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E*ZINES
March 2003 Vol. 2

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NASD-DR Has Second Record Year for Securities Arbitration Filings

NASD Dispute Resolution announced February 26 that 2002 was its second consecutive record year for securities arbitrations, with 7,704 new cases filed. Filings were up 11% over 2001 and up 39% over 2000. Of new cases, some 60% were settled before hearing and about 82% of cases referred to mediation settled.

Jones Walker's corporate and securities litigation group has extensive experience in NASDR and other SRO arbitrations and mediations. Several Jones Walker partners also serve on NASDR's roster of arbitrators and panel chairmen.

- Thomas K. Potter, III

Florida Prohibits Out-of-State Lawyers' Participation in Securities Arbitrations

In a February 20, 2003 ruling, the Florida Supreme Court enjoined a DC-admitted lawyer from representing parties in securities arbitrations in Florida. *The Florida Bar v. Rapoport*, No. SC01-73 (Fla. Fegb. 20, 2003). The issue had been left open in the Bar's 1997 advisory opinion prohibiting nonlawyer firms from providing private securities arbitration services. *See Florida Advisory Op. on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178, 1180 n. 1 (Fla. 1997)(expressly excluding lawyers admitted in other jurisdictions). The new ruling appears to require a Florida-licensed lawyer's participation in every securities arbitration heard in Florida.

Jones Walker's litigation group includes Florida-licensed lawyers and the partners in our Miami office are available to affiliate with and supervise others in securities-litigation group.

- Thomas K. Potter, III

NY Court of Appeals Reverses Punitive Award in Departing-Broker Arbitration

Applying *BMW of North America v. Gore*, the New York Court of Appeals vacated a $25 million punitive damages award in a departing-broker case, holding its 23:1 relationship to actual damages was irrational and a

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manifest disregard of law. *Sawtelle v. Waddell & Read, Inc.*, No. 2330 (NY Sup. Ct., App. Div'n, 1st Dept., Feb. 11, 2003). Looking past *Gore's* due-process rationale to its rationality and proportionality mandates, the Court held it applied to private securities arbitrations and would invalidate disproportionate awards, even where they have some grounding in the defendants' conduct. Although the U.S. Supreme Court long ago affirmed arbitrators' authority to award punitive damages, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 67, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), that decision still required that punitive damages be authorized by applicable law. Louisiana law generally does not allow punitive damages, except when specially authorized by statute – and they aren't applicable to most customer claims; nevertheless, claimants routinely seek them. *Sawtelle* provides additional protection by supporting judicial reversal of arbitration awards for punitive damages.

Jones Walker's securities litigation group is experienced in defending acquiring firms in departing-broker litigation.

- Stacie M. Hollis

Del. Court Upholds Privilege on Disclosures to SEC under Confidentiality Agreement

On an issue of first impression for Delaware courts, in *Saito v. McKesson HBOC Inc.*, Del. Ch., No. 18553 (10/25/02), the Court of Chancery ruled that work-product materials generated during an SEC investigation remained privileged despite disclosure to the SEC in the course of its investigation. The court upheld the privilege based on the corporation's use of a confidentiality agreement, and determined that all documents produced to the SEC after the agreement remained privileged.

The privileged materials consisted of a written report to the corporation's audit committee prepared by the corporation's outside lawyers in response to an SEC inquiry into alleged false and misleading financial statements. The court reasoned that the confidentiality agreement was sufficient to preserve the privilege because it created a reasonable expectation of privacy. Policy concerns also supported the decision. The "selective waiver" of the privilege in favor of the SEC encourages corporations to disclose their internal investigations to regulatory agencies.

The court refused to recognize the privilege for those documents produced before the execution of the confidentiality agreement. In addition, the court considered the second prong of the analysis for waiver of the conditional work-product privilege, and found that the plaintiff had not satisfied its burden of proving a "substantial need" for the privileged documents.

The "selective waiver" recognized by the Court of Chancery (also referred to as the self-critical evaluation privilege, self-audit privilege, and self-evaluative privilege) has received scant attention from the courts since its first recognition in 1970, *see Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970, *aff'd* 479 F. 2d 920 (D.C. Cir. 1973), and remains largely undefined by the federal courts. *See, e.g., Morgan v. Union Pacific Railroad Co.*, 182 F.R.D. 261 (N.D. Ill. 1998). The Fifth Circuit has not resolved to what extent, if any, the privilege exists. *See, e.g., In re Kaiser Aluminum and Chemical Co.*, 214 F. 3d 586, 593 (5th Cir. 2000); *see also* CATHERINE L. FORNIAS, *The Fifth Circuit Reconsiders Application of the Work Product Doctrine and the Privilege of Self-Evaluation: In re Kaiser Aluminum & Chemical Co.*, 76 T. L. Rev. 247 (2001).

Jones Walker's securities litigation group is experienced in representing clients subject to SEC investigations or inquiries.

- Amy L. Glovinsky

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact our Corporate and Securities Litigation practice group:

Thomas K. Potter, III
Jones, Walker
201 St. Charles Ave., 49th Fl.
New Orleans, LA 70170
ph. 504.582.8358
fax 504.589.8358
email: tpotter@joneswalker.com