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NASD Broker-Customer Arbitrations Does Connecticut Law Make a Difference?

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Aiding and Abetting, Attorney Fees and Costs

Unlike Rule 10b-5 promulgated under the Securities Exchange Act of 1934, CUSA, in Section 36b-29, contains a private right of action for aiding in the commission of securities fraud. Section 36b-29(a)(2) states that any person who "offers or sells or materially assists any person who offers or sells a security by means of an untrue statement...is liable to the person buying the security." The statute also states that the wrongdoer must be shown to have known "or in the exercise of reasonable care should have known of the untruth or omission."

Not only does the statute allow a customer to claim that his stockbroker may have lied to him, but CUSA also allows the customer to say that others may have assisted the stockbroker. Unlike Rule 10b-5, which requires a showing of knowledge or reckless disregard of material facts by the wrongdoer, Section 36b-29 requires only that the wrongdoer knew or should have known of the false or misleading statements which caused the customer to buy. This formula creates wrongdoing by the perpetrator or by someone who assists that person with a showing of mere negligence. The statute requires only that the aider or stockbroker should have known.

Statutes of Limitations

Contrary to some arguments by claimants' lawyers, Rule 12206 of the FINRA Code of Arbitration for Customers recognizes applicable statutes of limitations as well as a six-year eligibility period. That rule states, in part:

(a) No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.

(c) The rule does not extend applicable statutes of limitations;...

CUSA provides a two-year statute of limitations for actions not involving "intentional misrepresentation or fraud in the purchase or sale of securities." For actions which do involve misrepresentation in the purchase or sale of securities, the statute of limitations is two years from the date of discovery of the wrongdoing but not more than five years from the date of the occurrence of the misrepresentation or fraud.

There is a three-year statute of limitations for actions based on a tort. There is a six-year statute of limitations for actions based on a written contract, and a three-year statute of limitations for actions based on an oral contract.

Unauthorized Practice of Law

Claimants in arbitration occasionally hire individuals who are not licensed to practice law to represent them. FINRA Rule 12208 (c) states that "parties may be represented in an arbitration by a person who is not an attorney, unless state law prohibits such representation,..." In light of that rule the non-attorney should be aware of Connecticut's prohibition against the unauthorized practice of law. Section 51-88 of the Connecticut General Statutes states, in part:

(a) A person who has not been admitted as an attorney...shall not: (1) practice law or appear as an attorney-at-law for another, in any court of record in this state, (2) make it a business to practice law, or appear as an attorney-at-law for another in any such court... (or) (4) hold himself out to the public as being entitled to practice law...."

The prohibition against unauthorized practice is not limited to practice before a court. In *Committee of the Bar of Fairfield County v. Norman F. Dacey et al.*, 154 Conn. 129 (1966), the Connecticut Supreme Court rejected the argument that the unauthorized practice had to be before a court and stated that the defendant was "forbidden to practice law in or out of court....the only question was whether what he did constituted the practice of law."

The Connecticut Supreme Court, in the case of *In re Darlene c.* 247 Conn 1 (1988), held that "determining the legal theory of a case, drafting papers necessary to commence a legal action, checking the various possible legal grounds, signing the pleadings, and submitting them to court (are) acts that are commonly understood to (constitute) the practice of law."

The Connecticut Bar Association's Committee on the Unauthorized Practice of laws has indicated that the same analysis applies to arbitration. The committee's opinion considered a New York lawyer's representation of a corporation in arbitration against the State of Connecticut. It states: "the New York lawyer is not an employee or an officer of the party he represents and does not play a role similar to a

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union representative. He has been engaged because of his experience and legal knowledge." The committee concluded that "it appeared that the New York lawyer was impermissibly practicing law in Connecticut without a license."

This issue is sometimes a close call. The correct way to raise it is to file an action in Connecticut Superior Court seeking a determination that an individual is practicing law without a license. Parties may not choose to file that court action; however, it is available to them.

ATTORNEYS

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PRACTICE AREAS

Securities