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ETHICALLY REMOTE?
VIRTUAL REPRESENTATION IN FINRA ARBITRATION

Nicole G. Iannarone, Gabrielle Beers, & Emma Schurmeier[*]

INTRODUCTION

When the world first shut down in spring 2020 as a result of the Covid-19 pandemic, FINRA took the remarkable step of postponing all arbitration and mediation proceedings that were to be held in person.[1] In so doing, FINRA recognized that closing the in-person hearing option to protect the health and safety of all participants impacted those with pending claims.[2] Accordingly, FINRA offered a path to move forward: if there was agreement between the parties, the proceeding could go forward electronically via the virtual Zoom platform.[3] By 2021, most Americans had become comfortable with the ubiquity of virtual equivalents of our pre-pandemic lives, and many Americans, lawyers included, will continue to conduct work virtually.[4] Indeed,

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1. *See* FINRA, *Coronavirus Impact on Arbitration Hearings*, https://www.finra.org/rules-guidance/key-topics/covid-19/arb-hearings.

2. *See* Nicole G. Iannarone, Kaitlyn Barlow, and Olivia Szumski, *FINRA Arbitration in an Online World*, 27 PIABA B.J. 341, 341 (2020) ("Expedited hearings serve an important goal: ensuring that claimants who have a serious health concern are able to obtain a result as soon as possible. And, in a world where health concerns are front page news and Americans are suffering extreme financial difficulties, concluding a FINRA proceeding expeditiously is extremely important.").

3. *Id*. at 341-342 (describing online hearing option). *See also* FINRA, *FINRA Dispute Resolution Services Arbitrator Resource Guide for Virtual Hearings*, available at https://www.finra.org/sites/default/files/2020-06/FINRA-Dispute-Resolution-Services-Arbitrator-Resource-Guide-for-Virtual-Hearings.pdf.

4. Danielle Braff, *Thanks to the COVID-19 Pandemic, Law Firms are Starting to Embrace Virtual Offices – But will it Last?*, ABA Journal (Feb. 1, 2021), available at https://www.abajournal.com/magazine/article/thanks-to-the-covid-19-pandemic-law-firms-are-starting-to-embrace-virtual-officesbut-will-it-last.

some argue that virtual representation increases access to justice and permits those who might not otherwise be able to obtain or afford a lawyer to be represented.[5]

Our newfound embrace of virtual representation should not, however, ignore the reality that lawyers can only ethically practice law in jurisdictions where they are licensed to do so. Virtual representation and securities arbitration hearings raise a host of questions about the potential for unlicensed practice of law and violation of the multijurisdictional practice rules. For example, assume a Florida-licensed lawyer represents an investor who is temporarily residing in her North Carolina vacation home during the pandemic. The investor lived in New Jersey when a Pennsylvania-based broker provided her with allegedly negligent advice. The claim is assigned to a FINRA New Jersey hearing location. The broker's counsel is licensed in Connecticut, but currently living in Vermont, and the brokerage's firm's counsel is licensed in California, but currently living in New York. After discovery concludes, the investor's case proceeds to a Zoom hearing with all parties, lawyers, and arbitrators participating remotely. Are any of these lawyers violating prohibitions on the unlicensed practice of law? Should they investigate the law of their licensing jurisdiction(s)? Does the law of where the client receives the advice apply? Or is it the law of the hearing location? Are there different answers for each of the participants? What multijurisdictional practice rules even apply when a hearing is conducted over the Internet?

The answers to these questions have a significant impact on lawyers and parties in FINRA arbitration proceedings. Securities arbitration is a specialized field, and scholars have recognized that while repeat player respondents and their counsel in arbitration fare better than consumers, the playing field can be leveled when consumers are represented by lawyers who frequently represent parties in the arbitration forum.[6] Consumer investors thus face a disadvantage

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5. Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, Brennen Center, available at https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court ("At the same time, other research suggests that remote video proceedings may also enhance access to justice under some circumstances. For example, a Montana study found that the use of video hearings allowed legal aid organizations to reach previously underserved parts of the state.").

6. *See, e.g.*, Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 9 (2019) ("[C]oncern that arbitration favors repeat-playing corporations is well founded. Indeed, businesses that arbitrate often in an institution perform particularly well within that institution. Nevertheless, this is just one-half of the repeat-player story. Arbitration favors repeat players on

if they are unable to secure experienced counsel as a result of rigid representation rules. Moreover, lawyers who proceed without a thorough investigation of the potentially applicable rules face concerns including the inability recover their legal fees, suspension or disbarment from practice, or even criminal penalties.

In this article, we discuss ethical concerns and best practices related to multijurisdictional law practice and endeavor to provide a framework for lawyers considering representing a client in a FINRA virtual hearing. We begin with an overview of FINRA's rules relating to the representation of parties in a securities arbitration proceeding and their interplay with the American Bar Association (ABA) Model Rule 5.5 dealing with multijurisdictional practice. Section II describes rules related to multijurisdictional practice of law and virtual hearings, provides examples of some state approaches to regulating lawyers appearing virtually, and suggests a framework for lawyers navigating virtual representation in the FINRA dispute resolution space.

I. REPRESENTING PARTIES IN FINRA PROCEEDINGS

In order to represent a party in a FINRA proceeding, lawyers must ensure that they are following FINRA's representation rule, which permits lawyers to appear so long as state law does not prohibit the representation. The rule provides flexibility and allows lawyers to practice outside their licensing jurisdiction where the non-licensing state permits multijurisdictional practice, so long as the lawyer follows the general requirements of that forum. The sections that follow outline FINRA's representation rule and provide a high-level analysis of when jurisdictions permit lawyers to practice on a limited basis in the non-licensing forum.

A. FINRA's Representation Rules

FINRA's Codes of Arbitration Procedure govern who may represent a party in a FINRA arbitration proceeding.[7] Individuals and business entities

both sides. In a variety of different settings, serially arbitrating *plaintiffs' law firms* also fare particularly well.").

7. FINRA, Rule 12208 (Representation of parties in customer cases); FINRA, Rule 13208 (Representation of parties in industry cases). Because these rules are identical,

may represent themselves if they are parties to a FINRA proceeding.[8] Parties may also seek representation from others, including a lawyer.[9] Though lawyers are permitted in FINRA proceedings, Rule 12208(b) also provides that lawyers may not represent a party in a FINRA proceeding if state law prohibits them from doing so.[10] Accordingly, lawyers hoping to represent a party in a FINRA proceeding must determine whether they are permitted to do so under state law. If the client, lawyer, and proceeding are all physically located in the state where the lawyer is actively licensed, the inquiry is straight forward: the lawyer will be permitted to appear under FINRA Rule 12208(b) and no further inquiry is required.

There are several scenarios, however, where lawyers must look to other law to determine whether they are permitted to represent a party in a FINRA proceeding, including:

- The potential client resides in the jurisdiction where the hearing will be held, but the attorney seeking to represent the client is not licensed in that jurisdiction;
- The hearing location and the client's residence are both outside of the lawyer's licensing jurisdiction;
- There is no formal proceeding, but a lawyer is contacted by a client outside the jurisdiction in which the lawyer is licensed;
- A lawyer and client reside within the jurisdiction where the lawyer is licensed, but the hearing venue is in a jurisdiction where the lawyer is not licensed to practice law;
- There is a virtual or hybrid proceeding with parties participating from multiple physical locations; and/or

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for ease of reference, the remainder of this article refers only to the rule in the Code of Customer Procedure.

8. FINRA Rule 12208(a) ("Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.").

9. FINRA Rule 12208(b) (titled "Representation by an Attorney"). Parties may be represented by a non-attorney representative ("NAR") under some circumstances, a topic that is outside the scope of this article. FINRA Rule 12208(c) ("Parties may be represented in an arbitration by a person who is not an attorney, unless: state law prohibits such representation, or the person is currently suspended or barred from the securities industry in any capacity, or the person is currently suspended from the practice of law or disbarred.").

10. FINRA Rule 12208(b).

- The lawyer or client are living in a place that is not their typical residence and the lawyer is not licensed in any of those jurisdictions.

These challenging situations do not mean, however, that a lawyer should decline all cases simply because the hearing or client are located outside the lawyer's licensing jurisdiction. Many jurisdictions have recognized that the practice of law does not always squarely fit within their boundaries and permit lawyers licensed in other jurisdictions to engage in the practice of law within their borders if certain criteria are met. FINRA has effectively deferred to these jurisdictions to determine whether the lawyer may proceed outside their licensing jurisdiction in a FINRA arbitration hearing. [11]

B. Model Guidance: Multijurisdictional Practice

The American Bar Association's Model Rules of Professional Conduct seek to address the reality that the practice of law in today's world, with modern communication and technology, means that lawyers are often solicited by clients who do not necessarily reside in their state and in proceedings that may be held in multiple jurisdictions.[12] ABA Model Rule 5.5 attempts to answer the question of how to proceed if a lawyer is not licensed in a jurisdiction.[13] While the rule generally prohibits a lawyer from practicing law in violation of a jurisdiction's rules governing the practice of law, a lawyer admitted in another United States jurisdiction can provide "temporary" legal services in a few specifically delineated circumstances.[14] For example, lawyers not licensed in the jurisdiction may undertake their work with the active assistance of locally-licensed counsel, obtain or expect to obtain authorization to appear before the appropriate court, or prove a reasonable relationship between the legal matter at hand and the lawyer's work in their licensing jurisdiction.[15]

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11. FINRA Rule 12208(b) (permitting lawyers to represent parties in securities arbitration proceedings so long as not prohibited by state law).

12. Throughout the text of this paper, American Bar Association Model Rules of Professional Conduct will hereinafter be referred to as "ABA Model Rule [Rule No.].".

13. *See* Model Rules of Prof'l Conduct R. 5.5.

14. *Id*. at R. 5.5(c).

15. *Id*. at (c)(1)-(4).

In the matter of arbitration and mediation, Rule 5.5(c)(3) states that a lawyer may provide temporary legal services that

> are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.[16]

There is no definition of what "arise out of or are reasonably related to the lawyer's practice" means, though comments to Rule 5.5 provide some explanation.[17] The comment recognizes there cannot be a one-size-fits-all definition, but instead that "[a] variety of factors evidence such a relationship."[18] Among those factors are whether the lawyer has previously represented the client, the matter has a significant connection with the jurisdiction, or the lawyer's work may be significantly connected to the jurisdiction.[19] Most applicable to lawyers who practice securities arbitration, the requisite connection may be found when "the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law."[20]

Lawyers should not, however, take ABA Model Rule 5.5(c)(3) as permission to represent any client in any FINRA proceeding no matter the state in which it is pending, what law applies, or where the client resides. First, lawyers must recognize that the ABA Model Rules are exactly that – models. While most states have adopted some variant of Model Rule 5.5, a lawyer must first determine that the relevant jurisdiction permits the out-of-state representation. Though most states have adopted some variation of Model Rule 5.5, each state that adopted the rule considered its own jurisdiction and some have drastically deviated from the ABA's Model Rule 5.5.[21] Second, the

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16. *Id*. at (c)(3).

17. *Id*. at Cmt [14].

18. *Id*.

19. *Id*.

20. *Id*. Lawyers should be careful to not take this provision further than its intent and to understand that it is open to interpretation and some jurisdictions may not consider FINRA proceedings to be so universal such that they fall under the exception.

21. *See* AMERICAN BAR ASSOCIATION, CPR POLICY IMPLEMENTATION COMMITTEE, VARIATIONS OF THE ABA MODEL RULES OF

lawyer must ensure that the representation they are undertaking is indeed "temporary."[22] Each jurisdiction may treat temporary representation separately, and a residence or office in the jurisdiction may mean that the representation is not deemed temporary.[23] A lawyer may inadvertently violate the "temporary" practice exception by soliciting clients in the jurisdiction, appearing in the jurisdiction on multiple occasions, or otherwise holding themselves out as being able to assist clients in the state, including by advertising.[24] Moreover, even if states do permit temporary practice by lawyers licensed outside the jurisdiction, certain requirements must be met by the lawyer seeking to avail themselves of the state's equivalent of ABA Model Rule 5.5.[25] Finally, lawyers should consider the additional contours of virtual representation and how it may impact the analysis under Model Rule 5.5, concerns that are addressed in the section that follows.

II. MULTIJURISDICTIONAL PRACTICE AND VIRTUAL REPRESENTATION

The COVID-19 pandemic in early 2020 set in motion a myriad of logistical challenges, many of which continue to be relevant. Not only have attorneys had to adjust to the general strangeness and unpredictability of conducting their normal business from outside of the office, but multijurisdictional practice quickly acquired more challenging dimensions than many lawyers had previously considered. From the start of the pandemic,

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PROFESSIONAL CONDUCT: RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW (Feb. 20, 2020), https://web.archive.org/web/20210120173353/https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_5.pdf.

22. ABA Model Rule 5.5(c)(3).

23. *See, e.g.* Colo. R. Civ. P. 205.1(1)(b) (lawyer may practice remotely from Colorado only if not a Colorado domiciliary); Gould v. Fla. Bar, 259 F. App'x 208 (11th Cir. 2007) (lawyer's practice not temporary due to residence and office in state).

24. ABA Model Rule 5.5.

25. *See, e.g.*, FINRA, FINRA Dispute Resolution Services Party's Reference Guide, available at https://www.finra.org/sites/default/files/Partys-Reference-Guide.pdf at 49-53 (listing special requirements for attorneys seeking to appear in California, Florida, and Oregon based FINRA proceedings who are not licensed in those jurisdictions).

stay-at-home orders and social distancing requirements have forced attorneys to re-configure their practices and oftentimes subsequently re-evaluate their ethical compliance.[26]

Accidentally violating multijurisdictional practice boundaries added an extra layer of difficulty for many lawyers, particularly those who found themselves practicing from residences outside their licensing jurisdiction.[27] Some lawyers adopted the (risky) mindset that they can likely get away with potentially violating Rule 5.5 simply because "everybody is doing it," and the pandemic has forced a large number of practitioners to cross state lines virtually in some form.[28] Such a *laissez-faire* approach may result in harm to clients and to the lawyer's ability to practice at all. First, if an opponent challenges the lawyer's ability to represent a client in the proceeding, the lawyer may be excluded from the forum, placing the client in a precarious position where they need to locate new counsel at a late stage in the proceeding and often at a higher cost but with less knowledge about the case. Second, lawyers are subject to discipline if they engage in the unauthorized practice of law, ranging from a reprimand to suspension to disbarment.

A. American Bar Association Guidance on Virtual Law Practice

The American Bar Association stepped in with an ethics opinion that sought to clarify lawyers' responsibilities and when remote law practice would run afoul of ABA Model Rule 5.5. On December 16, 2020, the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility released Formal Opinion 495, "Lawyers Working Remotely," clarifying how lawyers may avoid unintentional unauthorized practice of law while working remotely from another jurisdiction in which they are not licensed. The ABA attempted to create a bright line rule that identifies when a lawyer may work remotely within three parameters found within the Model Rules.[29]

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26. Keith R. Fisher, *COVID-19 and the "Invisible" Lawyer*, BUS. L. TODAY, April 2021, at 1.

27. *Id*.

28. *See* Calon Russell, *Unauthorized Practice of Law Primer for the Nomadic Lawyer*, 1 LEGAL INNOV. & ETHICS 3.3 (2020).

29. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 495 (2020).

Lawyers may not remotely practice law in their licensed jurisdiction if that local jurisdiction has determined that the conduct in question constitutes unlicensed practice.[30] Accordingly, lawyers' first research inquiry should be how the jurisdiction defines unlicensed practice and identify any applicable practice rules. This may be a research-intensive practice, as the definition of unlicensed practice may appear within a statute,[31] state rule of professional conduct,[32] state rule of civil procedure,[33] advisory opinion by the local state's highest court[34] or state bar association,[35] or through case law.[36] Should the local jurisdiction determine that working remotely while physically located in the jurisdiction constitutes the unauthorized or unlicensed practice of law, the ABA states in its opinion that the conduct would also be prohibited by Model Rule 5.5(a).[37]

However, so long as there is not a prohibition by the local jurisdiction, the ABA makes clear in its opinion that "a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the 'licensing jurisdiction') even from a physical location where the lawyer is not licensed (the 'local jurisdiction')" as long as the lawyer ensures that three conditions are met.[38] If those conditions are met, "the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's

30. *Id.*

31. *See* N.Y. Judiciary Law § 478 (1965).

32. *See* Ariz. Rules of Prof'l Conduct r. 5.5.

33. *See* Colo. R. Civ. P. 205.1.

34. *See Fla. Bar re Advisory Op. - Out-of-State Attorney Working Remotely from Fla. Home*, 2021 Fla. LEXIS 803 (Fla. 2021).

35. *See* State of Maine Board of Overseers of the Bar Prof'l Ethics Comm., Ethics Op. #189: Unauthorized Practice of Law in Maine by Admittees of Foreign Jurisdiction; Utah State Bar Ethics Advisory Op. Comm., Op. No. 19-03.

36. *See* The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980).

37. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 495 (2020). Rule 5.5(a) states that "a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Model Rules of Prof'l Conduct r. 5.5(a) (Am. Bar. Ass'n 1983).

38. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 495 (2020).

licensing jurisdiction, as they would from their office in the licensing jurisdiction."[39]

The three conditions for such practice are pragmatic policies that balance public protection and the jurisdiction's interest in regulating its own law with the actual activities the lawyer is undertaking. First, lawyers may not "hold themselves out as being licensed to practice in the local jurisdiction."[40] This condition stems from and mirrors Model Rule 5.5(b)(2).[41] To determine whether lawyers are holding themselves out as being licensed, the ABA identifies several indicators, such as contact information tied to the local jurisdiction on websites, the lawyers' letterhead, business cards, or advertising materials.[42] Should lawyers, however, identify in these materials that they are limited to practice outside the jurisdiction, "do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction," the lawyers' representation is within the ambit of Model Rule 5.5.[43] Second, lawyers may not "advertise or otherwise hold out as having an office in the local jurisdiction."[44] This guideline is similar to the first in that it is concerned with the implication that lawyers are licensed in the local jurisdiction through their local contact information, including an address. Lawyers may avoid violating this requirement by only using their addresses in their licensing jurisdiction. To prevent confusion of physical presence, the ABA offers the solution to include a disclaimer of "by appointment only" or "for mail delivery" when referencing the address in the licensing jurisdiction.[45] Third, lawyers may not "provide or offer to provide legal services in the local

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39. *Id.*

40. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 495 (2020).

41. Rule 5.5(b)(2) states that a lawyer who is not admitted to practice in the local jurisdiction may not "hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction." Model Rules of Prof'l Conduct r. 5.5(b)(2) (Am. Bar. Ass'n 1983).

42. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 495 (2020).

43. *Id.*

44. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 495 (2020).

45. *Id.* at n.3.

jurisdiction."[46] A lawyer licensed in New York, for example, may not provide or offer to provide legal services in New Jersey or for New Jersey clients if not also licensed in that state.

The ABA's Opinion 495 provides guidance to lawyers whose practice temporarily moved from their licensing jurisdiction to another jurisdiction.[47] Accordingly, it should be read along with the analysis of Model Rule 5.5(c)(3) in Section I, above, that permits lawyers to provide "temporary"[48] legal services outside their licensing jurisdiction if those services "are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission."[49]

B. Jurisdiction-Specific Research Required

Though ABA Opinion 495 provides lawyers with a framework for evaluating multijurisdictional practice questions in virtual settings, lawyers cannot rely solely on the ABA's guidance. Carefully reviewing the rules of the relevant jurisdiction is crucial. While it is out of the scope of this short article to provide a nationwide survey of applicable guidance, some examples are helpful to illustrate the need for jurisdiction-specific research.

Attorneys might assume that they can safely practice only the law of their home jurisdiction while residing in another jurisdiction, but some states appear

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46. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 495 (2020).

47. *Id*.

48. *See* ABA Model Rule 5.5 Comment [6] (describing characteristics of temporary practice).

49. Model Rules of Prof'l Conduct r. 5.5(c)(3) (Am. Bar. Ass'n 1983). Lawyers should note that FINRA defers to jurisdictions that may require special procedures be followed in order to practice pursuant to that jurisdiction's equivalent to Model Rule 5.5(c)(3). *See, e.g.*, FINRA, *Notice to Attorneys and Parties Represented by Out-of-State Attorneys*, https://www.finra.org/arbitration-mediation/notice-attorneys-and-parties-represented-out-state-attorneys (providing resources for out of state attorneys, including special requirements for California, Florida, and Oregon-based proceedings).

to prohibit the virtual practice emanating from their borders.[50] One jurisdiction, while permitting virtual representation of an outside jurisdiction's law within its borders, conditioned the acceptance of the practice on the pendency of the pandemic, and permitted virtual representation only while emergency conditions exist. Thus, in Opinion 24-20, the District of Columbia Court of Appeals established that a lawyer can practice another jurisdiction's law remotely from the District of Columbia if the lawyer is doing so because of the pandemic, a temporary condition related to sheltering in place. [51] Several conditions are placed on this temporary remote practice, however. The lawyer is not engaging in unlicensed practice if

> the attorney (1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a District of Columbia address in any business document or otherwise holding out as authorized to practice law in the District of Columbia, and (4) does not regularly conduct in-person meetings with clients or third parties in the District of Columbia.[52]

The temporary nature of the District of Columbia's rule suggests that virtual representation will not be permitted at the conclusion of the pandemic emergency.

Jurisdictions that prohibit virtual representation from within the state – or only permit it during the pandemic – seem to be in the minority. Multiple jurisdictions have determined that a lawyer may practice law remotely from their jurisdiction. Thus, Colorado permits a lawyer to practice remotely from Colorado so long as they are not domiciled in Colorado.[53] Utah permits out-of-state lawyers to practice law representing non-Utah clients from their Utah home.[54] Maine reached the same conclusion: lawyers who are licensed in one state but working remotely from another are not engaging in the unauthorized

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50. *See* N.Y. Judiciary Law § 478 (1965); Colo. R. Civ. P. 205.1.

51. District of Columbia Court of Appeals Committee on Unauthorized Practice of Law Opinion 24-20 (Mar. 23, 2020).

52. District of Columbia Court of Appeals Committee on Unauthorized Practice of Law Opinion 24-20 (Mar. 23, 2020).

53. Colo. R. Civ. P. 205.1(1)(b).

54. Utah State Bar Ethics Advisory Op. Comm., Op. No. 19-03 (What interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none.").

practice of law.[55] Maine would also reach a similar conclusion for a lawyer who lived in the state of Maine and worked remotely for a firm in another jurisdiction.[56] Florida also permits non-Florida attorneys to work remotely from their Florida homes.[57] Other states have concurred with the ABA's approach in Opinion 495. Pennsylvania, for example, released an ethics opinion that formally adopts the ABA's opinion for its state rule of professional conduct.[58] Lawyers should take care, however, not to engage in legal practice in the guest jurisdiction or exceed the boundaries of their permissible virtual representation. Illinois cautions that "even if the virtual office were not based in Illinois, the fact that the State X lawyer would do work for Illinois clients and would seek legal work in Illinois establishes a systematic and continuous presence" and violates Illinois' prohibition on unlicensed practice of law.[59]

C. Best Practices for Avoiding Unauthorized Practice of Law when Virtually Representing Clients

In order to avoid allegations of impermissible multijurisdictional practice or the unauthorized practice of law, prudent lawyers should first investigate the remote and temporary practice rules of the jurisdiction from which they are

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55. *See* State of Maine Board of Overseers of the Bar Prof'l Ethics Comm., Ethics Op. #189: Unauthorized Practice of Law in Maine by Admittees of Foreign Jurisdiction.

56. *Id.* ("Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction.").

57. *Fla. Bar re Advisory Opinion--Out-of-State Working Remotely from Fla. Home*, 2021 Fla. LEXIS 803, *7 (Fla. 2021). *See also* Florida Bar v. Sperry, 2021 Fla. LEXIS 803 (attorney licensed in New Jersey but working remotely from his Florida home could work remotely on federal intellectual property matters for a law firm based in New Jersey).

58. 43 Pennsylvania Lawyer 56 - Joint Formal Opinion 2021-100.

59. Illinois State Bar Assn Professional Conduct Advisory Opinion No. 12-09 (2012). *See also In re* Towne, 929 A.2d 774 (Del. 2007) (disbarring PA lawyer who represented DE clients on DE law from office in PA).

practicing remotely during the pandemic.[60] In addition to evaluating rules of the location from which they are virtually practicing, lawyers should also determine where the proceeding is being held, a necessary question since at least one jurisdiction noted more than two decades ago that lawyers could engage in unlicensed practice of law through purely virtual presence in the jurisdiction.[61] Finally, lawyers should research the applicable practice rules of the jurisdictions where the client resides or whose law governs the proceeding as a jurisdiction may have interests not only in proceedings that go forward within their borders but also to protect their residents and the law of their forum.[62] Accordingly, virtual representation may involve lawyers ensuring compliance with more than one jurisdiction's multijurisdictional practice rules, any one of which may prohibit the representation. Prudent lawyers should adhere to the most stringent jurisdiction's requirements for multijurisdictional practice.

CONCLUSION

Though the pandemic has highlighted the need for guidance regarding multijurisdictional practice and virtual representation, these dilemmas predated stay-at-home orders and will likely persist post-pandemic. In this article, we have provided a basic framework for evaluating representation of parties outside of an attorney's licensing jurisdiction when the representation is undertaken virtually. Multiple jurisdictions' laws may be implicated, and prudent lawyers should approach every virtual representation by researching the law of each interested jurisdiction before agreeing to undertake the representation.

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60. *See* Devika Kewalramani et. al., *Social Distance Lawyering: How Close Is Your Ethical Compliance?*, N.Y. ST. B.J., 35, 38 (2020).

61. *See, e.g.*, Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1 (Ca. 1998). *See also In re Towne*, 929 A.2d at 774 (disbarring PA lawyer who represented DE clients on DE law from office in PA).

62. *See generally* ABA Model Rule 5.5.

RESOLVING COMMODITY FUTURES AND OPTIONS DISPUTES

Philip Vujanov[1]

Introduction

Trading volumes in the commodity futures markets have exploded in recent years. Worldwide contracts of futures reached record levels in 2020, totaling 25.55 billion, an increase of 32.7% from the previous year.[2] In part, this is because it is now much easier for retail investors to participate in the futures markets. Retail investors can readily purchase mutual funds which purchase derivative tracking commodities and exchange traded funds which track various commodities indices. Some of the biggest futures exchanges are now targeting retail investors with "mini" futures contracts.[3] Even day traders are jumping into the mix.[4] In addition to an increase in retail investor participation, commodities and futures markets have experienced high volatility and major shifts in supply and demand as a result of the Covid-19 pandemic and the global macroeconomic landscape. Spikes in trading volume have led to more customer litigation as well.

This article provides a high-level overview of commodities, commodity futures and options markets and the regulation of those markets under the

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1. Philip Vujanov is an attorney with ChapmanAlbin LLC whose practice focuses on securities and commodity futures litigation on behalf of retail and institutional investors. More information can be found at www.chapmanalbin.com.

2. FINANCIAL INDUSTRY ASSOCIATION (FIA), *Global futures and options trading reaches record level in 2020* (Jan. 21, 2021), https://www.fia.org/resources/global-futures-and-options-trading-reaches-record-level-2020.

3. "Mini" futures contracts are "a fraction of the cost to trade, as they come in smaller increments and are targeted at what the exchanges call the "sophisticated" retail investor." Philip Stafford, *US futures exchanges target retail investors with 'mini' contracts*, FINANCIAL TIMES (Sept. 15, 2020), https://www.ft.com/content/e7805c5b-7d1f-4666-984c-d0dea8263e5c.

4. For example, on its website, TD Ameritrade offers the following information to its customers: "Can I day trade futures? Yes. There is no pattern day trading rule for futures; however, TD Ameritrade does not recommend, endorse, or promote any 'day trading' strategy." TD AMERITRADE, FUTURES TRADING FAQ, https://www.tdameritrade.com/futures/education-and-resources/futures-trading-faq.html.

Commodity Exchange Act ("CEA") and the rules of the Commodity Futures Trading Commission ("CFTC"). It also explores the dispute resolution process for customers trading within futures markets, focusing on customer arbitration actions brought before the National Futures Association ("NFA").[5]

What is a Commodity?

Commodities are fungible, raw materials that are either consumed directly, such as food, or used as building blocks to create other products. In general, all of the units of a commodity type are identical, regardless of who produces them. Thus, the price of commodities are generally a function of supply and demand. So, what exactly is considered a commodity?

Frozen Orange Juice? "My God! The Dukes are going to corner the entire frozen orange juice market!"[6] Frozen orange juice is, indeed, a commodity.[7]
Platinum? Yes, platinum and other precious metals are commodities.[8]
Milk? Milk is not a commodity but, rather, a type of differentiated product. Despite milk coming from cows, each milk producer is able to brand their milk differently and charge different prices for their product. As such, milk is unable to be traded on futures markets.
Onions? No, onions are no longer a commodity under the CEA as of 1958.[9]
Arabica Coffee? Yes, along with Robusta coffee.
Bitcoin? Yes, along with other virtual currencies.[10]

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5. The NFA is a CFTC-designated futures association and serves as "the industrywide, self-regulatory organization for the U.S. derivatives industry, providing innovative and effective regulatory programs" designed to "safeguard the integrity of the derivatives markets, protect investors and ensure Members meet their regulatory responsibilities." NFA, https://www.nfa.futures.org/ (last visited July 13, 2021).

6. Trading Places (Paramount Pictures 1983).

7. *See* 7 U.S.C. § 1a(9).

8. Certain natural resources are considered to be a commodity. *See* CFTC, FUTURES GLOSSARY, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm.

9. A 1958 law banned futures trading in onions. Public Law 85-839; 7 USC § 13-1.

10. The CFTC defines virtual currencies, such as Bitcoin, to be commodities under the Commodities Exchange Act. The CFTC's jurisdiction "is implicated when a virtual currency is used in a derivatives contract, or if there is fraud or manipulation

In 1974, Congress redefined the term "commodity" under the CEA to include the following:

> The term "commodity" means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13–1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.

Commodities can be divided among 4 main categories: energy, metals, agriculture, and livestock. Fast-forwarding to present day, some of the most actively traded commodities include Brent Crude Oil and WTI Crude Oil, natural gas, gold, silver and copper, coffee, sugar and soybeans.

From Farmers to Gamblers to Sophisticated Traders: The Growth of Futures Regulations

Today, many retail investors participate in the futures markets, which serves valuable functions, including a means of diversifying away from the securities markets. As such, through member rules promulgated by the NFA and CFTC, increased emphasis is placed on investor protection. For most of its history, however, futures regulation has emphasized market stability, placing no significant focus on protecting individual investors.[11] This is because, originally, "farmers, consumers, and gamblers" were the primary participants in futures markets.[12] This has significantly changed. Today, market participants include a wide variety of actors, including mortgage

involving a virtual currency traded in in interstate commerce." CFTC, BITCOIN BASICS, https://www.cftc.gov/sites/default/files/2019-12/oceo_bitcoinbasics0218.pdf.

11. *See* Anita K. Krug, *Uncertain Futures in Evolving Financial Markets*, 93 Wash. U.L. Rev. 1209, 1267–68 (2018).

12. *Id.*

bankers, farmers, bond dealers, grain merchants, lending institutions and individual speculators. Speculative investors, who accept price risk that hedgers avoid, have no intention on making or taking of a commodity[13] but, rather, seek to profit on price changes. The interaction between hedgers and speculators provides markets which are active, liquid, and competitive.

Futures markets provide participants with important functions in the form of hedging and price discovery. Commodities merchants often use futures markets as "insurance" to hedge against fluctuations in underlying commodities prices: "derivatives allow a risk-averse party to shift the risk [of prices movements] to others better situated or more willing to bear that risk, usually for a fee, just as the insurance company charges homeowners a premium for taking on the risk of her home burning down."[14] Secondarily, futures markets provided the function of promoting price discovery, "the process by which trading in a market incorporates new information and market participants' expectations into asset prices."[15]

The CEA, enacted in 1963 and amended several times since, regulates the trading of commodity futures in the United States.[16] The CEA is a "remedial statute that serves the crucial purpose of protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived."[17] The CEA establishes

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13. As explained *infra*, if a position is taken that is not exited, in some instances that will result in delivery of the commodity being traded (oranges, cattle, etc.).

14. Salomon Forex, Inc. v. Tauber, 8 F.3d 866 (4th Cir. 1993). For example, "a Kansas wheat farmer who plants a crop runs the risk of losing money if the price of wheat falls before harvest and sale. The farmer can minimize this risk by selling wheat futures contracts, which guarantee that the farmer will receive a predetermined price. Hedging helps the economy function by allowing commodities producers (such as farmers) and consumers (such as millers) to conduct their businesses with greater certainty over how much they can expect to earn from and pay for commodities." CFTC, ASK CFTC, https://www.cftc.gov/LearnAndProtect/EducationCenter/economicpurpose.

15. Christopher L. Culp, *The Social Function of Financial Derivatives*, FINANCIAL DERIVATIVES: PRICING AND RISK MANAGEMENT 58 (Robert W. Kolb & James A. Overdahl eds., 2010).

16. CFTC, COMMODITY EXCHANGE ACT & REGULATIONS, https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm.

17. Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 101 (2d Cir. 2019).

the statutory framework under which the CFTC operates.[18] Under this Act, the CFTC has authority to establish regulations that are published in title 17 of the Code of Federal Regulations.

Two primary transactions are subject to CEA regulation: (1) commodity futures transactions, and (2) commodity option transactions. Most participants in the futures markets are commercial or institutional commodities producers or consumers who transact for hedging purposes to reduce business risk.[19] Other participants, institutional or retail investors, transact for speculative purposes or as a diversification tool.

18. The CFTC, created in 1974 with the enactment of the Commodity Futures Trading Commission Act, was formed, in part, due to congressional interest in further regulating the futures markets due to a grain shortage, which caused food prices to soar and the strange disappearance of anchovies. *See* Kevin T. Van Wart, *Preemption and the Commodity Exchange Act*, 58 CHI.-KENT L. REV. 657, 672 (1982):

> [The grain shortage was a result of] systematic reduction of grain reserves in the United States, massive crop failures in the Soviet Union which caused that country to become a major buyer of American grain, severe droughts in India and Africa, the mysterious disappearance of anchovies--the world's secondmost important protein source for livestock feed-off the coast of Peru and severe crop damage in the United States due to heavy rains and flooding. These circumstances reducing grain supplies converged at the same time that worldwide demand for American grain soared as a result of a wave of economic prosperity in Europe and Japan and two sharp devaluations of the U.S. dollar.

19. *See, e.g.,* CFTC, BASICS OF FUTURES TRADING, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/FuturesMarketBasics/index.htm.

A commodity futures contract is an agreement to sell or purchase a fixed quantity of a commodity, with delivery of the commodity effected at a specified time in the future.[20] The terms of the contract are standardized with the exception of price, which is determined by market forces.[21]

A commodity option contract is a right, for a limited time, to sell or purchase a certain amount of a commodity or a commodity futures contract at a specific strike price. The writer of the option right pays a premium to the seller for the right[22] and, unless exercised by the purchaser, the option expires. Thus, the option holder's liability is limited to the amount of the premium paid to the seller, while the seller has unlimited risk and a limited profit potential. For this reason, although most options expire worthless, selling options has been compared to "picking up pennies in front of a steam roller."

Margin in the futures market is different than margin used in the securities markets. Futures traders are not required to pay the entire value of a contract up front. Rather, they are required to post a "margin," which usually comprises between two and ten percent of the total value of the contract.[23] This posting of margin is not down payments like stock margins, "but are performance bonds designed to ensure that traders can meet their financial obligations."[24] If a position declines in value, the amount of money in the margin account will decline accordingly. If the margin account value drops below maintenance margin, "the futures trader will be required to post additional variation margin to bring the account up the initial margin level."[25]

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20. Most commodity traders never take physical possession of the commodity. *See, e.g.,* Matt Levine, *There's Nowhere to Put the Oil*, BLOOMBERG (April 20, 2020), https://www.bloomberg.com/opinion/articles/2020-04-20/there-s-nowhere-to-put-the-oil: "There are legendary stories on Wall Street about newbie commodities traders who forgot to roll their positions and had to scramble to find somewhere to store 10,000 pork bellies or bushels of wheat or barrels of oil or whatever. These stories are funny because they are rare, perhaps mythical; mostly financial traders just remember to keep their commodities trades in the world of financial abstraction.".

21. *See, e.g.,* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982).

22. The option to buy is referred to as a call option, while the right to sell is referred to as a put option.

23. CFTC, ASK CFTC, https://www.cftc.gov/LearnAndProtect/EducationCenter/economicpurpose.

24. *Id.*

25. *Id.*

Resolving Disputes in the Futures Industry

Similar to the securities industry, misconduct in the futures markets is not uncommon. In 2020, the CFTC Division of Enforcement filed a record-breaking 113 enforcement actions and ordered regulated persons and entities to pay more than $1.3 billion in total monetary relief.[26] Customers who have disputes arising from a commodity futures or option accounts may bring actions against the broker, advisor, or Futures Commission Merchant involved. The first step for attorneys representing aggrieved investors is to figure out the forum in which to file claims. Two choices commonly chosen by investors, discussed below, include filing in arbitration with the NFA, or filing an action with the CFTC's Reparations Program. Likewise, it is essential for attorneys representing aggrieved investors to understand the various types of claims which may be asserted, which are summarized below.

Pre-dispute Arbitration Agreements

Investors in the futures industry are not bound to one forum when deciding where to resolve disputes. The CFTC adopted Rule 166.5, 17 C.F.R. § 166.5, providing aggrieved investors with three avenues for claims arising from transactions executed on a CFTC-approved futures exchange: (1) civil litigation in federal court; (2) reparation proceedings before the CFTC; and (3) dispute resolution proceedings conducted by a registered exchange, a registered futures association (*i.e.*, NFA Arbitration) or other private organization.[27]

If a customer of a CFTC registrant voluntarily signs a pre-dispute arbitration agreement, the agreement is subject to certain procedural requirements. Within 10 business days after either a CFTC registrant or its customer notifies the other of intent to submit a claim to arbitration, the CFTC registrant must provide the customer with a list of potential arbitral forums "whose procedures meet Acceptable Practices established by the [CFTC] for dispute resolution."[28] The list must include three options: (1) the designated contract market on which the transaction was executed (for example, the Chicago Mercantile exchange); (2) the NFA; and (3) at least one other organization that meets certain criteria (this could include, for example, AAA

26. CFTC, FY 2020 DIVISION OF ENFORCEMENT ANNUAL REPORT at 1.

27. 7 U.S.C. §§ 7(d)(14), 18, 21(b)(10), 25(a)(2).

28. 17 C.F.R. § 166.5(c)(5)(ii).

or FINRA).[29] The customer has 45 days to select one of the forums from the list, otherwise the CFTC registrant has the right to select the forum.

NFA Arbitration Procedures

The NFA is required under the CEA to provide an arbitral forum that is fair, equitable, and expeditious. The NFA has broad jurisdiction to hear disputes that involve futures contracts and options on futures contracts traded on domestic exchanges, dealer options, futures transactions and commodity option transactions on foreign exchanges for U.S. customers, and leverage transactions.[30] Additionally, the NFA may, but is not required to, hear an unrelated claim involving securities if it is between the same parties as a claim involving futures transactions.[31]

The NFA's arbitral forum resolves far fewer disputes than FINRA.[32] Statistics published by the NFA show that, on average, between 2017 and 2021, approximately 28 NFA arbitrations are filed by customers each year.[33] In 2017, 67% of customers (6 out of 9) received a monetary award, averaging 32% of the compensatory damages requested. Thereafter, between 2018 and 2021, 7 awards have been rendered, with customers receiving compensation in only 2 of them.[34]

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29. *Id*.

30. NFA Code Section 2(a).

31. NFA Code Section 2(b).

32. FINRA, for example, processed 3,902 new disputes in 2020. *See* FINRA, DISPUTE RESOLUTION STATISTICS, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics. In this author's experience, the NFA is very responsive to questions regarding the NFA arbitration forum, which may be related to the amount of matters pending before it.

33. *See* NFA, ARBITRATION STATISTICS, https://www.nfa.futures.org/arbitration/arbitration-statistics.html. This does not include 2019, in which 319 cases were filed, of which 250 customer claims arose from one occurrence.

34. *Id.*

NFA Eligibility Rule

The NFA imposes a two-year time limit in which to file claims in NFA arbitration. If an investor is nearing the two-year time limit, the investor may submit a Notice of Intent with the NFA, which does not create an obligation to file a claim but, instead, temporarily suspends the two-year time limit to provide extra time to file a claim.[35] In most cases in which the timeliness of a filing is an issue, the focus will be on when you "knew or should have known" of the acts or transactions that are the basis for your claim.

The NFA clarifies that its two-year limitation period is "not a statute of limitation in the traditional sense. If NFA rejects the claim, you may still be able to go somewhere else."[36] But, even if NFA accepts the claim, the respondent may argue to the arbitrators that some shorter statute of limitation applies. Often, CFTC registrants attempt to shorten their customer's ability to file claims to a one-year period.

Statement of Claim and Answer

To start the arbitral process, a party must send the NFA a claim form. The claim form must provide the parties involved in the dispute, a description of the claim necessary for the NFA to determine if it has jurisdiction over the dispute, dates of alleged wrongdoing, the remedies being sought and claim amounts, and various other pieces of information.[37] A statement of claim or narrative detailing the party's allegations may also be submitted, along with the required fee due to the NFA upon filing. An answer to the claimant's claim must be served on the NFA and other parties within 45 days following service of the claim.[38]

The NFA generally requires separate claim forms to be filed for claims that involve different accounts owned by different people. Further, a party "generally must file separate claim forms for claims that involve different accounts you had at different firms… On the other hand, the filing of a single

35. NFA, ARBITRATION, https://www.nfa.futures.org/arbitration/index.html.

36. NFA, NFA ARBITRATION: CUSTOMER ARBITRATION GUIDE (2015) (hereinafter "NFA Customer Arbitration Guide").

37. *Id*. at 6-7.

38. *Id*. The 45-day timeframe to submit an answer applies to claims in excess of $50,000. For claims below $50,000, an answer must be submitted within 20 days.

claim is sufficient if the same person has several accounts at one firm, or if there is only one account but it has several owners (i.e., a joint account)."[39] However, the NFA, at its discretion, may consolidated cases for hearing: "A party may ask NFA to consolidate two or more claims involving common questions of fact or arising from the same acts or transactions. NFA may order consolidation in the interests of providing a fair, equitable and expeditious proceeding. In addition to deciding requests for consolidation, NFA also decides whether to condition consolidation on the consent of the other party."[40]

Discovery

Like most arbitral forums, which are intended to be expeditious and inexpensive, discovery is somewhat limited as compared to the discovery available to parties in a court proceeding. For example, parties may mutually agree to depositions, but an arbitration panel cannot order a discovery deposition. [41] NFA discovery rules apply to "documents and written information," but is to be construed liberally to include items such as tape recordings or written interrogatories.[42]

There are two phases to discovery in NFA arbitration. First, parties have 15 days from the date "the last pleading is due" to "automatically exchange routine documents," identified by the NFA.[43] This typically includes account opening documents and documents relating to the investor's account, records, notes, or correspondence between the investor and the firm, and so on. One item that also must be produced is a list, prepared by the investor, detailing the investor's investment experience, including the types of investments made, the names of the firms where the investor has done or is doing business, account numbers and dates the accounts were opened and closed. Following the automatic exchange of documents, parties may propound additional document and information requests.

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39. *Id*. at 8.

40. *Id.* at 15.

41. *Id*. at 13. An arbitration panel, however, does have authority to order an evidence deposition.

42. *Id*.

43. NFA Code Section 8(a)(2).

Arbitrators

Three arbitrators are appointed by the NFA in disputes where claims are over $150,000.[44] The arbitration panel is appointed by the NFA Secretary and there is no arbitrator ranking process, as there is in FINRA arbitrations. When a claim is filed, a customer may request to have a non-NFA-member panel, consisting of the chairperson and at least one other panel member who are not NFA members or affiliated with a NFA member.

Dispositive Motions

NFA rules prohibit motions to dismiss for failing to state a claim. However, the NFA permits certain other dispositive motions prior to the evidentiary hearing, with the caveat that such motions "must be included in a timely filed Answer or Reply."[45] The exception is a motion for summary judgment, which may be raised at any time and, likewise, a motion for directed verdict may be raised at the hearing.[46]

Hearing

Prior to oral hearings, the parties are required to submit a "hearing plan" which details information regarding the hearing, including a summary of the case, summary of claims and defenses, statement of agreed-upon facts, list of witness and a description of their testimony, and a list of exhibits the party intends to introduce.[47] The oral hearing is then conducted similarly to hearings in other forums. Each side may make opening and closing statements, perform direct and cross-examination of witnesses, and introduce exhibits into evidence. Awards must be made in writing, signed by a majority of the arbitration panel. Arbitrations are not required to provide a reasoned decision for the award. "Rather, the award will represent their best effort to do 'what's right.'"[48]

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44. NFA Code Section 4(a).

45. NFA Code Section 8(e)(2).

46. *Id*.

47. NFA Customer Arbitration Guide at 19.

48. *Id*. at 21.

CFTC's Reparations Program

Customers trading commodities futures, options on futures, or leverage contracts, who have a dispute with an NFA-member broker or brokerage firm may file a complaint with the CFTC's Reparations Program.[49] The dispute is resolved by CFTC a Judgment Officer who specializes in commodity law.

A customer may select from 3 different procedures. Voluntary procedure may be used if both the customer and the NFA member agree to such. "It is typically the quickest proceeding since it does not involve a hearing or allow for appeals. A Judgment Officer decides voluntary cases solely on the basis of written submissions and exhibits provided by the parties. Voluntary procedure decisions are final; you may not appeal a decision in the voluntary procedure to the Commission or the U.S. Court of Appeals."[50] Otherwise, for claims under $30,000, summary procedure is used. "In a summary procedure, you submit your evidence in writing and the Judgment Officer may, if needed, hold an oral hearing by telephone."[51] For claims over $30,000, formal procedure is used. "In a formal procedure, you must submit your evidence in writing and the Judgment Officer may, if needed, hold an in person hearing in a location that is, to the extent possible, convenient to all the parties."[52] Both summary procedure and formal procedure allows for appeals of the Judgment Officer's decision.

Common Claims Asserted in Disputes

Fraud

One of the main protections for investors is found in the antifraud provisions of the CEA. The provision makes it unlawful for any person to "cheat, defraud or attempt to cheat or defraud" any person in connection with the purchase or sale of a futures contract.[53] Additionally, it is unlawful to

49. CFTC, THE REPARATIONS PROGRAM OF THE COMMODITY FUTURES TRADING COMMISSION INFORMATIONAL BOOKLET, https://www.cftc.gov/sites/default/files/idc/groups/public/@cpdisciplinaryhistory/documents/file/complaintpackage.pdf.

50. *Id*.

51. *Id*.

52. *Id*.

53. 7 U.S.C. § 6b.

make, or attempt to make, any untrue or misleading statement of a material fact or omission; engage, or attempt to engage, in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person; or deliver a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity.[54] Commonly, the CFTC enforces the antifraud provision of the CEA by bringing actions relating to false representations, failure to register with the CFTC, violating bid and offers or creating fictitious sales, spoofing, and front running.

Churning

Churning claims entail excessive trading of a discretionary account for the purpose of producing commissions and with disregard of a customer's interest. Churning constitutes a violation of the anti-fraud provision of the CEA.[55] Whether an account is churned is a question of fact and factors, such as commission-to-equity ratio, departure from a previously agreed upon strategy, and day trades can be taken into account in making this determination.

Suitability

In contrast to the "Suitability Rule" found in the securities industry, the CFTC rejected a proposal for a similar rule which would prohibit recommendations of a commodities transaction to a customer unless it was determined to be suitable for the customer. Rather, the CFTC found that the rule would merely codify principles already implicit in the Commodities Exchange Act.[56]

Misrepresentations and Failure to Disclose Risk

The anti-fraud provision of the CEA prohibits misrepresentation and non-disclosure of or downplaying of risks involved in futures and options

54. *Id.*

55. *Id*.

56. Adoption of Customer Protection Rules, 43 Fed. Reg. 31,866, 31,889 (1978).

transactions.[57] Futures Commissions Merchants are mandated to provide certain risk disclosures to customers. Even so, the act of merely providing boilerplate risk disclosures is insufficient to cure an oral representation that is inconsistent with risk disclosures, or which downplays risk.[58]

Breach of Fiduciary Duty

The relationship between a Commodities Trading Advisor ("CTA") and a customer gives rise to a fiduciary duty.[59] A CTA is defined as "an individual or organization that, for compensation or profit, advises others, directly or indirectly, as to the value of or the advisability of trading futures contracts, options on futures, retail off-exchange forex contracts or swaps."[60] CTAs are similar to Registered Investment Advisers, in that they manage customer funds on a discretionary basis and, as such, owe fiduciary duties to their clients which, if breached, gives rise to a breach of fiduciary duty claim by a customer.

Vicarious Liability

In addition to NFA members' liability for their own violations, the CEA also provides that NFA members may be held vicariously liable for the acts of their agents. For example, if a CTA is found to be the agent of a Futures Commission Merchant ("FCM"),[61] the FCM may be found liable for the

57. *Id*.

58. *See, e.g.,* Clayton Brokerage Co. v. Commodity Futures Trading Com., 794 F 2d 571 (11th Cir, 1986) ("Oral representations may effectively nullify the warnings in the statement by discounting its general significance and its relevance to the customer's particular situation.").

59. *See, e.g*., McIlroy v. Dittmer, 732 F.2d 98 (8th Cir. 1984); Klatt v. Int'l Trading Grp., Ltd., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,636, at 22,598, CFTC Dkt. No. R 77-114, 1978 WL 10813, at *3 (CFTC June 21, 1978) ("The fiduciary nature of the relationship between a commodity trading advisor and his customer is beyond question.").

60. NFA, COMMODITY TRADING ADVISOR (CTA REGISTRATION), https://www.nfa.futures.org/registration-membership/who-has-to-register/cta.html.

61. "A futures commission merchant (FCM) is an entity that solicits or accepts orders to buy or sell futures contracts, options on futures, retail off-exchange forex contracts or swaps, and accepts money or other assets from customers to support

misconduct of its agent, the CTA. 7 U.S.C. § 2(a)(1)(B) provides the statutory basis for holding FCMs vicariously liable, as follows:

> The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

The CFTC explains the policies underlying the CEA's vicarious liability statute:[62]

> Section 2(a)(1)(A)'s imposition of secondary liability on a principal for the wrongdoing of its agent protects the interest of customers by providing a source of compensation that is generally more stable and reliable than often judgment-proof . . . employees. Aside from providing a source of compensation for the victims of wrongdoing, the strict liability imposed by Section 2(a)(1)(A) encourages principals to take steps to limit their potential liability. As a result, principals are more likely to investigate the character and ability of agents before they are retained and to provide supervision for those activities likely to result in liability.

Because principals are "strictly liable" for the misconduct of their agents, "[c]ommodities brokers will be more careful about whom they grasp to their bosoms as branch managers and commodity solicitors and this will be (or so the Commission is authorized to conclude) all to the good."[63]

Conclusion

In the current investment climate, it is likely that retail investors will continue the trend of increasingly participating in the commodity futures and options markets. With recent bouts of volatility, customer disputes will no doubt increase as well. Practitioners ought to be aware of the various avenues of recovery for aggrieved investors participating in these markets.

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such orders." NFA, FUTURES COMMISSION MERCHANT (FCM) REGISTRATION, https://www.nfa.futures.org/registration-membership/who-has-to-register/fcm.html.

62. Lobb v. J.T. McKerr & Co., Comm. Fut. L. Rep. P 24,568, 1989 CFTC LEXIS 608, *34 (C.F.T.C. Dec. 14, 1989).

63. Rosenthal & Co. v. Commodity Futures Trading Comm'n, 802 F.2d 963, 966 (7th Cir. 1986).

RECOVERY OF ATTORNEY'S FEES FOR SECURITIES VIOLATIONS - A STATUTORY ANALYSIS

Sara E. Hanley, Esq.[1]

Introduction

"Can I recover attorney's fees?" This is a question that clients regularly ask Claimant's attorneys, yet it is not always simple to answer. The purpose of this article is to provide practitioners with a guide to the state statutes providing for the imposition of civil liability to the seller of securities and a reference for the damages available under each state's securities statutes, specifically whether the state statute provides for recovery of attorney's fees.

Methods to Recover Attorney's Fees

> The FINRA Arbitrator's Guide provides that a FINRA arbitration panel: [M]ay award attorneys' fees when, for example: 1) the parties' contract includes a clause that provides for attorneys' fees; 2) the governing law provides for attorneys' fees when all of the parties' request or agree to such fees; 3) the fees are required or permitted as part of a statutory claim; or 4) as otherwise provided by law. FINRA does not provide guidance on whether arbitrators may award attorneys' fees. The law may vary widely and may require interpretation that FINRA, as a neutral forum, will not provide. In addition, you should not conduct your own legal research.
>
> If a party requests the recovery of attorneys' fees and you have questions regarding the panel's authority to award such fees, you should request briefs from the parties that identify the basis for awarding attorneys' fees.

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1. Sara Hanley represents investors nationwide who have lost their savings and retirement funds as a result of their brokerage accounts being mishandled. Attorney Hanley is the founder of Hanley Law based in Naples, Florida. The firm represents investors in FINRA arbitrations and securities related class actions. www.finralawyer.org. The author thanks Danielle Teutonico, Esq. for her research of the applicable state statutes in support of this article.

> If the panel determines that a party has a right to recovery, that party must prove the amount to the satisfaction of the panel. The panel may permit testimony or evidence to be submitted during the case-in-chief, or in post-hearing written submissions.[2]

Claimant's contract with the brokerage firm, if any, is unlikely to include a clause that provides for attorneys' fees in the event an arbitration is filed with FINRA. That practically limits Claimant's ability to seek attorney's fees in a FINRA Arbitration on the basis of governing law or a statutory claim.

State Statutory Attorney's Fee Entitlement

State statutes providing for the recovery of attorney's fees vary widely from state to state. For example, some states provide that a "prevailing party" may recover attorney's fees whereas other states provide that the "purchaser" of a security may recover attorney's fees. In states that statutorily provide for prevailing party attorney's fees, Claimants are not immune from risk in asserting a statutory claim for attorney's fees, because the Respondent may ultimately be the "prevailing" party in a claim.

By way of example, Florida Statute § 517.211, entitled Remedies Available in Cases of Unlawful Sale, provides that "[i]n any action brought under this section, including an appeal, the court shall award reasonable attorneys' fees to the prevailing party unless the court finds that the award of such fees would be unjust."[3] The prevailing party may be the Claimant or Respondent, and thus asserting a claim for statutory attorney's fees under Florida Statute § 517.211 exposes Claimant to potential liability for Respondent's attorney's fees as it is a two-way prevailing party attorney's fees provision.

Alternatively other states, such as North Carolina, have a one-way attorney's fees provision in the state securities statute which provides that the seller of a security may be liable to the person purchasing the security, who may sue to recover reasonable attorney's fees.[4] Under the North Carolina attorney's fees statute, which has a one-way attorney's fees provision, the seller of securities has no recourse for attorney's fees against the purchaser, even if the purchaser is not successful on his or her statutory claim.

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2. FINRA Dispute Resolution Services Arbitrator's Guide, p. 71, Feb. 2021 Edition.

3. FLA. STAT. ANN. § 517.211.

4. N.C. GEN. STAT. ANN. § 78A-56(a)(2).

In analyzing whether or not to make a claim for statutory attorney's fees in a FINRA arbitration, it is imperative to determine whether the particular state's statute is a Claimant friendly one-way statute or a prevailing party statute, and then to weigh the risk to benefit of making a statutory attorney's fees claim. If the specific state statute is a prevailing party statute, Claimants must be made aware of the risk of asserting a statutory claim for fees.

Leave Nothing to Interpretation

States have varying rules on whether the court or the arbitrators determine the amount of the attorney's fees award after the entitlement to attorney's fees is determined by the FINRA arbitration panel. In Florida, statutes and case law authorize and endorse the resolution of disputes through arbitration. However, there has been substantial confusion as to the procedure and appropriate forum for recovering attorney's fees incident to arbitration proceedings.[5] Florida Statute § 682.11 provides: "[a]n arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding."[6] This *Revised* Florida Arbitration Code is silent regarding the procedure for consideration of an application for reasonable attorney's fees. Prior to the revision of Florida Statute § 682.11, in the case of *Turnberry Associates v. Service Station Aid, Inc.,* the court held that arbitrating parties may waive their right to have the circuit court address the issue and agree that the arbitrators may do so.[7] District courts have since consistently addressed this issue in accordance with *Turnberry.*[8]

The uncertainty concerning the procedure for an award of attorney's fees in arbitration proceedings is exacerbated when an award fails to set out the basis for the award of attorney's fees and a trial court must look for "signals"

5. Moser v. Barron Chase Securities*,* 783 So. 2d 231 (Fla. 2001).

6. FLA. STAT. ANN. § 682.11.

7. Turnberry Associates v. Service Station Aid, Inc., 651 So. 2d 1173 (Fla. 1995).

8. *See* Barron Chase Securities, Inc. v. Moser, 745 So. 2d 965, 967 (Fla. 2d Dist. Ct. App. 1999); Charbonneau v. Morse Operations, Inc., 727 So. 2d 1017, 1020 (Fla. 4th Dist. Ct. App. 1999); GCA, Inc. v. 90 S.W. 8th St. Enterprises, 696 So. 2d 1230, 1233 (Fla. 3d Dist. Ct. App. 1997); Robert Gay Const. Co. v. Ceco Bldg. Sys., 680 So. 2d 1124, 1126 (Fla. 1st Dist. Ct. App. 1996).

or speculate as to the basis of an award.[9] The Florida Arbitration Code provides little guidance as to the contents of an award but, instead, focuses on the procedural framework within which the parties may seek to confirm, vacate, or modify an award.[10] For example, § 682.09(1) states that "[t]he record must be signed or otherwise authenticated by any arbitrator who concurs with the award." Section 682.14(1)(c) provides for the modification or correction of an award where "[t]he award is imperfect as a matter of form, not affecting the merits of the controversy." Last, section 682.13 provides a list of criteria upon which an award may be challenged. However, it is limited to concerns which may taint the process such as fraud, partiality and the like, and says nothing about the essentials of an award.[11]

Furthermore, under the FINRA Code it has been held that an award does not have to reflect the precise reasoning, findings of facts, conclusions of law, or ultimately the basis upon which a decision was arrived at by the arbitrators.[12] The court in *Moser* found that "[n]otwithstanding our recognition of this underlying policy, we find the practice of arbitrators not disclosing the basis upon which an award is made inadequate and inconsistent with the policy goals of the arbitration process as provided by the Florida Legislature with regard to the award of attorney's fees."[13] The court went on the conclude that the "practice of discouraging disclosure of the basis of an award as described in the trial court proceedings also raises concern as to the due process rights of the parties as it relates to a property interest in recovering attorney's fees incurred in litigating securities violations cases."[14] Courts have long held that rights to attorney's fees granted by statute are substantive rather than procedural.[15] As such, the due process standards necessary in safeguarding such a right must provide for a "meaningful, full and fair"

9. Moser v. Barron Chase Securities*,* 783 So. 2d 231, 232 (Fla. 2001).

10. *See* Air Conditioning Equipment, Inc. v. Rogers, 551 So. 2d 554, 556 (Fla. 4th Dist. Ct. App. 1989).

11. *See id.*

12. *See generally* Prudential-Bache Securities, Inc. v. Shuman, 483 So. 2d 888, 889 (Fla. 3d Dist. Ct. App. 1986).

13. *Moser,* 783 So. 2d at 232.

14. *Id.*

15. *See*, U.S. Security Insurance Co. v. Cahuasqui, 760 So. 2d 1101, 1107 (Fla. 3d Dist. Ct. App. 2000).

hearing to the affected individual.[16]

> In the case of *Moser v. Barron Chase Securities, Inc.,* the court held that: where a party brings claims in arbitration based upon several theories, one or more of which provide for the recovery of attorney's fees, the arbitration award must specify the theory under which the claimant prevailed, or otherwise clearly indicate whether the claimant has prevailed on a theory that would permit the trial court to award fees. In the event the award fails to reflect such a finding, the circuit court may remand the matter to the arbitration panel for the purpose of resolving the issue. Thereafter, the circuit court may determine the fee issue in accord with the finding of the arbitrators…[T]he basis of an award is necessary for the subsequent determination of an entitlement to attorney's fees, an award without a basis is per se inadequate and subject to correction by the trial court.[17]

Therefore, it is of paramount importance that the arbitration panel set forth clearly in its Award the basis under which they are awarding attorney's fees. For example, an award in Florida may read "pursuant to Florida Statute Chapter 517.211, the Panel makes a prevailing party finding for attorney's fees in favor of Claimant, the amount of which is to be determined by a court of competent jurisdiction". Notwithstanding whether Claimant files a petition to confirm the arbitration award with the court and seeks the determination of the amount of reasonable attorney's fees to be awarded by a court of competent jurisdiction or the parties agree that the FINRA arbitrators may make the determination of the attorney's fee amount to be awarded, the basis for such attorney's fees should be set forth in the FINRA Award as a matter of good practice.

Entitlement is a Start

A FINRA arbitration panel may award entitlement to attorney's fees as part of the FINRA Arbitration Award, but counsel must prove the amount of fees sought to be recovered either to a court of competent jurisdiction or the FINRA Arbitrators. Claimant's attorneys oftentimes enter into contingency fee agreements with their clients, and therefore may make a claim for a percentage of the recovery awarded to the Claimant as set forth in the contingency fee agreement. However, many contingency fee agreements also

16. Rucker v. City of Ocala, 684 So. 2d 836, 841 (Fla. 1st Dist. Ct. App. 1996).

17. Moser v. Barron Chase Securities*,* 783 So. 2d 231, 236-37 (Fla. 2001).

provide that in cases where an attorney's fee is awarded by a court or arbitrator or received from Respondent(s), then the law firm will be entitled to the higher of either the contingency fee or the court or arbitrator awarded attorney's fees.

If the fee agreement with the client provides for an award of attorney's fees based on attorney hours, then counsel must prove their request for attorney's fees based on reasonable hours at a rate supported by evidence of what other practitioners in the surrounding legal community with similar experience, knowledge and ability and similar practices charge as an hourly rate. Furthermore, an argument for a lodestar or multiplier may be appropriate in some circumstances. For example, reasonable attorney's fees in Florida are determined using the federal lodestar approach (number of hours reasonably expended multiplied by a reasonable hourly rate gives the lodestar figure), with an addition or subtraction from the lodestar amount depending upon a contingency risk factor and the results obtained.[18]

Furthermore, FINRA Rule 10215 Attorneys' Fees, was implemented on April 16, 2007 and provides that "[t]he arbitrator(s) shall have the authority to provide for reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law." Additionally, FINRA Rule 10214 Awards, provides that:

> [t]he arbitrator(s) shall be empowered to award any relief that would be available in court under the law. The arbitrator(s) shall issue an award setting forth a summary of the issues, including the type(s) of dispute(s), the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

Therefore, when seeking a statutory award of attorney's fees, practitioners must be prepared to plead the statutory basis for the attorney's fee entitlement and present proof to the decision makers to support the reasonable amount of attorney's fees sought. Thus, an award of attorney's fees is a three-step process that requires: (1) filing of proper pleadings; (2) winning the issue of entitlement; and (3) proving, to the court or arbitrators, the reasonable amount of fees to be awarded.

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18. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1150-51 (Fla. 1985).

Conclusion

Listed below by state is a summary overview of each of the 50 states' securities statutes and resulting damages that may be sought as a remedy for violation of the statute for review of the applicable attorney's fees provision by state. As practitioners often experience, Claimants are not made whole even if all of their investment losses are recovered because the recovered funds are often used in part to pay reasonable attorney's fees. When representing Claimants in FINRA arbitrations, another method to best assist Claimants may be to seek an award of attorney's fees from the Respondent, in hopes that doing so will result in an improved economic outcome for the aggrieved investor looking to recover his or her investment losses.

Civil Liability and the Recovery of Attorney's Fees for Securities Violations | State by State

Jurisdiction and Relevant Law	**Acts Creating Liability to Seller**	**Damages**
Alabama AL ST § 8-6-19 Civil liabilities of sellers, agents, etc.; remedies of purchasers	Sells or offers to sell by means of untrue statements of material fact or omission of material fact. AL ST § 8-6-19	Consideration paid plus 6% interest, costs, **attorneys' fees**, less the amount of any income received on the security, or for damages if security no longer owned. AL ST § 8-6-19
Alaska AK ST § 45.56.710 Civil liability	(b) A person is liable to the purchaser if the person sells a security in violation of AS 45.56.100, or by means of an untrue statement of a material fact or an omission to state a material fact necessary to make the statement made, in light of circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. AK ST § 45.56.710	(b)(1) the purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest under AS 09.30.070, or eight percent a year, whichever is greater, from the date of the purchase, costs, and **attorney fees** as determined by the court, upon the tender of the security, or for actual damages as provided in (3) of this subsection; AK ST § 45.56.710

Arizona AZ ST § 44-2001 Voidable sale or contract for sale of securities; remedy AZ ST § 44-2002 Remedy for voidable purchases	A. A sale or contract for sale of any securities to any purchaser in violation of section 44-1841 or 44-1842 or article 13 of this chapter is voidable at the election of the purchaser, and the purchaser may bring an action in a court of competent jurisdiction… AZ ST § 44-2001 A. A purchase or contract for purchase from a seller of securities made in violation of section 44-1842, 44-1991 or 44-1994 is voidable at the election of the seller of the securities, and the seller may bring an action in a court of competent jurisdiction… AZ ST § 44-2002	Consideration paid for the securities, with interest, taxable court costs and **reasonable attorney fees**, less the amount of any income received by dividend or otherwise from ownership of the securities, on tender of the securities purchased or the contract made, or for damages if the purchaser no longer owns the securities. AZ ST § 44-2001 To recover the amount of the seller's damages, with interest, taxable court costs and **reasonable attorney fees**. AZ ST § 44-2002
Arkansas AR ST § 23-42-106 Civil liability	(a)(1) A person is liable to a buyer of a security if the person offers or sells the security: (A) In violation of § 23-42-212(b), § 23-42-301, or § 23-42-501(1) or (2), a rule or order of the Securities Commissioner under § 23-42-502 which requires the affirmative approval of sales literature before it is	(2) In a successful action under subdivision (a)(1) of this section, the buyer may recover costs and **reasonable attorney's** fees plus: (A) Upon tender of the security, the consideration paid for the security and interest at six percent

	used, or any condition imposed under § 23-42-403(d), § 23-42-404(g), or § 23-42-404(i); or (B) By means of an untrue statement of a material fact or a failure to state a material fact necessary in order to make the statement made, in the light of circumstances under which it is made, not misleading, the buyer not knowing of the untruth or omission, and the seller not sustaining the burden of proof that the seller did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. AR ST § 23-42-106	(6%) per year from the date of payment, less the amount of any income received from owning the security; or (B)(i) Damages if the buyer no longer owns the security (ii) Damages are the amount that would be recoverable upon a tender of the security less the value of the security when the buyer disposed of the security plus interest at six percent (6%) per year from the date of disposition of the security. AR ST § 23-42-106
California CA CORP § 25401 Fraudulent and Prohibited Practices	It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. CA CORP § 25401	Any person who violates Section 25401 shall be liable to the person who purchases a security from him or sells a security to him, who may sue either for rescission or for damages (if the plaintiff or the defendant, as the case may be, no longer owns the security), unless the defendant proves that the plaintiff knew the facts concerning the untruth

		or omission or that the defendant exercised reasonable care and did not know (or if he had exercised reasonable care would not have known) of the untruth or omission. Upon rescission, a purchaser may recover the consideration paid for the security, plus interest at the legal rate, less the amount of any income received on the security, upon tender of the security. Upon rescission, a seller may recover the security, upon tender of the consideration paid for the security plus interest at the legal rate, less the amount of any income received by the defendant on the security. Damages recoverable under this section by a purchaser shall be an amount equal to the difference between (a) the price at which the security was bought plus interest at the legal rate from the date of purchase and (b) the value of the security at the time it was disposed of by the

		plaintiff plus the amount of any income received on the security by the plaintiff. CA CORP § 25501
Colorado CO ST § 11-51-501 Fraud and other Prohibited Conduct CO ST § 11-51-604 Civil liabilities	(1) It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly: (a) To employ any device, scheme, or artifice to defraud; (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. CO ST § 11-51-501(1)	(3) Any person who recklessly, knowingly, or with an intent to defraud sells or buys a security in violation of section 11-51-501(1) or provides investment advisory services to another person in violation of section 11-51-501(5) or (6) is liable to the person buying or selling such security or receiving such services in connection with the violation for such legal or equitable relief that the court deems appropriate, including rescission, actual damages, interest at the statutory rate, costs and **reasonable attorney fees**. CO ST § 11-51-604
Connecticut CT ST § 36b-29 Buyer's remedies	(a) Any person who: (2) offers or sells or materially assists any person who offers or sells a security by means of any	Is liable to the person buying the security, who may sue either at law or in equity to recover the

	untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they are made, not misleading, who knew or in the existence of reasonable care should have known of the untruth or omission, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission… CT ST § 36b-29(a)	consideration paid for the security, together with interest at eight per cent per year from the date of payment, costs and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. CT ST § 36b-29(a)
Delaware DE ST TI 6 § 73-605 Civil liabilities	Offers, sells or purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading (the buyer or seller not knowing of the untruth or omission), and who does not sustain the burden of proof that the person did not know, and	Consideration paid for the security, together with the interest at the legal rate from the date of payment, costs, and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. DE ST TI 6 § 73-605(a)(2)

	in the exercise of reasonable care could not have known of the untruth or omission, is liable to the person buying or selling the security from or to him or her, who may sue either at law or in equity. Every person who directly or indirectly controls a seller or buyer, every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such seller or buyer who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale or purchase are also liable jointly and severally with and to the same extent as the seller or buyer. DE ST TI 6 § 73-605	
District of Columbia DC CODE § 31-5606.05 Civil liability	(a)(1) A person shall be civilly liable to another person who buys a security if the person: (B) Offers or sells a security by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in the light of the	(b)(1) In an action brought under subsection (a)(1) of this section, a buyer may sue at law or in equity: (A) To recover the consideration paid for the security, interest at the rate used in the Superior Court of the District of Columbia

	circumstances under which made, not misleading, the buyer does not know of the untruth or omission and the offeror or seller does not sustain the burden of proof that the offeror or seller did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. (a)(2) A person shall be civilly liable to another person who sells a security if the person offers to purchase or purchases the security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading, the seller does not know of the untruth or omission, and the purchaser does not sustain the burden of proof that the purchaser did not know, and in the exercise of reasonable care could not have known of the untruth or omission. DC CODE § 31-5606.05	from the date of payment, costs, and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security and any income received on it; or (B) For damages if the buyer no longer owns the security. The amount of damages shall be the amount that would be recoverable on a tender less the value of the security when the buyer disposed of it, plus interest at the rate used in the Superior Court of the District of Columbia from the date of disposition. (2) In an action under subsection (a)(2) of this section, a seller may sue at law or in equity: (A) On tender of the consideration paid for the security, to recover the security, the amount of any income received on the security, costs, and **reasonable attorneys' fees**; or (B) For damages if the

		buyer no longer owns the security. DC CODE § 31-5606.05(b)(1)-(2)
Florida FL St § 517.301 Fraudulent Transactions; falsification or concealment of facts FL ST § 517.211 Remedies available in cases of unlawful sale	(1) It is unlawful and a violation of the provision of this chapter for a person: (a)(1) To Employ any device, scheme, or artifice to defraud; (a)(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (a)(3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a person. FL ST § 517.301	(2) Any person purchasing or selling a security in violation of s. 517.301, and every director, officer, partner, or agent of or for the purchaser or seller, if the director, officer, partner, or agent has personally participated or aided in making the sale of purchase, is jointly and severally liable to the person selling the security from such person in an action for rescission, if the plaintiff still owns the security or for damages, if the plaintiff has sold the security. FL ST § 517.211 (2) In an action brought under this section, including an appeal, **the court shall award reasonable attorneys' fees to the prevailing party unless the court finds that the award**

		of such fees would be unjust. FL ST § 517.211(6)
Georgia GA ST § 10-5-58 Actions to recover; joint and several liability; right of contribution	Liable to the purchaser if the person sells a security in violation of Code Section 10-5-20, or, by means of an untrue statement of a material fact or an omission to state a material fact. GA ST § 10-5-58(b)	The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest from the date of the purchase, costs, and **reasonable attorney fees determined by the court** upon the tender of the security or for actual damages. GA ST § 10-5-58(b)(1)
Hawaii HI ST § 485A-509 Civil liability	A person is liable to the purchaser if the person sells a security in violation of section 485A-301 or, by means of an untrue statement of a material fact or an omission of a material fact necessary to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the	The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest, from the date of the purchase, costs, and **reasonable attorney's fees** determined by the court, upon the tender of the security, or for

	seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. HI ST § 485A-509(b)	actual damages as provided in paragraph (3). HI ST § 485A-509(b)(1)
Idaho ID ST § 30-14-509 Civil liability	A person is liable to the purchaser if the person sells a security in violation of section 30-14-301, Idaho Code, or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. ID ST § 30-14-509(b)	The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the annual rate of interest set forth in section 28-22-104(2), Idaho Code, from the date of the purchase, costs, and **reasonable attorneys' fees determined by the court**, upon the tender of the security, or for actual damages as provided in subsection (b)(3) of this section. ID ST § 30-14-509(b)(1)
Illinois IL ST CH 815 § 5/12 Violation IL ST CH 815 § 5/13 Private and other civil remedies; securities	Violation. It shall be a violation of the provisions of this Act for any person: F. To engage in any transaction, practice or course of business in connection with the sale or purchase of securities which works or tends to	(A)(1) for the full amount paid, together with interest from the date of payment for the securities sold at the rate of the interest or dividend stipulated in the securities sold (or if no rate is stipulated,

	work a fraud or deceit upon the purchaser or seller thereof. G. To obtain money or property through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. H. To sign or circulate any statement, prospectus, or other paper or document required by any provision of this Act or pertaining to any security knowing or having reasonable grounds to know any material representation therein contained to be false or untrue. IL ST CH 815 § 5/12	then at the rate of 10% per annum) less any income or other amounts received by the purchaser on the securities. (A)(2) if the purchaser no longer owns the securities, for the amounts set forth in clause (1) of this subsection A less any amounts received by the purchaser for or on account of the disposition of the securities. If the purchaser shall prevail in any action brought to enforce any of the remedies provided in this subsection, the court shall assess costs together with **reasonable fees and expenses of the purchasers' attorney against the defendant.** IL ST CH 815 § 5/13(a)(1) and (a)(2)
Indiana IC 23-19-5 Fraud and Liabilities	It is unlawful for a person, in connection with the offer, sale or purchase of a security, directly or indirectly: (1) to employ a device,	(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income

	scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading; or (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person. IC 23-19-5	received on the security, and interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the purchase, cost, and **reasonable attorney's fees** determined by the court or arbitrator, upon the tender of the security, or for actual damages as provided in subdivision (3). IC 23-19-5-9
Iowa IA ST § 502.509 Civil liability	A person is liable to the purchaser if the person sells a security in violation of section 502.30 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. IA ST § 502.509(2)	The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate from the date of the purchase, costs, and **reasonable attorney fees** determined by the court, upon the tender of the security, or for actual damages as provided in paragraph "c". IA ST § 502.509(2)(a)

Kansas KS ST 17-12a509 Civil liability	A person is liable to the purchaser if the person sells a security in violation of K.S.A. 2006 Supp. 17-12a301, and amendments thereto, or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make a statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. A person acting as a broker-dealer or agent that sells or buys a security in violation of K.S.A. 2006 Supp. 17-12a401(a), 17-12a402(a), or 17-12a506, and amendments thereto, is liable to the customer. KS ST 17-12a509(b)	Consideration paid for the security, less the amount of any income received on the security, and interest from the date of the purchase at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and **reasonable attorneys' fees determined by the court**, upon the tender of the security, or for actual damages as provided in paragraph (3). Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest from the date of the purchase at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys' fees determined by the court. KS ST 17-12a509(b)(1)

Kentucky KY ST § 292.480 Civil liabilities	Any person, who offers or sells a security in violation of this chapter or of any rules or orders promulgated hereunder or offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact is liable to the person buying the security from him, who may sue either at law or in equity. KY ST § 292.480(1)	Consideration paid for the security, together with interest, costs and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less: (a) The value of the security when the buyer is disposed of it; and (b) Interest at the legal rate per annum from the date of disposition. KY ST § 292.480(1)(a)-(b)
Louisiana LA R.S. 51:712 Unlawful practices LA R.S. 51:714 Civil liability from sales of securities	A. It shall be unlawful for any person: (2) To offer to sell or to sell a security by means of any oral or written untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, if such person	Any person who violates R.S. 51:712(A) shall be liable to the person buying such security, and such buyer may sue in any court to recover the consideration paid in cash or if such consideration was not paid in cash, the fair value thereof at the time such consideration was paid

	in the exercise of reasonable care could not have known of the untruth or omission. LA R.S. 51:712(A)(1)-(2)	for the security with interest thereon from the date of the payment down to the date of repayment as computed in R.S. 51:714(C)(1), less the amount of any income received thereon, together with all taxable court costs and **reasonable attorney's fees**, upon the tender, where practicable, of the security at any time before the entry of judgment, or for damages if he no longer owns the security. Damages are the amount which equals the difference between the fair value of the consideration the buyer gave for the security and the fair value of the security at the time the buyer disposed of it, plus interest thereon from the date of payment to the date of repayment as computed in R.S. 51:714(C)(2). LA R.S. 51:714

Maine ME ST T. 32 § 16509 Civil liability	A person is liable to the purchaser if the person sells a security in violation of section 16301; section 16303, subsection 6; section 16304, subsection 5; or section 16305, subsection 6 or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing of the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. ME ST T. 32 § 16509(2)	The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest from the date of the purchase, costs, and **reasonable attorney fees**, upon the tender of the security, or for actual damages as provided in paragraph C. ME ST T. 32 § 16509(2)(A)
Maryland MD CORP & ASSNS § 11-703 Persons civilly liable	A person is civilly liable to the person buying a security from him if he: (ii) Offers or sells the security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which	On tender of the security, to recover the consideration paid for the security, together with interest at the rate provided for in § 11-107(a) of the Courts and Judicial Proceedings Article, as amended, from the date of payment, costs, and **reasonable**

	they are made, not misleading, the buyer not knowing of the untruth or omission, and if he does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. MD CORP & ASSNS § 11-703(a)(1)(i)-(ii)	**attorneys' fees**, less the amount of any income received on the security; or if he no longer owns the security, for damages. MD CORP & ASSNS § 11-703(b)(1)(i)-(ii)
Massachusetts MA ST 110A § 410 Civil Liabilities	(a) Any person who (1) offers or sells a security in violation of section 201(a), 301, or 405(b), or of any rule or order under section 403 which requires the affirmative approval of sales literature before it is used, or of any condition imposed under section 303(d), or (2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of	to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the vale of the security when the buyer disposed of it and interest at six per cent per year from the date of disposition. MA ST 110A § 410(a)(2)

	reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity… MA ST 110A § 410(a)(2)	
Michigan MI ST 451.2509 Civil liability; joint and several liability; statute of limitation; violative contract; waiver prohibited; other rights or remedies.	(2) A person is liable to the purchaser if the person sells a security in violation of section 301, or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission, and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. MI ST 451.2509	(2)(a) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at 6% per year from the date of the purchase, costs, and **reasonable attorney fees determined by the court**, upon the tender of the security, or for actual damages as provided in subdivision (c). MI ST 451.2509
Minnesota MN ST § 80A.76 Section 509; civil liability	(b) A person is liable to the purchaser if the person sells a security in violation of section 80A.49 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in	(b) (1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest

	order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. MN ST § 80A.76	from the date of the purchase, costs, and **reasonable attorneys' fees determined by the court**, upon the tender of the security, or for actual damages as provided in paragraph (3). MN ST § 80A.76
Mississippi MS ST § 75-71-509 Civil liability	(b) A person is liable to the purchaser if the person sells a security in violation of Section 75-71-301 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission; MS ST § 75-71-509	(b)(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest from the date of the purchase, costs, and **reasonable attorney's fees** determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3). MS ST § 75-71-509

Missouri MO ST 409.5-509 Liabilities--violations--damages--remedies	1. A person is liable to the purchaser if the person sells a security in violation of section 409.3-301 or, by means of an untrue statement of a material fact or an omission to state a material fact. MO ST 409.5-509(b)	(b)(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the rate of 8% per year from the date of the purchase, costs, and **reasonable attorneys' fees determined by the court**, upon the tender of the security, or for actual damages as provided in paragraph (3). (b)(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest at the rate of 8% per year from the date of the purchase, costs, and **reasonable attorneys' fees determined by the court**. MO ST 409.5-509

Montana MT ST 30-10-307 Civil liabilities -- limitations on actions	(1) Any person who offers or sells a security in violation of 30-10-202 or offers or sells a security by means of fraud or misrepresentation is liable to the person buying the security from him. (2) Every person who directly or indirectly controls a seller liable under subsection (1), every partner, officer, or director (or person occupying a similar status or performing similar functions) or employee of the seller, and every broker-dealer or salesperson who participates or materially aids in the sale is liable jointly and severally with and to the same extent as the seller if the nonseller knew, or in the exercise of reasonable care could have known, of the existence of the facts by reason of which the liability is alleged to exist. There must be contribution among the several liable persons. MT ST 30-10-307	Any person who offers or sells a security in violation of 30-10-202 or offers or sells a security by means of fraud or misrepresentation is liable to the person buying the security from the offeror or seller, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 10% a year from the date of payment, costs, and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if the buyer no longer owns the security. Damages are the amount that would be recoverable upon a tender less: (a) the value of the security when the buyer disposed of it; and (b) interest at 10% a year from the date of disposition. MT ST 30-10-307(1)

Nebraska NE ST § 8-1118 Violations; damages; statute of limitations	(1) Any person who offers or sells a security in violation of section 8-1104 or offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they are made not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he or she did not know and in the exercise of reasonable care could not have known of the untruth or omission, shall be liable to the person buying the security from him or her. NE ST § 8-1118	(1) Consideration paid for the security, together with interest at six percent per annum from the date of payment, costs, and **reasonable attorney's fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages shall be the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at six percent per annum from the date of disposition. NE ST § 8-1118
Nevada NRS 90.570 Offer, sale and purchase NRS 90.660 Civil Liability	In connection with the offer to sell, sale, offer to purchase or purchase of a security, a personal shall not, directly or indirectly: 1. Employ any device, scheme or artifice to defraud; 2. Make any untrue statement of a material fact or omit to state a material fact necessary in order to	1. A person who offers or sells a security in violation of any of the following provisions: (d) Subsection 2 of NRS 90.570 is liable to the person purchasing the security. Upon tender of the security, the purchaser may recover the consideration paid for

	make the statements made not misleading in the light of the circumstances under which they are made; or 3. Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon a person. NRS 90.570	the security and interest at the legal rate of this State from the date of payment, costs and **reasonable attorney's fees**, less the amount of income received on the security. A purchaser who no longer owns the security may recover damages. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, plus legal interest at the legal rate of this State from the date of disposition of the security, costs and reasonable attorney's fees determined by the court. Tender requires only notice of willingness to exchange the security for the amount specified. NRS 90.660
New Hampshire NH ST § 421-B:5-509 Civil Liabilities	(b) A person is liable to the purchaser if the person sells a security in violation of RSA 421-B:3-301 or, by means of an untrue statement of a material fact	(b)(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income

	or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. NH ST § 421-B:5-509	received on the security, and interest at the legal rate of interest from the date of the purchase, costs, and **reasonable attorneys' fees** determined by the court, upon the tender of the security, or for actual damages as provided in subsection (b)(3). NH ST § 421-B:5-509
New Jersey NJ ST 49:3-71 Sale of Securities	(a) Any person who (2) Offers, sells or purchases a security by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), or (3) offers, sells or purchases a security by employing any device, scheme, or artifice to defraud, or (4) offers, sells or purchases a security by engaging in any act, practice or course of business which operates or would operate as a fraud or	(c) Any person who offered, sold or purchased a security or engaged in the business of giving investment advice to a person in violation of paragraph (1), (2), (3), (4) or (5) of subsection (a) of this section is liable to that person, who may bring an action either at law or in equity to recover the consideration paid for the security or the investment advice and any loss due to the advice, together with interest set at the rate established for interest on judgments for the same period by the

	deceit upon any person, or (5) engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities, or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities (i) in willful violation of this act or of any rule or order promulgated pursuant to this act, or (ii) employs any device, scheme or artifice to defraud the other person or engages in any act, practice or course of business or conduct which operates or would operate as a fraud or deceit on the other person, is liable as set forth in subsection (c) of this section. NJ ST 49:3-71	Rules Governing the Courts of the State of New Jersey from the date of payment of the consideration for the investment advice or security, and costs, less the amount of any income received on the security, upon the tender of the security and any income received from the investment advice or on the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at the rate established for interest on judgments for the same period by the Rules Governing the Courts of the State of New Jersey from the date of disposition. NJ ST 49:3-71
New Mexico NM ST § 58-13C-509 Civil liability	(B) A person is liable to the purchaser if the person sells a security in violation of Section 301 of the New Mexico Uniform Securities Act or, by means of an	(B)(1) the purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income

	untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances pursuant to which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. (D) A person acting as a broker-dealer or agent that sells or buys a security in violation of Subsection A of Section 401 of the New Mexico Uniform Securities Act, Subsection A of Section 402 of that act or Section 506 of that act is liable to the customer. (E) A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of Subsection A of Section 403 of the New Mexico Uniform Securities Act, Subsection A of Section 404 of that act or Section 506 of that act is liable to the client.	received on the security, and interest at the legal rate of interest from the date of the purchase, costs and **reasonable attorney fees determined by the court**, upon the tender of the security, or for actual damages as provided in Paragraph (3) of this subsection (D) The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in Paragraphs (1) through (3) of Subsection B of this section, or, if a seller, for a remedy as specified in Paragraphs (1) through (3) of Subsection C of this section. (E) The client may maintain an action to recover the consideration paid for the advice, interest at the legal rate of interest from the date of payment, costs and **reasonable attorney fees** determined by the court. (F)(1) the person defrauded may

	(F) A person that receives, directly or indirectly, any consideration for providing investment advice to another person and that employs a device, scheme or artifice to defraud the other person or engages in an act, practice or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. NM ST § 58-13C-509	maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at the legal rate of interest from the date of the fraudulent conduct, costs and **reasonable attorney fees** determined by the court, less the amount of any income received as a result of the fraudulent conduct NM ST § 58-13C-509
New York GBL § 23-A	No statutory civil liability. Only the attorney-general is empowered to act under the code. GBL § 23-1	No statutory civil remedy available.
North Carolina NC ST § 78A-56 Civil liabilities	(a) Any person who: (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does	To recover the consideration paid for the security, together with the interest at the legal rate from the date of payment, costs and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if the purchaser no longer

	not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person purchasing the security from him, who may sue either at law or in equity…. NC ST § 78A-56	owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition. NC ST § 78A-56
North Dakota N.D. ST 10-04-15 Fraudulent Practices N.D. St 10-04-17 Remedies	It shall be a fraudulent practice and it shall be unlawful: 1. For any person knowingly to subscribe to, or make or cause to be made, any material false statement or representation in any application, financial statement, or other document or statement required to be filed under any provision of this chapter, or to omit to state any material statement or fact in any such document or statement which is necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. 2. For any person, in connection with the offer, sale or purchase of any	Every sale or contract for sale made in violation of any of the provisions of this chapter, or any rule or order issued by the commissioner under any provisions of this chapter, shall be voidable at the election of the purchaser. The person making such sale or contract for sale, and every director, officer, or agent of or for such seller who shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser, together with all taxable court costs, interest as provided in this

	security, directly or indirectly, to: a. Employ any device, scheme, or artifice to defraud; b. Make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in light of the circumstances under which they are made, not misleading; or c. Engage in any acts, practices, or course of business which operates or would operate as a fraud or deception upon purchasers of the public. N.D. ST 10-04-15	subsection, and **reasonable attorney's fees**, less the amount of any income received on the securities, upon tender to the seller, in person or in open court of the securities sold or of the contracts made, or for damages if the purchaser no longer owns the securities. Damages are the amount that would be recoverable upon a tender less the value of the securities when the purchaser disposed of them and interest as provided in subsection 2 from the date of disposition. N.D. ST 10-04-17
Ohio OH ST § 1707.41 Civil liability of seller for fraud OH ST § 1707.43 Remedies of purchaser in unlawful sale	(A) Any person that, by a written or printed circular, prospectus, or advertisement, offers any security for sale, or receives the profits accruing from such sale, is liable, to any person that purchased the security relying on the circular, prospectus, or advertisement, for the loss or damage sustained by the relying person by reason of the falsity of any material	(A) Subject to divisions (B) and (C) of this section, every sale or contract for sale made in violation of Chapter 1707 of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making

	statement contained therein or for the omission of material facts, unless the offeror or person that receives the profits establishes that the offeror or person had no knowledge of the publication prior to the transaction complained of, or had just and reasonable grounds to believe the statement to be true or the omitted facts to be not material. OH ST § 1707.41	such sale or contract for sale, are jointly and severally liable to the purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision. OH ST § 1707.43
Oklahoma OK ST T. 71 § 1-509 Civil liability	(B) A person is liable to a purchaser if the person sells a security in violation of Section 10 of this section, or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission, and the seller not	(B)(1) The purchaser may maintain an action at law or in equity to recover the consideration paid for the security, and interest at the legal rate of interest per year from the date of the purchase, less the amount of any income received on the security, plus costs, and **reasonable attorneys' fees determined by the**

	sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. (D) A person acting as a broker-dealer or agent that sells or buys a security in violation of subsection A of Section 18, subsection A of Section 19, or Section 34 of this act is liable to the customer. (E) A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of subsection A of Section 20, subsection A of Section 21, or Section 34 of this act4 is liable to the client. OK ST T. 71 § 1-509	**court**, upon the tender of the security, or for actual damages as provided in paragraph 3 of this subsection. (D) The customer, if a purchaser, may maintain an action at law or in equity for recovery of actual damages as specified in paragraphs 1 through 3 of subsection B of this section; or, if a seller, a remedy as specified in paragraphs 1 through 3 of subsection C of this section. (E) The client may maintain an action at law or in equity to recover the consideration paid for the advice, interest at the legal rate of interest per year from the date of payment, costs, and **reasonable attorney's fees determined by the court**. OK ST T. 71 § 1-509

Oregon ORS 59.135 Fraud and deceit with respect to securities or securities business ORS 59.137 Liability in connection with violation of ORS 59.135	It is unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security of the conduct of a securities business or for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise: (1) To employ any device, scheme or artifice to defraud; (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon a person; or (4) To make or file, or cause to be made or filed, to or with the Director of the Department of Consumer and Business Services any statement, report or document which	(1) Any person who violates or materially aids in violation of ORS 59.135 (Fraud and deceit with respect to securities or securities business) (1), (2) or (3) is liable to any purchaser or seller of the security for the actual damages caused by the violation, including the amount of any commission, fee or other remuneration paid, together with interest at the rate specified in ORS 82.010 (legal rate of interest) for judgments for the payment of money, unless the person who materially aids in the violation sustains the burden of proof that the person did not know and, in the exercise of reasonable care, could not have known of the existence of the facts on which liability is based. (4) Except as provided in subsection (5) of this section, **the court may award reasonable attorney fees to the prevailing**

	is known to be false in any material respect or matter. ORS 59.135	**party in an action under this section.** (5) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (4) of this section if the action under this section is maintained as a class action pursuant to ORCP 32. ORS 59.137
Pennsylvania PA ST 70 P.S § 1-501 Civil Liabilities	(a) Any person who: (i) offers or sells a security in violation of section 407(c)1 or at any time when such person has committed a material violation of section 301.2 or any regulation relating to either section 301 or 407(c), or any order under this act of which he has notice; or (ii) offers or sells a security in violation of sections 401, 403, 404 or otherwise by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the purchaser not knowing of the untruth	who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, less the amount of any income or distributions, in cash or in kind, received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, plus interest at the legal rate from the date of disposition. PA ST 70 P.S § 1-501

	or omission, and who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission, shall be liable to the person purchasing the security from him… PA ST 70 P.S § 1-501	
Rhode Island RI ST § 7-11-501 Offers, sales, and purchases	In connection with the offer to sell, sale, offer to purchase, or purchase of a security, a person may not, directly or indirectly: (1) Employ a device, scheme, or artifice to defraud; (2) Make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading; or (3) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit on a person. RI ST § 7-11-501	(A) Upon tender of the security, the purchaser may recover the consideration paid for the security and interest at the legal rate of this state from the date of payment, costs, and **reasonable attorney's fees as determined by the court**, less the amount of income received on the security. Tender requires only notice of willingness to exchange the security for the amount specified. If that purchaser no longer owns the security, the purchaser may recover damages. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser

		disposed of it, plus interest at the legal rate of this state from the date of disposition of the security, costs, and **reasonable attorney's fees as determined by the court.** RI ST § 7-11-605
South Carolina SC ST § 35-1-509 Civil liability	(b) A person is liable to the purchaser if the person sells a security in violation of Sections 35-1-301 or 35-1-501 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. (d) A person acting as a broker-dealer or agent that sells or buys a security in violation of Section 35-1-401(a), 35-1-402(a), or 35-1-506 is liable to the customer. (e) A person acting as an	(b)(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest from the date of the purchase, costs, and **reasonable attorneys' fees determined by the court**, upon the tender of the security, or for actual damages as provided in paragraph (3). (d) The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsections (b)(1) through (3), or, if a seller, for a remedy as specified in subsections (c)(1)

	investment adviser or investment adviser representative that provides investment advice regarding securities for compensation in violation of Section 35-1-403(a), 35-1-404(a), or 35-1-506 is liable to the client. SC ST § 35-1-509	through (3). (e) The client may maintain an action to recover the consideration paid for the advice, interest at the legal rate of interest from the date of payment, costs, and **reasonable attorneys' fees determined by the court**. SC ST § 35-1-509
South Dakota SD ST § 47-31B-509 Civil liability	(b) Liability of seller to purchaser. A person is liable to the purchaser if the person sells a security in violation of § 47-31B-301 or, by means of an untrue statement of a material fact or an omission to state a material fact. (f) Liability for investment advice. A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. SD ST § 47-31B-509	(b) (1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at Category D, § 54-3-16 from the date of the purchase, costs, and **reasonable attorneys' fees determined by the court**, upon the tender of the security, or for actual damages as provided in paragraph (3). (f)(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the

		fraudulent conduct, interest at Category D § 54-3-16 from the date of the fraudulent conduct, costs, and **reasonable attorneys' fees determined by the court**, less the amount of any income received as a result of the fraudulent conduct. SD ST § 47-31B-509
Tennessee TN ST § 48-2-121 Fraudulent acts or devices TN ST § 48-1-122 Civil Liabilities	(a) It is unlawful for any person, in connection with the offer, sale or purchase of any security in this state, directly or indirectly, to: (1) Employ any device, scheme, or artifice to defraud; (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. TN ST § 48-2-121	(a)(1)(B) shall be liable to the person purchasing the security from the seller to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, less the amount of any income received on the security, upon the tender of the security, or, if the purchaser no longer owns the security, the amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it and interest at the legal rate from the date of disposition. (f) In any such suit

		under this section, the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including **reasonable attorneys' fees, against either party litigant**. TN ST § 48-1-122
Texas TX CIV ST Art. 581-33 Civil Liability with Respect to Issuance or Sale of a Security	(2) Untruth or Omission. A person who offers or sells a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security. TX CIV ST Art. 581-33	D. Rescission and Damages. For this Section 33: (1) On rescission, a buyer shall recover (a) the consideration he paid for the security plus interest thereon at the legal rate from the date of payment by him, less (b) the amount of any income he received on the security, upon tender of the security (or a security of the same class and series). (3) In damages, a buyer shall recover (a) the consideration the buyer paid for the security plus interest thereon at the legal rate from the date of payment by the buyer, less (b) the greater of:

		(i) the value of the security at the time the buyer disposed of it plus the amount of any income the buyer received on the security; or (ii) the actual consideration received for the security at the time the buyer disposed of it plus the amount of any income the buyer received on the security. (6) On rescission or as a part of damages, a buyer or a seller shall also recover costs. (7) On rescission or as a part of damages**, a buyer or a seller may also recover reasonable attorney's fees if the court finds that the recovery would be equitable in the circumstances**. TX CIV ST Art. 581-33

Utah UT ST § 61-1-1 Fraud unlawful UT ST § 61-1-22 Sales and purchases in violation--Remedies--Limitation of actions	It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to: (1) employ any device, scheme, or artifice to defraud; (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. UT ST § 61-1-1	(1)(c) Damages are an amount calculated as follows: (i) subtract from the amount that would be recoverable upon a tender under Subsection (1)(b), excluding interest, the value of the security when the buyer disposed of the security; and (ii) add to the amount calculated under Subsection (1)(c)(i) interest at: (A) 12% per year: (I) beginning the day on which the security is purchased by the buyer; and (ii) ending on the date of disposition; and (B) after the period described in Subsection (1)(c)(ii)(A), 12% per year on the amount lost at disposition. (2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and **attorney fees**, less any amounts, all as specified in Subsection

		(1) upon a showing that: (a) the violation was reckless or intentional; or (b) the violation was of Subsection 61-1-1(2), was negligent, and is demonstrated by clear and convincing evidence that the violation involved an investment by a person over whom the violator exercised undie influence. UT ST § 61-1-22
Vermont VT ST T. 9 § 5509 Civil liability	(b) A person is liable to the purchaser if the person sells a security in violation of sections 5301, 5501, or 5502 of this chapter, the purchaser not knowing the untruth or omission or deceptive nature of the conduct and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission or deceptive nature of the conduct. (d) A person acting as a broker-dealer or agent that sells or buys a security in violation of subsection	(b) (1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest from the date of the purchase, costs, and **reasonable attorney's fees determined by the court**, upon the tender of the security, or for actual damages as provided in subdivision (3) of this subsection. (d) The customer, if a

	5401(a) or 5402(a) or section 5506 of this chapter is liable to the customer. (f) A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person or otherwise violates section 5502 of this chapter is liable to the other person. VT ST T. 9 § 5509	purchaser, may maintain an action for recovery of actual damages as specified in subdivisions (b)(1) through (3) of this section, or, if a seller, for a remedy as specified in subdivisions (c)(1) through (3) of this section. (f) (1) The person wronged may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at the legal rate of interest from the date of the fraudulent conduct, costs, and **reasonable attorney's fees determined by the court**, less the amount of any income received as a result of the fraudulent conduct. VT ST T. 9 § 5509
Virginia VA ST § 13.1-522 Civil liabilities	A. Any person who: (i) sells a security in violation of §§ 13.1-502, 13.1-504 A, 13.1-507 (i) or (ii), 13.1-510 (e) or (f), or (ii) sells a security by means of an untrue statement of a	(A) shall be liable to the person purchasing such security from him who may sue either at law or in equity to recover the consideration paid for

	material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security. B. Any person who (i) engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities in willful and material violation of § 13.1-503, subsection A of § 13.1-504, or of any rule or order under § 13.1-505.1, or (ii) receives, directly or indirectly, any	such security, together with interest thereon at the annual rate of six percent, costs, and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of such security, or for the substantial equivalent in damages if he no longer owns the security. (B) shall be liable to that person who may sue either at law or in equity to recover the consideration paid for such advice and any loss due to such advice, together with interest thereon at the annual rate of six percent from the date of payment of the consideration plus costs and **reasonable attorney's fees**, less the amount of any income received from such advice and any other economic advantage. VA ST § 13.1-522

	consideration from another person for advice as to the value of securities or their purchase or sale, whether through the issuance of analyses, reports or otherwise and employs any device, scheme, or artifice to defraud such other person or engages in any act, practice or course of business which operates or would operate as a fraud or deceit on such other person, shall be liable to that person. VA ST § 13.1-522	
Washington WA ST § 21.20.010 Unlawful offers, sales, purchases WA ST 21.20.430 Civil liabilities--Survival, limitation of actions--Waiver of chapter void--Scienter	It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) To employ any device, scheme, or artifice to defraud; (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstance under which they are made, not misleading; or (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or	(1) is liable to the person buying the security from him or her, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are

	deceit upon any person. WA ST § 21.20.010	the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition. WA ST 21.20.430
West Virginia WV ST § 32-4-410 Civil liabilities	Any person who: (a)(2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him WV ST § 32-4-410	(a)(2) may assert a claim in a civil action to recover the consideration paid for the security, together with interest at nine percent per year from the date of payment, costs and **reasonable attorneys' fees**, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at nine percent per year from the date of disposition. WV ST § 32-4-410

Wisconsin WI ST 551.509 Civil liability	(2) A person is liable to the purchaser if the person sells a security in violation of s. 551.301 or 551.501 and, as to s. 551.501(2), the purchaser did not know the untruth or omission and the seller cannot sustain the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. (4) person acting as a broker-dealer or agent that sells or buys a security in violation of s. 551.401(1), 551.402(1), or 551.506 is liable to the customer. (5) (5) Liability of unregistered investment adviser and investment adviser representative. A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of s. 551.403(1), 551.404(1), or 551.506 is liable to the client. (6) A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in	(2)(c) (a) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate under s. 138.04 from the date of the purchase, costs, and reasonable attorney fees determined by the court, upon the tender of the security, or for actual damages as provided in part (c). (2) (c) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest at the legal rate under s. 138.04 from the date of the purchase, costs, and **reasonable attorney fees determined by the court.** (4) The customer, if a purchaser, may maintain an action for recovery of actual damages as specified

	an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person is liable to the other person. WI ST 551.509	in sub. (2)(a) to (c), or, if a seller, for a remedy as specified in sub. (3)(a) to (c). (5) The client may maintain an action to recover the consideration paid for the advice, interest at the legal rate under s. 138.04 from the date of payment, costs, and reasonable attorney fees determined by the court. (6)(a) (a) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at the legal rate under s. 138.04 from the date of the fraudulent conduct, costs, and **reasonable attorney fees determined by the court**, less the amount of any income received as a result of the fraudulent conduct. WI ST 551.509

Wyoming WY ST § 17-4-509 Civil Liability	(b) A person is liable to the purchaser if the person sells a security in violation of W.S. 17-4-301 or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. (d) A person acting as a broker-dealer or agent that sells or buys a security in violation of W.S. 17-4-401(a), 17-4-402(a), or 17-4-506 is liable to the customer. (e) A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of W.S. 17-4-403(a), 17-4-404(a), or 17-4-506 is liable to the client. (f) A person that receives directly or indirectly any consideration for providing investment advice to	(b) (i) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at six percent (6%) per year from the date of the purchase, costs, and **reasonable attorneys' fees determined by the court**, upon the tender of the security, or for actual damages as provided in paragraph (iii) of this subsection; (b) (iii) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest at six percent (6%) per year from the date of the purchase, costs and reasonable attorneys' fees determined by the court. (d) The customer, if a purchaser, may maintain an action for recovery of actual damages as specified

	another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person, is liable to the other person. WY ST § 17-4-509	in paragraphs (b)(i) through (iii) of this section, or, if a seller, for a remedy as specified in paragraphs (c)(i) through (iii) of this section. (e) The client may maintain an action to recover the consideration paid for the advice, interest at the rate of six percent (6%) per year from the date of payment, costs, and **reasonable attorneys' fees determined by the court.** (f)(i) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at six percent (6%) per year from the date of the fraudulent conduct, costs, and **reasonable attorneys' fees determined by the court**, less the amount of any income received as a result of the fraudulent conduct; WY ST § 17-4-509

AN OVERVIEW OF BROKERCHECK AND THE CENTRAL REGISTRATION DEPOSITORY

Christine Lazaro[1] *and Albert Copeland*[2]

Securities brokers are governed by a unique regulatory framework, subject to both extensive state and federal statutory and regulatory regimes. The vast bulk of federal regulation and oversight of brokers and brokerage firms has been delegated to the Financial Industry Regulatory Authority ("FINRA"), a self-regulatory organization with the power to govern its members' conduct. FINRA operates under the oversight of the Securities and Exchange Commission (the "SEC"), a federal agency established by the federal securities laws.

FINRA was created on July 26, 2007 through the consolidation of the National Association of Securities Dealers ("NASD") and the member regulation, enforcement and arbitration operations of the New York Stock Exchange.[3] Because these two different self-regulatory organizations had different rulebooks, FINRA has been gradually consolidating their rules into a single, governing FINRA rulebook.[4]

FINRA has established rules governing the conduct of brokers and brokerage firms, as well as the disclosure of certain information. It also provides an arbitration forum to resolve customer disputes, disputes between broker-dealer firms, and disputes between brokers and their firms. Notably, nearly every brokerage account opening agreement contains a pre-dispute arbitration clause requiring customers to submit their disputes through FINRA's arbitration forum.

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3. For ease of reference, this article generally refers to the NASD as FINRA throughout unless the context requires otherwise.

4. This process has not yet been completed. Accordingly, FINRA maintains three rulebooks – FINRA Rules, NASD Rules and NYSE Rules. As NASD and NYSE Rules are consolidated, they are given FINRA Rule numbers and are then retired.

In contrast to actions filed in court, FINRA arbitrations are private proceedings. Because of this, there is limited amount of publicly available information about FINRA disputes. Pleadings and other documents and evidence filed in FINRA arbitrations are not public records. Thus, customers seeking information about a broker may not access the underlying documents filed in arbitration proceedings. This is why the FINRA mandated disclosures regarding complaints made by a broker's customers are crucial to the investing public. Without these disclosures, current and potential customers of a particular broker would not be able to determine whether, and how many, other customers have filed complaints against their broker. As such, public disclosures take on heightened importance.

This article will start with an overview of the Central Registration Depository (the "CRD"). It will then discuss FINRA's BrokerCheck® database and describe how the two databases work together. Next, it will provide an overview of a broker's BrokerCheck report and detail what information may be included, which can be quite useful to both current and prospective customers in vetting a broker. This information may also be useful to attorneys who are representing investors in connection with a complaint or arbitration claim.

I. THE DISCLOSURE SYSTEMS

A. The Central Registration Depository

Information about brokers comes from a national records database known as the CRD. FINRA and the North American Securities Administrators Association ("NASAA")[5] jointly developed and implemented the CRD database in 1981. It "consolidated a multiple paper-based state licensing and regulatory process into a single, nationwide computer system. . . Its computerized database contains the licensing and disciplinary histories on

5. "Organized in 1919, the North American Securities Administrators Association (NASAA) is the oldest international organization devoted to investor protection. NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico." NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, *About Us*, *available at* http://www.nasaa.org/about-us/ (last visited June 30, 2021).

more than 630,000 securities professionals and 3,800 securities firms"[6] and is used by brokerage firms, regulators, and self-regulatory organizations.[7] Today, FINRA operates the CRD system pursuant to policies developed jointly with NASAA.[8] FINRA has worked with NASAA, the SEC, brokerage firms and other members of the regulatory community to "establish policies and procedures reasonably designed to ensure that information submitted to and maintained in the CRD is accurate and complete."[9]

Much of the CRD's information comes from the registration forms filed on behalf of each FINRA registered broker, also known as an "associated person."[10] When a broker first becomes registered with FINRA, they must submit a Form U4, the Uniform Application for Securities Industry Registration or Transfer. Additionally, a Form U4 must be filed whenever a broker becomes registered with a new brokerage firm, also knows as a "member firm".[11] A new Form U4 is required whenever the broker changes employment and joins a different member firm. Brokers have an ongoing duty to amend and update the information contained within the Form U4 as changes occur.[12]

The Form U4 contains certain disclosure questions which require detailed answers. For example, question 14I is entitled "Customer Complaint/Arbitration/Civil Litigation Disclosure[,]" and requires the broker to answer a number of questions about customer complaints. Brokers must

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6. *See* NASAA, *Industry Resources*, *available at* http://www.nasaa.org/industry-resources/investment-advisers/crd-iard/ (last visited June 30, 2021).

7. *See* Order Approving a Proposed Rule Change Amending the Codes of Arbitration Procedure to Establish Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief, Exchange Act Release No. 58886, 94 SEC Docket 1445, at 2 n.8 (October 30, 2008).

8. *Id.* at 2.

9. *Id.*

10. This article will use the term broker throughout, rather than the more technical term, "associated person." Although brokers are associated persons, not all associated persons are brokers. This article focuses on the rules and practices affecting brokers. In practice, each firm where a broker is licensed will file the requisite forms on behalf of the broker. This is generally done through a registration department at the firm.

11. For simplicity, this article will use the term brokerage firm, rather than the more technical term, "member firm.".

12. *See* FINRA, *Form U4 Instructions*, *available at* http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015111.pdf.

disclose whether they have ever been named as a respondent in an investment-related, customer initiated arbitration or civil litigation or were the subject of such a complaint if the complaint (i) is still pending; (ii) resulted in an award or judgment against the broker; or (iii) was settled for $15,000 or more.[13] Brokers must also disclose any written customer complaints that allege sales practice violations and damages of greater than $5,000 that have been made within the prior 24 months, as well as any written or oral customer complaints that have settled for $15,000 or more.[14]

Question 14I requires detailed disclosure of investment-related, consumer-initiated arbitrations regardless of whether the broker has been named as a respondent in the proceeding. The disclosure must be made if there are any allegations within the body of the complaint that the broker was involved in sales practice violations, forgery, theft, misappropriation or conversion of funds or securities. The Form U4 also mandates disclosure of several other categories of information including criminal matters, regulatory actions, civil judicial matters, termination information, and financial issues.[15]

The Form U4 contains information provided by the broker; however, the form is filed on the broker's behalf by the brokerage firm.[16] Brokers may have the ability to collaborate with the firms in terms of the information submitted, but ultimately, the firm determines the final language and submits the form initially, as well as any updates.

Information obtained from the Form U4 appears within the CRD system. Certain information that has been disclosed on the Form U4 is then made available to the public through FINRA's BrokerCheck system.

B. The BrokerCheck System

Today, the public may access information about brokers and brokerage firms through FINRA's BrokerCheck system, an internet portal which

13. *See* FINRA, *Form U4*, *available at* https://www.finra.org/sites/default/files/form-u4.pdf. If the settlement occurred prior to May 18, 2009, it must be reported if it is for $10,000 or more.

14. *Id.* Here, brokers must also disclose settlements of $10,000 or more if the settlement occurred prior to May 18, 2009.

15. *See* FINRA, *Form U4*, question 14 generally.

16. See FINRA, *Form U4, Who Files a Form U4?, available at* https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-u4#u4-who.

provides the public with access to some of the information contained in the CRD database.[17]

Before BrokerCheck existed, FINRA provided information through the Public Disclosure Program. FINRA began the Public Disclosure Program in 1988 in response to written inquiries from the public about brokers' disciplinary histories.[18] FINRA established the Public Disclosure Program "to permit members of the public to have access to information that will help them to determine whether or not to conduct, or continue to conduct, business" with a broker or brokerage firm.[19] It was created about a year after Black Monday and the 1987 stock market crash, during a time when investors had lost confidence in the markets and were having problems resolving complaints against their brokers.[20] At the same time, NASAA established a toll-free number that investors could call to get information about their brokers.[21] Shortly thereafter, Congress passed legislation requiring FINRA to establish a toll-free number to respond to public inquiries about brokers and brokerage firms.[22] In response, FINRA amended its rules to provide for the dissemination

17. *See* FINRA, *BrokerCheck*, *available at* https://brokercheck.finra.org/.

18. *See* GAO Letter Report, NASD Telephone Hotline: Enhancements Could Help Investors Be Better Informed About Brokers' Disciplinary Records (Letter Report, 08/19/96, GAO/GGD-96-171), *available at* http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GGD-96-171/html/GAOREPORTS-GGD-96-171.htm. At the time, FINRA had amended Article V, Section I of the NASD Rules of Fair Practice, "Notice to Membership and Press of Suspensions, Expulsions, Revocations, and Monetary Sanctions." *See* Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Related to Notice to Membership and Press of Suspension, Expulsions, Revocations and Monetary Sanctions and Release of Certain Information Regarding Disciplinary History of Members and Their Associated Persons, Exchange Act Release No. 25604, 53 Fed. Reg. 14878 (April 20, 1988).

19. *See id.*

20. Nathaniel C. Nash, *Many Black Monday Cases Unheard*, N.Y. TIMES (October 10, 1988), *available at* http://www.nytimes.com/1988/10/10/business/many-black-monday-cases-unheard.html.

21. *See* NASAA Comment Letter in response to NASD Notice to Members 02-74, *available at* http://www.nasaa.org/wp-content/uploads/2011/07/87-NASDPublicInformationReview.37627-43960.pdf (January 6, 2003).

22. *See* NASD Notice to Members 02-74, *Public Information Review* (November 2002).

of information in response to both written requests and telephonic requests.[23] In 1993, FINRA began to include information about arbitration awards in the information it made available to the public.[24]

Federal legislation has since evolved which now requires FINRA to maintain both a toll-free number and a "readily accessible electronic or other process" to respond to inquiries about brokers.[25] In 1998, FINRA began to make certain information available on-line through its website [26] and BrokerCheck was created.[27] BrokerCheck disclosures are governed not only by federal legislation but also by FINRA Rule 8312, which requires FINRA to make information available about a broker's current registrations and exams passed, as well as summary information about arbitration awards, customer complaints and settled arbitrations.

C. Expungement of Information from the CRD and Brokercheck

Because BrokerCheck's public disclosures come directly from the CRD database, its utility may be diminished by anything which reduces or pollutes the information within that database. To address possibly inaccurate information which may appear within BrokerCheck, Congress authorized FINRA to adopt rules establishing a process for brokers to dispute the accuracy of information maintained in the CRD that is provided in response to public

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23. *See* Order Approving Proposed Rule Change Relating to Release of Certain Information Regarding Disciplinary History of Members and Their Associated Persons via Toll-Free Telephone Listing, Securities Exchange Act Release No. 30629, 51 SEC Docket 488 (April 23, 1992).

24. *See* Order Granting Accelerated Approval of Proposed Rule Change, Exchange Act Release No. 32568, 54 SEC Docket 957 (July 8, 1993).

25. *See* 15 USC §78o-3(i).

26. *See* Order Approving a Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Amended Interpretation of IM-8310-2 Concerning the Release of Additional Disciplinary Information, Exchange Act Release No. 39562, 66 SEC Docket 722 (January 20, 1998).

27. Initially, BrokerCheck was called the Public Disclosure Program. In 2003, FINRA renamed the program "NASD BrokerCheck." *See* Notice of Filing of Amendment Nos. 4 and 5 to the Proposed Rule Change Relating to the Release of Information Through NASD BrokerCheck, Exchange Act Release No. 54053, 88 SEC Docket 958 (June 27, 2006).

inquiries.[28] FINRA has established this process within Rule 8312(e), FINRA BrokerCheck Disclosure.

A broker may dispute the accuracy of information pursuant to Rule 8312(e) by providing written notice to FINRA identifying the inaccurate information and by explaining the reason the information is inaccurate. FINRA will then investigate the claim of inaccuracy and make a determination. If FINRA determines the information is inaccurate, it will modify or remove the information from the CRD, as appropriate.

In addition to disputing the accuracy of information provided by BrokerCheck through the administrative process, a broker may also seek to expunge customer dispute information[29] from the CRD system through a court action or arbitration proceeding.[30] Since the inception of the CRD system in 1981, FINRA has expunged customer dispute information from the CRD system when a court order has directed it to do so. For some time, it has also honored *arbitrator*-ordered expungement of customer dispute information from the CRD system. However, in January 1999, after consultation with NASAA, FINRA imposed a moratorium on arbitrator-ordered expungements[31] of customer dispute information because NASAA took the position that the CRD system contained state records and that state records could only be properly expunged with a court order.[32]

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28. *See* 15 USC §78o-3(i)(3).

29. "Customer Dispute Information" includes "customer complaints, arbitration claims, and court filings made by customers, and the arbitration awards or court judgments that may result from those claims or filings. This category of information contains allegations that a member or one or more of its associated persons has violated securities laws, regulations, or rules." Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. Relating to Proposed Rule 2130 Concerning the Expungement of Customer Dispute Information From the Central Registration Depository System, Exchange Act Release No. 47435, 79 SEC Docket 2123 (March 4, 2003).

30. This removes the record of the dispute from BrokerCheck as well because BrokerCheck gets its information from the CRD system.

31. *See* NASD Notice to Members 99-09, *NASD Regulation Imposes Moratorium On Arbitrator-Ordered Expungements of Information From The Central Registration Depository* (February 1999).

32. See NASAA Comment Letter in response to Request for Comments 01-65 Proposed Rules and Policies Relating to Expungement of Information From The Central Registration Depository (December 31, 2001), *available at* http://www.nasaa.org/wp-content/uploads/2011/07/95-Letter.37262-47637.pdf.

NASAA plays an important role in the administration of the CRD system. As discussed above, FINRA operates the CRD system pursuant to policies developed jointly with NASAA.[33] Moreover, NASAA and FINRA are both parties to the CRD Agreement, which states that "data on CRD Uniform Forms filed with the CRD shall be deemed to have been filed with each CRD State in which the applicant seeks to be licensed and with [FINRA] and *shall be the joint property of the applicant, [FINRA], and those CRD States*."[34] State laws generally do not permit information to be expunged once it has been filed on the CRD system without a court order explicitly directing the expungement.[35]

Since imposing the moratorium in 1999, FINRA has required a two-step process when a broker seeks to expunge customer dispute information through the arbitration process. First, the broker may request that the arbitrator direct or recommend expungement of the customer dispute information from the broker's CRD.[36] Then, the broker must confirm any arbitration award recommending expungement in a court of competent jurisdiction before FINRA will expunge the information from the CRD system.[37] After conducting a thorough review of its expungement procedures, in 2002 FINRA proposed adopting NASD Rule 2130 to govern the expungement of customer dispute information from the CRD system. In the proposed rule, FINRA sought to balance three competing interests:[38]

> (1) the interests of [FINRA], the states, and other regulators in retaining broad access to customer dispute information to fulfill their regulatory responsibilities and investor protection obligations; (2) the interests of the brokerage community and others in a fair process that recognizes their stake in protecting their reputations and permits expungement from the CRD system when appropriate; and (3) the interests of investors in having access to accurate and meaningful information about brokers with whom they conduct, or may conduct, business.

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33. *See* Exchange Act Release No. 47435, 79 SEC Docket 2123 (March 4, 2003).

34. Karsner v. Lothian, 532 F.3d 876, 885 n.9 (D.C. Cir. 2008) (emphasis in original).

35. *See* Exchange Act Release No. 47435, 79 SEC Docket 2123 (March 4, 2003).

36. Oftentimes in the arbitration award, the arbitrator "recommends expungement." Courts differ on whether this is a directive of expungement.

37. *Id*.

38. *See* Exchange Act Release No. 47435, 79 SEC Docket 2123, at 2 (March 4, 2003).

Foreseeing issues to come, FINRA stated that it was "cognizant of the importance of ensuring that the expungement policy does not have an overly broad chilling effect on the settlement process or inappropriately interfere with the arbitration process or arbitrators' authority to award appropriate remedies."[39]

The SEC approved NASD Rule 2130 in December 2003. The rule codified the requirement that an arbitration award directing the expungement of customer dispute information be confirmed by a court of competent jurisdiction. The rule further required that FINRA be named as a party to the confirmation proceeding unless it waived the requirement. Pursuant to the rule, a broker would not be required to name FINRA as a party if certain requirements were met:[40]

> (1) Upon request, [FINRA] may waive the obligation to name [FINRA] as a party if [FINRA] determines that the expungement relief is based on affirmative judicial or arbitral findings that:
>
> (A) the claim, allegation or information is factually impossible or clearly erroneous;
>
> (B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or
>
> (C) the claim, allegation, or information is false.
>
> (2) If the expungement relief is based on judicial or arbitral findings other than those described above, [FINRA], in its sole discretion and under extraordinary circumstances, also may waive the obligation to name [FINRA] as a party if it determines that:
>
> (A) the expungement relief and accompanying findings on which it is based are meritorious; and
>
> (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements.

This rule contemplates that FINRA may have a role in the broker's request to confirm an arbitration award that contains an expungement directive. Additionally, the rule takes into consideration that the state regulators (in the states where the broker was registered) would also be notified whenever a broker sought FINRA waiver under the rule, and that the state regulators would have an opportunity to petition the court to intervene at the confirmation

39. *Id*.

40. *See* NASD Rule 2130(b).

stage.[41] In 2009, NASD Rule 2130 was adopted as part of the Consolidated FINRA Rulebook as FINRA Rule 2080.[42]

Importantly, this Rule falls within the "Duties and Conflicts" section of the FINRA Rulebook but not within the "Code of Arbitration Procedure for Customer Disputes" section. Indeed, until 2008, the Code of Arbitration Procedure did not even address expungement of customer dispute information. As a result, arbitrators and parties in customer dispute cases operated without any guidelines or rules governing the arbitrators or their consideration of expungement requests. NASD Rule 2130 only governed the process of confirming an arbitration award containing an expungement directive.[43] Its existence did however at least validate that arbitrators could direct expungement and suggested that expungement might be appropriate in the circumstances covered by NASD Rule 2130(1).

To provide guidance to parties and arbitrators, in March 2008, FINRA filed a proposed rule change with the SEC to adopt FINRA Rule 12805 to establish procedures for arbitrators considering expungement requests.[44] The SEC approved the Rule on October 30, 2008.[45] Under Rule 12805, arbitrators must do the following before granting an expungement request:

> (a) Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This paragraph will apply to cases administered under Rule 12800 even if a customer did not request a hearing on the merits.[46]

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41. See Exchange Act Release No. 48933, 81 SEC Docket 2659 (Dec. 16, 2013).

42. *See* FINRA Reg. Notice 09-33, *SEC Approval and Effective Date for New Consolidated FINRA Rules* (June 2009).

43. As discussed above, confirmation of the arbitration award is a necessary step in having the information ultimately expunged from the CRD system.

44. *See* Order Approving a Proposed Rule Change Amending the Codes of Arbitration Procedure to Establish Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief, Exchange Act Release No. 58886, 94 SEC Docket 1445 (October 30, 2008).

45. *Id*.

46. Rule 12800 is the Simplified Arbitration Rule. Pursuant to Rule 12800, no hearing may be held unless the customer requests one. Rule 12805 modifies the rule to permit a hearing to be held for the limited purpose of determining the expungement issue.

(b) In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement.
(c) Indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case.
(d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.

In its discussion about the need for the rule proposal, FINRA commented that, in the case of settlements, it had expected arbitrators to review the terms and conditions of settlement, including the amount paid, before granting expungement.[47] Because arbitrators were not inquiring into the terms of settlement, FINRA adopted the rule to provide more guidance.[48] FINRA viewed this change as "part of its 'continuing effort to ensure that arbitrators evaluate fully each request for expungement.'"[49]

Yet, the new guidance in Rule 12805 did not cover all situations where a broker might legitimately seek to expunge a customer complaint from his or her record. Although FINRA Rule 12805 explains how *parties* to an arbitration may seek expungement, BrokerCheck also discloses customer dispute information even if the broker is not a party to the arbitration. For example, in certain cases a broker may be the subject of allegations of sales practice violations made in an arbitration claim but not named as a party to the arbitration. In such a case, the information about the arbitration claims is reportable on the broker's CRD record pursuant to questions 14I(4) and (5) of the Form U4 as discussed above.[50]

In cases where brokers have not been named in the arbitration, they may ask the firm to seek expungement on their behalf, or they may institute a separate action seeking expungement. Often when a broker files a separate action, they name their brokerage firm as the respondent, as they were the

47. *See id*., at 4.

48. *Id*.

49. *Id*., at 16.

50. *See* FINRA Reg. Notice 12-18, *FINRA Requests Comment on Proposed New In re Expungement Procedures for Persons Not Named in a Customer-Initiated Arbitration* (April 2012).

entity who made the disclosure. FINRA is presently considering adopting rules that further govern how a broker may seek expungement.

II. HOW TO USE BROKERCHECK TO RESEARCH INDIVIDUALS

As explained above, FINRA's BrokerCheck is a tool that helps investors research the professional backgrounds of brokers and brokerage firms, as well as investment adviser firms and advisers.[51] The tool may also be used by attorneys who are representing investors in connection with a complaint or arbitration claim. As mentioned above, there is a lot of information disclosed about brokers through BrokerCheck. The information contained in BrokerCheck is sourced from certain information reported on uniform registration forms to the CRD,[52] and the tool is accessible via the web, phone, mail and fax. [53] BrokerCheck's online tool, available at https://brokercheck.finra.org/ provides investors with the most interactive and informational experience, as detailed below.

A. Using the Search Tool

To research an individual broker[54] on BrokerCheck, enter information on one or more of the following search fields: (a) name or CRD#, (b) firm name

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51. "Investment adviser representative registration and disclosure information is now provided in BrokerCheck reports for registered brokers who are also current or former investment adviser representatives." FINRA, *BrokerCheck Release Notes*, *available at* https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck/release-notes.

52. *See* FINRA Reg. Notice 10-34, *SEC Approves Changes to Expand the Information Released Through BrokerCheck and Establish a Process to Dispute (or Update) Information Disclosed Through BrokerCheck* (July 2010).

53. FINRA, *BrokerCheck FAQ*, *available at* https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck/faq (Stating that a person may request a BrokerCheck Report by visiting www.finra.org/brokercheck, calling the toll-free Hotline at (800) 289-9999, faxing (240) 386-4750, or mailing P.O. Box 9495, Gaithersburg, MD 20898-9495).

54. This section details the BrokerCheck information for individuals who are registered within the last 10 years. For brokers whose registration ended more than 10 years ago, more limited disclosure information is available. *See* FINRA, *About*

and (c) city, state or zip. The firm name and city, state and zip search fields are optional, but may aid in locating the correct individual.[55] In response to a search request, BrokerCheck will display the searched broker or list of brokers reflecting the relevant search terms.[56] The default display provides the results in a list view, which shows summary information about each individual broker such as their name, CRD number, registration status, disclosures, and years of experience. Once the user locates their intended individual, click on the "More Details" button below their name to view the Individual Report on BrokerCheck.[57]

B. BrokerCheck's Individual Report

Upon accessing the Individual Report, viewers will notice various displays, icons, and explanations throughout the report. FINRA has worked to improve investor access to and use of BrokerCheck information.[58]

BrokerCheck, *available at* https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck.

55. Staff of the Office of Investor Education and Advocacy of the U.S. Securities and Exchange Commission, Study and Recommendations on Improved Investor Access to Registration Information About Investment Advisers and Broker-Dealers (January 2011), *available at* https://www.sec.gov/files/919bstudy.pdf. Searching by zip code is a "near-term" recommendation since the current system did not easily permit investors to locate and compare nearby financial services providers because they lack a function that would allow investors to search for a broker-dealer or investment adviser by ZIP code or other indicator of location. A search by ZIP code function might be helpful to investors who are seeking to hire a financial services provider by identifying those financial services providers who are located close enough to visit in person, or to compare an individual they have hired already with others nearby providing similar services.

56. FINRA provides a User Guide for using the search tool, which contains helpful tips, glossary and FAQs, and other information to assist investors. In the User Guide, consult the Search Help tab, where you can view search tips for using BrokerCheck's tool. *See, e.g.*, FINRA, *BrokerCheck Search Help*, available at https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck/search-help.

57. *See* FINRA, *Ask and Check*, *available at* https://www.finra.org/investors/protect-your-money/ask-and-check#tips.

58. *See*, *e.g.*, FINRA Reg. Notice 12-10, *FINRA Requests Comment on Ways to Facilitate and Increase Investor Use of BrokerCheck Information* (Feb. 2012). *See*

FINRA provides a number of different icons and hyperlinks within the BrokerCheck summary and detailed reports. FINRA also provides additional information, including that "State regulators are governed by their public records laws (not FINRA Rule 8312), and may provide information not in BrokerCheck, including information no longer required to be reported or updated on uniform registration forms due, for example, to its age or final disposition. You may contact your state regulator to request this additional information."

a. Report Summary

The opening section of an individual's BrokerCheck is the Report Summary. FINRA describes this section as a "brief overview of the broker and his or her credentials" and professional background and conduct. [59] Specifically, the Report Summary includes a recap of a broker's qualifications, passed examinations, registration history and disclosure events. As the name describes, this introductory section is simply an overview of the more comprehensive information described in other sections and, most importantly, on the broker's "Detailed Report."

b. Broker Qualifications

The Broker Qualifications section includes a listing of a broker's current registrations, licenses, industry exams they have passed, and professional designations.[60] The current registrations section provides the SROs and U.S. states/territories the broker is presently registered and licensed with, the category of each license, and the date on which it became effective. Also, this section provides the address of each branch of the brokerage firms where the broker is currently employed.

The industry exam subsection of the Broker Qualifications section includes all securities industry exams that the broker has passed. Before working as a securities professional, individuals must generally pass

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also SEC, *Study and Recommendations on Improved Investor Access to Registration Information About Investment Advisers and Broker-Dealers* (Jan. 2011), *available at* https://www.sec.gov/files/919bstudy.pdf.

59. FINRA, *About BrokerCheck*, *supra* note 54.

60. *Id.*

qualifying securities examinations administered by FINRA to demonstrate competence in a particular securities activity.[61] The Broker Qualification section will display all the passed exams, which pertain to the categories of Registered Representative, Principal/Supervisory and State Securities Law.[62] FINRA does not make available, however, information relating to scoring or failed examinations.[63]

If a broker has a professional designation, the Broker Qualifications section will detail that information. Professional designations are generally administered by an issuing organization that governs the requisite criteria to earn the designation (*e.g.* Chartered Financial Analyst designation set by Certified Financial Analyst Institute). However, users of BrokerCheck should not entirely rely on the professional designation listing on an individual's BrokerCheck. Though FINRA rules regulate how brokers communicate their credentials,[64] it appears to disclaim responsibility for verifying the accuracy or completeness of professional designation information.[65] As such, individuals

61. Under limited circumstances, FINRA can grant waiver or exemptions for qualification exams. *See* FINRA, *Qualification Exam Waivers and Exemptions*, *available at* https://www.finra.org/registration-exams-ce/qualification-exams/exam-waivers-and-exemptions.

62. For a list of Registered Representative exams, *see* FINRA, *Permitted Activities of Registered* Representatives, *available at* https://www.finra.org/registration-exams-ce/qualification-exams/permitted-activities-registered-representatives. For a list of Principal/Supervisory exams, *see* FINRA, *Permitted Activities of Registered Principals*, *available at* https://www.finra.org/registration-exams-ce/qualification-exams/permitted-activities.

63. *See* FINRA Rule 8312(b)(2)(E).

64. *See* FINRA Rule 2210; *see also* FINRA, *Professional Designations Rules and Resources*, *available at* https://www.finra.org/investors/professional-designations/pd-rules-and-resources.

65. *See* FINRA, *Professional Designations Disclaimer, Submissions and Updates*, *available at* https://www.finra.org/investors/professional-designations/pd-disclaimer-and-submissions.

should not only use both FINRA's tools[66] and resources[67] to investigate a broker's professional designation appearing on a BrokerCheck, but also confirm the designation with the appropriate issuing organization. For more information for how investors professional designations, consult the SEC's Investor Bulletins and FINRA's Investor Insights on the topic.[68]

c. Registration and Employment History

Next, FINRA's BrokerCheck Report provides registration and employment history information. For the registration history, FINRA provides a list of registered securities firms where the broker is currently and/or was previously registered, including the start and end dates, firm name and its corresponding CRD number, and branch location. On the web, BrokerCheck graphically displays an individual's registration history through an interactive vertical timeline.[69] Registrations with a brokerage firm or investment advisor are marked by a circular "B" or "IA" icon, respectively, next to the relevant years on the timeline. For each registration, the entry will show the registering firm's name, CRD #, and time period next to the year.

Moreover, the employment history reports an individual's occupational experience both in and outside of the securities industry. FINRA obtains this

66. *See*, *e.g.*, FINRA, *Professional Designations*, *available at* https://www.finra.org/investors/professional-designations (providing a tool to both interpret the letter combinations following a financial professional's name and learn more about the issuing organization.).

67. *See*, *e.g.*, FINRA, *Professional Designations Rules and Resources*, *supra* note 61 (providing rules, regulations, and hyperlinks to SEC and FINRA resources regarding understanding professional designations).

68. *See* SEC, *Investor Bulletin: Financial Professionals' Use of Professional Honors – Awards, Rankings, and Designations* (Sept. 14, 2017), *available at* https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_professionalhonors; SEC & NASAA, *Making Sense of Financial Professional titles* (Sept. 2013), *available at* https://www.sec.gov/files/ib_making_sense.pdf; and FINRA, *Choosing an Investment Professional; 3 Things to Know About Financial Designations* (Oct. 10, 2017), *available at* https://www.finra.org/investors/insights/financial-designations.

69. FINRA implemented this feature on BrokerCheck in 2013 in an effort to allow "investors to more quickly access and more intuitively understand the professional background of investment professionals." FINRA, *FINRA Releases Enhanced Version of BrokerCheck* (Nov. 12, 2013), *available at* https://www.finra.org/media-center/news-releases/2013/finra-releases-enhanced-version-brokercheck.

information from the broker on the Form U4.[70] The phrase "employment history" for purposes of BrokerCheck includes not only a broker's full-time work, but also part-time work, self-employment, military service, unemployment, and full-time education.[71]

However, the employment information on BrokerCheck may not always be accurate. Since brokers are only required to provide employment information while registered with FINRA or a national securities exchange, employment history for formerly brokers may not be up to date.[72]

d. Disclosure Section

Individuals registered to sell securities or render investment advice must disclose information regarding customer disputes, disciplinary events, and certain criminal and financial matters.[73] FINRA publicizes this information through the Disclosure Section of BrokerCheck. Below is a description of the types of disclosures contained in this section.

i. Customer Disputes

Customer dispute information on BrokerCheck comes from a broker's CRD record. Specifically, the source information comes from Forms U4 and U5 relating to complaints, arbitrations, and civil litigations.[74] A broker need not be named as a Respondent to an arbitration for a customer complaint to appear on an individual's BrokerCheck report.[75]

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70. *See* FINRA, *About BrokerCheck*, *supra* note 54.

71. *Id.*

72. A broker's detailed report contains the following statement: "Please note that the broker is required to provide this information only while registered with FINRA or a national securities exchange and the information is not updated via Form U4 after the broker ceases to be registered. Therefore, an employment end date of "Present" may not reflect the broker's current employment status.".

73. *See* FINRA, *About BrokerCheck*, *supra* note 54.

74. *See* FINRA, *Form U4* at Section 14I, and FINRA, *Form U5* at Section 7D.

75. Beginning in May 2009, FINRA expanded its rules to require CRD reporting of customer complaints even if the financial advisor is not named as a party to the arbitration. *See* FINRA Reg. Notice 09-23, *SEC Approval of Proposed Changes to*

There are several components to a customer dispute disclosure on BrokerCheck. Those components include a narrative description of the customer's allegation, date of allegation, status (*e.g.* pending, settled, closed, withdrawn), and, if applicable, the damage amount requested and settlement amount.

Customer dispute disclosures might also contain Broker Comments.[76] The Broker Comment field results from FINRA's Broker Comment Process, which permits eligible individuals to provide an update or additional context to information that is disclosed on their Individual Report in BrokerCheck.[77] As noted above, the brokerage firm files the Form U4 on behalf of the broker. However, both current and formerly registered brokers can provide Broker Comments.[78] Currently registered brokers provide their comments to their firm that is filing the Form U4 on their behalf.[79] Formerly registered brokers may submit their comments directly to FINRA.[80] However, FINRA maintains discretion of whether to accept or reject Broker Comments, and only those Broker Comments that meet certain eligibility requirements will be posted to an Individual Report on BrokerCheck, which generally occurs 30 business days after the receipt of a sufficient submission.[81] Once posted, the Broker Comment will remain displayed as long as the individual's BrokerCheck report is available to the public.[82]

If a public customer is awarded damages in a FINRA arbitration, information relating to that award is summarized in the disclosure section of

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Forms U4 and U5 and FINRA Rule 8312 (FINRA BrokerCheck Disclosure) (May 2009).

76. Under FINRA Rule 8312(b)(2)(D), a broker may provide a comment to FINRA about a customer complaint.

77. *See* FINRA, *Guidelines for Broker Comments on BrokerCheck*, *available at* https://www.finra.org/registration-exams-ce/individuals/guidelines-broker-comments-brokercheck.

78. *See*, *e.g.*, FINRA, *Broker Comment Request Form*, *available at* https://www.finra.org/sites/default/files/2020-04/Broker-Comment-Request-Form.pdf.

79. *Id.*

80. *Id.*

81. *See* FINRA, *Guidelines for Broker Comments on BrokerCheck*, *supra* note 77.

82. *Id.*

BrokerCheck.[83] BrokerCheck will display several details regarding a final arbitration award, including the case or docket number, allegation summary, requested damages, disposition date, status and final outcome. In alignment with FINRA's mission to provide more access and education to investors through BrokerCheck, the disclosure section includes a hyperlinked arbitration case or docket number in the report, which will take the user to FINRA Arbitration Awards Online.[84]

ii. Regulatory Events

BrokerCheck's disclosure of regulatory actions is based on what has been reported to the CRD via a uniform registration form.[85] FINRA Rule 4530(a) requires firms to promptly report specified events like regulatory events.

The extent of regulatory event information contained in BrokerCheck will slightly vary depending on the status of the broker. For brokers currently associated with a brokerage firm or a broker who was associated with a brokerage firm within the preceding ten years, any regulatory action information reported on the most recently filed registration forms will appear on the individual BrokerCheck. This information is sourced from Form U4 and U5, and includes details such as the reporting source, sanctions, initiation date, docket or case number, employing firm when activity occurred which led to the regulatory event, allegations, current status, resolution, resolution date, and sanction information (*e.g.,* monetary sanction information, regulator statement, *etc.*).[86]

However, the regulatory action disclosures on BrokerCheck for formerly registered brokers who no longer work in the securities industry in a registered capacity contain slightly different information. Under FINRA Rule 8312(c)(1), for a broker who was formerly associated with a brokerage firm, but who has not been associated with a brokerage firm within the preceding ten years, FINRA releases information on that category of brokers who were

83. *See* FINRA Rule 8312(b)(2)(C).

84. *See* FINRA, *BrokerCheck FAQ*, *supra* note 53.

85. *See* FINRA Reg. Notice 09-66, *SEC Approves Changes to FINRA's BrokerCheck Disclosure Rule to Retain and Make Publicly Available Information About Final Regulatory Actions Against Former Brokers* at fn 3 (Nov. 2009).

86. See, e.g., FINRA, *Form U4*, pp. 34-39; and FINRA, *Form U5*, at pp. 18-23.

subject of a "final regulatory action."[87] The phrase "final regulatory action" means "any final action—including any action that is on appeal—by the SEC, Commodity Futures Trading Commission, a federal banking agency, the National Credit Union Administration, another federal regulatory agency, a state regulatory agency, a foreign financial regulatory authority or a self-regulatory organization."[88]

In other words, the primary difference in BrokerCheck disclosures between the two groups – that is, between formerly registered brokers who have not been associated with a brokerage firm in past ten years, and brokers associated with a brokerage firm within the last ten years – pertains to (1) regulatory complaints or proceedings and (2) investigations.

If a broker who has been associated with a brokerage firm in the past ten years has been notified, in writing, that they are the subject of any (1) regulatory complaint or proceeding[89] that could result in affirmative responses to any disclosure questions posed in any part of section 14C (SEC and CFTC), section 14D (Other federal regulatory agencies, state regulatory agencies or foreign financial regulatory authorities), or section 14E (SROs), then the corresponding Disclosure Reporting Page responses on Form U4 will be included on the BrokerCheck report.[90] Moreover, if such person has received written notice that they are subject of any investigation[91] that could result in affirmative responses to any disclosure questions posed in any part of the criminal disclosure questions in Sections 14A and 14B, as well as Section 14C – E, the Disclosure Reporting Page responses are included.[92]

Moreover, regulatory actions involving formerly registered brokers might also appear on BrokerCheck. Specifically, regulatory actions involving a formerly registered broker that were initiated after that person has left the firm,

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87. *See* FINRA Reg. Notice 09-66, *supra* note 85.

88. As described in FINRA Regulatory Notice 09-66 and accompanying footnotes, Sections 14C, 14D or 14E of Form U4 are viewed as "final regulatory actions," as well as actions detailed in Question 7D on Form U5 that have a status of "final" or "on appeal." *See* FINRA Reg. Notice 09-66, *supra* note 85 at footnotes 4-5.

89. *See* FINRA, *Form U4 Explanation of Terms*, *available at* https://www.finra.org/sites/default/files/AppSupportDoc/p468051.pdf (includes definition of "proceeding").

90. *See* FINRA, *Form U4* at 12-13.

91. *See* FINRA, *Form U4 Explanation of Terms*, *supra* note 89 (includes definition of "investigations").

92. *See* FINRA, *Form U4* at 12-13.

but that were initiated based on events that occurred while the individual was employed by or associated with the firm, should appear on BrokerCheck, if the firm has actual notice of an action that is required to be reported on Form U5.[93]

However, not every regulatory action appears on an individual's BrokerCheck. For example, FINRA will not release information reported on Registration Forms relating to regulatory investigations or proceedings if the reported regulatory investigation or proceeding was vacated or withdrawn by the instituting authority.[94] Moreover, incorrectly reported information by a brokerage firm will likewise not be displayed on BrokerCheck.[95]

iii. Criminal Events

Section 14A and 14B of Form U4 contains questions brokers must answer and amend regarding criminal disclosure. A criminal event is only disclosed if a law enforcement agency files formal charges against a broker. For the parameters of what constitutes disclosure of criminal events, FINRA Form U4's Explanation of Terms and Form U4 and U5 Interpretative Guidance defines "charged" as being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge)."[96]

Criminal disclosures involving pardons and, in some cases, set-aside convictions, appear on BrokerCheck. If a broker is convicted of a crime and is subsequently pardoned, firms are required to continue reporting the event on Form U4, and therefore, it will be available to view on BrokerCheck. Convictions that are set aside, however, may not be on a BrokerCheck.[97]

Moreover, criminal actions of formerly registered brokers might also appear on BrokerCheck. Specifically, criminal actions involving a formerly registered broker that were initiated after that person has left the firm, but that

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93. *See* FINRA, *Form U4 and U5 Interpretive Questions and Answers* at p. 12-13, *available at* https://www.finra.org/sites/default/files/Interpretive-Guidance-final-03.05.15.pdf.

94. *See* FINRA Rule 8312(g)(2); *see also* FINRA, *Form U4 and U5 Interpretive Questions and Answers*, *supra* note 93 at p. 2.

95. *See* FINRA Rule 8312(g)(6)(A).

96. *See* FINRA, *Form U4 Explanation of Terms*, *supra* note 89, *see also* FINRA, *Form U4 and U5 Interpretive Questions and Answers*, *supra* note 93.

97. *See* FINRA, *Form U4 and U5 Interpretive Questions and Answers*, *supra* note 93 at p. 1.

were initiated based on events that occurred while the individual was employed by or associated with the firm, should appear on BrokerCheck, if the firm has actual notice of an action that is required to be reported on Form U5.[98]

However, similar to other displays of disclosures in BrokerCheck, the online summary page for an individual's BrokerCheck does not contain all information on a criminal event, and one must open the "Detailed Report" to discover additional information. For example, the disclosure online will show the person's charges and disposition, but other details like the court location, docket or case #, plea and sentencing, for example, can only be viewed in the Detailed Report.

iv. Civil Events

Section 14H of Form U4 contains questions related to civil judicial disclosures. A broker must disclose if any domestic or foreign court (a) enjoined them in connection with any investment-related activity; (b) found that they were involved in a violation of any investment-related statute(s) or regulation(s); or (c) dismissed, pursuant to a settlement agreement, an investment-related civil action brought against them by a state or foreign financial regulatory authority. Additionally, the broker must disclose if any such action is currently pending.

v. Termination Events

Section 14J of the Form U4 requires that a broker disclose whether they have ever voluntarily resigned, been discharged or permitted to resign after allegations were made that accused the broker of: (a) violating investment-related statutes, regulations, rules, or industry standards of conduct; (b) fraud or the wrongful taking of property; or (c) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct.

Brokerage firms file a Form U5 to terminate a broker's registration with FINRA, other self-regulatory organizations, states and/or jurisdictions. Among other disclosures, Form U5 requires firms to report the reason for an individual's termination. Specifically, Form U5 includes five checkboxes for an individual's termination type: (1) discharged, (2) other, (3) permitted to

98. *See id.* at p. 12-13.

resign, (4) deceased and (5) voluntary.[99] If a firm selects discharged, other or permitted to resign, the firm is required to write an explanation.[100]

However, explanations for these type of terminations do not appear on an individual's BrokerCheck. Under FINRA Rule 8312(g)(4), BrokerCheck does not include the "Reason for Termination" information reported on Section 3 of the Form U5. Instead, BrokerCheck only shows termination type, termination date, reporting source, allegation, and product type. An individual's BrokerCheck could technically include a "Comment" field, but the field is optional per the Form U5 Disclosure Reporting Page.[101] As such, the authors recommend individuals obtain copies of a broker's Form U5 to view explanations for terminations.

vi. Financial Events

Section 14K of the Form U4 requires a broker to disclose certain financial events if they occurred within the past ten years. For example, brokers must disclose whether they or any company they controlled has ever made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition. Brokers must also disclose whether any broker-dealer over which they had control was subject to an involuntary bankruptcy petition or SIPC proceeding. Brokers must also disclose if a bonding company ever denied, paid out, or revoked a bond, regardless of when it happened. Last, brokers must disclose any unsatisfied judgments or liens.

C. What's Not Included in BrokerCheck

Although BrokerCheck is fairly comprehensive, certain information is not included on the report. FINRA Rule 8312(g)(3) states that BrokerCheck will not display "Internal Review Disclosure" information reported on Section 7 of the Form U5. Additionally, BrokerCheck will not include information that has been determined by regulators, through amendments to the uniform Registration Forms, to be no longer relevant to securities registration or

99. *See* FINRA, *Form U5* at p .2.

100. *Id.*

101. *See* FINRA, *Form U5* at p. 24.

licensure, regardless of the disposition of the event or the date the event occurred.[102]

Additionally, FINRA will not include information that a broker has not reported or is not required to report. This may include "(1) non-investment-related civil litigation, including, for example, civil protective orders; (2) customer complaints that do not allege sales practice violations, fraud or theft; (3) certain personal or confidential information (for example, Social Security Numbers, residential addresses); or (4) arrests that did not result in a charge or conviction, and misdemeanor charges or convictions that are not investment-related or do not involve theft or a "breach of trust," including, for example, disorderly conduct or assault."[103] FINRA will also remove previously reported information that is no longer required to be reported (such as judgments or liens that have been satisfied).[104]

FINRA recommends that investors do an Internet search to obtain additional information about "civil litigation not involving investments, civil protective orders, criminal matters unless they are felonies, or misdemeanors that are investment-related or involve theft or a 'breach of trust.'"[105]

Finally, "FINRA reserves the right to exclude confidential customer information, offensive and potentially defamatory language or information that raises significant identity theft or privacy concerns that are not outweighed by investor protection concerns."[106] FINRA does not explain how it determines if information meets these criteria.

D. State CRDs

In addition to reviewing information about a broker on FINRA's BrokerCheck, the public may also request information directly from state regulators. In fact, FINRA tells investors to check with these regulators.[107] Certain states will make all information within a broker's CRD, with the exception of personal data, for any brokers currently or previously registered with the state available to the public upon request. For example, Florida's

102. See FINRA Rule 8312(g) (6)(B).

103. See FINRA, BrokerCheck FAQ, supra note 53.

104. See id.

105. FINRA, *BrokerCheck*, *supra* note 17.

106. *Id.*

107. *See*, *e.g.*, FINRA, *Ask and Check*, *supra* note 57.

Office of Financial Regulation, Division of Securities will make available current and archived information from a broker's CRD for brokers who have been registered with Florida. Significantly, it does exclude any information which has been expunged from a broker's record. To determine whether a state makes any information available beyond BrokerCheck, one should contact the state securities regulator.

CONCLUSION

There is a lot of important information available about brokers through the BrokerCheck summary and detailed reports and through their CRDs, available in many states. This information can prove valuable to investors when initially vetting a broker. Additionally, the information may be valuable to attorneys who are advocating for an investor in a complaint or arbitration. The information on BrokerCheck may be helpful to determine whether a firm had prior notice of a broker's propensity for misconduct, and it may also be relevant in assessing the brokerage firm's system of supervision. Without these public disclosures, the investing public, as well as attorneys advocating for the investing public, would be kept in the dark.

RECENT ARBITRATION AWARDS

Sara Hanley, Esq. and Melanie Cherdack, Esq.

This issue's featured arbitration awards include cases in which FINRA arbitration panels granted noteworthy relief, including an award imposing liability on a clearing firm for the notorious Stanford Financial Ponzi scheme. Several of this issue's awards involve cases brought by pro se Claimants. Those cases resulted in disparate results, with one award denying the pro se Claimant's claims, while imposing damages against the Claimant on the Respondent's counterclaim. In two other pro se cases brought on operational grounds, the Claimants were successful, perhaps because proof of such claims was easily determined by the panel through examination of the documents. Also included are two awards where the estates of a deceased account holder were awarded damages. One involves the Respondent's mismanagement of an insurance product and the other asserted claims of an imposter stealing from the decedent's account. These cases dispel the misconception that arbitrators are reluctant to award damages to an account holder's heirs.

Joyce E. Cagle IRA, Joyce E. Cagle, Isom R. Cagle, J. Russell Mothershed, Susan Kay Lankford IRA, Susan Kay Lankford, Craig D. Nelson IRA, Craig D. Nelson, Cynthia Clark Nelson, Dudley Devore IRA, Dudley Devore, James T. Dorris IRA, James T. Dorris, Huey P. Decoto IRA, Huey P. Decoto, Hazel F. Decoto, Frankie Wayne Bono IRA, Frankie Wayne Bono, Marilyn Ainsworth, as Personal Representative of the Estate of Lawrence Ainsworth, Jeffrey Roe, Kellie Roe, Michael A. Teague, Steven Brauser, as Personal Representative of the Estate of Gerald Brauser, Richard Griswold IRA, Richard Griswold, Thomas Guennewig IRA, Thomas Guennewig and Victoria Guennewig, Charles Kenneth Babin, Millicent H. Babin, Lennard J. Belaire, Barbara A. Belaire, Lennard J. Belaire IRA, Bobbie L. Belaire, Edna T. Belaire, Walter J. Eldredge IRA, David Guidry, Ann Guidry, Kenneth Musick, Celia Musick, Kenneth Musick IRA, Dean M. Simon, Betty S. Simon, Angie Villemarette, George M. Glantz Revocable Trust, George M. Glantz IRA, Charlie Hayek, Kathleen Gilmartin, David E. Herndon IRA, David Herndon, Joann D. Herndon, Jimmie E. Bridges, Brenda Bridges, Steven M. Graham, and Charles A. Pope (Claimants) vs. Pershing LLC (Respondents)
Case No. 20-00922 and 20-03862 (consolidated)
Dallas, Texas

Hearing Dates: May 31, June 1-5, 2021
Award Date: July 8, 2021
Counsel:
Counsel for Claimants:
Donald L. Ferguson, Esq., Portland, Maine, Charles E. Scarlett, Esq., Boca Raton, Florida, and Nicole D. Cottone, Esq., Houston, Texas.
Counsel for Respondent:
Jeffrey J. Chapman, Esq., McGuireWoods LLP, New York, New York and Thomas M. Farrell, McGuireWoods LLP, Houston, Texas.
Arbitration Panel:
Eric Ross Cromartie, Presiding Chairperson, Synthia L. Taylor, Public Arbitrator, Anisha Kinra, Public Arbitrator
Investments at Issue:
The causes of action related to Claimants' allegations that Respondent, acting as custodian and clearing firm for Stanford Group Company ("SGC"), gave material assistance to a Ponzi scheme, involving CDs issued by Stanford International Bank, Ltd. ("SIBL") and recommended by SGC financial advisors. Claimants further alleged that despite having concerns about the CDs and SGC, Respondent continued to provide assistance.
Claimants' Claims:
Causes of Action in Statement of Claim:
(1) Aiding and abetting common law fraud;
(2) Aiding and abetting breach of fiduciary duty;
(3) Negligence (gross negligence);
(4) Breach of contract;
(5) Violation of FINRA Conduct Rule 3310;
(6) Violation of FINRA Conduct Rule 2120;
(7) Violation of NASD Conduct Rule 2110 (now FINRA Rule 2010);
(8) Violation of NASD Conduct Rule 3110;
(9) Civil conspiracy to defraud;
(10) Participation in common law fraud;
(11) Participation in the breach of fiduciary duty by SGC
Relief Requested:
(1) Full rescission of the CDs issued by SIBL that were purchased by Subsequent Claimants and an award of approximately $4,620,000 in compensatory damages.
(2) Punitive damages;
(3) Pre-judgment and post-judgment interest, at the legal rate, for Claimants' loss of use of capital, as permitted by law;

(4) All costs and fees incurred in this action, including all forum fees, expert witness fees, and any additional costs/fees incurred by counsel; and
(5) Such further relief as the Arbitrators deem just and appropriate.
(6) In the First Amended Statement of Claim, First Amended Claimants reasserted the previous relief request but requested $5,320,000.00 in compensatory damages.
(7) In the Second Amended Statement of Claim, Second Amended Claimants reasserted the previous relief requested.
(8) In the Third Amended Statement of Claim, Third Amended Claimants reasserted the previous relief request but requested approximately $7,070,000.00 in compensatory damages.
(9) In the Corrected Statement of Claim, Corrected Claimants reasserted the previous relief requested, but requested approximately $5,320,000.00 in compensatory damages.
(10) Subsequent Claimants requested full rescission of the CDs issued by SIBL that were purchased by Subsequent Claimants and an award of approximately $4,174,975.00 in compensatory damages;
(11) Punitive damages;
(12) Pre-judgment and post-judgment interest, at the legal rate, for Claimants' loss of use of capital, as permitted by law;
(13) All costs and fees incurred in this action, including all forum fees, expert witness fees, and any additional costs/fees incurred by counsel; and
(14) Such further relief as the Arbitrators deem just and appropriate.

Relief Requested Post Hearing:

(1) At the hearing, Third Amended Claimants requested $10,585,195.08 in damages and $6,239,360.32 in interest, for a total award of $16,824,585.40.
(2) After the hearing, Corrected Claimants submitted a Stipulated Damages request of $10,563,324.73.

Award:

(1) Respondent is liable for and shall pay to Charles A. Pope the sum of $436,000.00 in compensatory damages.
(2) Respondent is liable for and shall pay to Dudley Devore IRA the sum of $124,593.00 in compensatory damages.
(3) Respondent is liable for and shall pay to Joyce E. Cagle the sum of $87,200.00 in compensatory damages.
(4) Respondent is liable for and shall pay to Corrected Claimants $750.00 in costs as reimbursement for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services.

(5) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys' fees, are denied.

Analysis:

This award is noteworthy because it involves clearing firm liability for the notorious Stanford Financial CD Ponzi scheme. The Panel provided an explained decision finding that based on all the evidence and testimony presented, by the beginning of 2008, Respondent had the requisite level of knowledge as to SGC's wrongful conduct in connection with the CD scheme, that it knew or should have known that it was providing meaningful/substantial assistance to that wrongful scheme by remaining the clearing firm for SGC in the United States and, more particularly, by facilitating wire transfers for the purpose of CDs issued by SIBL on behalf of Charles A. Pope, Dudley Devore IRA and Joyce E. Cagle during 2008. This rare explained decision provides a meaningful analysis of clearing firm liability.

Rick and Jennea Augsbury v. Gregory W. Rachele
Case No. 20-01499
Dallas, Texas
Hearing Dates: July 9, 2021
Award Date: July 21, 2021
Counsel:
Counsel for Claimants:
Barrett T. Robin, Esq. Hamilton Wingo, LLP Dallas Texas
Counsel for Respondent:
Gregory W. Rachele appeared pro se.
Arbitration Panel:
Robert L. Yeager, III, Presiding Chairperson, Joseph A. Vicario, Jr., Public Arbitrator, Albert Joseph Roberts, Public Arbitrator
Investments at Issue:
The causes of action relate to Claimants' allegation that Respondent, acting with discretionary trading authority, implemented a strategy of buying and holding substantial positions in leveraged and inverse exchange traded funds.
Claimants' Claims:
Causes of Action in Statement of Claim:
(1) Breach of fiduciary duty;
(2) Breach of contract;
(3) Common law fraud;
(4) Violation of Texas Securities Act § 33-2 et seq.;

(5) Violation of the Securities Exchange Act of 1934 § 10(b);
(6) Violation of the Texas Deceptive Trade Practices Act § 17.50 et seq.;
(7) Gross negligence.

Relief Requested:

(1) Unspecified amount in actual damages;
(2) Interest at the legal rate accruing from the date of the payment of consideration;
(3) Economic damages and/or damages for mental anguish;
(4) Treble damages;
(5) Attorneys' fees and expenses under Tex. Civil Prac. & Rem. Code § 33-1 or other applicable law.

Relief Requested Post Hearing:

(1) Actual damages in the amount of $689,288.82;
(2) Lost profits in the amount of $1,377,115.74;
(3) Recovery of account management fees in the amount of $103,003.78;
(4) Attorneys' fees in the amount of $15,000;
(5) FINRA filing fees and hearing costs.

Award:

(1) Respondent is liable for and shall pay to Claimants the sum of $792,292.60 in compensatory damages, including reimbursement of account management fees.
(2) Respondent is liable for and shall pay to Claimants the sum of $15,000.000 in attorneys' fees pursuant to Tex. Sec. Act § 33-1 and Tex. Civ. Prac. & Rem. Code § 38.001.
(3) Respondent is liable for and shall pay to Claimants the sum of $375.00 as reimbursement of the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services.
(4) Any and all claims for relief not specifically addressed herein, are denied.

Analysis:

This award is noteworthy because Claimants filed a request for default proceedings pursuant to Rule 12801 of the Code of Arbitration Procedure. Accordingly, the claims against Respondent proceeded pursuant to Rule 12801 of the Code, with the Chairperson of the three-member Panel remaining the sole Arbitrator until Respondent filed his Statement of Answer. Thereafter, the default proceedings against the Respondent were terminated, the three-member panel was reinstated, and the case proceeded under the regular provisions of the Code. Also noteworthy, is that Claimants received attorney's fees pursuant to Texas statute in the amount requested of $15,000 on a compensatory damage award of $792,292.60.

Richard Birney v. Taylor Capital Management, Inc., Mark Gregory Raezer and Dennis Mitchell Farrah
Case No. 18-00617
Denver, Colorado
Hearing Dates: Decision on the papers
Award Date: June 29, 2021
Counsel:
Counsel for Claimants:
Jeffrey Pederson, Esq., Greenwood Village, Colorado
Counsel for Respondent:
Preston Spears, Woodstock Georgia for Taylor Capital Management, Russel K. Bean, Esq., Aurora, Colorado for Respondent Raezer and Blain K. Bengtson, Esq., Jones & Keller, P.C., Denver, Colorado for Respondent Farrah.
Arbitration Panel:
Steven Meyrich, Presiding Chairperson, Ronald G. Guida, Public Arbitrator, Rick Gale Doty, Public Arbitrator
Investments at Issue:
The causes of action relate to Respondents' alleged sale of unregistered limited partnership securities to Claimant.
Claimants' Claims:
Causes of Action in Statement of Claim:
(1) Breach of fiduciary duty;
(2) Fraud;
(3) Misrepresentation;
(4) Negligence;
(5) Violation of Colorado securities law, C.R.S. § 11-51-501 et. seq.
Relief Requested:
(1) Recission of the investments, or in the alternative, compensatory damages in the amount not less than $424,052;
(2) Consequential damages in an amount according to proof;
(3) Disgorgement and restitution of all earnings, profits, compensation and benefits received by Respondents as a result of their unlawful acts and practices in an amount according to proof;
(4) Punitive and exemplary damages in an amount to be determined by the Panel;
(5) Pre-award and post-award interest at the maximum rate allowed by law from the date of the original investment;
(6) Costs and expenses, including reasonable attorneys' fees, expert witness fees and other costs deemed reasonable.

Counter-claim Relief Requested:

(1) Farrah requested compensatory damages;
(2) Pre-judgment and post-judgment interest;
(3) Attorneys' fees and costs; and
(4) Such other and further relief as permitted under the law or that the Panel deems just and proper.

Award:

(1) TCM is liable for and shall pay to Claimant the sum of $424,052, inclusive of costs and disbursements.
(2) Claimant and TCM shall be responsible for their respective attorney's fees;
(3) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages are denied.

Analysis:

This award is noteworthy because by way of a counterclaim an individual Respondent asserted a cause of action for malicious prosecution relating to statements by Claimant to government investigators which allegedly lacked probable cause and were motivated by malice. Respondent filed a Motion for Stay of Arbitration Pending Resolution of Criminal Proceedings. Ultimately the case was resolved by a stipulated award in which the Respondent paid Claimant $424,052. The product at issue was an unregistered limited partnership.

David White v. E*Trade Securities, LLC
Case No. 21-00374
Jackson, Mississippi
Hearing Dates: Decision on the papers
Award Date: June 17, 2021
Counsel:

Counsel for Claimants:
Pro Se

Counsel for Respondent:
Meredith F. Hoffman, Esq., E*Trade Securities, LLC, Jersey City, New Jersey

Arbitration Panel:

Karl A. Vogeler, III, Sole Public Arbitrator

Investments at Issue:

The cause of action relates to Claimant's allegation that Respondent failed to execute his order at the original limit price, not the higher trading price that the option was priced at the time.

Claimants' Claims:

Causes of Action in Statement of Claim:

(1) Failure to execute

Relief Requested:

(1) Compensatory damages of $37,000.

Award:

(1) Respondent is liable for and shall pay to Claimant the sum of $31,135 in compensatory damages.
(2) Respondent is liable for and shall pay to Claimant interest on the above-stated sum at the rate of 8% per annum from January 27, 2021 until the date of payment of the award.
(3) FINRA Dispute Resolution Services shall retain the $600.00 filing fee that Claimant deposited previously.
(4) Respondent is liable for and shall pay to Claimant $600.00 to reimburse Claimant for the filing fee previously paid to FINRA Dispute Resolution Services.
(5) Any and all claims for relief not specifically addressed herein are denied.

Analysis:

This award is noteworthy because this matter was filed on the papers by a pro se investor and alleged a claim for failure to execute an order at the original limit price and not the higher trading price that the option was priced at the time. Claimant requested $37,000 and was awarded $31,135 in compensatory damages. Importantly, this award is evidence of an arbitrator holding a broker dealer liable for its internal failure to meet its obligation to a client even though the account was self-directed.

Sigve Mauritzen v. TD Ameritrade, Inc.
Case No. 21-00416
New York, New York
Hearing Dates: Decided on the papers
Award Date: June 22, 2021
Counsel:

Counsel for Claimants:

Pro se

Counsel for Respondent:

Amanda Wright, TD Ameritrade, Inc., Omaha Nebraska

Arbitration Panel:

Arthur Neil Tolciss, Sole Public Arbitrator

Investments at Issue:

The causes of action relate to Luckin Coffee stock.

Claimant's Claims:

Causes of Action in Statement of Claim:

(1) Breach of fiduciary duty;
(2) Negligence

Respondent's Counter-claims:

(1) Breach of client agreement

Relief Requested:

Claimant Requested:

(1) Compensatory damages in the amount of $12,800 and other monetary relief of $1,544.

Respondent Requested in Counterclaim:

(1) $4,800 in compensatory damages.

Award:

(1) Claimant's claims are denied in their entirety;
(2) Claimant is liable for and shall pay to Respondent the sum of $4,800 in compensatory damages;
(3) Any and all claims for relief not specifically addressed herein are denied;
(4) Claimant is liable for and shall pay to Respondent $525.00 to reimburse Respondent for the Counterclaim filing fee previously paid to FINRA Dispute Resolution Services.

Analysis:

This award is noteworthy because Claimant sued Respondent for breach of fiduciary duty and negligence and the causes of action related to Luckin Coffee stock. Respondent asserted a counterclaim for breach of the client agreement. Claimant's claim was denied, and Claimant was ordered to pay $4,800 in compensatory damages to Respondent. The provision of the TD Ameritrade client agreement that client breached is not set forth in the award, but it is curious how Claimant could have liability to Respondent as a result of the client agreement which resulted in an award being rendered against Claimant. Perhaps this was a margin debit case, but it is unclear from the award.

Estate of Lance Wynn vs. Jaime M. Westenbarger
Case No. 21-00797
Detroit, Michigan
Hearing Dates: Decided on the papers.
Award Date: May 14, 2021
Counsel:
Counsel for Claimants:
Daniel J. Broxup, Esq., Mika Meyers PLC, Grand Rapids, Michigan.
Counsel for Respondents:
Pro se
Arbitration Panel:
Sandra Franklin, Sole Public Arbitrator
Investments at Issue:
Forrest Hills, Financial Inc., multiple variable annuities, Benefit Street Partners Realty Trust, American Realty Capital Healthcare Trust, Northstar Realty Finance Corporation, Griffin-American Healthcare REIT III, United Development Funding, ARC Realty Finance Trust and Healthcare Trust Inc.
Claimants' Claims:
Causes of Action in Statement of Claim:
(1) Common law conversion
(2) Statutory conversion, MCL 60.29191a
(3) Common law fraud
(4) Breach of contract
(5) Violations of FINRA Rule 3240
(6) Negligence
(7) Breach of fiduciary duty
(8) Violations of the Michigan Uniform Securities Act
Relief Requested:
(1) Compensatory damages;
(2) Exemplary damages;
(3) Punitive damages in the amount of at least three times the compensatory; and exemplary damages awarded;
(4) Statutory attorney's fees;
(5) Costs; and
(6) Interest

Relief Requested Post Hearing:

(1) On April 16, 2021 the panel decided the case on the papers and denied Claimant's claims in their entirety in an explained decision stating: Claimant provided no evidentiary proof upon which to grant relief. The bald Statement of Claim is not enough even in default proceedings against Respondent. On April 26, 2021, Claimant filed a request for reconsideration and submitted evidence in support of its claims. Respondent opposed Claimant's request for reconsideration.

Award:

(1) Respondent is liable for and shall pay Claimant the sum of $160,000, representing the principal amount due under the promissory note dated on or about November 1, 2011 ("Promissory Note").
(2) Respondent is liable for and shall pay Claimant the sum of $30,066.74, in interest due and owing under the Promissory Note from January 2015 through October 2016.
(3) Respondent is liable for and shall pay Claimant the sum of $180,000, in treble damages pursuant to MCL 600.2919a for conversion of the $60,000 check dated April 18, 2018.
(4) Respondent is liable for and shall pay Claimant the sum of $28,372.47 in interest from April 2018 through April 2021 on treble damages awarded in paragraph 3 above.
(5) Respondent is liable for and shall pay Claimant the sum of $69,457.49 in attorney's fees pursuant to MCL 600.2919a.
(6) Any and all claims for relief not specifically addressed herein are denied.

Analysis:

This award is noteworthy because the case was initially dismissed even though the Respondent had defaulted and did not otherwise participate in the arbitration. The arbitrator denied the initial claims because the Claimant did not offer any supporting evidence. Upon Claimant's request for reconsideration and submission of supporting evidence, as well Claimant's submission of additional evidence, which was requested by the arbitrator, the Claimant recovered a substantial award. Ultimately, the Panel found Respondent liable on a promissory note and conversion of a check. The Panel awarded treble damages, attorneys' fees, and costs under Michigan's conversion statute.

Carole Dill Rauf vs. T. Rowe Price Investment Services, Inc., Jennifer Joy Farmer, Romelio Antonio Flores, and Michelle Lane
Case No 19-03115
Cincinnati, Ohio
Hearing Dates: May 6, 2021 via videoconference
Award Date: May 14, 2021
Counsel:
Counsel for Claimants:
Pro se
Counsel for Respondents T. Rowe Price Investment Services, Inc., Jennifer Joy Farmer, Romelio Antonio Flores:
Daniel J. Donovan, Esq., Donovan & Rainie, LLC, Baltimore, Maryland.
Respondent Michelle Lane:
Did not enter an appearance.
Arbitration Panel:
Lawrence W. Arness, Sole Public Arbitrator
Investments at Issue:
3D Systems, Stratasys, Fidelity Government Cash Reserves and Janus Triton Fund.
Claimant's Claims:
Causes of Action in Statement of Claim:
(1) Unspecified claims for damages for sale and transfer of almost 64 times the amount Claimant had authorized from her Roth IRA account, before returning the funds to her Fidelity account after 17 days.
Relief Requested:
(1) Compensatory damages of $700.00 for time on telephone calls, $1,300.00 for letters and postage;
(2) Interest of $416.93;
(3) FINRA filing fees; and
(4) Punitive damages of $2,000.
Award:
(1) T. Rowe Price Investment Services is liable for and shall pay to Claimant the sum of $2,416.93 in compensatory damages.
(2) T. Rowe Price Investment Services is liable for and shall pay to Claimant $50.00 to reimburse Claimant for the nonrefundable portion of the filing fee previously paid to FINRA Dispute Resolution Services.

(3) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and other related attorneys' fees and costs are denied.

Explained Decision:

The Arbitrator has made the decision based on the following reasons:
This case does not warrant punitive damages as TRPIS attempted to resolve their mistakes and did finally restore Claimant's accounts to the desired actions, albeit only after considerable time, effort, and consternation of Claimant. Claimant appears to not have suffered any additional loss from the loss of use or access to her funds for approximately 17 days, other than her claim of lost interest. This case cried out to be settled as I previously advised the parties.

Analysis:

This award is noteworthy because the panel awarded a pro se claimant 100% of the compensatory damages, interest and costs requested, although the Claimant did not appear to have lost money in her investment due to the operational error by T. Rowe Price above the $416.93 in claimed lost interest. The sole arbitrator, in awarding damages above the lost interest, admonished the Respondent firm for not settling the case earlier stating that "This case cried out to be settled as I previously advised the parties." This result should serve as a warning to parties on both sides of a case that if an arbitrator expresses his or her opinion that a case should be settled, then the prudent thing to do would be to heed this warning. T. Rowe was punished an additional $2,000 by the award for its failures to heed the arbitrator's warning.

Kendall Charles Montgomery, as Trustee of the Montgomery Children's 1998 Trust and as Independent Executor of the Estate of the Charles Hunter Montgomery, Deceased vs. Morgan Stanley Smith Barney, LLC f/k/a Smith Barney, a Member of Travelers Group

Case No. 20-00456
Houston, Texas
Hearing Dates: April 26-30, 2021 via videoconference
Award Date: May 11, 2021
Counsel:

Counsel for Claimants:

Fred Hagens, Esq., Hagens, Montgomery, Hagens, Houston, Texas and Paul K. Nesbitt, Esq., Kelly, Sutter and Kendrick P.C., Houston, Texas.

Counsel for Respondent:

Jeremy S. Winer, Esq., Morgan Stanley Smith Barney LLC., New York, New York, and Donald Littlefield, Esq., Bressler, Amery and Ross, P.C.

Arbitration Panel:

Thomas A. Martin, Michael Hendrix, Jonathan Charles Day

Investments at Issue:

Beneficiaries claim that Respondent caused them to lose the accumulated cash value of an Aetna Life Insurance and Annuity product.

Claimants' Claims:

Causes of Action in Statement of Claim:

(1) Breach of Fiduciary Duty;
(2) Negligence
(3) Gross negligence;
(4) Negligent misrepresentation and omissions; and
(5) Fraudulent concealment.

Relief Requested:

(1) Unspecified compensatory and exemplary damages;
(2) Pre-judgment interest;
(3) Attorneys' fees pursuant to the contract between the parties or pursuant to Texas Civ. Prac. & Rem. Code § 38.001;
(4) Costs and expenses;
(5) Post-judgment interest; and
(6) Such other and further relief to which Claimants may be justly entitled.

Award:

(1) Respondent is liable for and shall pay to Claimant the sum of $172,438.00 in compensatory damages.
(2) Respondent is liable for and shall pay Claimant the sum of $375.00 in costs as reimbursement for the non-refundable portion of the Initial Claim Filing Fee.
(3) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages and attorneys' fees are denied.

Analysis:

This award is interesting in that it dispels a common belief that it is difficult to recover for the Estate of a decedent. Here, the Estate brought a claim for recovery on behalf of the intended beneficiaries of a life insurance product. The panel awarded damages of $172,438 to the Estate reimbursing it for losses to the accumulated cash value of the product. Often Claimant's attorneys are reluctant to bring claims on behalf a deceased client's heirs as there may be a concern that the heirs could be seen as "greedy." This award shows that a FINRA recovery by the Estate is possible where there is mismanagement by the firm resulting in losses to the Estate.

Daniel P. Freebery vs. Fidelity Brokerage Services LLC, Jeffrey Paytas, Nathaniel J. Wright

Case No. 20-01948
Wilmington, Delaware (Main case decided on the papers)
Hearing Dates (expungement) March 12, 2021
Award Date: April 13, 2021
Counsel:

Counsel for Claimants:

Pro se

Counsel for Respondent Fidelity Brokerage Services LLC:

Noah D. Sorkin, Esq., FMR LLC Legal Department, Boston, Massachusetts.

Counsel for Respondent Jeffery Paytas and Nathaniel J. Wright:

Joel M. Everest, Esq. Bressler, Amery & Ross, P.C., Birmingham, Alabama.

Arbitration Panel:

Robert E. Anderson, Sole Public Arbitrator

Investments at Issue:

Failure to execute a stop loss order in unspecified securities

Claimants' Claims:

Causes of Action in Statement of Claim:

(1) Breach of Fiduciary Duty;
(2) Negligence; and
(3) Trade execution error.

Relief Requested:

(1) Compensatory damages of $50,000.

Relief Requested Post Hearing:

Expungement requested by Respondents Jeffry Paytes and Nathaniel J. Wright.

Award:

(1) Claimant's claims are denied in their entirety.
(2) The Arbitrator recommends the expungement of all references to the above captioned arbitration (Occurrence Number 2083099) from registration records maintained by the CRD for Respondent Jeffery Paytas (CRD Number 5874660) with the understanding that, pursuant to Notice to Members 04-16, Respondent Jeffery Paytas must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive. The Arbitrator recommends the expungement of all references to the above captioned arbitration (Occurrence Number 2082959) from registration records maintained by the CRD for Respondent Nathaniel J. Wright (CRD Number 5530889) with the understanding that, pursuant to Notice to Members 04-16, Respondent Nathaniel J. Wright must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
(3) Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents. Pursuant to Rule 12805 of the Code of Arbitration Procedure ("Code"), the Arbitrator has made the following Rule 2080 affirmative finding of fact: The claim, allegation, or information is factually impossible or clearly erroneous.
(4) The Arbitrator has made the above Rule 2080 finding based on the following reasons: Claimant filed this simplified arbitration to recover the sum of $50,000.00. According to his filing, this was half of what he stated was the loss in his portfolio attributable to the individual brokers' failure to heed his instructions to protect his portfolio from a market decline from $480,000 to below $430,000 during the COVID related precipitous break of March 2020. While all involved acknowledge Claimant's concern about limiting potential losses and had discussions about taking a more defensive posture starting early in March of 2020 (at which time his account was at $450,000), what Claimant is essentially arguing is that the equivalent to an automatic stop loss order should have been placed in his portfolio to preserve this $430,000 'floor.' Since Claimant had a managed account containing mutual funds, the managers could not make any adjustments outside a very narrow band and did not have the discretion to make wholesale changes without authorization. The account only marginally dropped below $430,000.00 on March 11, 2020. On March 13, 2020, a Friday, Claimant's account was valued at some

$420,000.00. On Monday March 16, 2020, Claimant had a long conversation with Respondents Jeffery Paytas and Nathaniel J. Wright to discuss specific steps to implement a more conservative strategy, which was in process when he transferred the account away on March 23, 2020. At that time, the account had a value of some $380,000.00. As stated above, there was no cognizable 'stop loss' or other liquidation instruction on the account at the time of the market drop in March 2020. At best, the client's interest was to re-balance it if it fell below the level discussed with his account managers.

(5) By reason of the foregoing, these occurrences should be expunged on the ground that they are clearly erroneous. A 'stop loss' order is not possible in a managed account, and Claimant's advisors made every effort to discuss with him, on multiple occasions, various strategies to minimize his portfolio loss in a very difficult and turbulent market.
(6) FINRA Dispute Resolution Services shall retain the $600.00 filing fee that Claimant deposited previously.
(7) Respondent Fidelity Brokerage Services LLC is liable for and shall pay to Claimant $300.00 to reimburse Claimant for one-half of the filing fee previously paid to FINRA Dispute Resolution Services.
(8) Any and all claims for relief not specifically addressed herein are denied.

Analysis:

This award may have had a different outcome were it not brought by a pro se claimant. The expungement award found that the parties agreed that the Claimant expressed concern about limiting potential losses and that he had discussions about taking a more defensive posture starting early in March of 2020 (at which time his account was at $450,000). The sole arbitrator's award denying his claims seemed to be based upon the premise that a 'stop loss' order is not possible in a non-discretionary managed account containing mutual funds. Had the Claimant been represented by counsel, perhaps his claim could have better articulated the cause of action or facts supporting his case. Sole arbitrator cases on the papers are often difficult to win. Add to that a pro se claimant against two seasoned defense attorneys, and the odds are stacked in the Respondents' favor.

Estate of Joseph A. Muff vs. Hartford Funds Distributors, LLC and Woodbury Financial Services, Inc.
Case No. 19-02405
Des Moines, Iowa
Hearing Dates: June 30, 2021 – July 2, 2021 and July 8, 2021 via videoconference
Award Date: August 11, 2021
Counsel:
Counsel for Claimant:
Gail E. Boliver, Esq., Boliver Law Firm, Marshalltown, Iowa.
Counsel for Respondent Hartford Funds Distributors, LLC ("Hartford"):
John B. Ashley, Esq., Hartford Funds Distributors, LLC, Wayne, Pennsylvania
Counsel for Respondent Woodbury Financial Services, Inc. ("Woodbury"):
Gregory M. Curley, Esq., Advisor Group, Inc., Jersey City, New Jersey.
Arbitration Panel:
Jack D. Elmquist, Alain Frecon, Michael Anthony Pysno
Investments at Issue:
The causes of action relate to Claimant's allegation that Hartford permitted an individual to impersonate Mr. Muff and withdraw a large sum from the Hartford Core Equity Fund, which was the sole product in Claimant's SEP IRA account, and failed to comply with investor protection requirements. Further, Claimant alleged that Woodbury, despite having received statements from Hartford showing the large withdrawals and having knowledge of the withdrawals, took no action to contact Mr. Muff.
Claimants' Claims:
Causes of Action in Statement of Claim:
(1) Claimant requested damages of over $282,000.00;
(2) Punitive damages;
(3) Costs;
(4) Expert fees; and
(5) Such other damages as the Panel finds just and equitable.
Additional Relief Sought at Hearing:
(1) Claimant requested damages of many multiples of $282,000.00, as requested in the Amended Statement of Claim, up to $648,000.00.

Award:

(1) Respondents are liable jointly and severally for and shall pay to Claimant the sum of $100,000 in compensatory damages.
(2) Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys' fees, are denied.

Analysis:

This award stands out because it awards damages to the Estate of the account holder for the theft from the decedent's SEP account by an imposter. The account holder did not testify prior to his death. (Although not in the award, the attorney for Claimant has reported that the imposter, who was the account holder's stepson, pled guilty to impersonating the account holder via telephone by using his personal confidential information. A transcript of the stepson's sentencing hearing was used at the arbitration hearing.) The panel imposed damages against both the broker dealer Respondent as well as the fund which released the money to the imposter. Again, this award dispels the notion that panels are loathe to award damages to the heirs of a deceased account holder.

The Supreme Court holds that the generic nature of an alleged misrepresentation can be relevant to the determination of whether the misrepresentation had a price impact that would support a presumption of reliance based on the fraud-on-the-market-theory, but it also reiterated that the defendant bears the burden of proof that the alleged misrepresentation did not have a price impact.

***Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951 (2021):**

In a securities fraud action alleging material misrepresentations in connection with the sale of securities, one element of the claim is reliance, which is traditionally established by showing that the plaintiff "was aware of a defendant's misrepresentation and engaged in a transaction based on that misrepresentation." *Id.* at 1958. In a class action, however, such individualized issues of reliance would ordinarily defeat predominance and preclude certification. *Id.* at 1959.

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Supreme Court held that a plaintiff can establish reliance on a class-wide basis through the "fraud-on-the-market theory," by proving "(1) that the alleged misrepresentation was publicly known; (2) that it was material; (3) that the stock traded in an efficient market; and (4) that the plaintiff traded the stock between the time the misrepresentation was made and when the truth was revealed." *Goldman Sachs*, 141 S. Ct. at 1958. In *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455 (2013), the Supreme Court went further, and held that the issue of materiality does not bear on predominance and should not be addressed at class certification; thus at the class certification stage, a plaintiff need only prove "publicity, market efficiency, and market timing." *Goldman Sachs*, 141 S. Ct. at 1959.

Once the plaintiff makes a showing of those three elements, the defendant can then rebut the fraud-on-the-market theory, through "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Id.* at 1958 (citing *Basic*, 485 U.S. at 248). Typically, a defendant will seek to show a lack of "price impact," or "that an alleged misrepresentation did not actually affect the market price of the stock." *Halliburton Co. v. Erica*

P. John Fund, Inc., 573 U.S. 258, 284 (2014). A lack of price impact showing, however, often dovetails with materiality, raising the question of whether evidence about the alleged non-materiality of statements should be addressed at class certification, notwithstanding the Supreme Court's holding in *Amgen*. *See Goldman Sachs*, 141 S. Ct. at 1960.

In *Goldman Sachs*, the plaintiffs were Goldman shareholders who brought a securities fraud class action alleging "inflation maintenance," a theory where a misrepresentation causes a "stock price to *remain* inflated by preventing preexisting inflation from dissipating from the stock price." *Id.* at 1959 (citing *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1315 (11th Cir. 2011)) (emphasis in original). The plaintiffs alleged that Goldman maintained an inflated stock price through misrepresentations about its conflict-of-interest policies and business practices, including statements like: "We have extensive procedures and controls that are designed to identify and address conflicts of interest;" and "Integrity and honesty are at the heart of our business." 141 S. Ct. at 1960. The plaintiffs alleged that these rather generic statements were shown to be false when a government enforcement action and news reports revealed several allegedly conflicted transactions in which Goldman participated, and Goldman's stock price fell. *Id.* at 1959-60.

In response to the plaintiffs' fraud-on-the-market evidence, Goldman contended that these generic statements could not have had a price impact, and both parties submitted extensive expert evidence. *Id.* at 1960. The district court and Second Circuit both found class certification was appropriate, as Goldman had failed to prove a lack of price impact. *Id.*

The Supreme Court began by noting that the "generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory." *Id.* at 1961. Accordingly, courts "may assess the generic nature of a misrepresentation at class certification even though it also may be relevant to materiality, which *Amgen* reserves for the merits." *Id.* at 1960.

The Supreme Court then went on to confirm that at the class certification stage the burden of proof remained with the defendant to prove lack of price impact. *Id.* at 1961-63. In response to Goldman's argument that Federal Rule of Evidence 301 establishes that a presumption only requires a party to produce evidence and does not shift the burden of proof,[1] the Supreme Court held that its prior decisions in *Basic* and *Halliburton* had done more. "The defendants

1. Federal Rule of Evidence 301 provides: In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

must 'in fact' 'sever the link' between a misrepresentation and the price paid by the plaintiff—and a defendant's mere production of *some* evidence relevant to price impact would rarely accomplish that feat." *Id.* at 1962 (emphasis in original). While acknowledging that presumptions do not ordinarily shift the burden of persuasion, the Supreme Court held that courts have the authority to change the customary burdens of persuasion under a federal statute, and *Basic* and *Halliburton* were a "clear departure from th[e] general rule [of Federal Rule of Evidence 301]." *Id.* at 1962, n.4. The Supreme Court held that to defeat class certification, defendants must prove lack of price impact by a "preponderance of the evidence," although the Court noted that the "allocation of the burden is unlikely to make much difference on the ground" because "the defendant's burden of persuasion will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise." *Id.* at 1963.

The Supreme Court then remanded the case to the Second Circuit because it was unclear whether the lower court had "properly considered the generic nature of Goldman's alleged misrepresentations." *Id.* at 1961. Justice Sotomayor concurred in part and dissented in part, agreeing with the Court's reasoning but finding that the Second Circuit's analysis of the misrepresentations had been comprehensive and the lower court's ruling should simply be affirmed. *Id.* at 1964-65. Justice Gorsuch, joined by Justices Thomas and Alito, dissented to the portion of the Court's ruling on the allocation of the burden of proof and would have held that defendants were only required to meet a burden of production on price impact while the burden of persuasion should stay with the plaintiffs, consistent with Federal Rule of Evidence 301. *Id.* at 1965-70.

The Second Circuit demonstrates the difficulty of vacating an arbitration award under the manifest disregard of law standard, which the Court noted to be a "doctrine of last resort."

***Jefferies LLC v. Gegenheimer*, 849 F. App'x 16, 17 (2d Cir. 2021):**

In a Member vs. Associated Person dispute, financial services firm Jefferies, LLC filed a FINRA arbitration claim against investment banker Jon Gegenheimer, seeking liquidated damages of $1 million for the alleged breach of an employment agreement. Jefferies essentially claimed that Gegenheimer breached his agreement by failing to begin employment after accepting a job with Jefferies, and instead, negotiated more favorable terms with his existing employer, Credit Suisse. At the conclusion of the arbitration, the Panel found Gegenheimer liable to Jefferies for $1 million in liquidated damages and

$483,245.36 in costs and attorney's fees. *See Jefferies, LLC vs. Gegenheimer,* FINRA Case No. 16-02461 (Apr. 9, 2019). The following day, Jefferies filed a petition to confirm the award, and Gegenheimer filed a cross motion to vacate the award, in the United States District Court for the Southern District of New York. *Jefferies LLC v. Gegenheimer*, 19-3147, 2020 WL 3268536, at *1 (S.D.N.Y. June 17, 2020).

To the district court, Gegenheimer argued the Panel's "manifest disregard of law" as the sole basis for vacating the award. *Id.* at *4. The district court noted:

> "Vacatur on this ground requires a showing that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *KT Corp. v. ABS Holdings, Ltd*., 784 F. App'x 21, 24 (2d Cir. 2019). The standard of review under this judicially created doctrine is "severely limited." *Gov't of India v. Cargill Inc*., 867 F.2d 130, 133 (2d Cir. 1989). Under this standard, "[a] federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004). That a party may later regret his agreement to arbitrate his dispute with the counterparty is of no consequence. *See Asturiana De Zinc Marketing, Inc. v. LaSalle Rolling Mills, Inc.*, 20 F. Supp. 2d 670, 671 (S.D.N.Y. 1998) (Rakoff J.) ("Ironically, the vaunted informality of arbitration may invite the arbitrator to be arbitrary—for who will ever know the difference? Still, businesses know what they are getting when they agree to arbitrate and cannot be heard to complain unless the results plainly manifest disregard of law and reason.").

Id. at *4. Gegenheimer specifically argued that the Panel manifestly disregarded the law in four aspects:

(1) by disregarding a New York law principle (often called the exclusive remedy rule) that "liquidated and actual damages are mutually exclusive remedies;" *id.* at *5.
(2) by enforcing the agreement's choice of law provision designating New York's law as the governing law and thereby effectively depriving Gegenheimer, a California resident, of the protections of Section 16600 of the California Business and Professions Code (a law that prohibits unlawful restraint of employees); *id.* at *7-8.
(3) by concluding that the liquidated damages provision was an enforceable restrictive non-compete covenant under New York law; *id.* at *9-10.

(4) by finding that the specified liquidated damages amount of $1 million was reasonable with respect to the anticipated probable harm in the absence of Jefferies presenting any such evidence. *Id.* at *11.

The district court rejected each of these arguments. Regarding the first argument, the court found that the Panel did not disregard the exclusive remedy rule because it only awarded liquidated damages and did not additionally award actual damages. *Id.* at *5. The district court further held that Gegenheimer "failed to show that the Panel was aware of—or that there even existed—a law that was 'well defined, explicit, and clearly applicable to the case,' under which the [liquidated damages] clause should have been held unenforceable." *Id.* at *7. As to the second argument, the district court noted that the Panel specifically considered and rejected Gegenheimer's argument regarding unlawful restraint and that the Panel concluded that Gegenheimer could waive the protections of Section 16600 by agreeing to the New York choice of law provision. *Id.* at *7.

The district court entirely rejected Gegenheimer's third argument, noting "[t]his argument is a total construct: nowhere in the Award does the Panel suggest it had ever considered the [liquidated damages] clause as a non-compete covenant." *Id.* at *9. Finally, with regard to Gegenheimer's fourth argument, the district court found that Gegenheimer's argument was "predicated on an incorrect understanding of applicable legal standard." *Id.* at *11. Specifically, the court noted that Gegenheimer, and not Jefferies, "bears the burden of proffering evidence that would allow a reasonable trier of fact to deny enforcement of the provision as unconscionable." *Id.* at *11 (quoting *AXA Inv. Managers UK Ltd. v. Endeavor Cap. Mgmt. LLC*, 890 F. Supp. 2d 373, 388 (S.D.N.Y. 2012).

The district court granted Jefferies' motion to confirm the award and denied Gegenheim's motion to vacate the award. *Id.* at *11. Gegenheim then filed an appeal with the Second Circuit.

The Second Circuit, applying a *de novo* standard of review, disposed of the appeal by way of a summary order. *Jefferies LLC v. Gegenheimer*, 849 F. App'x 16 (2d Cir. 2021). The Court began its analysis by noting:

> Manifest disregard of law "is a doctrine of last resort—its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003). "An arbitral award may be vacated for manifest disregard of the law only if a reviewing court finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Wallace*, 378

> F.3d at 189 (internal quotation marks and alterations omitted). A reviewing court may not "vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." *Id.* at 190. Instead, "[a]n arbitration award should be enforced, despite a court's disagreement with it on the merits," as long as "there is a barely colorable justification for the outcome reached." *Banco de Seguros del Estado*, 344 F.3d at 260.

Jefferies LLC v. Gegenheimer, 849 F. App'x at 17–18. The Court ultimately found that none of Gegenheimer's arguments had merit and affirmed the decision of the district court.

The Ninth Circuit holds that the *Affiliated Ute* presumption of reliance in omission cases will not apply when a complaint alleges both omissions and affirmative misrepresentations and the complaint cannot be characterized as primarily claims of omission.

***In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2 F.4th 1199 (9th Cir. 2021):**

In addition to the fraud-on-the-market presumption discussed above in *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951 (2021), another method of proving reliance in a securities fraud case is the *Affiliated Ute* presumption, established by the Supreme Court in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). The *Affiliated Ute* presumption removes "affirmative proof of reliance as a condition of recovery" in cases "involving primarily a failure to disclose." *Volkswagen*, 2 F.4th at 1203-04. In such cases, "all that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Id.* (citing *Affiliated Ute*, 406 U.S. at 153-54). "This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact." *Affiliated Ute*, 406 U.S. at 154. The *Affiliated Ute* presumption of reliance is "generally available to plaintiffs alleging violations of section 10(b) based on omissions of material fact." *Volkswagen*, 2 F.4th at 1204. The presumption is often relied upon in class action cases because the two elements of obligation to disclose and materiality of the omission are susceptible to class-wide proof. *See, e.g., Regents of Univ. of California v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 383 (5th Cir. 2007) (describing the *Affiliated Ute* presumption as a "class-wide presumption of reliance," and noting that "without a class-wide presumption of reliance, plaintiffs would have to prove individual reliance on defendants'

conduct. A fraud class action cannot be certified when individual reliance will be an issue.").

Affiliated Ute leaves open the question of how a plaintiff must proceed in a case alleging both material misrepresentations and omissions. The Ninth Circuit has held generally that the "presumption should not be applied to cases that allege both misstatements and omissions unless the case can be characterized as one that primarily alleges omissions." *Id.* This is because the "rationale behind the presumption was that direct proof of reliance in omission cases would require 'proof of a speculative negative'—that 'I would not have bought had I known' or 'I would not have sold had I known.'" *Id.* at 1204. Accordingly, courts are required to "analytically characterize the action as either primarily a nondisclosure case (which would make the presumption applicable), or a positive misrepresentation case (where the presumption would be unavailable)." *Id.* at 1204-05 (citing *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999)).

In *Volkswagen*, the Plaintiff alleged an omission which "looms large over Plaintiff's claims," that "Volkwagen failed to disclose—for years—it was secretly installing defeat devices in its 'clean diesel' line of cars to mask unlawfully high emissions from regulators and cheat on emissions tests." *Id.* at 1206. Nonetheless, the operative complaint alleged nine pages of affirmative misrepresentations that were allegedly relied upon by the Plaintiff in deciding to purchase Volkswagen bonds. *Id.* For example, the complaint alleged that Volkswagen stated that its "top priority for research & development [in past years] was to develop engines and drivetrain concepts to reduce emissions." *Id.* at 1206-07. This statement and similar statements were allegedly false because "Volkswagen 'did not intend to ... reduce emissions' and 'misleading because they implied that Volkswagen had already reduced vehicle emissions when in truth Volkswagen's diesel engines emitted more pollutants than [it] represented.'" *Id.* at 1207. The complaint also alleged that Volkswagen stated that it is "continuing to focus in depth on developing efficient drive technologies, thus extending its position as an innovation leader in the area of environmentally friendly mobility." *Id.* This statement was also allegedly false because "rather than actually being 'environmentally friendly,' Volkswagen diesel vehicles were equipped with secret defeat devices that allowed them to be sold under the pretense that their NOx emissions were within the legal limits when they actually exceeded such limits by as much as 40 times." *Id.* Finally, the Plaintiff expressly alleged that the Plaintiff reviewed and relied on these allegedly false statements contained in Volkswagen's offering memoranda when purchasing the bonds. *Id.*

These allegations of affirmative misrepresentations and actual reliance made the *Affiliated Ute* presumption unavailable to the Plaintiff. As the Court

noted, Plaintiff reassumed the burden of proving affirmative reliance "by explicitly pleading reliance on extensive, detailed, and specific affirmative misrepresentations." *Id.* at 1208. While there was "no question that Plaintiff alleges an omission regarding Volkswagen's use of defeat devices, … that omission is simply the inverse of the affirmative misrepresentations described above: Volkswagen made certain affirmative statements about environmental compliance and financial liabilities and those statements were materially false or misleading." *Id.* The Ninth Circuit thus reversed the lower court's ruling denying summary judgment to Volkswagen, and remanded for consideration of whether the Plaintiff could prove a triable issue of material fact on the element of reliance. *Id.* at 1209.

The holding in *Volkswagen* exposes a trap for the unwary in pleading a securities fraud claim, particularly in the class action context. Fraud "necessarily involves concealing the truth," and "all misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representations are not true." *Id.* at 1208. Indeed, "affirmative misrepresentations are almost always rendered misleading by an omission." *Id.* Accordingly, many cases could probably be pled either as affirmative misrepresentations or as omissions. Where a plaintiff pleads affirmative misrepresentations, however, it will lose the ability to rely on the *Affiliated Ute* presumption and must prove reliance "through ordinary means by demonstrating a connection between the alleged misrepresentations and its injury." *Id.* at 1209.

The Ninth Circuit holds that a clause in a pre-printed contract delegating arbitrability to an arbitration panel is unenforceable as unconscionable where it imposes cost-splitting, fee-shifting, and a foreign venue.

***Lim v. TForce Logistics, LLC*, --- F.4th ----, 2021 WL 3557294 (9th Cir. Aug. 12, 2021):**

Plaintiff Lim was a delivery driver for TForce in California, delivering supplies for the Red Cross. To maintain his employment, he was forced to sign a contract that was "largely preprinted." *Lim v. TForce Logistics, LLC* , 2021 WL 3557294 at *2. He was "not taken into a separate room to review the contract, was not given an opportunity to read through the contract, [] no one explained any terms or their meanings, [] no one informed him that he could take the contract with him, and [] no one explained that he was giving up rights or that he could seek the advice of an attorney in reviewing the contract." *Id* at *2. The contract contained a mandatory arbitration agreement, providing that

"all disputes and claims arising under, out of, or relating to this Agreement … including the arbitrability of disputes between the parties, shall be fully resolved by arbitration." *Lim v. TForce Logistics, LLC* , 2021 WL 3557294 at *2. The contract also provided that "arbitration fees shall be split between the parties, unless [Lim] shows that the arbitration fees will impose a substantial financial hardship on [Lim] as determined by the Arbitrator." *Id.* The contract also contained a fee-shifting provision, providing that "the prevailing party shall be entitled to recover its attorney's fees, costs and disbursements in pursuing such an action." *Id.* Finally, the contract provided that "any legal proceedings … including arbitration proceedings discussed below, shall be filed and/or maintained in Dallas, Texas or the nearest location in Texas where such proceedings can be maintained." *Id.* at *1.

Lim subsequently filed an action in court, asserting that he had been misclassified as an independent contractor even though he was treated and managed as an employee, in violation of California labor laws. *Id.* In response, TForce moved to compel arbitration, which motion was denied because the district court found that the contract was procedurally and substantively unconscionable under California law. *Id.* at *3.

Although Lim's contract provided that it was governed by Texas law, the Ninth Circuit concluded that the California law applied to the unconscionability analysis. *Id.* at *5, n.3. Further, although the contract delegated the question of arbitrability to the arbitrators, the Ninth Circuit noted that this delegation simply creates an "additional, antecedent agreement" to arbitrate that the movant is seeking to enforce, and that additional delegation agreement is also subject to a defense of unconscionability. *Id.* at *4.

Pursuant to California law, a court may refuse to enforce a provision of a contract, including a contract to arbitrate, if the plaintiff can "demonstrate procedural and substantive unconscionability." *Id.* at *5.

The procedural element concerns "oppression or surprise due to unequal bargaining power." *Id.* This can be established by "showing the contract was one of adhesion or by showing from the 'totality of the circumstances surrounding the negotiation and formation of the contract' that it was oppressive." *Id.* Here, procedural unconscionability was established because Lim was presented with a "contract of adhesion" in the form of a "take-it-or leave it offer," and he "received the contract on the day it was to be executed, material terms—including the delegation clause—were preprinted, and there were no negotiations as to any of the contract terms." *Id.* Importantly, Lim believed that he had to sign the contract or could not continue his employment, and those circumstances, "especially in the employment context, indicate some degree of procedural unconscionability." *Id.*

As to the element of substantive unconscionability, the Ninth Circuit examined both the cost-splitting and fee-sharing provisions and the Texas forum clause. California law requires that when "an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Id.* at *6 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 687 (Cal. 2000)). Cost-splitting is thus substantively unconscionable because the employee would not be required to bear those costs in court. *Id.* at *6. Notably, the court held that "imposing arbitration expenses on an employee that he would not otherwise bear in federal court is unconscionable regardless of his ability to pay." *Id.* at *8. Likewise, fee-shifting provisions are also substantively unconscionable because they create "greater financial risk in arbitrating claims than they would face if they were to litigate those same claims in federal court." *Id.* at *6 (citing *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1004 (9th Cir. 2010)). A fee-shifting provision "creates a chilling effect on Lim enforcing his rights because it exposes him to the possibility of paying attorney's fees to TForce if he lost at arbitration, including fees associated with the threshold issue of arbitrability." *Id.* at *8. Finally, although foreign venue provisions were not *per se* substantively unconscionable, the Court considered the "respective circumstances of the parties" and concluded that the district court's finding that this Texas venue provision was unconscionable was supported by the record. *Id.* at *7.

TForce offered to waive these unconscionable provisions "by paying all of the administrative costs of arbitration, not enforcing the venue clause, and arbitrating the claims in Southern California." *Id.* at *9. The Ninth Circuit rejected this offer because "later willingness to alter the arbitration provision 'does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy.'" *Id.* (citing *Armendariz*, 6 P.3d at 669). "To conclude otherwise would incentivize drafters to overreach based on the assumption they could simply waive unconscionable terms when faced with litigation." *Id.*

For the same reason, the Ninth Circuit refused to sever these unconscionable provisions from the rest of the arbitration clause. "[A]n unconscionable arbitration term should also not be severed if drafted in bad faith because severing such a term and enforcing the arbitration provision would encourage drafters to overreach." *Id.* at *9.

Having concluded that the delegation provision was unenforceable as unconscionable, the Ninth Circuit addressed the issue of arbitrability,

considered the arbitration clause itself, and found that it was likewise unenforceable as unconscionable for the same reasons. *Id.* at *10.

Minnesota Supreme Court confirms that absent specific contractual language, the Court, and not the Arbitrator, decides whether or not a dispute is arbitrable.

***Glacier Park Iron Ore Properties, LLC v. United States Steel Corp*., 961 N.W.2d 766, 769 (Minn. 2021):**

In *Glacier Park,* the Minnesota Supreme Court reviewed the lower courts' decisions that (1) the court decides the issue of arbitrability and (2) the parties' dispute did not come within the scope of the arbitration clause. The Court first considered who—the district court or the arbitrator—decides whether the parties' dispute is subject to arbitration. *Glacier Park,* 961 N.W.2d at 767-68. Appellant Glacier Park sought to compel arbitration of a dispute involving a mineral lease with U.S. Steel Corp. Glacier Park alleged that the U.S. Steel had wrongly procured the lease through a breach of fiduciary duty by a third party. Glacier Park further alleged that U.S. Steel aided and abetted in the breach of fiduciary duty.

Glacier Park argued that Minnesota's "reasonably debatable" standard should apply to the issue. This standard essentially provides that "if the intention of the parties is reasonably debatable as to the scope of the arbitration clause, the issue of arbitrability is to be initially determined by the arbitrator." *Glacier Park,* 961 N.W.2d at 769 n.1 (quoting *Atcas v. Credit Clearing Corp. of Am.*, 197 N.W.2d 448, 452 (Minn. 1972), overruled by *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344 (Minn. 2003)). But the Court noted that the "reasonably debatable" standard had been developed in a prior case that arose under Minnesota's state arbitration statute. The Court further noted that because the instant matter involved interstate commerce—and, therefore, was governed by the Federal Arbitration Act ("FAA"), the Court needed to look to federal law.

From there, the Court reasoned:

> Under federal law, parties to a contract "may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. ——, ——, 139 S. Ct. 524, 529, 202 L.Ed.2d 480 (2019) (citation omitted) (internal quotation marks omitted). And when parties agree to arbitrate arbitrability, a court may not disregard that agreement. *Id.*

> But the FAA provides that, in the absence of an agreement otherwise, the court is to decide arbitrability. 9 U.S.C. § 3.
>
> Interpreting the federal statute, the Supreme Court has adopted a clear and unmistakable evidence standard to determine whether the parties agreed to arbitrate arbitrability. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943–44, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Using that standard, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Id. (quoting *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)) (alterations in First Options). **Given that federal law applies to this case, we are bound to apply the clear and unmistakable standard to determine whether the parties agreed to delegate arbitrability to the arbitrator.**

Glacier Park, 961 N.W.2d at 769–70 (emphasis added). With the "clear and unmistakable" standard in mind, the Court then turned the language of the arbitration clause. The paragraph that specifies the disputes that were subject to mandatory arbitration read as follows:

> In the event that any disagreement or controversy arises between [Glacier Park] and [U.S. Steel] as to whether any of [U.S. Steel]'s mining practices conform to the standards stipulated herein, or as to any fact that might affect the determination of royalty payable hereunder, or as to any fact relative to the observance or fulfillment of the terms and obligations hereof by either party, or as to any other matter herein specifically stated to be the subject of arbitration, then either party may demand that such disagreement or controversy shall be determined by final and binding arbitration in the manner hereinafter provided.

Glacier Park, 961 N.W.2d at 770.

The Court found that this paragraph limited arbitrable disputes to the following four issues: conformance of mining practices, royalty payment determinations, any fact relative to the observance or fulfillment of the terms and obligations of the contract, and any other matter specifically stated. *Id.* The Court specifically held that "[t]he arbitration clause in the Lease does not provide that arbitrability of the claim itself is subject to arbitration" and ruled "that this silence does not satisfy the clear and unmistakable standard." *Glacier Park*, 961 N.W.2d at 770. Accordingly, the Court found that the question of whether the parties' breach of fiduciary duty claim was arbitrable is a question for the court to decide. *Id.*

After determining that the lower courts were correct in deciding the arbitrability issue, the Court next reviewed, on a *de novo* basis, whether the

lower courts were also correct in deciding that the parties' breach of fiduciary duty claim was not arbitrable. Reviewing the basic law on the subject, the Court noted:

> A party cannot be required to arbitrate claims that they have not agreed, by contract, to arbitrate. *Johnson*, 530 N.W.2d at 795; *AT & T Tech., Inc.*, 475 U.S. at 648, 106 S.Ct. 1415. Courts examine the language of the agreement to determine the scope of the arbitration clause. *See Onvoy, Inc.*, 669 N.W.2d at 349; *First Options*, 514 U.S. at 943, 115 S.Ct. 1920. When analyzing whether the substantive claim is subject to an agreement to arbitrate, "[a]ny doubt with respect to the intent of the parties regarding the scope of arbitration should be resolved in favor of arbitration." *Onvoy, Inc.*, 669 N.W.2d at 351; *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Glacier Park, 961 N.W.2d at 771. Again, the Court observed that the clause identified four specific types of disputes that the parties had agreed to arbitrate. "Because a claim as to contract formation, such as Glacier Park's breach of fiduciary claim, is not one of those disputes," the Court affirmed the lower courts and held that the claim was not subject to arbitration. *Id.* at 772.

WHERE WE STAND

Historically, PIABA has commented on a number of issues,[1] on both a formal and an informal basis, which are directly applicable to our promotion of the interests of public investors in securities arbitration proceedings that are conducted before the Financial Industry Regulatory Authority ("FINRA").

For example, among the issues that generated the most interest, from and/or on behalf of the members of our association, were proposed amendments to the rules concerning:

- Abusive pre-hearing dispositive motion practices; and
- The adoption of specific procedures that arbitrators will be required to follow before granting the extraordinary remedy of the expungement of prior customer complaints from the registration records of registered representatives.

In this section of the *PIABA Bar Journal*, we will share with our readers the comment letters and formal positions that have been submitted on behalf of our association, during the quarter, to the various regulatory authorities so that all of our constituents will know exactly where we stand

1. To review all PIABA Comment letters, visit www.PIABA.org. For more information, contact David Meyer at dmeyer@meyerwilson.com, or Michael Edmiston at msedmiston@stocklaw.com, or Robin S. Ringo at rsringo@piaba.org for assistance.

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The following Comment Letter regarding *Effective Methods to Educate Newer Investors, FINRA Special Notice – 6/30/21* was submitted to the Securities and Exchange Commission by David Meyer on August 31, 2021. (prepared with the assistance of Dayton Haigney and Lisa Braganca).

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506
pubcom@finra.org

Re: *Effective Methods to Educate Newer Investors*
FINRA Special Notice – 6/30/21

Dear Ms. Mitchell,

The Public Investors Advocate Bar Association ("PIABA"),[1] jointly with the PIABA Foundation,[2] submits this letter in response to FINRA's Special Notice, dated June 30, 2021, requesting comments from stakeholders pertaining to *Effective Methods to Educate Newer Investors.*

PIABA is an international bar association whose member attorneys are devoted to representing the interests of investors in disputes with the securities industry. Since its formation in 1990, PIABA has promoted the interests of the public investor in all dispute resolution forums, while also advocating for public education regarding the securities industry. Our members routinely represent public investors who have been damaged financially as customers of financial institutions. PIABA frequently comments upon proposed legislation, rules and solicitation of comments involving investor protection, including educational initiatives.

Formed in 2012, the PIABA Foundation's mission is to promote investor literacy to consumers, in part, by providing educational materials that are designed to prevent investment abuse as well as to raise awareness about the investment-related securities arbitration dispute resolution process.

PIABA and the PIABA Foundation have always maintained that the issue of investor education is paramount to protecting public investors. Many of

1. PIABA's website may be accessed at www.piaba.org.

2. The PIABA Foundation's website may be accessed at https://piabafoundation.org/.

the investors represented by PIABA's members would not have suffered losses if they had been provided with minimal information about the workings of the financial industry prior to investing. We strongly feel that the education of new and unsophisticated investors is crucial, particularly in light of the recent rise of investor app-based platforms that intentionally make the investing process seem like a video game. Proper investor education may help to stem the problems that result from the rise of the 'gamification' of investing by these new, low-cost platforms that target young, unsophisticated investors with no prior experience in securities.

Most investors begin their financial literacy process when they come in direct contact with individuals employed in the financial industry, however, there is a fundamental conflict of interest between a securities professional's desire to manage investor accounts – and investor expectations – and the investor's need to comprehend how the system works. PIABA has long maintained that the financial industry should not be in charge of investor education. If the financial industry were to take control of investor education with respect to newer investors, the goal of protecting the public investor would be taken out of the equation. One does not have to be a cynic to conclude that Wall Street would use "investor education" as a vehicle to increase bottom line profits. As the industry's watchdog, FINRA is in a position to provide educational opportunities and resources that do not have Wall Street's bottom line as their primary goal.

PIABA suggests a few specific areas on which to focus that would serve to strengthen investor education and, commensurately, extend protections to newer investors. First, FINRA should look into disseminating investor education information through social media. Second, FINRA should consider making use of behavioral science research to understand how and why Americans invest. Third, FINRA should take steps to make the existing investor education modules maintained by the FINRA Foundation more accessible to newer investors, including inserting a link to the educational projects supported by the PIABA Foundation. And lastly, FINRA must work with the SEC in developing programs to thwart the 'gamification' of investing through app-based platforms.

EFFECTIVE USE OF SOCIAL MEDIA

PIABA encourages FINRA to explore the use of social media to inform newer investors of the availability of investor education. Younger investors have grown up in the digital age and obtain the vast majority of their information through social media. While FINRA already maintains somewhat

of a presence on Twitter and Facebook, FINRA should actively seek to disseminate investor education information via some of the newer social media platforms that have seen massive use by young people.

According to a 2021 study, adults under 30 (the targeted demographic of FINRA's investor education initiatives and app-based platforms) stand out for their use of Instagram, Snapchat, YouTube, and TikTok[3]. 18- to 29-year-olds say they use Instagram or Snapchat and about half say they use TikTok, with those on the younger end of this cohort – ages 18 to 24 – being especially likely to report using Instagram (76%), Snapchat (75%), TikTok (55%), and YouTube (95%). FINRA needs to shift their resources to the platforms that garner the most use by younger investors.

UNDERSTANDING INVESTORS' BEHAVIORAL SCIENCE

When contemplating education for newer investors, one additional factor that FINRA must consider is how easy it is for investors to be misled into believing that they are knowledgeable about complex investment strategies and products. In many cases, people consider themselves reasonably knowledgeable about investments when they have a minimum understanding at best. Many of us represent professors, doctors, lawyers, and even financial professionals who believe they understood how an investment worked, only to learn that they were completely wrong. It is important for investors to be advised of the danger of overconfidence and how other cognitive biases can lead investors to lose a great deal by engaging in extremely risky trading[4].

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3. Social Media Use in 2021, Pew Research Center, April 7, 2021 (available at https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/).

4. *See, e.g.,* Richard Thaler, From Cashews to Nudges: The Evolution of Behavioral Economics, Nobel Prize Lecture December 8, 2017, (available at https://www.nobelprize.org/uploads/2018/01/thaler-lecture.pdf); Thaler, Tversky, Kahneman, Schwartz, The Effect of Myopia and Loss Aversion on Risk Taking: An Experimental Test, 112 Quarterly Journal of Economics 647 (May 1997), (available at https://www.jstor.org/stable/2951249); Shampanier, Mazar, Ariely, Zero as a Special Price: The True Value of Free Products, (Nov-Dec 2007, Marketing Science), (available at https://people.duke.edu/~dandan/webfiles/PapersPI/Zero%20as%20a%20Special%20Price.pdf); Ariely, Dan & Norton, Michael I (2008), How actions create--not just reveal--preferences. *Trends Cogn Sci*, *12*(1). pp. 13-16,(available at https://hdl.handle.net/10161/6219).

In arbitration proceedings, investors are frequently accused of failing to mitigate their losses by selling a bad investment. It is important that investors, financial advisors, arbitrators, and others incorporate the well-established research on the cognitive bias of loss aversion. Some in the financial services industry have incorporated behavioral economics into their offerings, giving them an advantage when marketing to newer investors[5]. FINRA should also incorporate what we have learned from behavioral economics into its educational offerings, rather than relying upon outdated investment education materials.

IMPROVEMENT OF EXISTING INVESTOR EDUCATION INFORMATION

PIABA commends FINRA in the establishment and support of the FINRA Investor Education Foundation. The website provides a wealth of information to assist in educating newer investors. PIABA feels that the FINRA Investor Education Foundation could be more effective by making some revisions to the available materials that target the younger demographic of newer investors.

Currently, the FINRA Investor Education Foundation homepage is not user-friendly and does not provide a prominent link on its homepage to access the detailed content modules dealing with investor education. We note that neither the table of contents nor the actual component modules can be easily accessed from the home page. The investor education materials page is essentially impossible to locate from the home page. The home page should be revised to assist newer investors to locate all of the investor education materials maintained by the Foundation easily.

Another impediment to easy access of available material is, once an investor finds the actual educational modules, they are required to download MS Word versions of the information (for example, see the table of contents: https://www.finrafoundation.org/files/content-module-table-contents). Many investors may be hesitant to download content. The site should be updated to

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5. *See, e.g.,* UBS article, Is there a link between emotions and economic outcomes? (available at https://www.ubs.com/microsites/nobel-perspectives/en/latest-economic-questions/success/articles/emotional-economics.html); How Top Financial Advisors re Using Behavioral Science to Rethink Your Investments, Forbes September 11, 2018, (available at https://www.forbes.com/sites/halahtouryalai/2018/09/10/how-top-financial-advisors-are-using-behavioral-science-to-rethink-your-investments-1/?sh=6d6c16d33c09).

allow investors to access the substance of the modules through clickable links without downloading files.

Section 11-4 of the educational module, 'Safeguarding Your Investments', is inadequate. The section purports to advise investors of their legal rights and discusses 1) Corporate information; 2) Shareholder derivative and class action actions; and 3) The Securities Investor Protection Corporation (SIPC), however, the entire educational module fails to reference the fact that an aggrieved investor may have recourse against a broker-dealer or registered representative through arbitration or civil litigation. The section should be revised to include language about direct legal claims by individual investors against broker-dealers and provide a link to FINRA's online complaint services.

Additionally, FINRA has long maintained a link to PIABA's website so aggrieved investors can locate attorneys experienced in investor rights. It would be useful for newer investors if the FINRA Investor Education Foundation website and educational materials contains a similar link to the PIABA website and other external resources, including the PIABA Foundation.

GAMIFICATION OF INVESTING

PIABA is concerned about the recent trend of "gamification" of investing by App based platforms. Immediate efforts should be taken to educate newer investors as to the pitfalls of low cost, app-based platforms and their lack of meaningful educational offerings. Newer investors are enticed to actively trade through these apps with the use of game-like leaderboard competitions, constant notifications/alerts and social networking links. Investing is not a game. FINRA should take immediate action to curb the abuses of securities sales through these app-based platforms and offer educational materials specifically addressing the issues associated with using these platforms. A crucial component of curbing abuses would be through a major social media push to educate newer investors on the pitfalls and risks of investing through these app platforms.

CONCLUSION

PIABA and the PIABA Foundation appreciate the opportunity to submit these comments and applauds FINRA for looking into the vital area of

education for newer investors. PIABA and the PIABA Foundation would like to continue to be engaged with this effort as it moves forward.

Thank you for your consideration.

Respectfully submitted,

David P. Meyer, President
Public Investors Advocate Bar Association

The following Comment Letter regarding *SR-FINRA-2021-016 – Proposed Rule Change To Amend Rule 2165 (Financial Exploitation of Specified Adults)* was submitted to the Securities and Exchange Commission by David Meyer on July 19, 2021. (prepared with the assistance of Daren Luma).

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

Re: FINRA Proposed Rule Change to Amend Rule 2165 (Financial Exploitation of Specified Adults) – File No. SR-FINRA-2021-016

Dear Ms. Countryman:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors. Since its formation in 1990, PIABA has promoted the interests of the public investor in all dispute resolution forums, while also advocating for public education regarding investment fraud and securities industry misconduct. Our members and their clients have a fundamental interest in the rules promulgated by the Financial Industry Regulatory Authority ("FINRA") that relate to investor protection.

PIABA members frequently represent senior investors, and we are particularly concerned with enhancing protections for this vulnerable population. PIABA previously commented on FINRA Regulatory Notices 15-37 and 19-27, which included a variety of senior protection proposals, and FINRA's previously proposed revisions to Rule 2165, as detailed in Regulatory Notice 20-34 ("RN-34"). FINRA's current rule proposal concerns revisions to FINRA Rule 2165, which creates a "uniform national standard" for FINRA-registered members and associated persons regarding certain tools to help prevent financial exploitation of specified adults. This includes a "safe harbor" provision allowing firms to place a temporary hold on a disbursement of funds or securities when there is suspected misconduct. Based on FINRA's retrospective review, FINRA proposes extending the time of the permissible hold period under Rule 2165 and allowing temporary holds on securities transactions, not just disbursements.

As noted in PIABA's comment letter to RN-34,[1] while PIABA cautiously supports FINRA's proposal to permit an extension of time on the permissible hold period under rule 2165 and the expansion of temporary holds to include securities transactions, rather than just disbursements, PIABA remains concerned with maintaining investor autonomy and protecting senior investors from member firms potentially misusing the expanded hold periods and the extension of holds to securities transactions.

As such, PIABA reiterates to the Commission its recommended revisions to Rule 2165 made in the PIABA RN-34 Comment Letter that member firms be required to: (1) update their written supervisory manuals to include training and review transactions suspected of elder abuse; (2) include in their retained records documentation of the firms' reasonable efforts to quickly investigate the matter; and (3) file a report with the appropriate Adult Protective Services agency and state regulator as soon as reasonably practical but no later than seven business days from the commencement of the initial hold period.

In response to PIABA's recommended revisions, FINRA noted that Rule 2165 "currently include[d] several safeguards designed to prevent misapplication of the rule" and that FINRA "expect[ed] member firms to comply with all applicable state requirements, including reporting requirements."[2] FINRA's response fails to adequately address PIABA's recommended revisions.

Requiring member firms to include additional training and review of transactions regarding suspected elder abuse would help to ensure adequate protection for elderly investors. Requiring member firms to explicitly retain records that document the firms' reasonable efforts to investigate the matter helps to ensure Rule 2165's requirements are met and not used as an excuse by member firms for their own financial benefit or other ulterior motive.

Further, PIABA's recommendation that member firms be required to file a report with the appropriate Adult Protective Services agency and state regulator within seven business days from the commencement of the ***initial*** hold period will provide more robust and earlier protection by appropriate governmental agencies than FINRA's current rules proposal regarding notifying government agencies and/or courts, which is only triggered when

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1. *See* PIABA Comment Letter to Jennifer Piorko Mitchell, FINRA Regulatory Notice 20-34, *Senior Investors Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report* (December 4, 2020), attached as exhibit 2b, comment 11 to FINRA Rule Proposal ("PIABA RN-34 Comment Letter").

2. *See* FINRA Proposed Rule Change to Amend Rule 2165 (Financial Exploitation of Specified Adults), File No. SR-FINRA- 2021-016, pg. 29.

member firms seek an additional thirty-day extension of the initial hold period. Given that FINRA's current rules proposal acknowledges the importance of notifying appropriate governmental agencies regarding suspected cases of financial exploitation, the Commission should opt for PIABA's recommendation for an earlier notification requirement to ensure that the appropriate governmental agencies can take action earlier and that the protection of senior investors is not left to the whims of FINRA's member firms.

In reviewing FINRA's proposal to revise and strengthen Rule 2165, the Commission should look beyond FINRA's limited and narrow requested revisions and adopt other appropriate revisions to Rule 2165 that would enhance the protection of vulnerable senior investors. PIABA's suggested revisions provide three such mechanisms for doing so.

PIABA appreciates the opportunity to submit these comments and urges the Commission to approve the proposed rules with the revisions suggested above.

Respectfully submitted,

David P. Meyer
PIABA President