No. 94-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Antonio C. Mastrobuono and
Diana G. Mastrobuono,

Petitioners,

v.

Shearson Lehman Hutton Inc., a
corporation,
Nick DiMinico, Richard F. Benzer,
and Mark Stevenson,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE
AND
BRIEF AMICUS CURIAE

The Public Investors Arbitration Bar Association hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the Petitioners has been obtained. The consent of the attorney for the Respondents was requested but refused.

The interest of the Public Investors Arbitration Bar Association in this case arises from the fact that its members currently represent public investors involved in securities arbitrations and related litigation actions pending before arbitration panels and state and federal courts throughout the United States, in which the same issue is before the Court, namely whether securities arbitration panels have the power to award punitive damages.

In the instant case in the Court of Appeals, Petitioners barely mentioned the public policy implications of the ability of arbitrators to award punitive damages, and also barely dealt with the issue of whether the agreement between the parties invoked the rule of New York law that prohibits arbitrators from awarding punitive damages.

Since it is likely that Petitioners may pursue the same course in this court, it is believed that the brief which amicus curiae is requesting permission to file will contain a more complete argument on the public policy issues and the invocation of the New York rule. If this argument is accepted, it could be dispositive of this case.

Respectfully submitted,

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Interest of Amicus Curiae

It is the avowed purpose of the Public Investors Arbitration Bar Association ("PIABA") to create within the securities arbitration process what has been referred to as a "level playing field." PIABA is composed of attorneys from most of the 50 states who concentrate a significant majority of their practice in the representation of public investors throughout the 50 states. Members of PIABA have encountered the issue that is before this court in many arbitration and litigation proceedings throughout most of the 50 states and in many state and federal courts throughout the country.

Summary of Argument

The Public Investors Arbitration Bar Association, as amicus curiae, urges this Court to reverse the decision of the court of appeals because punitive damages play an important role in securities arbitration.[1]

The lower court, in its decision, failed to appreciate this important role. The decision below was based upon two conclusions:

(1) that New York law, viz. Garrity v. Lyle Stuart Inc., 40 N.Y.2d 354 (1976), impermissibly prohibits arbitrators from awarding punitive damages; and

(2) that the agreement between the parties must be read to invoke the rule of Garrity.

Each of these two conclusions, however, is built on a faulty foundation, and, for the reasons herein stated, as well as those

[1] PIABA is composed of attorneys that represent public investors in securities arbitration and related litigation actions in most of the 50 states and state and federal courts. The issue of whether arbitrators have the power to award punitive damages arises frequently in these proceedings.

stated by Appellant in its Brief, the decision below was in error and should be reversed.

POINT I: NEW YORK'S GARRITY RULE IS AN UNWISE AND ANACHRONISTIC INTRUSION INTO THE PROVINCE OF THE ARBITRATOR, AND IS A HOLDOVER FROM AN ERA WHEN ARBITRATION WAS SUSPECT

New York law, which ousts arbitrators of any authority to award punitive damages, is contrary to the principles that underlie the Federal Arbitration Act. See generally Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements"). See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25, n.32 (1983); Volt Information Sciences v. Board of Trustees for the Leland Stanford Jr. University, 489 U.S. 468 (1989).

Garrity v. Lyle Stuart, Inc., supra., upon which "New York law" and the decision below rests, was decided in 1976. Since that time, arbitration has gained widespread acceptance as a fair, useful and sound method of dispute resolution. Indeed, this Court, which at one time displayed a hostility to arbitration similar to that of the Garrity Court, now views nearly all arbitration agreements as valid and enforceable.[2]

The arbitrators in Garrity had awarded the arbitration claimant $45,000 in compensatory damages and $7,500 in punitive damages after the arbitration respondent had walked out of the hearing dissatisfied with the certain preliminary rulings. The New York Supreme Court confirmed the award, and that decision was affirmed by the Appellate

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[2]In fact, this Court once viewed pre-dispute arbitration agreements in securities fraud cases as unenforceable, see Wilko v. Swann, 346 U.S. 427 (1953), but that position has changed markedly in recent years. See Rodriguez de Queijas v. Shearson/American Express, Inc., 109 S.Ct. 1917 (1989); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, rehearing denied, 483 U.S. 1056 (1987).

Division. The respondent, however, persisted in its appeal to New York's highest court, challenging only the punitive damage portion of the award. The Court of Appeals split 4-3, vacating the punitive damage award and rendering New York arbitrators powerless to award punitive damages.

Joan Garrity, the claimant in the arbitration, was the author of two successful books, and she alleged that the respondent, the books' publisher, had "maliciously" withheld royalty payments due her. The Court of Appeals, in ordering modification of the award, stated:

> An arbitrator has no power to award punitive damages, even if agreed upon by the parties. [citation omitted] Punitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention.

Garrity, 40 N.Y. 2d at 356. It is submitted that New York's policy in this regard is antithetical to the federal policies encouraging the arbitrability of disputes.

The New York Court of Appeals expressed several motivations for its decision, all grouped under the general heading of "public policy." The court was obviously concerned that the free reign given to arbitral authority by the legislature and the courts might lead to punitive awards that are excessive and beyond the reach of the courts to correct.

This fear was underscored by the nature of the substantive claims involved in <u>Garrity</u>, <u>i.e.</u> breach of contract. It is of course well-established that punitive damages are not, as a matter of law, available in an action for breach of contract, no matter how willful or wanton the breach. <u>Garrity</u>, 40 N.Y. 2d at 358. Yet, as the Court observed in <u>Garrity</u>, arbitrators are not bound by such substantive legal provisions, and the courts are not permitted to overturn an award based upon an error in applying substantive legal principles. Denying arbitrators the power to apply punitive damages was a logical way to correct the arbitrator's legal error.

But Judge Gabrielli, along with Judge Wachtler and Jones, dissented from the now-controversial ruling in Garrity. The dissenters criticized the majority for vacating a "rational and just award," 40 N.Y.2d at 360, thus suggesting that an irrational or unjust award could be vacated by the Court.

The majority decision in Garrity, however, goes beyond mere concern over the misapplication of substantive law. Rather, the Court's opinion bespeaks a blatant suspicion of the arbitral process, one that is difficult to reconcile with the strong current policies favoring arbitration.

Judged by the standards in effect seventeen years ago, the Garrity Court's suspicion of arbitration was not inconsistent with the limited experience society had with commercial arbitration at the time. As stated, the Court's decision was also consistent with some of the then-existing federal misgivings about arbitration.

But the climate of distrust that gave rise to the federal decision in Wilko in the 1950's, and the New York decision in Garrity in the 1970's, no longer exists in the 1990's. It is thus not surprising that in virtually every forum outside New York, judicial hostility to Garrity has been overwhelming. Judges sitting in the federal courts located outside New York state have almost always seen fit to ignore it, sidestep it, or simply reject it out of hand, even in cases where the arbitration agreement involved contained a New York choice of law clause. See e.g., Raytheon Co. v. Automated Business Systems, Inc., 882

F2d 6 (1st Cir. 1989)(Reinhardt, J.); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988)(Kravitch, J.) Todd Shipyards v. Christensen, 943 F2d 1056 (9th Cir 1991).[3] Likewise, other state courts have with almost amazing uniformity refused to apply New York's limitation on punitive damages in arbitration.[4]

Importantly, virtually all courts now view the arbitration system differently from the way it was viewed in Garrity. As one court has stated on the issue of an

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[3] See also Willis v. Shearson/American Express, Inc., 569 F. Supp. 821 (M.D.N.C. 1983) (H.Ward, J.)(holding that, even though the contract contained a New York choice-of-law clause, federal law favoring arbitrability supersedes the Garrity rule).

[4] See, e.g. Baker v. Sadick, 208 Cal.Rep. (1984); State Farm Fire & Casualty Co. v. Wise, 721 p.2d 674 (Ariz.App. 1986). In addition, nearly all scholarly commentators have been critical of Garrity. See, e.g. Stipanovich, Punitive Damages in Arbitration - Garrity v. Lyle Stuart Revisited, 66 B.U.L. Rev. 953 (1986).

arbitrator's power to award punitive damages:

> [A]n arbitrator steeped in the practice of a given trade is often better equipped than a judge... to decide what behavior so transgresses the limits of acceptable commercial practice in that trade as to warrant a punitive award...

Willoughby Roofing and Supply Inc., v. Kajima International, Inc., 598 F.Supp. 353 (N.D. Ala. 1984), affirmed, 776 F.2d 269 (11th Cir. 1985).

More recently, the 1st Circuit, in Raytheon, supra, expressed the prevailing view:

> Punitive damages serve as an effective deterrent to malicious or fraudulent conduct. Where such conduct could give rise to punitive damages if proved in court, there is no compelling reason to prohibit a party which proves the same conduct to a panel of arbitrators from recovering the same damages.

Raytheon, at 10.

Indeed, even in New York, the Garrity rule has been criticized in the context of securities arbitration. In Matter of Dreyfus Service Corp. v. Kent, 183 A.D.2d 446, 584 N.Y.S2d 483 (1st Dep't.), Motion for Leave for Appeal Denied, 81N.Y. 2d 701, 594, N.Y.S. 2d 715, 610 N.E.2d 388, 1992, an intermediate level appellate court dutifully followed Garrity. But, in a separate concurring opinion, Justice Sidney Asch Wrote:

> if the Court of Appeals were to reexamine the issue of whether punitive damages can be awarded by an arbitrator in a securities dispute, it might well decide that changing times and circumstances mandate a reconsideration of the rule announced in Garrity....
>
> Under the present state of affairs, the danger represented in 'the uncontrolled use of coercive economic sanctions in private agreements' no longer refers to the ability of an arbitrator to impose punitive damages, but the inability of the investor to recover for real, and in some cases, glaring abuses.

N.Y.S. 2d at 484-485[5]

Garrity, of course, did not involve securities fraud, and it can be distinguished from the instant matter based upon that fact. Indeed, the differences between ordinary commercial arbitration based on breach of contract and securities arbitration based, for the most part, on fraud, presents important grounds for not applying Garrity to securities arbitration.

Punitive damages play a necessary and important role in securities arbitration. When awarded at the conclusion of a matter,

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[5] Like the case at bar, the Kent arbitration involved a dispute over fraud and misrepresentation in the sale of securities. The arbitrator who heard the dispute considered the evidence, and determined that a case had been made for punitive damages. No claim was made that the arbitrator's award was irrational, without merit or that it was excessive. Rather, Dreyfus only claimed, and the Appellate Division determined, that Garrity's precedential force mandates vacatur of the arbitrator's award insofar as punitive damages are concerned. The New York Court of Appeals denied the motion for leave to appeal.

punitive damages serve as a deterrent to similar unlawful conduct. And at the outset of a case, the prospect that punitive damages might be awarded can motivate a transgressor promptly to offer adequate compensation or a fair settlement for the wrong that has been committed.

The rule of Garrity should not be applied to securities arbitration because punitive damages are necessary to police adequately the securities industry, where deterrence of wrongful conduct and the benefits of early settlement are especially important. The securities industry is involved in the sensitive fiduciary task of giving financial advice and investing other people's money on a commission basis. If a brokerage firm is assessed punitive damages for knowingly fraudulent or grossly negligent behavior, the firm is likely to cease and desist from such offensive conduct. Conversely, if the securities industry is insulated from the dangers of punitive damages, (as it is under Garrity), there will be far less deterrence, and, consequently, a greater number of abuses.

Miley v. Oppenheimer & Co., 637 F.2d 318, 330 (5th Cir. 1981), was one of the first appellate cases upholding a jury verdict of punitive damages against a securities firm. As the Fifth Circuit explained in Miley, relying in part on the work of one of the authors of this brief;

> Most courts in the past have seen fit, when they find the broker-dealer's hand in the till, to simply request removal of the offending appendage. And when the till is empty, and the broker-dealer's fingerprints are all that remain where the money once lay, all the courts do is to require the crook to replace the booty. If ever there was a situation where crime pays it is in such circumstances;...No wonder one commentator saw fit to term the average recovery in churning cases as creating for the broker-dealer a "low risk larceny."
>
> ...[T]he only sure way of deterring such conduct in the future is to take the profit away from the wrongdoers and slap on an additional amount as punitive damages;...

Goldberg, Fraudulent [Broker]-Dealer Practices, sec.6.5 (1978).

Miley, 637 F.2d at 331-32.

Logic similar to that used by the Fifth Circuit in Miley has been used time and again by other courts reviewing punitive damage assessments against brokerage firms. See, e.g., Raytheon, supra. In the post-McMahon era, even though juries have been preempted from considering punitive damage verdicts against securities firms because such cases are now heard in arbitration, the force of Miley, that punitive damages provide much-needed deterrence, is still very much appropriate. If the type of deterrence that motivated the Miley court is to be achieved in the post-McMahon era, the rule of Garrity must not be extended to securities arbitration.

A vivid example of the deterrent effect that punitive damage awards can have on the securities industry took place in the summer of 1988. During that summer, arbitrators in two separate arbitrations awarded investors a total of over $2.5 million in punitive damages against Dean Witter Reynolds, Inc. See Matter of Mark & Traczyk v. Dean Witter Reynolds, Inc. (AAA Fla. 7/29/88) and Matter of Hutcheson v. Dean Witter Reynolds, Inc., (AAA Fla. 8/12/88) summarized in Goldberg, 1991 REPORT OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION AS TO THE AUTHORITY OF ARBITRATORS TO AWARD PUNITIVE DAMAGES IN SECURITIES ARBITRATION (1991), at 18-21. Both these arbitrations were decided by panels of the American Arbitration Association sitting in Florida. Both matters focused on the unsuitability of naked index options in the accounts of an elderly couple (Mark & Traczyk) and a recently widowed housewife (Hutcheson).

Just six days after the second award, Haskell T. Adler, southern regional manager for Dean Witter, issued a memo dated August 18, 1988 to "Florida Regional Managers" on the topic "Florida Regional Options Policy."

The memo stated:

> Effective immediately, the <u>only</u> types of options activity that will be permitted in the Florida Region will be the following:
>
> 1. The selling (writing) of <u>covered equity calls.</u> To be considered covered the equities underlying the calls must be on deposit in the account or be purchased at the same time the calls are sold, or they must be backed by escrow receipts in approved accounts.
>
> 2. The selling (writing) of cash secured <u>equity puts</u>. In this case there <u>must be on deposit</u> in the account a cash amount equal to the value of the strike price of the put sold.
>
>> Example: Client sells 1 XYZ August 40 put.
>>
>> Strike price of put $40 X 100 = $4,000 requirement.
>
> Any account engaged in this type of activity must be interviewed by the branch manager and a memo regarding the account's suitability to engage in the selling (writing) of cash secured equity puts must accompany the Option Client Information form which is to be sent to the Regional Director for final approval.

3. The purchase of Put or Call Index Options.

4. The purchase of Put or Call Equity Options.

Any account executive who violates this policy will be subject to disciplinary action up to and including termination.

The deterrent effect of the punitive damage awards is obvious. The activity prohibited by the Adler memo is precisely the activity involved in the two arbitrations. With the advent of the Dean Witter prohibition and screening process, elderly and unsophisticated investors are far less likely to be harmed by similar practices at Dean Witter. Without the punitive damage awards, the practice might well have continued, causing untold losses to other innocent investors.

Punitive damages thus play a crucial role in policing the securities industry. The ever-contracting budgets of governmental watchdogs makes public policing alone impractical and far too sporadic. But public investors, acting as private attorneys-general, can play a useful part in deterring securities fraud. If the rule of Garrity is retained in securities arbitration, such non-governmental policing will cease to exist, and investors will be less safe from those who might wantonly or willfully like to part them from their money.

The importance of deterrence notwithstanding, the members of the Public Investors Arbitration Bar Association are especially concerned with the important role punitive damages play in the settlement of disputes. Our collective experience is that in many situations, it is impossible to reach an expeditious and just settlement in cases where punitive damages are not available. And unfortunately, securities arbitration cases frequently involve elderly customers who have lost all or a substantial part of their life's savings.[6] In such cases, expeditious and just settlement is especially important.

If arbitrators are not empowered to award punitive damages, brokerage firms have minimal incentive adequately to settle just disputes. If Garrity is extended to securities arbitrations, brokerage firms will know in advance that the worst they can do in arbitration is to be forced to make restitution; their incentive to make that restitution prior to hearing and award will be all but eliminated. Instead, brokerage firms often offer settlements that are smaller than the amount justly deserved, knowing that the investor must then face the difficult choice of (1) taking the lesser sum, or (2) incurring significant attorneys

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[6] An example of this is the NASD arbitration case of Peterson v. Shearson (NASD - AZ '89) which resulted in a punitive damage award of $1,000,000 which was paid in full. The arbitrator's case summary began with the following sentence: "Peterson is a 100 year old widow with impaired vision."

fees, expert witness fees and arbitral forum fees in order to obtain restitution (less the costs of the proceeding).[7]

The possibility of punitive damage awards reduces the likelihood that brokerage firms will commit "extortion by arbitration." The prospect of punitive damages awards has a useful impact on dispute control and the encouragement of just settlements, and punitive damages should not be eliminated through the insertion of an innocent-looking choice-of-law clause into a consumer contract of adhesion.

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[7] The prospect of this type of conduct occurring in the setting of litigation is reduced not only by the availability of punitive damages, but also by the possibility of the imposition of sanctions by the court. In this regard, it is worth noting that arbitrators lack the power to "sanction" participants for misbehavior or for making legal and factual arguments that are frivolous, baseless and without any merit. See, e.g. A.G. Edwards & Sons v. McCollough. No. M90-129-PHX-PGR, slip op., (D.Ariz. May 2, 1991)(Rosenblatt, J.)

The need for punitive damages in securities cases is best summed up by recounting a statement made in Aldrich v. Thomson, McKinnon Securities, Inc., 746 F.2d 243, 246 n.3 (2d Cir. 1985)(Lumbard, J.).

> Thomson McKinnon's wanton and reckless disregard of the trust placed in it by Aldrich was not only a wrong against her but, by what it portended for other unfortunate investors, it was a wrong against the general public. Thomson McKinnon, a seller of securities on national exchanges and over the counter, a member of the New York Stock Exchange and other leading exchanges, is a large, highly regulated, and socially significant institution. ...[T]he purpose of the punitive damage award is to punish and deter the offender...[and to] discourage repetition of Thomson McKinnon's grossly negligent conduct, or instances of such conduct by other brokerage firms.

Id. at 249.[8] The deterrent effect just-described would be lost if the rule of Garrity is permitted to operate nationally in the context of securities arbitration.

POINT II: IT IS UNCONSCIONABLE TO ALLOW THE SECURITIES INDUSTRY TO USE THE NEW YORK CHOICE OF LAW CLAUSE IN ITS CONTRACTS OF ADHESION TO INSULATE ITSELF FROM PUNITIVE DAMAGE AWARDS

The members of the securities industry almost uniformly require that customers sign a pre-printed "Customer Agreement." The Appellant here was such a customer. The standard "Customer Agreement," like the agreement in the case at bar, invariably has two clauses of significance. The first calls for arbitration, typically before one or more industry self-regulatory

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[8] While the approach of Garrity has been followed in Indiana, School City of East Chicago, Indiana v. East Chicago Federation of Teachers, 422 N.E.2d 656 (Ind.App. 1981)(Gerrard, J.), West Virginia, Anderson v. Nichols, 359 S.E.2d 117, 121, n.1 (W.Va. 1987)(Nealy, J.), and New Mexico, Shaw v. Kuhnel & Associates Inc., 698 p.2d 880, 882 (1985)(Riordan, J.), none of these cases involved securities arbitration.

organizations; the second states that New York law shall govern any controversy. These two clauses then work together (in a somewhat surreptitious way) to insulate the industry from effective policing by private attorneys general. This Court should not sanction such a practice.

In Garrity, the New York Court of Appeals expressed a concern about permitting arbitrators to award punitive damages because their selection can be "restricted or manipulat[ed] by the party in a superior bargaining position." This fear, however, has no application to investor-initiated securities arbitration, because, almost invariably, when punitive damages are awarded in connection with claims brought by public investors, the punitive damages are awarded to the investors against the brokerage firms.

Needless to say, in securities arbitration, it is the brokerage industry that holds the superior bargaining position, and it was the brokerage industry that was the driving force behind compulsory arbitration of securities disputes. On June 8, 1987, when the United States Supreme Court reversed its thirty-four year tradition of federal judicial hostility toward arbitration of securities disputes, and held that an arbitration agreement in an investor-broker contract was binding on the investor, the appeal was brought by a securities firm, and the Securities Industry Association supported that position by filing a brief as Amicus Curiae. See Shearson/American Express Inc. v. McMahon, 482 U.S. 220, rehearing denied, 483 U.S. 1056 (1987).

In most cases, the arbitration agreements in broker-customer agreements permit arbitration only before the various self-regulatory organizations of which the firm is a member. The arbitrations thus take place in the brokerage firm's proverbial backyard, where the customer can exert little influence and there is scant chance for the evil manipulation to occur. Even in the (rare) case where securities arbitration is not before a self-regulatory organization, it takes place before the American Arbitration Association, which boasts a long history of impartial resolution of disputes.[9]

In short, the "evil manipulation" rationale for Garrity cannot logically be applied to securities arbitration in the 1990s. Thus, while Garrity might still have validity in some contexts, it simply should not be applied to securities arbitrations, especially those conducted in states that permit arbitrators to award punitive damages.

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[9] And as added insurance against manipulation, most securities arbitrations, whether held before the SROs or the AAA, have a member or affiliate of the brokerage industry on the panel.

Yet another underpinning of the rule of Garrity is that arbitration should not be permitted to replace the State as the "engine for imposing a judicial sanction." But the securities industry, through its dogged advocacy of arbitration as the exclusive mechanism for the adjudication of public investor grievances, has left the State judiciary no role in the process of resolving broker-customer disputes. See Shearson v. McMahon. supra. It is also noteworthy that in McMahon, the Supreme Court specifically took from the courts, and gave to arbitrators, the power to determine R.I.C.O. claims in public investor disputes, including claims for treble damages under that statute.

That same industry now urges that Garrity be exported to include securities arbitration awards in states that decline to follow the rule. In so doing, the industry seeks to insulate itself from effective punishment. Having succeeded completely in replacing the State and Federal judiciary as the "engine" for the adjudication of customer disputes, the securities industry now employs <u>Garrity</u> to prevent awards of punitive damages against themselves.

The use of <u>Garrity</u>, within the monopolistic area of securities arbitration, is less than ethical because it constitutes an indirect way of violating rule 21(f)(4) of the N.A.S.D.'s Rules of Fair Practice, which mandates that: "<u>No agreement shall include any condition which</u> limits or contradicts the rules of any self-regulatory organization or limits the ability of a party to file any claim in arbitration or <u>limits the ability of the arbitrators to make any award.</u>" Thus, while no brokerage firm could write a pre-dispute arbitration clause that directly states that "no customer can obtain punitive damages in securities arbitration," that same result is achieved through the indirect device of putting a New York choice-of-law clause into a national securities contract which then seeks to govern millions of public investors who have no other contact with the state of New York other than the aforesaid clause in their brokerage contracts. In addition, efforts by such self-regulatory organizations as the NYSE to include a punitive damages section in their standard arbitration award form are rendered a nullity by the express reference to New York law (and implicit invocation of Garrity) in the standard brokerage contract.

Today, the members of that same industry, armed with a monopoly over adjudication of customer disputes, seek to utilize the agreements they have extracted from their customers to insulate themselves from punishment for such torts as breach of fiduciary duty and the most invidious kinds of frauds. Now that the United States

Supreme Court has virtually foreclosed the possibility of litigation of broker-customer disputes, arbitration _must_ assume the role of judge, jury and policemen in resolving claims against the brokerage industry.

To compound matters, it must be noted that the securities industry knows that the laws of states other than New York permit punitive damage awards by arbitrators. For this reason, many members of the industry actively seek to impose the New York view on non-New York claimants by placing New York governing law provisions in their standard form contracts they make their customers sign.[10] Clearly, the inclusion of such a provision is intended to extend the rule of _Garrity_ across the nation. By imposing _Garrity_ on the perhaps-unwilling, out-of-

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[10] On the other hand, customers of brokerage firms know nothing about the rule of _Garrity_, and they are thus likely to be surprised when they learn that New York's _Garrity_ rule forecloses any award of punitive damages.

state participants in the securities arbitration process, New York law becomes the shield that the securities industry uses against claims of securities fraud.[11] And by designating New York law as governing, (often adding language "without giving effect to New York's conflict-of-laws provisions,") they seek to disenfranchise the judiciary of other states and the consumer protection laws of those states (regardless of the anti-waiver provisions contained therein), and compel application of Garrity even in states that reject it.

This Court should decline to participate in this disenfranchisement. Members of the securities industry know that a provision in their contracts which would expressly provide that a state's consumer

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[11] Indeed, to the extent that other jurisdictions, with or without a New York choice-of-law clause, have declined to adhere to Garrity, New York's Garrity rule becomes the source of conflict with the law of other jurisdictions.

protection laws would not govern the transaction would be void if that state's law contained an anti-waiver provision. The securities industry instead inserts a New York choice-of-law clause in their agreements and makes the same otherwise prohibited argument that the remedy of punitive damages has been waived by the investor.

This Court should reverse the decision below because it is unconscionable to permit the New York choice-of-law clause, contained in a consumer contract of adhesion, to insulate the securities industry from the deterrent effect of punitive damage awards.

Conclusion

For the reasons stated here, the Public Investors Arbitration Bar Association, as amicus curiae, urges this Court to reverse the decision of the court of appeals.

Respectfully submitted,

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I hereby certify that three (3) copies of the foregoing has been served upon the following Counsel of Record by United States Mail, postage prepaid on this 15th day of November, 1994:

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