLE committee to explore doing additional independent programs at various sites throughout the country. I would encourage membership input as to the desirability of these programs, potential site locations, and potential topics to be covered.

At this writing, the Committee is considering doing one program this summer and a new program before the Annual meeting. This type of program lets us educate our members and establish a presence in the CLE market which is good for membership and recognition purposes.

My third major area of focus is on PIABA providing additional services to the membership. PIABA is in the process of exploring arrangements to provide the membership, in either on-line or CD-ROM format, access to the arbitration awards from all the SROs, past, present, and future. This access we hope will allow both a full text and segment searches. PIABA may participate in developing the segments which will be searchable.

Other projects which are under consideration include a brief bank and compliance manual data base.

My final area of focus is on increasing membership participation in the organization and its policy-making decisions. In an effort to increase membership participation, the annual business meeting will be scheduled early at the Annual Meeting.

I also want to increase membership in the operation of the organization. I strongly encourage members to indicate their interest in serving on the various committees of the organization and to actively participate in the committee activities when appointed. It is my intention to give these committees increased responsibility and decision-making authority. It is my feeling that, while the decisions of the committees will continue to be subject to Board approval, the committee decisions and recommendations will come to the Board with a strong presumption of correctness. As a result, acceptance of a committee recommendation should be assumed and only in extreme cases where well articulated reasons are demonstrated should the recommendation be rejected. I also want to encourage members to participate in the Board selection process through the nomination from the floor procedure in the by-laws.

There are also a number of issues where I believe membership input is not only desirable, but critical. The Board is presently wrestling with the issue of membership requirements for the organization. This issue needs also to be addressed by the members, hopefully at the annual business meeting. These requirements go to the very heart of the organization and its purpose.

Finally, I would like to explore the possibility of the President of the organization be elected by direct vote of the membership. I know that there are both pros and cons of such election, but I would like to see the issue at least considered.

I am well aware that not all of the above ideas are embraced by all or substantial parts of the organization membership. I feel strongly that PIABA is at a crossroads as to its mission, purpose, and function. No longer is it a small organization that can operate without procedures and standards known to all. It must also become a truly democratic organization with full membership participation.

It is my hope that I can help the organization solve some of these identity problems and, by consensus of the membership, help PIABA move forward as the premier voice for investor protection in securities arbitration. This is the premise the organization was founded to perform, and one which I hope we can strengthen as PIABA moves through a transition period.

Joe Long

RECENT COURT DECISIONS REGARDING ARBITRATION

United States Supreme Court Holds that Actions to Confirm Arbitration Awards May Be Brought in Multiple Venues

In a well publicized decision, *Cortez Byrd Chips v. Bill Harbert Construction*, No. 98-1960, 3/21/2000, the U.S. Supreme Court held that the venue provisions of the FAA are permissive, permitting a motion to confirm, vacate, or modify an arbitration award be filed either where the award was made **or** in any district proper under the general venue statute.

Although Sections 9, 10, and 11 of the FAA, which govern confirming, vacating, and modifying arbitration awards, respectively, proscribe that these actions be brought in the district in which the arbitration award was made, the Supreme Court focused on the fact that these Sections use the term "may" and found that these venue provisions were permissive rather than restrictive and that these sections merely supplemented the existing venue statutes.

[Editors Note: As several commentators have noted, this creates a "race to the courthouse" scenario after an arbitration award – with the winner allowed to determine the venue for the court proceeding to confirm or vacate the award.]

Ninth Circuit Determines That *Res Judicata* Defense is Subject to Arbitration Agreement.

In *Chiron Corporation v. Ortho Diagnostic Systems*, 2000 WL 309779 (9th Cir. (Cal.)), the court was faced with the circumstance where the defendant in an arbitration raised the defense of res judicata of a prior arbitration award in a subsequently filed arbitration, and where the defendant contended that the res judicata defense was not subject to arbitration. The question to be decided was whether the adjudication of the effect of res judicata should be determined by the court or by the arbitrator.

The Plaintiff had filed a declaratory judgment action in court, seeking an order compelling arbitration. The defendant filed a cross-motion on the ground that an earlier arbitration award operated as res judicata to all the claims the Plaintiff sought to bring in arbitration. The district court found that the res judicata defense itself was an arbitrable issue within the scope of the parties arbitration agreement.

The defendant argued that a choice of state law provision in the arbitration agreement overrode the operation of federal law. Citing *Mastrobuono v. Shearson Lehman Hotton*, 115 S. Ct. 1212 (1995), the Ninth Circuit held that the inclusion of a choice-of-law clause in an arbitration agreement does not incorporate state decisional law pertaining to the allocation of power between the courts and the arbitrators; rather, that when read together, create an ambiguity which must be construed in favor of arbitration.

As to whether the particular issue of res judicata of a prior arbitration should be subject to arbitration, the Ninth Circuit cited the Third Circuit's holding in *John Hancock v. Olick* 151 F. 3rd 132 (3d Cir. 1998) wherein the court determined that a res judicata objection based on a prior arbitration is an issue to be arbitrated under NASD arbitration procedures.

Ninth Circuit Holds That The FAA Bars an Immediate Appeal From an Order Compelling Arbitration

In *Cook v. Erbey*, 2000 WL 283381 (9th Cir. (Cal.)), the Ninth Circuit held that there is no immediate appeal from an order completing arbitration based on Section 16 of the FAA.

Section 16 states that an appeal can be taken in certain circumstances, among them being the denial of an action to compel arbitration under Section 3 of the FAA. Section 16 also states that an appeal may not be taken from an interrogatory order which directs an arbitration to proceed under Section 4.

The *Cook* court noted the potential harshness of the ruling, but then stated: "we are not precluding review of the district court's order compelling arbitration; we are merely postponing it until the arbitration has run its course."

[Editors note: the Ninth Circuit joins four other circuits in finding an order compelling arbitration as unappealable as interlocutory – the First, Seventh, Fifth and Eight. See. Cook FN2.]

Sixth Circuit Dismisses Investor's Arbitration Claim for Damages For Interfering With an Arbitration Proceeding

In *Decker v. Merrill Lynch*, 2000 WL 240063 (6th Cir. (Mich.)), the Court was faced with the unusual situation where an investor, after receiving an arbitration award, filed a second civil action alleging that Merrill Lynch interfered with the initial arbitration.

The Claimant filed the second action after Merrill Lynch, through one of its subsidiaries, hired the chairman of an ongoing arbitration to act as the closing agent for several real estate transactions in his geographical area. The Claimant had filed a motion for sanctions in the arbitration and a motion to have the arbitrator recuse himself. The arbitration panel met and denied the motions for sanctions and for recusal. The arbitration then concluded and the Claimant was awarded $40,000.00 in damages.

The Claimant then filed a court action alleging certain tort and breach of contract claims against Merrill Lynch. After the district court granted Merrill Lynch's 12(b)(6) motion to dismiss, the Claimant appealed. The Sixth Circuit affirmed the district court action, stating that the court action by the Claimant was an impermissible collateral attack on the arbitration award, which may be challenged only as provided by Section 10(a) of the FAA.

Seventh Circuit Revisits Section 15 (10304) Question

In *J.E. Liss v. Levin*, 201 F. 3d 848, the Seventh Circuit considered the NASD six year eligibility rule and the circumstance where the Claimant alleges conduct within the six year period after the initial purchase of the security which occurred outside the six year period.

The Claimant had purchased a limited partnership which went into bankruptcy. The Claimant alleged that the broker had assured him that the company would emerge from bankruptcy with its value intact. He filed a claim both on the initial purchase and the later actions of the broker regarding the bankruptcy. The arbitration panel made an award and said they based it on the latter. The district court vacated the award on the ground that the arbitrators had exceeded their jurisdiction. After a thorough discussion of Section 10304, and the various cases and law review articles which interpret it, the Sixth Circuit reversed the district court's decision.

[Editor's Note: This case can be cited for the proposition that, by joining the NASD, a brokerage firm agrees to abide by its rules. See page 850.]

New Jersey District Court Dismisses A Securities Firms' Cross Motion to Vacate an Arbitration Award Filed After 90 Days

In *Prasad v. Investors Associates, Herman Epstein and Lawrence Penna*, 82 F. Supp. 2d 365, the court was faced with the circumstance where the Claimant filed a motion to confirm and the Respondents' cross motion to vacate was filed after 90 days after the award was rendered.

The court noted that the FAA contains a 90 day limitation period to vacate arbitration awards. (FAA, Section 12), and that the FAA does not permit challenges to an award in opposition to a confirmation after the 90 day limitation period. The Respondent contended that the agreement between the parties contained a general New York choice of law provision and the New York law allows vacatur motions after 90 days when filed in opposition to confirmation motions. Respondents cited *Volt Information v. Stamford*, 109 S. Ct. 1248, for the proposition that the FAA does not necessarily preempt state arbitration statutes if the state rules were not inconsistent with overall federal arbitration policy. The court noted that the New York choice of law agreement was general in nature, it provided that the parties rights under the contract would be governed by New York law and that the arbitration would be governed by NASD rules for the arbitration confirmation process. In light of this silence and federal policy favoring the prompt resolution and finality of

arbitration, the court found that the Respondents' motion to vacate the arbitration award was time barred.

New York State Appellate Court Holds that Timeliness Under NASD Section 10304 To Be Decided by Arbitrator

In *Kidder, Peabody v. Weiner*, 702 N.Y.S. 2d 71, the New York state appellate court took another look at the seemingly age-old question of who determines timeliness under NASD Section 10304 -- the arbitrators or the court.

The appellate court found that the timeliness issue should be decided by the arbitrators, noting that New York state law "favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties"; and that NASD Rule 10324 empowers an arbitrator to interpret and determine the applicability of the six year limitations period.

Short Stuff

Sues v. John Nuween 146 F. 3d 175. Form U-4 compliance clause obligates a registered representative to comply with the NASD arbitration clause as it exited at the time suit was filed.

Houdsternmaatschappij, BV v. Standard Microsystems Corp., 103 F. 3d 9 (2d Cir. 1997). Firm not liable for damages after the account is transferred.

RECENT NASD ARBITRATION AWARDS

Arvid L. Barth and Joann M. Barth v. Smith Hayes Financial - NASD Arb. No. 98-02994

Claimants alleged unauthorized transactions, securities fraud, unsuitable recommendations, excessive commissions, and violation of fiduciary duties. Claimants alleged that the losses occurred primarily through unauthorized transactions in Net Scape, and unsuitable recommendations and false and misleading statements in connection with the private placement Rehabvisions, Inc. Claimants further alleged that Respondent Smith Hayes failed to inform the Claimants of the broker's prior disciplinary history and that the firm failed to establish and implement proper supervisory procedures. Claimant requested damages of $412,000.00.

Respondents denied the claim and further alleged that Claimants failed to submit a timely written objection to any unauthorized trade as required in the customer agreement. Respondents further claimed that violations of NASD and NYSD rules did not provide a basis for a private right of action, and that Smith Hayes acted in good faith and was not subject to control person liability.

The arbitrators awarded Claimants $8,000.00. Claimants were represented by Rodney Vincent, Esq., of Lincoln, Nebraska.

Oscar L. Berry and Susan B. Berry v. James McCurry, Joseph Biederham, Uwe Schmidt, et al. – NASD Arb. No. 97-01491

Claimants alleged that Respondents were guilty of fraud and breach of fiduciary duty in the sale of Towers Notes to Claimants. Claimants collectively purchased $1,473,000.00 of Towers Notes. Of this amount, $1,325,000.00 was purchased with Oscar L. Berry's retirement plan, constituting more than 90% of the plans total assets. Claimants further alleged that the officers and directors of Biedenham Investment Group, James McCurry, Uwe Schmidt, and Joseph Biedenham, were jointly and severally liable for the losses on the Tower Investments due to the misrepresentations made by the brokers and because Biedenham Investment Group failed to perform proper due diligence on the Towers Notes.

Claimants requested out of pocket damages of $1,338,000.00, plus interest for 6½ years, totaling approximately $1,000,000. The Arbitration panel awarded Claimants the sum of $150,000.00; that prejudgment interest was specifically excluded; and that post judgment interest shall accrue in accordance with Rule 10330 (h) of the Code. The Arbitrators also awarded Claimants $13,060.00 in costs, but denied Claimants request for punitive damages and attorney fees. The Claimants were represented by James L. Sullivan, Esq. of Novato, California.

Kenneth W. Costa and Robert J. Halloran v. Aragon Financial, Lewis McConnell, Douglas Lish - NASD Arb. No. 98-03395

Claimants alleged that Respondent Aragon, acting through Lewis McConnell and Douglas Lish, recommended that Claimants invest in Promissory Notes issued by Keller Financial Services. Claimants further alleged that the Keller prospectus did not disclose numerous material risks concerning the investment, including Keller's plans to purchase subprime notes and the condition of the subprime industry at the time. Claimants requested damages in the amount of $238,390.00 punitive damages, and requested a finding under the Florida Securities Act so that Claimants may recover their attorney fees in Court.

Respondents denied the allegations in the statement of claim, and contended that Claimants read the prospectus for the investment, and made the investment based on their desire to earn 10.5% interest, with knowledge of the attendant risks.

The arbitration panel awarded Claimant Costa $49,850.00, plus interest at the rate of 10% per annum, against Respondents Aragon Financial, Lewis McConnell, and Douglas Lish. The arbitration panel awarded Robert J. Halloran the amount of $108,000.00, plus interest at the rate of 10%, from the date of the award until the date of the payment of the award. The panel denied Claimants request for punitive damages and a finding in favor of the Claimants under the Florida Securities Act which would have allowed for an award of attorney fees in state court. The Claimants were represented by Kalu Nekvasil, Esq., of Clearwater, Florida.

Dalton, Inc. v. E-Trade Securities - NASD Arb. No. 98-04446

Claimant alleged that it had purchased a number of securities on margin, and that it was able and willing at all times to meet any margin call. On August 31, 1998, Claimant had a margin position in Amazon.com, and that Claimant contacted Respondent to inquire whether or not it needed to forward additional funds to cover the margin position. Claimant further alleged that it was told to expect a margin call on September 1, 1998. On that day, Claimant received a message to contact Respondent within fifteen minutes, and Claimant contacted Respondent within fifteen minutes, and was informed that its position in Amazon.com had been sold. Claimant further alleged that Respondent's acts and omissions violated Respondent's directions that Claimant contact Respondent within fifteen minutes, and the contract Respondent signed with Claimant; and that Claimant was damaged by Respondent's actions. Claimant requested damages in the amount of $140,000.00.

Respondent denied the allegations in the statement of claim. Respondent alleged that, as specifically authorized by Claimant's customer agreement, Respondent determined that it needed to take immediate action after having issued a margin call for $80,000.00, and attempted to contact the Claimant. Respondent alleged that it liquidated Claimant's position before Claimant contacted Respondent, and that at the time that Respondent liquidated Claimant's position in Amazon.com, the equity in Claimant's margin account stood at 7%. Respondent also alleged that Claimant was aware that it's margin position could be liquidated at any time if the account equity fell below acceptable levels, and that Claimant's trading loss was a foreseeable risk of Claimant's strategy of buying volatile technology stocks on margin.

The arbitration panel dismissed Claimant's claim in its entirety. The Claimants were represented by Michael Richards, Esq. of Memphis, Tennessee.

Gregory E. Demaray v. Ameritrade - NASD Arb. No. 98-05030

Claimant alleged that Respondents improperly sold his stock position after giving false and misleading information to him, as to the amount of funds he needed to provide and the amount of stock he needed to sell to meet a margin call. Claimant further alleged that when he finally reached Respondent on the phone, he was assured that his position would not be sold, and that, despite these assurances, Respondents improperly sold 15,000 shares. Claimant requested an award of unspecified compensatory damages plus punitive damages in the amount of $100,000.00.

Respondents alleged that the liquidation of stock in Claimant's account was authorized by the terms and conditions of the account agreement. Respondents further alleged that when Claimant's account became severely under-margined, although not required to do so, Respondent gave Claimant notice and an opportunity to wire funds to his account, or sell stock to meet the margin deficiency. Respondent further contended that Claimant promised to sell stock to meet the margin deficiency, and that Claimant failed to do so, and when the value of his stock continued to decline to the point where Claimant's account had little or no equity, Respondent then liquidated the shares to reduce the risk in the account.

The arbitration panel denied all claims made by the Claimant in their entirety. The Claimant was represented by Levy K. Wallen-Friedman, Esq., of Minneapolis, Minnesota.

John J. Macionis v. Foster Jeffries Securities – NASD Arb. No. 98-02667

Claimant asserted causes of action including unsuitability, misrepresentation, and failure to execute. The causes of action related to several transactions in various penny stocks and house stocks of Respondent, which were traded in the over-the-counter market. Claimant requested compensatory damages in the amount of $335,156.00, and punitive damages in the amount of $3,200,000.00.

Respondents contended that Claimant was advised of and assumed the risk of market fluctuation and

that the Claimant ratified the transactions in question, and was stopped from asserting the claims concerning transactions which he was fully aware of and which he never complained about.

The arbitrators awarded the Claimant the sum of $273,768.00 in compensatory damages, plus interest at the rate of 6%, and denied Claimants request for any other relief, including attorney fees. The Claimant was represented by Alexis H. Shapiro, of New York, New York.

David Pond v. Stifel, Nicolaus & Co. - NASD Arb. No. 98-04233

Claimant alleged that he was an unsophisticated investor who was induced by Respondent to purchase and hold shares of Crystallex International Corporation, and that Respondent failed to fully advise Claimant of the risk associated with the purchase of a speculative stock. Claimant further alleged that Respondents sold Claimant unsuitable investments, overused margin, and breeched its fiduciary duty to the Claimant.

Respondents alleged that Claimant fully understood the risk of the investment, and that Claimant had subscribed to an on-line electronic service to monitor his investment. Respondent also alleged that they advised Claimant on several occasions to sell Crystallex stock which Claimant declined. Respondent further alleged that Claimant was aware of the volatility of the stock, having paid several margin calls which were made.

Claimant requested compensatory damages of $96,000.00, plus interest, attorney fees, and punitive damages. The arbitration panel awarded Claimant the sum of $61,000.00, inclusive of interest, and attorney fees in the amount of $20,000.00. The Claimant was represented by Mark E. Maddox, Esq. of Indianapolis, Indiana.

Ramsey v. Dickinson & Co. - NASD Arb. No. 97-05165

Claimant alleged causes of actions under the Rule 10b 5, breach of contract and breach of fiduciary duty, relating to the order execution of 46 different transactions in high risk securities, including Crystallume stock. Claimant request compensatory damages in the amount of $100,000.00.

Respondents denied the allegations made in the statement of claim and asserted that Claimant suffered no damages as a result of any alleged wrongful conduct by the Respondent, and that Claimant's action was barred or reduced by reasons of his own negligence and failure to exercise diligence with respect to his investments.

The arbitration panel awarded claimant damages in the amount of $56,100.00, and denied the Claimant's claim of punitive damages and attorney fees. The Claimant was represented by Stephen J. Scheckter, Esq., of Houston, Texas.

Susan Richards v. Prudential Securities, Ronald Harris, and Nunzio Garzino - NASD Arb. No. 96-01208

Claimant alleged that Respondents traded her account in an unsuitable manner and without Claimant's prior knowledge and consent, and made false and misleading statements regarding such investments.

Respondents denied the allegations made in the statement of claim and contended that losses sustained by the Claimant were attributable to market conditions and her own investment decisions, and are not the result of any action or inaction on behalf of the Respondents.

The arbitration panel awarded the Claimant damages in the amount of $40,000.00 jointly and severally against Prudential Securities and Ronald Harris, plus interest at the statutory rate, and denied the claims against Nunzio Garzino. Claimants request for attorney fees was also denied. The Claimant was represented by W. Randolph Kraft, Esq., of Middletown, New Jersey.

George Sers v. Thomas K. Wasserman & Associates, Thomas K. Wasserman and Alfred W. Simoneau - NASD Arb. No. 99-00129

Claimant was ninety three years old, and alleged that he was advised about an investment in Keller Financial, of which the Respondent was the selling agent. Claimant invested $190,000.00, which represented the bulk of his net worth, in the Keller Investment. Claimant's stated investment objectives on his new account form were income and safety, and Claimant alleged that the Keller Notes were risky and illiquid investments. Prior to Claimants second transaction, Respondents prepared a letter for execution by Claimant, which stated that the notes met his investment objectives. Claimant requested damages in the amount of $169,229.00, and a finding of entitlement to attorney fees pursuant to the Florida Securities Statute.

Respondents denied the allegations made in the statement of claim, and asserted that the Claimant was fully appraised of all the risks involved in the investments in Keller, that he was cautioned not to invest as heavily as he did, and that the Claimant understood the risks involved in the investment, and invested in Keller in spite of warnings from Respondent.

The arbitration panel awarded $25,000.00 against Respondent Thomas K. Wasserman & Associates, $25,000.00 against Respondent Thomas K. Wasserman individually, and $25,000.00 against Respondent Alfred W. Simoneau individually. The arbitration panel specifically denied Claimant's request for a finding of entitlement to attorney fees under the Florida Securities Statute, and his request for punitive damages. The Claimant was represented by Lonnie K. Martens, Esq., of West Palm Beach, Florida.

Sam L. Barr v. Smith Barney and Judy Bunch – NASD Arb. No. 98-01352

Claimant asserted causes of action for fraud, violation of the Texas Deceptive Trade Practices Act, unsuitability, negligence, unauthorized trading, fraudulent concealment, and breach of fiduciary duties in relation to Locke Rich Minerals, LTD Stock, and Electronic Manufacturing Services, Inc. Claimant requested compensatory damages in the amount of $229,000.00, and punitive damages in the amount of $2,000,000.00, plus attorney fees and interest.

Respondents asserted that the allegations made in the statement of claim were barred by the applicable statute of limitations and in whole or in part by the NASD six year eligibility rule, and that the damages claimed were caused by the Claimant's own negligence and that Claimant reviewed and approved each and every trade, and therefore because he failed to complain about the transactions at issue, had waived his right to object to any of the transactions complained of.

The arbitration panel awarded the Claimant $55,000.00 in compensatory damages against Respondent Judy Bunch, and denied Claimant's request for attorney fees and punitive damages. The panel also denied Claimant's claims against Smith Barney. The Claimant was represented by John S. Torigian, Esq., of Houston, Texas.

Robert K. Coleman v. The Golden Lender Financial Corporation - NASD Arb. No. 98-04114

Claimant asserted the causes of action based on unsuitability, misrepresentation, and negligence involving the purchase of Cyprus Center Conductor Corporation stock. Claimant requested compensatory damages in the amount of $195,636.00.

Respondents denied the allegations made in the statement of claim and alleged that the losses sustained by Claimant were attributable to market forces which were beyond the control of the Respondents; that Respondents acted in conformity with the standards and conduct of the industry and NASD rules; that there are no private right of action for violation of NASD rules; and that the investments were recommended as appropriate for Claimant's investment objectives and financial resources.

The arbitration panel awarded the Claimant $38,000.00 in compensatory damages, which the panel reported represented lost investment on the purchase and sale of Cyprus Center Conductor Corporation stock as computed as the difference between the purchase price of Cyprus Center Conductor Corporation stock and a subsequent price level which the Claimant might reasonably have been expected to dispose of his interest in the stock if he had tried to implement the 10% maximum loss rule. Claimant's request for interest and attorney fees were denied. The Claimant was represented by Jeffrey D. Clason, Esq., of Fresno, California.

Arthur M. Martin v. Palm State Equities, James R. Tuberosa, Buckhead Financial and Leonard Donatelli - NASD Arb. No. 98-02673

Claimant alleged that Respondents failed to properly investigate notes that they sold to the Claimant, and failed to inquire about Claimant's financial status before recommending the notes of Keller Financial Services. Claimant further alleged that the notes were purchased and were designed to pay monthly payments at a rate of 10.5%, with a maturity rate of four to six years and that several of the notes had already matured yet no principal payments or interest payments were made because of the bankruptcies of the affiliated Keller entities. The Claimant requested compensatory damages in the amount of $94,000.00, with interest and attorney fees.

Respondents Palm State and Tuberosa alleged that Claimant was provided with thorough disclosures with respect to the Keller investments and that Claimant understood the nature of the investments and made informed choices to buy the colored debt securities after having reviewed the prospectus for each purchase, and having certified that he reviewed the prospectuses and the investments met with his investment goals. Respondent Donatelli alleged that he did not solicit Claimant to purchase colored secure promissory notes, and that the Claimant's transaction with Buckhead Financial was the result of an unsolicited referral order.

Prior to the hearing Claimant dismissed its claims against Palm State and Tuberosa. The arbitration panel awarded Claimant damages against Buckhead Financial and Leonard Donatelli in the amount of $36,000.00, plus

interest at the rate of 10.5%, and awarded attorneys fees in the amount of $8,560.00. The Claimant was represented by Stephen A. Baker, Esq., of St. Petersburg, Florida.

Josef A. Blatstein v. GKN Securities and John G. Flanigan - NASD Arb. No. 98-02628

Claimant alleged that he was a 48 year old retiree living on a fixed income with limited education and limited command of the English language. Claimant further alleged that the new account form which was completed by Respondent Flanigan contained conflicting investment objectives, long term capital appreciation and short term trading. Claimant further alleged that Respondents induced him into purchasing speculative and volatile stocks, including Diana Corporation, Source Media, Organogenesis and Healthdyne. Claimant requested compensatory damages in the amount of $179,855.00, punitive damages, interest and attorney fees.

Respondents alleged that the transactions executed in Claimant's account were all suitable based on the information provided to the Respondents, in that Claimant indicated that he had vast experience in active short term margin trading of stocks, and that he had a net worth in excess of 1.2 million dollars. Respondents further alleged that Claimant had at least sixteen other brokerage accounts, and that many were contemporaneous with Claimant's GKN account, and that the investment objectives on the other accounts included trading and speculation, and also indicated active margin trading in options and other short term transactions prior, during and subsequent to trading at GKN.

The arbitration panel awarded Claimant the sum of $49,464.00, and denied Claimant's request for punitive damage, interest and attorney fees. The Claimant was represented by Kenneth S. Sandler, Esq., of Hollywood, Florida.

Rita Curcio v. Advest, Inc. and Michael B. Rose - NASD Arb. No. 98-04649

Claimant instituted the claim for alleged recommendations made by Respondents in investment in DBR Promotions, Inc. Claimants asserted causes of action based on the unsuitability of the investment for Claimants, based on Claimants low risk tolerance and instructions for trading in conservative securities. Claimant further alleged that Respondents recommended the unsuitable investments for the Claimant for the purpose of generating commissions; that Respondents failed to advise Claimant of the risk inherent in the transactions, and that Respondent failed to provide adequate supervision of the activities of Rose. Claimant requested a reward of compensatory damages in the amount of $40,000.00.

Respondents alleged that the statement of claim was barred by the applicable statute of limitations, and that the Claimant failed to state any cause of action against the Respondents who acted in good faith and in compliance with all applicable rules and regulations. Respondents further alleged that any damages allegedly suffered by Claimant have no causal or relationship with any act committed by Respondents, and that Claimant was estopped by her own conduct from maintaining the action against Respondents.

The arbitration panel awarded the Claimant $15,000.00 against Advest, plus interest at 7%, and $25,000.00 against Respondent Rose, with interest at 7%. The panel further held that the parties would bear their own costs and expenses, including attorney fees. The Claimant was represented by Jeffrey M. Cooper, Esq., of Upper Darby, Pennsylvania.

Yeemay & Thomas Griffin v. Gaines Berland Inc., Alan Gaines, Joseph M. Angelone, Jr. and Richard D. Tollin - NASD Arb. No. 98-01850

Claimants asserted causes of action against Respondents in violation of the Oregon Securities Laws and Rule 10b-5 of the Securities and Exchange Act, breach of fiduciary duty, negligence, and violation of the rules and regulations of the NASD and the New York Stock Exchange. Claimants requested compensatory damages in the amount of $260,000.00, which represented $157,00.00 in lost principle and $103,000.00 in lost opportunity costs, and punitive damages, interest and attorney fees.

Respondents alleged that they acted in compliance with all applicable rules and regulations and acted in good faith and did not induce the alleged acts constituting the alleged violations. Respondents also alleged the damages suffered by Claimants had no causal relationship with any act committed by the Respondents. Respondents further alleged that Claimant waived their rights to maintain the action and ratified all transactions in the account, and further that Claimants failed to take reasonable steps to mitigate any alleged damages.

The arbitration panel awarded Claimants the amount of $12,640.00, jointly and severely against the Respondents, plus attorney fees in the sum of $36,765.00. The panel denied Claimants request for punitive damages. The Claimants were represented by Gary M. Beme, Esq., of Portland, Oregon.

Carol S. Modugno v. Advest, Inc. and Edward Barry - NASD Arb. No. 97-04391

Claimant alleged the following causes of action relating to purchases of PictureTel Stock and Kopen:

unsuitability, unauthorized trading, misrepresentation of facts and churning. Claimant requested compensatory damages in the amount of $77,112.00, interest, punitive damages and attorney fees in the amount of $29,094.00.

Respondents alleged that Claimant had knowledge of all material facts including the associated risks, and that Claimant's failure to timely object to any of the transactions constitutes a ratification of the transactions and a waiver of Claimant's rights to recovery. Respondents further alleged that Claimant failed to mitigate her damages after investing in securities that were in accord with her investment objectives.

The arbitration panel awarded damages against Advest in the amount of $14,915.00, and attorney fees of $6,041.00, and damages against Respondent Barry in the amount of $7,457.00 and attorney fees in the amount of $3,020.00. The panel denied Claimants' request for punitive damages. The Claimant was represented by Irene P. Romanelli, Esq., of Hartford, Connecticut.

Terrell J. Slawson, et al. v. SIFE - NASD - Arb. Nos. 98-03522 and 98-02725

Claimants alleged claims with respect to the investment in MEDCO promissory notes, including violation of California and federal securities laws, breach of contract, common law fraud, and breach of fiduciary duty. Claimants requested an award for actual damage and recision together with benefit of the bargain damages, lost opportunity cost, model portfolio damages, pre-judgment interest, attorney fees and punitive damages.

Respondents alleged that Claimants were not customers of SIFE, and further alleged that the NASD did not have jurisdiction over the Claimant's claim regarding their purchase of MEDCO.

The arbitration panel awarded Claimant Bernal the sum of $97,994.00; Claimant Garner the sum of $24,508.00; Claimant Silva the sum of $28,072.00; Claimant Slawson the sum of $493,881.00; and Claimant Underwood the sum of $42,292.00. The arbitrators also awarded attorney fees in the amount of $229,000.00, and costs in the amount of $27,723.00. Claimants claims for punitive damages were denied. The Claimants were represented by Joel A. Goodman, Esq., of Clearwater, Florida.

Alfonso Tiu v. Prudential Securities and Thomas Derse - NASD Arb. No. 98-02624

Claimant asserted causes of action relating to the sale of the Hyperion 1997 Term Trust Inc., violation of Rule 10b-5 of the Securities and Exchange Act of 1934, misrepresentation, breach of fiduciary duty, and violation of New York Stock Exchange Rule 405. Claimant requested damages in the amount of $100,000.00, punitive damages, attorney fees and costs.

Respondents alleged that Claimant authorized and ratified the investment of which he now complained, and that Claimant assumed the risk associated with the investment and failed to mitigate any damages. Respondents further alleged that losses sustained by Claimant are attributable to market conditions and his own investment decisions.

The arbitration panel awarded Claimants $43,312.00, plus 5% interest against Prudential Securities and $14,437.00, plus 5% interest against Respondent Thomas Derse. The panel denied Claimant's request for attorney fees, costs, and punitive damages. The Claimants were represented by Paul R. Erickson, Esq., of Milwaukee, Wisconsin.

RECENT PACIFIC EXCHANGE ARBITRATION AWARD

Allen Olsen v. Bear, Stearns, Richard Lavoice and Preston Hammer - PCX Arb. No. 99-S012

Claimant alleged that Claimant deposited $2,570,000 into his Bear Stearns account; that Hammer made unauthorized trades on margin in his account; that he gave instructions to Hammer to sell certain securities in his account; that after he gave these instructions he received a portfolio report from Bear Stearns which showed that the securities had been sold; that his monthly statement then showed that the transactions had not been made; and that ultimately his account was sold out to meet Bear Stearns margin calls. Claimant sought damages of $3,550,091, which included attorneys fees, expert witness fees and costs, and unspecified punitive damages.

Respondent asserted that Claimant was a sophisticated investor who wanted to trade aggressively and gave Hammer discretion to trade in his account. Respondent further alleged that the Claimant actively monitored the activity in the account, that Claimant signed a "happy letter" on the account, and that, since the statements the Claimant was receiving form the broker were easily distinguishable from Bear Stearns statements, it was unreasonable for the Claimant to have relied on the statements.

The arbitration panel found that Hammer had defrauded the Claimant, failed to follow the Claimant's instructions and had made unauthorized trades in the

account. The panel further found that Hammer concealed his acts from Lavoice (the branch manager) and Bear Stearns, but that Bear Stearns failed to effectively supervise Hammer by reason of inadequate policies and procedures. The panel awarded Claimant $3,900,000 jointly and severally against Hammer and Bear Stearns, inclusive of costs and attorneys fees. The panel denied the claim against Lavoice and denied Bear Stearns' cross-claim for indemnity against Hammer. The Claimant was represented by Brian Zagon, Esq. And Robert Gonser, Esq. of Lafayette, CA.

ADR: The 10 Greatest Myths About Mediation

[illegible] Scott Douglas is a former partner of Keesal, Young & Logan in Long Beach, CA. Since 1997 he has served as a full-time private mediator and arbitrator for the National Association of Securities Dealers, LA Superior Courts, US District Courts, Judicate West and other organizations. He can be reached at (310) 379-9875 or at esdouglas@aol.com

1. *"If The Other Side Suggests A Certain Mediator, I Don't Want Him."*

Some counsel and parties still adhere to the belief that if the other side suggests a certain mediator, he must be biased or otherwise unacceptable. Both sides should recognize that in order for mediation to be effective, the mediator must have the confidence and respect of both parties. While mediator bias may indeed exist at some levels, any mediator concerned with his long-term reputation would never risk an accusation of bias.

Rather than being a negative, the opponent's familiarity with the mediator may instead work to your advantage. At a Mediation Advocacy program co-sponsored by the NASDR, a panelist who is senior litigation counsel for a major broker-dealer was asked what is the most important thing he looks for in a mediator. His succinct reply: "I want someone that the other side will respect." Sophisticated mediation practitioners recognize that the most important part of mediation is often having someone the other side will listen to. If the mediator has their respect and a good track record of achieving settlements with your opposition, chances are he has the ability to help you settle your dispute with them as well.

2. *"Suggesting Mediation Is A Sign of Weakness."*

As mediation has gained in acceptance and popularity, the so-called "wimp factor" has become less significant. Still, a segment of the population clings to the old school belief that anyone who suggests mediation must lack confidence in their case. For this reason, many attorneys still prefer that a mediator or mediation administrator approach the other side to "broker" the mediation. In order to avoid a perception of weakness, you may hear corporate counsel represent that it is "company policy" to either mediate or at least discuss settlement at a certain stage of the proceedings.

The simple fact of the matter is that while mediation necessarily entails some level of compromise, parties will play their negotiating cards as aggressively as the case merits. As a result, cases settled at mediation generally resolve for a number very close to their maximum settlement value. By suggesting mediation, the only necessarily correct presumptions one can draw is that the initiating party perceives a benefit to using a neutral party to facilitate settlement discussions and realizes that suggesting mediation does not reflect negatively on their case.

3. *"Mediation is a Waste of Time Because We're too Far Apart."*

One of the explanations most commonly provided for not mediating a case is the parties' perception that settlement is unachieveable. If mediators took seriously the opening demands or offers bandied about by many litigants, most cases would never get settled. While it sometimes takes a sharp knife to cut the fat off of the parties' initially unrealistic positions, once done, most cases settle despite the posturing and big talk. If most settlements were not confidential you would be amazed how little correlation often exists between the parties' initial positions and the ultimate settlement figure reached.

4. *"I Have A Strong Case, So There's Nothing to Gain by Mediating."*

According to LeDona Withaar, Mediation Administrator for the NASDR, Western Region, this is one of the main reasons given by counsel for rejecting mediation. Often, out of curiosity, the Administrator will follow up to ascertain the outcome of such a rock solid case at arbitration or trial. "I can think of a number of cases," reports Ms. Withaar, "when that 'slam dunk' case ended in a poor result for the 'sure winner.' Cases are rarely as clear cut as some people think."

The revised list system of securities arbitrator selection has thrown a monkey wrench into many an experienced practitioner's ability to accurately predict the outcome of a case. Moreover, experience tells us there are few "sure things" when it comes to litigation. Many a fine lawyer has been surprised at trial by what his client failed to tell him. While you may accept a little less at mediation, you will also avoid the bad loss and the accusations that often go with it.

5. *"The Other Side Isn't Interested in Negotiating in Good Faith."*

People and companies have a lot of different reasons for settling cases, many of which are never made known to either the mediator or opposing counsel. I once had a claimant's counsel very candidly tell me that he wanted to mediate a certain case because "it's a dog." Meanwhile, that same attorney had been busy telling opposing counsel how he was going to cream them if the case went to hearing. As a result, the opposing counsel thought mediating would be fruitless. After the case settled at mediation, respondent's counsel expressed his surprise at the "reasonableness" of the settlement figure. Simultaneously, claimant's counsel was expressing his delight that he had gotten a decent sum from a case he desperately wished to dump.

Conversely, I've had broker-dealer's counsel confide in me that they "need to settle" a certain case because of regulatory or supervisory issues, perhaps entirely unrelated to the merits of the particular customer's claim. The opposing attorney had no idea this might be an issue affecting his case. Respondent's Counsel feared correctly that any sign of weakness would put blood in the water. At the mediation, claimant's counsel was surprised by the broker-dealer's flexibility and the case promptly settled. For the broker-dealer's counsel, what he most needed was a safe and confidential environment in which to get the other side to the table. Both sides achieved their objectives.

Although seldom expressly stated, some parties settle to avoid scheduling conflicts, to avoid dealing further with an abrasive or difficult client, or because they suspect the client is being dishonest with them. There may be corporate shake-ups, internal strife, or a company retreat interfering with the trial date. As mediators, we may never know what truly motivates a certain party to seek a settlement. Often, we are just the facilitators of unknown objectives.

6. *"I'm Afraid the Mediator will Try to Ram his Number Down my Client's Throat."*

This simply falls into the category of choosing the right mediator for your particular case, interests, and style. Because of the very fact that we mediators often do not know what motivations may exist under the surface, (and because my ego is not large enough to presume I can foresee the precise outcome of a case) I seldom interfere with the parties' ability to control the amount or terms of the settlement. Bottom line, you don't have to accept anything you and your client are not comfortable with. Be strong. If you fear the overbearing mediator, check references carefully and make sure you select a mediator who allows you to maintain ultimate control over the negotiations.

7. *"If the Mediation Isn't Successful, I've Wasted Time and Money"*

There are many valid reasons to consider a mediation successful even if it does not result in a settlement. Among these: (1) Your client knows you put his/its interests first, and tried to resolve the case short of trial, (2) You may learn something valuable about your case and/or that of your opponent, (3) You may benefit from a neutral source of evaluation you presumably value and trust, (4) You may be forced to evaluate and prepare your case earlier rather than later, which may in turn result in a better prepared case. Rarely is mediation a failure or a waste of time, even if a settlement is not the direct result of the process.

8. *"Mediation Is Only Effective On the Eve of Trial/Arbitration."*

Many cases do in fact only settle on the eve of trial, but this is primarily due to both sides' lack of preparation or the belief that the looming trial is the only pressure point that will bring the opponent to the table. When confronted with the hard reality that the opponent is not going to blink, and having focused more fully on the actual risks and costs of trial, parties often get down to meaningful settlement discussions. Only then do they find that the case could probably have been settled much earlier.

Of course, you as counsel must determine what is the best and most opportune time to mediate a case. It may in fact be just before trial. Very often, however, the case can and should be resolved well before it gets to that stage.

Situations in which mediated settlements occur early in the case often seem to follow certain patterns: (1) the value of the case is such that protracted litigation is not warranted; (2) The parties are familiar with the claims and/or opponents, and are comfortable with their ability to evaluate the case early, (3) One party or both has an alternative motivation to settle (e.g., multiple claims pending, potential insolvency of a party, regulatory concerns, etc.), or (4) A pressure point occurs or is created which motivates the parties to settle.

Trial or arbitration is not the only meaningful pressure point for settlement discussions. For the same reasons that cases settle just prior to trial, many cases can be successfully resolved right before dispositive motions are heard or major discovery is conducted. My advice: try to maximize your negotiation leverage by timing your mediation to coincide with a pressure point in your case. Once trial is looming, both sides are faced with the same risk and preparatory concerns and your advantage may have dissipated.

9. *"Mediation Is Little More than an Opportunity for My Opponent to Obtain Free Discovery."*

The exchange of information at mediation is, of course, a double-edged sword. Don't forget that you have the control over how much information is disseminated in the mediation process. If this is truly a concern, instruct your mediator to keep certain matters in confidence. Such a wish must be obeyed. In most instances, however, there is really very little that is secret between capable counsel and intelligent parties. If you are concerned about disclosure of sensitive information, confirm with the mediator before he leaves the room that such matters will not be communicated to the opposition without your express authorization.

10. *"My Client won't be happy unless he gets his day in court"*

Occasionally this is true. Sadly, these litigants need and require a decision, whether good or bad. These are clients you would typically reject unless you were being paid on an hourly basis.

For the more rational client mediation often acts as a substitute for the trial process. It has been said that in certain cases, mediators must wear the hats of both psychotherapist and settlement referee. In that an effective mediation often deprives the litigants of the opportunity to air their grievances to a judge or jury, the mediator who recognizes this need should provide the forum for this catharsis to occur. In short, a sympathetic ear is often as important to the individual party as sound analysis is to his attorney. Shortcutting this process can undermine the basis for many an otherwise achievable settlement.

THE RETURN

Seth E. Lipner
Deutsch & Lipner
New York, New York

'Twas a month to the hearing
and here in New York,
we were starting to worry
about all the work.

The case was a tough one
'bout "selling away",
and the Claimant a doctor,
What more can I say?

Then a phone call was heard
and the voice strongly came:
"retirement is boring
get me back in the game"

We sent him the file
in a blue and white box.
He put in 300 hours,
that sly desert fox.

A few days to the hearing
the first offer was made
not nearly enough -
The voice called it "chump change!"

"I'll get them to double that offer
you'll see,
just give me one witness
any witness for me."

He flew in from Phoenix (or is it that like a Phoenix?)
with no help from reindeer
no, this flight was commercial
there was nothing to fear.

He had in his bag
Some road maps and some charts
"Just give me a witness,
and then I can start."

The client was nervous,
he wanted resolution
But we turned down the offers
demanding full restitution!!!

The first day of hearings
went off very well
the broker he crumbled
Their case it did fell

The rest is now history
no more can we say
the offer had doubled
the check came next day

And so, it was over
But check out this fact
The world is now different -
STU GOLDBERG IS BACK!!!

PIABA 9TH ANNUAL MEETING
OCTOBER 12 - 14, 2000

SECURITIES 201
OCTOBER 11, 2000

HYATT HILL COUNTRY RESORT
SAN ANTONIO, TEXAS