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The PIABA Quarterly

The Newsletter of the Public Investors Arbitration Bar Association

December 1999 Volume 1 Number 2

In This Issue

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Volume 1 Number 2

Editor's Note

This is your second issue of the PIABA newsletter. We received many favorable comments on the first issue. If you have suggestions as to the content of the newsletter, please let us know.

However, as was the case in our first issue, the articles in this newsletter came almost exclusively from the PIABA Board members. Again we encourage our members to contribute. If you have information on a related topic, send us a copy. If you have written a particularly good motion to compel, statute of limitations argument or a general brief on the issues, forward it to us. You'll be credited for submission.

We will also publish a "Letters to the Editor" section in our next newsletter, so sharpen your quills.

The deadline for receiving submissions for the January issue is January 6, 1995.

As you know, the PIABA Annual Meeting begins on the 27th of this month in West Palm Beach. For a schedule of events, please see pages 8-10. This promises to be a most informative meeting. Hope you all will attend.

Letter From the President

J. Boyd Page, PAGE & BACEK, Atlanta, Georgia

It has indeed been an honor and a privilege serving as the President of PIABA over the past twelve months. As outlined in the last newsletter, I believe that we have taken tremendous steps forward as an organization and are poised for even greater things in the future. I am confident that out new president, Seth Lipner of Deutsch & Lipner, will take our organization to new heights. I urge each of you to join me in assisting Seth in his endeavors.

PIABA ANNUAL MEETING - PIABA's 3rd Annual Meeting promises to be the best yet. It is currently scheduled for October 27-30, 1994 at The Breakers in Palm Beach, Florida. We have received registrations from 121 of our members and from additional interested parties.

The speakers which have been lined up are indeed outstanding. The meeting will begin with an update on arbitration law provided by Rick Ryder (Securities Arbitration Commentator), Professor Joe Long and our President-Elect, Seth Lipner. This will be followed by a report from the SRO's provided by Deborah Masucci (NASD), Robert Clemente (NYSE), Jim Beckley (SICA), and Bill Lapp (NASD National Arbitration Committee). On the second day of the meeting, five of our members will provide a discussion on various trial tactics and techniques. This will be followed by a presentation regarding the benefits of mediation by Neil Blacker (NASD National Mediation Co-ordinator) and a panel discussion on ethical issues and professionalism. The highlight of day two will be a luncheon speech by Dee Harris, the new President of the North American Securities Administrators Association. If possible, day

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three promises to be even more exciting. Our first session will focus on new areas of practice. We will 've presentations from two experts on the entry of ..nks into the brokerage business and on government securities and derivatives. This will be followed by a panel discussion conducted by four of our experienced members regarding where our business will be in the 1990's. Our seminar will conclude with an experts roundtable. As in years past, we expect the session will be quite informative and one of the highlights of our meeting.

The social events and meals will continue to be outstanding. Special thanks to Herb Deutsch for his efforts in coordinating these events.

As you can see, our 3rd Annual Meeting promises to be a special occasion and I look forward to seeing you there.

RECENT DEVELOPMENTS - The North American Securities Administration Association is currently producing a video on investor rights and securities arbitration. I understand that it intends to distribute approximately 200,000 copies. PIABA members, Brian Smiley (Page & Bacek) and Tom Grady (Grady & Associates) were among those invited to participate in the video. We look forward seeing how our new-found "movie stars" perform.

PIABA Directors J. Boyd Page, Mark Maddox and Seth Lipner met again with representatives of the Securities Industry Association in mid August to discuss ways in which the process could be improved. Among other things, arbitrator selection, discovery and motions practice were discussed. While no great solutions were agreed upon, our dialog continues. Please let us have your thoughts.

Recently, I have received letter from several members complaining about arbitrator selection and/or bias. In certain areas this is an apparent problem. I encourage you to paper your file on the problem and get your associates to do likewise. Please complete and file arbitrator evaluations and the like and submit them to PIABA, the SEC and Congress as well as the SRO's. We must confront this problem head on.

Likewise, recently I have heard various complaints concerning the "economic loss rule" form Florida attorneys. I would like to encourage our Florida members to draft an article for our next issue and to band together in an effort to influence the Florida legislature to act on this injustice.

PROBLEMS CONFRONTING THE ARBITRATION PROCESS - As some of you may know, I was recently selected to the NASD's Arbitration Policy Task force chaired by former SEC Chairman David Ruder. The Task Force will undertake a comprehensive review of the arbitration process with the objective of developing suggestions to improve the process. Input will be solicited from an array of interested parties including, of course, the investor's bar. Thus, I am soliciting each of you to provide me with your input on ways to improve the process and to personally undertake independent efforts to improve the process.

It has been my observation that, while arbitration generally provides investors with a quicker, more efficient and less expensive means of pursuing claims against securities brokerage firms, the process is continually evolving and faces some serious dilemmas.

Earlier this year, PIABA conducted a survey in an effort to identify the problems with the arbitration process which our membership believed to be most significant. While the response from our members was less than overwhelming (only about 15% responded), it was sufficient to identify several areas of particular concern. The two particular area of concern repeatedly identified by our members were:

1. Arbitrator selection/professional arbitrators; and
2. Discovery problems.

Other notable problems mentioned were delays in the process and the trend toward increasing motions practice and other litigation-type tactics.

Recent developments have indeed placed significant burdens on the arbitration process. Consider the following:

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:
ne PIABA QUARTERLY, 7909 Wrenwood Boulevard, Suite C, Baton Rouge, Louisiana 70809; FAX (504) 926-4348. All copy is subject to the approval by the publisher. Any material accepted is subject to such revision as is deemed appropriate in the publisher's discretion.

1. More than 5,000 arbitration cases are being filed annually with the SRO's (in fact, approximately 5,500 cases have been filed with the NASD alone ring each of the last two years);

2. the pool of available arbitrators has dropped significantly during the last several years (at last count the NASD had approximately 3,800 active arbitrators) due to a variety of facts including:

a. arbitrators are now required to attend at least some training sessions (sometimes at their own expense);
b. hearings are taking longer, thus requiring arbitrators to spend more time away from paying jobs;
c. arbitrators are being required to spend more time addressing pre-hearing disputes and considering post-hearing briefs; and
d. the compensation of arbitrators remains nominal.

3. more challenges are being raised to proposed arbitrators as parties have access to more extensive data;

4. many arbitrators are unwilling to serve on cases that are likely to take more than several days.

Thus, while some of the problems are undoubtedly h the process and current procedures, other problem are caused, at least in part, by an increasing caseload and a serious shortage of arbitrators.

Each of us can help in addressing these problems and in making his process better. In this regard, it is essential for each of you to make your concerns and observations know. I again encourage you to report your concerns and observations to the SRO's, to PIABA, to the Arbitration Task, to SICA, to the SEC and to Congress. If PIABA's members will make a unified effort in this regard, we will see some action.

Likewise, PIABA and its members must make a concerted effort to expand the number of active arbitrators. Each of us must recommend qualified individuals in our respective communities and must encourage such persons to participate. We will be able to avoid professional arbitrators and improve arbitrator selection only if we are aggressive in this area.

In conclusion, I want to thank you again for the opportunity to serve you. Best wishes for much success in the future.

Sincerely,
J. Boyd Page

A Response to the Report of the Subcommittee on Punitive Damages of the NASD Legal Advisory Committee

By: Brian N. Smiley
Partner, PAGE & BACEK
Atlanta, Georgia

The NASD recently released its "Report of the Subcommittee on Punitive Damages of the NASD Legal Advisory Committee" for comment. Although the comment period has closed, this report should be of concern to all investors who utilize NASD arbitration. The hodge-podge of "reforms" proposed in the report unilaterally favor brokerage firms at the expense of the investing public. More distressingly, the report relies on dubious data and flawed analysis to suggest that there is reason for concern about punitive damage awards by arbitrators.

Most public investors have no choice but to arbitrate their claims before the NASD or some other SRO. The securities industry requires clients to sign arbitration agreements and has consistently argued that arbitration affords investors a fair alternative to court. By allowing awards of punitive damages, the NASD gives these claimants no greater rights than they would have before a jury of their peers. However, to curtail all public investors' access to this long-established remedy, as is proposed, smacks of pro-industry prejudice and threatens to undermine the integrity of the NASD arbitration process.

A. There is No Punitive Damages Crisis in Arbitration

The report recommends a radical curtailment of investor rights, yet presents no evidence of abuses requiring such extraordinary measures. The little data that is shown in the report is skewed to imply that punitive damages awards are increasing dramatically. For example, while citing a significant increase in recent years in the number of customer arbitrations filed with self-regulatory organizations, the report fails to point out that punitive damages are awarded in only about 1.7% of all arbitration cases resulting in awards. The majority of punitive awards falls between $10,000.00 and $99,999.99. See "Comments of NASD Deputy Director Kenneth Andrichik," Securities Arbitration Commentator ("SAC"), p.11 (June, 1994). Thus, neither the frequency nor the amount of such punitive awards poses a threat to the multibillion dollar securities industry.

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The Subcommittee resorts to dubious use of data to support its apparent premise of an explosion of ırge punitive damages awards in arbitration. The ɔubcommittee's sole source of data is a survey on punitive damages published in the May, 1993 issue of the Securities Arbitration Commentator. That survey is used by the Subcommittee to support two statistics. First, the Subcommittee points to the fact that the total dollar value of punitive damages awarded in the first half of 1992 was greater than twice that in the prior six month period, even though the total number of awards remained relatively constant. There is less to these figures than meets the eye. According to the SAC study, there were only 27 punitive awards in the second half of 1991 and 19 in the first half of 1992. These numbers are so small that no serious statistical significance can be attached to them.

The Subcommittee also makes much of the fact that, according to the SAC study, the proportion of the punitive damages to compensatory damages awarded in arbitration rose from .7-to-1 for the second half of 1991 to 1.3-to-1 for the first half of 1992. Here again, this statistic provides no basis for meaningful conclusions. In reality, the .7-to-1 punitive damages to compensatory ratio was itself so low for the period under study that the increase 1.3-to-1 merely represents a move from an extremely low ratio to a fairly typical one.[1] Moreover, the punitive damages appear to be quite conservative in that they are not even twice the amount of compensatory damages issued.[2]

While the report mentions four "large punitive awards from NASD arbitrators in 1992" no information is given about those cases from which one could conclude that the awards were inappropriate or disproportionately high in view of the compensatory damages recovered. Thus, the Subcommittee has not even produced anecdotal evidence to suggest that arbitrators are issuing irresponsible punitive damage awards in favor of customers.[3]

It is ironic that overheated rhetoric about juries destroying legitimate business with excessive punitive verdicts has been transplanted into the arbitration field. Arbitrators are different from jurors in ways which suggest they will be less likely to award punitives even where legally warranted. Arbitrators, as a group, tend to be business owners and managers. As such, arbitrators are far more likely to favor business interests than jurors. In ·bitrations conducted by self-regulatory organiza- .ɔns, generally at least one member of the panel is from the securities industry. Even public arbitrators tend to be highly educated and knowledgeable about the brokerage business and its standards. It is then unlikely that arbitrators can be so inflamed by appeals to bias or ignorance as to issue unreasonable punitive awards. Moreover, since arbitration awards are now made public, an arbitrator who takes part in issuing a punitive award may realize that he will likely be the subject of peremptory challenges by brokerage firms in subsequent cases.

B. The Subcommittee's One-Sided Debate For and Against Punitive Damages

In its report, the Subcommittee purports for and against punitive damages in securities arbitration. For all practical purposes, however, the Subcommittee is only interested in raising the arguments against punitive damages. The most the Subcommittee can say in favor of punitives is that they may generate a "marginal" increase in deterrence of abuses. The Subcommittee hastens to add that this deterrent value has never been clearly demonstrated.[4]

Having complained that the proponents of punitive damages can not prove they deterrent value, the Subcommittee make the remarkable assertion that the present system of regulatory review and civil and criminal liability provides sufficient deterrence to enforce compliance with securities laws and industry rules. A review of the financial news gives every reason to believe that more deterrence, not less, is in order. If anything, recent brokerage scandals have shown firm-wide compliance failures. Similarly, the recently released GAO study indicates that the current regulatory system has failed to protect investors from unscrupulous stockbrokers with records of disciplinary infractions. Indeed, the ever escalating number of arbitration claims filed by investors evidences serious ethical and legal problems in the securities industry.[5]

C. Response to Subcommittee Recommendations

The major recommendations of the Subcommittee for restricting the award of punitive damages in arbitration involve radical revisions in arbitration practice and the creation of special rules for the benefit of the securities industry. These proposals are unfair and unwise.

The Subcommittee's proposed requirement that arbitrators state their reasons for granting punitive damages marks a radical revision of arbitration practice. Traditionally, arbitrators have not been required to state their reasons for their decisions. Arbitrators are not judges, need not be lawyers, and should not be called upon to write quasi-judicial decisions.[6] Requiring detailed findings of fact and conclusions of law from those not trained in law virtually invites appeals, which will rob the arbitra-

tion process of its speed and economy.

The Subcommittee also recommends that a panel of bitrators be created to hear appeals of awards granting (but not denying) punitive damages. The proposed appeal simply gives brokerages a second chance to escape punitives. The result of such appeals will be to enhance the public perception that the deck is stacked against the investor in arbitration.

The Subcommittee also proposes that special and uniform standards of misconduct (willful, wanton and malicious conduct) and proof (clear and convincing evidence) be established before allowing punitive damages in arbitration. These proposals are quite simply requests for special rules for the brokerage industry. The brokerage industry has done nothing to justify its exemption from the same rules which govern the rest of the world. Punitive damages are made available pursuant to state Law. When state legislators drafted those laws they did not have in mind one set of laws for doctors, lawyers, engineers, auto manufacturer and retailers and a separate set for stockbrokers. If state law provides a standard of conduct or proof, that standard should apply evenhandedly, without special protection for one industry.

ıe proposal for placing a cap on punitive damages also smacks of special protection for brokerage firms. If other businesses or persons are not subject to such a cap, there is no justification for providing stockbrokers with special protection from punitives. If such caps apply as a matter of state law, they should apply in arbitration, but no special rule should apply to the exclusive benefit of the securities industry in arbitration proceedings.

There is likewise no justification for the Subcommittee's proposal that prevailing plaintiffs give the majority of their punitive awards to securities regulators. Regulators do not take any of the risks in bringing a claim to hearing, nor share any of the costs. They should not reap any of the benefit when a claim is successfully prosecuted.

There is no reason to object to the Subcommittee's recommendation that arbitrators be better screened and educated on a continuing basis. However, there is reason for concern about the Subcommittee's recommendation that the NASD advise arbitrators of the standards for granting punitive damages. Those standards exist under state statutes and case v. It is counsel's function to advocate the law to ...e panel. The NASD should not appear to weigh in on one side or the other in this process.

The proposal to bifurcate arbitration proceedings to separate the finding of liability from the decision to award punitives is similarly unwise. Arbitrators are skilled professionals, who are not likely to be prejudiced by hearing evidence on issues such as the wealth of the defendant.

In its zeal to protect the securities industry from punitive damages, the Subcommittee also proposes that the NASD tell arbitrators that they may wish to consider referring a case to an enforcement body in lieu of awarding punitive damages. It is not the role of the NASD to protect brokerages form all the consequences of their misconduct.[7]

One of the more bizarre proposals of the Subcommittee is that defendants be required to pay punitive damages arising out of an action only after paying all compensatory damages. Since most of the major brokerage firms are constantly subject to having to pay compensatory damages claims, it is unclear when, if, ever, they would ultimately be required to pay punitive damage awards. The purported rationale for this scheme is that it prevents one plaintiff from receive their compensatory damages due to the insolvency of the defendant. This rationale is utterly spurious, since a defendant rendered insolvent by damage awards can obtain protection under the bankruptcy code. At that point all creditors, including judgment creditors, simply make their claims against the assets of the state.

CONCLUSION

The NASD's Subcommittee appears to have placed the interests of member firms above those of the investing public. In doing so, the Subcommittee has created the appearance of a punitive damages crisis, when, in reality, there is no evidence that there is even a problem. In fact, punitive damages are rarely awarded in arbitration and when awarded do not appear to be excessive. The very nature of arbitration proceedings and the involvement of skilled commercial arbitrators militate against the kind of runaway verdicts that have been of concern in the courts. Where a panel of arbitrators has concluded that a securities firm's conduct is so egregious as to warrant an award of punitive damages, there is every reason to defer to that finding. Arbitrators are better equipped than jurors to determine when misconduct warrants a punitive award. As on influential case put it:

> Nor is there reason to believe that the purposes of punitive awards - punishment of the present wrongdoer and deterrence of others who might otherwise engage in similar conduct -

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will not be furthered by arbitral awards every bit as much as by formal judicial awards. Indeed, an arbitrator steeped in th practice of a given trade is often better equipped than a judge not only to decide what behavior so trangresses the limits of acceptable commercial practice in that trade as to warrant a punitive award, but also to determine the amount of punitive damages needed to (1) adequately deter others in the trade from engaging in similar misconduct and (2) punish the particular defendant in accordance with the magnitude of the misdeed.

Willoughby Roofing & Supply Co., Inc. v. Kijima, 598 Supp. 353, 363 (N.D.Ala. 1984), aff'd, 776 F. 2d 269 (11th Cir. 1985).

Having now convinced the courts that compulsory arbitration provides sufficient due process protection to require investors to submit to it merely by reason of having opened a brokerage account, it is unseemly for the securities industry and its advocates to demand special protection from damages in that very process. If the securities industry now wishes to cut back on the rights to recovery investors now have in arbitration, it should be willing to offer investors the option of having their claims heard in court. That is one proposal the Subcommittee fails to present, because it, like the securities industry itself, wants brokerages to have their cake and eat it too.

In summary, there is no punitive damages crisis in arbitration. There will most certainly be a crisis of investor confidence concerning arbitration if the Subcommittee's proposals are adopted.

Footnotes

[1] The .7-to-1 punitive to compensatory ratio for the second half of 1991 was, in fact, the lowest figure for the study period. The ratio for the entire three year period under study was 1.1-to-1.

[2] By way of comparison, in Miley v. Oppenheimer, 637 F. 2d 318 (1981), the Fifth Circuit deemed a 3-to-1 ratio "a proper rule of thumb" in a churning case.

[3] As shown in the May, 1993 SAC study, customers are not the only beneficiaries of punitive damages awards by arbitrators. In fact, arbitrators have granted punitive damages in favor of brokerage firms on several occasions.

[4] Evidently the Subcommittee gives no credence to the long legal history of punitive damages as a recognized method of civil punishment and deterrence.

[5] In the interest of brevity, no effort will be made here to address the Subcommittee's legal argument that the arbitration process provides insufficient due process guarantees to allow for imposing punitive damages. It should suffice to note that if clients can be required by firms to waive their due process rights to trial by jury and appeals, brokerages can not insist on superior constitutional protection.

[6] In civil cases, jurors are not required to explain their reasons for awarding punitive damages.

[7] The Subcommittee's proposal regarding offers of judgment warrants no comment since it has apparently already been rejected. C. Katsoris, "SICA, Does the Bell Toll For Thee," 6 SAC p.2 (January, 1994).

News From New York

Contributed By: Seth Lipner

On August 18, 1994, Justice Solomon rendered her decision in Merrill Lynch v. Barnum et al. In that decision, Justice Solomon ruled that New York did not have jurisdiction over non-resident investors who otherwise did no securities business in New York. The fact that the investor agreed to arbitrate at an SRO based in New York was held not to be a consent to jurisdiction, and she characterized the brokerage industry's assertion of jurisdiction as "fundamentally unfair." After so ruling, Justice Solomon indicated that, absent some real New York contacts, she would not sign any more orders preliminarily staying arbitration. A copy of the Barnum decision will be included in the annual meeting material. Obviously, Justice Solomon's decision was a big victory for investors.

In the meantime, the appeal (to the Appellate Division) in Merrill Lynch v. McLeod will be heard in October. That case is an appeal from a decision of Justice Beverly Cohen finding jurisdiction. We are optimistic.

In August, the Appellate Division (Third Department) ruled, in Prudential v. Puriello that, under New York law, eligibility is a question for the arbitrators, not the courts. That decision is in direct conflict with Prudential v. Archard (Second Dept) and Merrill Lynch v. DeChaine (1st Dept). For obvious reasons, Prudential has

not appealed. While the Puriello case thus has little effect on New Yorkers who live outside of Albany, it potentially has tremendous effects on non-New Yorkers who have customers agreements providing for application of New York law. In those cases, the industry can no longer claim that "under New York law, eligibility is always a matter for the courts and not the arbitrators."

Finally, Ray DeChaine (of Merrill Lynch v. DeChaine fame) is still fighting. In his case, the lower court had issued an order staying arbitration of claims "as to [ineligible] investments," an order that seems to preclude making any post-purchase claims. Because Mr. DeChaine has excellent post-purchase claims, we are now trying to have the order modified to permit him to make these post-purchase claims. Justice Lebedeff has recused herself (because Mr. DeChaine sent her an ex-parte letter pleading with her for relief from her decision, a letter which she indicated "influenced her thinking.") The case will now (probably) be assigned to Justice Solomon, who has yet to rule on whether (and what kind of) post-purchase claims can be made.

Punitive Damages Update

Contributed By: Mark Maddox

1994 has been a very active year for events effecting the ability of investors to recover punitive damages in arbitration. In the Spring, the 7th Circuit became the first federal circuit to climb into bed with the 2nd Circuit in applying a New York choice of law clause to deny securities arbitrators the power to award punitive damages in arbitration. See Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (CA7 1994). The Mastrobuono case is presently on a writ for Cert. to the United States Supreme Court, and we anticipate that the Court will determine whether to accept or reject this case by the PIABA conference in Palm Beach in late October. An excellent summary of the Mastrobuono pleadings filed with the Supreme Court can be found in the most recent Securities Arbitration Commentator, Volume Number VI, No. 8 on page 5.

In June, the U.S. Supreme Court denied Cert. in the case of J. Alexander Securities, Inc. v. Mendez, 114 S.Ct. 2182. An interesting dissent from denial from the Writ of Cert. in Mendez was filed by Chief Justice Rhenquist and Justice O'Conner in which they recognized the split in the federal circuits relating to the issue of punitive damages. Since it takes 4 votes to accept a Writ of Cert., Rhenquist and O'Conner will have to twist a few arms in order to find the votes necessary to accept Mastrobuono. Perhaps one of those votes will be new Justice Stephen Breyer, who was involved in the Raytheon decision in the 1st Circuit, which permitted arbitrators to award punitive damages. If Mastrobuono is accepted by the Supremes, PIABA stands ready to file an amicus brief in support of the Mastrobuono's position. *[Ed. note, For the complete text of Justice O'Connor's Dissent, see 62 LW 3806.]*

Proving one again that we live in a system governed by law, and not men (and women), the 7th Circuit decided the case of Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994) in June. Approximately 3 months after its decision in Mastrobuono declaring that punitive damages were not available as a remedy when a New York choice of law clause exists, Chief Judge Posner, along with another judge on the Mastrobuono panel, held that so long as there is no agreement that elects a specific choice of law that prohibits punitive damages, such as New York, federal common law governs the question of arbitral authority, and punitive damages can be awarded. Since Baravati, investors and their attorneys in the 7th Circuit have rued the day that Chief Judge Posner was not appointed to the Mastrobuono panel.

Also in July, the NASD sent a notice to its members on a report by its Legal Advisory Board on Punitive Damages. The report, which can be found in Notice to Members 94-54, deals with a variety of issues relating to punitive damages in arbitration. There is presently no consensus within the securities industry as to the various issues relating to punitive damages. Some CEOs and general counsel to prominent Wall Street firms have gone on record stating that they will never accept any sort of amendment to the NASD Code allowing or permitting punitive damages in any form. Others have been willing to consider permitting punitive damages subject to certain reasonable restrictions such as upper limits (caps) on punitive awards. Still others have discussed paying some portion of a punitive award to a third party institution that would be endowed with some undefined ability to either benefit or compensate investors.

No consensus is likely within the securities industry on this issue in the foreseeable future. There seems to be little interest on the part of the securities industry to advance this issue at this time. Although the Securities and Exchange Commission leaned on the securities industry to meet with representatives of the PIABA Board of Directors this past year to discuss punitive damages, no serious attempts were made by the securities industry to reach a compromise or consensus on this issue. Absent the U.S. Supreme Court establishing

a national rule of law by accepting the Mastrobuono case, it appears that the punitive damages issue will continue to be determined on a federal circuit by circuit basis.

NASD Withdraws "Loser Pays" Arbitration Proposal

As many of you know, the NASD has withdrawn its proposed change in its Arbitration Code which would have forced an investor who turned down a settlement offer by a brokerage firm to pay the firm's costs if the arbitrators' award was for less than the offer of settlement. Of the 60 or so written responses received by the NASD, only 3 were in favor of the proposal.

This was part of the NASD's proposed rule changes for Sections 43 and 44 of the Code as would then effect large and complex cases. For your copy of the proposed rule changes and to register any comments, call Elliot R. Curzon at (202) 728-8451.

The AMEX Window Revisited

The question of the availability of arbitration at the AAA through the Amex Window is again being litigated, this time in Florida state court. Trimble et al v. Dean Witter, (9th Judicial District, Orange County, FL #CI94-4504).

Dean Witter has taken the familiar position that the phrase "in the City of New York" in the American Stock Exchange (AMEX) Constitution is a venue provision requiring that the arbitration hearing actually occur in New York City.

The judge made a preliminary finding in favor of Dean Witter. In his Motion for Rehearing, the customer argues that the interpretation of the AMEX of its own rules should be recognized citing (Shearson/American Express Inc. v. McMahon, 107 S.Ct. 2332 (1987)), such interpretation having been made by the AMEX's Director of Arbitration Scott Noah in a deposition in Merrill Lynch v. Hart, 88-CIV-3319 (S.D.N.Y.). In that deposition, Mr. Noah stated that the "in the City of New York" phrase was not meant to be a venue provision.

Also cited is Wade v. Prudential, (CCH TP 98, 117, N.D. Cal, 1994), where that court quoted the AMEX from an SEC filing (SEC Release No. 34-27459) wherein, the Exchange also interpreted the words "in the City of New York" not to be a venue provision. "Once the matter is before the AAA, any questions regarding the administration of the proceedings including the location of the hearing should be resolved pursuant to the AAA's own rules and procedures". We'll keep you informed as to the outcome.