DISTRICT COURT OF APPEAL
FOURTH DISTRICT

RICHARD S. FAHNESTOCK, and
GEORGE D. KARIBJANIAN,
co-personal representatives of the
ESTATE OF VALERIE H. FAHNESTOCK,

Plaintiffs/Appellants/
Cross-Appellees,

v.

4th DCA Case No. 96-345
L.T. Case No. 95-1164 AJ

DEAN WITTER REYNOLDS, INC., and
WILLIAM KATZ,

Defendants/Appellees/
Cross-Appellants.

BRIEF AMICUS CURIAE OF PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION (PIABA)

Submitted by:

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TABLE **OF CONTENTS**

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

The brokerage industry's position that all arbitrations under the AMEX Window must take place in Manhattan based on the "in the City of New York" language in that provision is contrary to that taken by the American Stock Exchange itself, the drafter of the provision, and to the rules of the American Arbitration Association, the tribunal which will administer the arbitration and whose rules thus govern the proceeding. Furthermore, it is not within the province of the courts to intervene in procedural matters once the threshold determination of whether an enforceable arbitration agreement exists. More fundamentally, it is difficult to justify allowing brokerage firms to limit a customer's choice of venue in arbitration to New York City without regard to traditional judicial principles of forum non, conveniens simply because the customer elected the only securities arbitration forum unaffiliated with the very industry he or she is suing.

ARGUMENT

Introductory Statement

Since the Supreme Court's decisions in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, **107** S.Ct. 2332, 2343, 96 L.Ed.2d 185 (1987) and Dean Witter Reynolds Inc. v. Byrd, **470** U.S. 213, **105** S.Ct. 1238, **1244, 84** L.Ed. 2d 158 (1985), nearly all customer claims against stockbrokers have been brought in arbitration, as customers routinely are required to sign standard form agreements containing arbitration provisions. Most broker-dealers prefer, and therefore designate in their customer contracts, arbitration forums operated by their self-regulatory organizations ("SROs"), such as the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"). If given a choice, many customers and their counsel would choose an independent arbitration forum over one operated by an SRO. One way for a customer to do so is through the "AMEX Window," which requires member firms of the American Stock Exchange to submit to arbitration before the one independent forum that administers securities arbitrations, namely, the American Arbitration Association ("AAA"). As one commentator (and AAA and SRO arbitrator) has said,

> "One of the major advantages in AAA arbitration is that the AAA does not impose arbitrators on the parties. A list of potential arbitrators is furnished from whom the parties may strike those whom they do not want to sit. Typically, the AAA list is not skewed in favor of the industry with which the arbitration is concerned. If the parties desire, however, they may choose an arbitrator with industry expertise and experience. AAA arbitrators are not employees of the AAA and they usually serve *pro bono* for the first day of a hearing. Thereafter they are paid by the parties, on a per *diem* basis, through assessment by the AAA." Grant, J. Kirkland, "Securities Arbitration: Is Required Arbitration Fair to Investors?" 24 New England Law Rev. 389, 485 (Winter 1989) (footnote omitted).

Three of the four dissenting justices in McMahon also noted that "because of the background of the arbitrators, the investor has the impression, frequently justified, that his claims are being judged by a forum composed of individuals sympathetic to the securities industry and not drawn from the public." 482 U.S. at 260-61, 107 S.Ct. at 2355, 96 L.Ed.2d 185 (Blackmun, J., dissenting).

Thus, if arbitration is to be the mandated remedy for resolving disputes between broker/dealers and the investing public, the availability of an independent forum as an option for the customer is a critical consideration.

The Disputed Provision: The AMEX Window

The provision at issue -- commonly referred to as the AMEX Window -- appears in Article VIII of the Constitution of the American Stock Exchange.

> "SEC. 2. Arbitration shall be conducted under the arbitration procedures of this Exchange, except as follows:
>
> * * *
>
> "(c) if any of the parties to a controversy is a customer, the customer may elect to arbitrate before the American Arbitration Association in the City of New York, unless the customer has expressly agreed, in writing, to submit only to the arbitration procedure of the Exchange."

The brokerage industry has taken the position that all arbitrations under the AMEX Window must take place in Manhattan based on the "in the City of New York" language. Not only is this position contrary to that of the drafter of the provision (the AMEX) and to the rules of the tribunal which will administer the arbitration and whose rules thus govern the proceeding (the AAA), it is not within the province of the courts to intervene in the dispute. On perhaps a more basic level, it is difficult to justify allowing brokerage firms to limit a customer's choice of

venue in arbitration to New York City without regard to traditional judicial principles of forum non conveniens (recently adopted in this state by the Florida Supreme Court in Kinney System, Inc. v. The Continental Ins. Co., 21 Fla.L.Weekly S43 (Fla. Jan. 25, 1996)) simply because the customer elected the only securities arbitration forum unaffiliated with the very industry he or she is suing.

A. Courts Play a Limited Role In Cases That Are Subject To Arbitration Under the Federal Arbitration Act

The Federal Arbitration Act limits the role of the courts to (1) a determination of whether a valid agreement to arbitrate exists, and if so, (2) enforcement of that agreement as to any party seeking to avoid that agreement. 9 U.S.C. §4. In John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557; 84 S.Ct. 909, 918, 11 L.Ed.2d 898 (1964), the Supreme Court addressed the implications of Section 4's limitations:

> "Once it is determined that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

The need to abstain from judicial intervention in the context of an AMEX Window venue dispute was echoed by Judge Keeton in Shearson Lehman Bros., Inc. v. Brady, 783 F.Supp. 1490 (D.Mass. 1992):

> "A commonsense understanding of 'the statutory policy of rapid and unobstructed enforcement of arbitration agreements,' . . .suggests that in order rigorously to enforce agreements to arbitrate, a court must be vigilant to decline an invitation, by a party who is reluctant to arbitrate pursuant to the written agreement, to sidetrack the arbitration by complex, delay-ridden, and expensive litigation over issues tangential to the underlying substantive dispute. . . . If courts readily took jurisdiction

> over procedural issues ancillary to the substantive dispute between the parties, arbitration proceedings would be vulnerable to frequent and expensive interruptions and delays." Id. at 1497 (emphasis added, citations omitted).

The court added:

> "A submission before this court indicates that AAA is prepared to decide the appropriate site of the arbitration pursuant to a number of neutral, commonsense factors, including the location of the parties, the location of the witnesses and documents, a consideration of the relative cost to the parties, the place of performance of the contract, and the laws applicable to the parties. . . . This process seems likely to be fair and far less expensive than threshold determination of the issue of situs in courts." Id. at 1496-97.

See also Joseph v. Prudential Bache Securities, Inc., 16 Fla.L.Weekly C82, Fed.Sec.L.Rep. (CCH) ¶96,184, at 90,991 (Fla. 9th Jud'l Cir. May 1, 1991), where Judge Powell observed:

> "In light of the present strong judicial policy favoring arbitration, procedural questions, such as where the hearing is to be held, should be decided by the appropriate arbitration organization. Certainly a court should be hesitant in telling that organization where it should lay venue, since by its very nature venue requires a case-by-case determination." 16 F.L.W. at C83; Fed.Sec.L.Rep. 796,184, at 90,993 (emphasis added).

These decisions reflect the Federal Arbitration Act's underlying policies of creating an expeditious and inexpensive alternative to litigation and reducing the burden of the overcrowded court dockets. If courts open themselves up to applications to review procedural issues such as time bar defenses and arbitration hearing venues, these salutary goals will fall by the wayside, as will the ability of arbitrators to control the proceedings and help insure finality of arbitration awards.

B. **The Drafter Of the AMEX Window -- the AMEX Itself -- Does Not Interpret "In the City Of New York" As a Venue Provision**

The American Stock Exchange has made its position clear: The phrase "in the City of New York" merely indicates the AAA's address and is not a designation of venue. See transcript of deposition of Scott Noah, then Associate General Counsel and Director of Arbitration at the AMEX, taken August 17, 1988 in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hart, 88-CIV-3319 (S.D.N.Y.), the relevant portions of which are attached hereto as Exhibit A. At his deposition Mr. Noah testified that pursuant to the authority delegated to him by the Board of Governors at the AMEX to interpret and apply AMEX rules, the phrase "in the City of New York" indicated the address of the MA rather than a venue provision.

> "Q. . . . with reference to the words, 'in the City of New York,' is that considered by your Exchange to be the location or the address of the American Arbitration Association or a venue provision?
>
> * * *
>
> "A That is not to be considered to be a venue provision, no.
>
> ". . . any questions regarding the administration of that matter, whether they pertain to venue or any other procedural or administrative matters, should be resolved according to the rules and procedures of that organization." Noah Deposition Transcript, pp. 1 l-12.

Nor did Mr. Noah believe that this "in the City of New York" language should influence the AAA internal guidelines for deciding venue.

> 'We, the Exchange, does not presume generally to say that any of its rules or provisions should supersede or impact or otherwise govern conduct of a proceeding before another organization [referring to the venue rules and policy of the AAA]." Noah Deposition Transcript, p. 12.

The American Stock Exchange submitted to the SEC for approval a year later a proposed amendment to the AMEX Window. The primary thrust of the amendment was language that effectively would have closed the Window. This might explain the SEC's failure to act on the amendment and the AMEX's resultant withdrawal of it five years later. See letter dated June 2, 1994, from Geraldine M. Brindisi, Corporate Secretary of the AMEX, to the SEC withdrawing the 1989 amendment proposal (copy attached hereto as Exhibit B). However, the AMEX included in its submission the proposed elimination of the "in the City of New York" language and a reaffirmation of Mr. Noah's statements with respect to the venue issue:

> "...The Exchange has interpreted the words 'in the City of New York' as referring merely to the fact that the AAA is headquartered in New York City. This reference is not viewed by the Exchange as a venue setting provision nor as a limitation on the right to have an arbitration submitted to the AAA conducted in any of the various locations outside of New York City where the AAA has regional offices or otherwise may choose to allow an arbitration to proceed. Once a matter is before the AAA, any questions regarding the administration of the proceeding, including the location of the hearing should be resolved pursuant to the AAA's own rules and procedures."

See Wade v. Prudential Securities, Inc., 1994 WL 124428, Fed.Sec.L.Rep. (CCH) ¶98,117, at 98,918, 98,921 (N.D.Cal. Feb. 11, 1994)(quoting S.E.C. Release No. 34-27459, Fed. Reg. Vol. 54, No. 229, p. 49374-6 (November 30, 1989)).

That courts should defer to a self-regulatory organization's (SRO's) interpretation of its own rules was described in First Heritage Corp. v. NASD, Inc., Fed.Sec.L.Rep. (CCH) ¶96,596, at 92,809, 92,810 (E.D.Mich. Feb. 5, 1992):

> "Defendants further argue that judicial deference is appropriate and broad latitude should be given to a self-regulatory body in the determination of its rules. See

> Shearson/American Express Inc v. McMahon, 482 U.S. 220, 234, 107 S.Ct. 2332, 2341, 96 L.Ed.2d 185 (1987). Deference is particularly appropriate since the statute requires that the Securities and Exchange Commission review the rules of a self-regulatory body such as the NASD and the SEC has approved the forum fee rule of the NASD."

The obligatory nature of exchange rules addressed in First Heritage can be traced back to the creation under the Securities Exchange Act of 1934 of the self-regulatory organization framework for the national securities exchanges, which today are known as the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), the Pacific Stock Exchange and the like. Section 5 of the Exchange Act prohibits securities transactions on any major exchange unless the exchange is registered with the Securities and Exchange Commission (SEC). 15 U.S.C. §78e. Section 6(b) creates the broker-dealers' binding obligations to the registered exchanges:

> "(b) An exchange shall not be registered as a national securities exchange unless the Commission determines that -
>
> (I) Such exchange is so organized and has the capacity to . . . enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, and the rules of the exchange." 15 U.S.C. §78f(b)(1).

Section 6(b) imposes the additional requirement that

> "(5) The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers...." 15 U.S.C. §78f(b)(5).

In accordance with the requirements of §6(b), the AMEX adopted a Constitution and other rules by which its members must abide. Echoing the mandate of §6(b)(1) of the Securities Exchange Act, Article IV of the AMEX Constitution expressly requires compliance with the Constitution and other rules of the AMEX as a condition of membership.

> "SEC. l.(a)
>
> * * *
>
> (3) No person whose application for regular membership has been approved by the Exchange shall be admitted to the privileges thereof until he shall have signed the Constitution of the Exchange. By such signature he pledges himself to abide by the Constitution as the same has been or shall be from time to time amended and by all rules and regulations adopted pursuant to the Constitution and all regulations, orders, directives or decisions adopted or made in accordance therewith.
>
> * * *
>
> "SEC. 2.(a) No partnership or corporation shall become or remain a member firm or member corporation and no person associated with a partnership or corporation shall become or remain an allied member or approved person unless such firm, corporation, allied member or approved person meets and continues to meet the standards prescribed in the Constitution and rules of the Exchange."

One of the rules imposed on member firms by the AMEX Constitution is the AMEX Window: The requirement that a member firm submit to AAA arbitration upon the demand of a customer. As interpreted by the AMEX itself, that obligation does not allow member firms to ignore or refute the traditional venue principles imposed upon them by the AAA's rules. If firms were allowed to do so while being required to honor venue determinations in arbitration matters administered by the

AMEX or by the SROs, such a practice would run afoul of the Exchange Act's mandate in Section 6(b)(5) that rules of an exchange "protect investors and the public interest." 15 U.S.C. §78f(b)(5). It also would create the unintended effect of requiring the investing public to travel to New York to arbitrate regardless of any venue considerations simply because the customer opted for an arbitration forum unaffiliated with the very industry he or she is suing.

That the SROs wish their members to take these obligations seriously was made clear last year by the National Association of Securities Dealers (NASD). In its Notice To Members #95-16, 1995 NASD Lexis 28 (March 1995) (copy attached hereto as Exhibit C), the NASD cautioned member firms that requiring customers to sign agreements dictating the location of an arbitration hearing was "inconsistent" with the NASD's Code Of Arbitration Procedure. In NASD Notice To Members #95-85 (October 1995) (copy attached hereto as Exhibit D) released as a "clarification" of the prior Notice, the NASD stated unequivocally that firms may not designate hearing locations in their arbitration clauses.

> "Question No. 7: May a firm designate a hearing location for self-regulatory organization (SRO) arbitrations in its arbitration clause?
>
> Answer: No."

It is thus clear that the AMEX has taken the position that the "in the City of New York" language in the AMEX Window is not a venue provision; that courts have a duty to abide by that determination; and that this rule, like all other rules of the AMEX and of the other exchanges and SROs, are legally binding upon, and enforceable against, all member firms.

C. The Tribunal Administering the Arbitration and Whose Rules Govern the Arbitration Similarly Requires Venue Determination By the Arbitrators and Not a New York City Mandate

The American Arbitration Association also has spoken to the issue. The May 1988 Supplement #7 to the AAA's Commercial Manual states with respect to the AMEX Window that:

> "Locale
>
> "The arbitration clause quoted in the proceeding [sic.] section provides for administration by the AAA in the City of New York. This is interpreted to be merely descriptive of the location of the AAA's headquarters. Therefore, we will not automatically designate New York City as the locale for these cases. Rather, we will make locale determinations on a case-by-case basis, examining the traditional factors as set forth in the Commercial Manual.
>
> "As a general matter of policy, the location of the customer should be a major factor, especially if the brokerage house had an office in the customer's city and transacted business with the customer through that office." AAA, Commercial Manual, Supplement #7, p. 4 (May 1988)(emphasis in original)(copy attached hereto as Exhibit E).

The AAA's internal guidelines for determining the locale of an arbitration hearing certainly accord with statutory and judicial principles of venue, including considerations of convenience and deference to a plaintiffs choice of forums. Specifically, the AAA's Commercial Manual provides:

> "Factors to be considered in Locale Determinations
>
> 1. Location of parties.
>
> 2. Location of witness and documents.
>
> 3 If construction, location of site and relevance to dispute.

4. Consideration of relative cost to the parties.

5. Place of performance of contract.

6. Laws applicable to the contract.

7. Place of previous court actions.

8. Location of most appropriate panel.

> "Note that if all factors are equal, the claimant's choice of locale should be favored." (AAA, Commercial Manual, Section 11, p. 6 (December 5, 1986) (copy attached hereto as Exhibit F).

It was the application of these traditional convenience factors that influenced, at least in part, the court's decision to "abstain" from mandating a New York City venue or otherwise involving itself in the issue and leaving that determination to the AAA in Shearson Lehman Bros. v. Brady, supra, 783 F.Supp. at 1496-97.

D. The Better-Reasoned Court Decisions Support the Position That "In the City Of New York" Is Not Properly Interpreted As a Venue Provision

Both federal and state court decisions in Florida have held that the question of where an AMEX Window arbitration is to take place should be decided by the AAA. Boudreau v. L.F. Rothschild & Co., Inc., 1990 WL 81861, at 4 (M.D.Fla. Feb. 23, 1990); Joseph v. Prudential Bache Securities, Inc., 16 Fla.L.Weekly C82, Fed.Sec.L.Rep.(CCH) 796,184, at 90,991 (Fla. 9th Jud'l Cir. May 1, 1991). In Boudreau, the court stated:

> "Once it is determined that the parties are obligated to submit the subject matter of a dispute to arbitration--as has been done in this case--"'procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.' John Wiley & Sons, Inc., 376 U.S. 543, 557; 84 S.Ct. 909, 918 (1964).

* * *

> "The question of where the arbitration hearing in this case is to be held is a matter for determination by the arbitrator." 1990 WL 81861, at 4.

Florida circuit courts initially reached the same result. See, e.g., Grindle v. Prudential Securities, Inc., Order, CI94-6 (Fla. 9th Jud'l Cir. Mar. 31, 1994)(copy attached hereto as Exhibit G); Willette v. Dean Witter Reynolds, Inc., Final Order, CI93-7473 (Fla. 9th Jud'l Cir. Jan. 20, 1994)(copy attached hereto as Exhibit H). However, two other circuit court decisions took a conflicting position. See Trimble v. Dean Witter Reynolds, Inc., CI94-4504 (Fla. 9th Jud'l Cir. Sept. 7, 1994)(copy attached hereto as Exhibit I); Eno v. Dean Witter Reynolds, Final Order, CI94-3614 (Fla. 9th Jud'l Cir. Nov. 9, 1994)(copy attached hereto as Exhibit J).

Only Joseph was expressly approved by a federal district court (interpreting the Federal Arbitration Act) in Prudential Securities, Inc. v Thomas, 793 F.Supp. 764 (W.D.Tenn. 1992). There, the court stated:

> "This court does not, however, believe that the language in question is so clear that it admits of only one interpretation. Both the geographic description and the forum selection explanations are reasonable constructions of the language of the AMEX constitutional clause. The language is thus ambiguous." Id. at 767n.3.

Because of the ambiguity it found in the language, the court noted certain "extrinsic evidence":

> "[T]he AMEX has taken the position that this language is merely descriptive of the AAA by geographical location. Moreover, the AMEX has sought to have the language 'in the City of New York' deleted by a proposed rule change filed with the Securities and Exchange Commission. To date, however, the Commission has not issued an order approving the proposed rule change." Id.

The court concluded that

> [n]o valid reason has been advanced why the AAA should not, in accordance with the agreement of the parties [pursuant to he AMEX Window], resolve the controversy that has arisen between them as to the proper venue of the arbitration proceedings. The controversy concerning the venue of the arbitration is clearly one that relates to the account and to the parties' agreement and therefore is one that should be settled by the arbitration association. Id. at 767.

CONCLUSION

As a representative of the public investor, PIABA sees no justifica whatsoever for allowing brokerage firms to limit a customers choice of v arbitration to New York City in the single instance where the customer e only forum that is not affiliated with the brokerage industry (the AAA). AMEX itself expressly rejects any interpretation of the AMEX Window whic imposes such a limitation, and the courts should not allow the industry that obligation. Indeed, the Federal Arbitration Act discourages judici intervention beyond the threshold issue of arbitrability. It is PIABAs this Court adhere to these well-established principles by vacating the 0 trial court below and directing the parties to proceed with arbitration AAA in a proper venue set by the AAA in accordance with its rules.

Respectfully submitted,

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ADDENDUM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has served by first-class mail, postage pre-paid, this _____ day of June, 199 Dyer I Esquire, P.O. Box 3791, Orlando, Florida, 3280203791, and to Josep Coates, III, Steel Hector & Davis, 1900 Phillips Point West, 777 South F Drive, West Palm Beach, Florida, 33401-6198.

_____