

may bear on the SRO's consideration of a membership continuance application and may be considered in "appropriate context" and given an "appropriate weight."

Finally, the SEC noted its holding that "NASD should generally confine its analysis to new information when evaluating a membership continuance application." The agency said that it could not determine whether NASD knew about Rokeach's failures to disclose his felony conviction on the four applications for insurance registration at the time that it reached its settlement with Rokeach. Thus, the SEC could not determine whether "enough new information was brought to NASD's attention to allow it to consider the conduct underlying [the settlement] as forming a significant pattern with Rokeach's other misconduct."

## Arbitration

### **NASD Panel Awards \$22 Million To Retired ExxonMobil Workers**

**A**n NASD arbitration panel May 15 awarded \$22 million to a group of retired ExxonMobil Corp. employees who claimed that their broker steered them into inappropriate, high risk investments in variable annuities and mutual fund B-shares, costing them much of their retirement savings.

The unusually large award against Ameriprise Financial Inc. subsidiary Securities America Inc. and David McFadden, one of the firm's registered representatives, included \$3.5 million in punitive damages. It also included \$11.6 million in compensatory damages, \$4.7 million in attorney's fees, interest currently totaling \$1.8 million, and another \$453,000 in costs.

Scott Hoyt, general counsel to Securities America Inc., told BNA May 17, "We disagree with the arbitration panel's decision, and we intend to file a motion to vacate that award."

Counsel to the claimants, Joseph C. Peiffer, an associate at Correro Fishman Haygood Phelps Walmsley & Casteix L.L.P. in New Orleans, told BNA May 17, "We started in July 2003 and the respondents dragged it out. We went through 90 days of trial." According to Peiffer, the arbitration hearings were held in New Orleans and then moved to Baton Rouge after Hurricane Katrina. "We didn't lose any dates because of Katrina," he said, explaining that hearings that had originally been scheduled to take place after Katrina were moved to Baton Rouge.

Peiffer said that he and James R. Swanson, a partner at Correro Fishman, brought the case on behalf of 32 former Exxon employees who are mostly from the Baton Rouge area. Only two of the former employees had undergraduate degrees, and they were financially unsophisticated, the arbitration complaint alleged. McFadden allegedly functioned as a financial planner, investment adviser, and registered financial consultant with respect to the claimants, all of whom had a contractual relationship with him.

In testimony during the arbitration, it emerged that McFadden, who had touted himself as a practicing CPA until well after 2000, had not been licensed as a CPA since 1987.

**Thrift Plan, Defined Benefit Plan.** In general, the claimants had two primary sources of assets to generate retirement income—a company thrift plan and a defined benefit pension plan. Upon turning 55, ExxonMobil employees with enough years of service could retire and take their defined benefit pension in monthly payments for life or in a lump sum. If they decided to continue working at the company, the amount of their monthly benefits would increase as they added years of service and their pay level rose, the complaint explained. If they decided to retire, their benefits became fixed.

Employees had the option to keep the assets, often Exxon stock and cash, in the plan or to roll it over into a tax-deferred vehicle such as an IRA.

According to the complaint, the claimants asked McFadden his advice on whether they had enough money to retire or whether they should continue working. They sought to know how much money they could safely receive during retirement and still have enough money to generate a monthly income for the remainder of their lives. Finally, they asked his advice on how their money should be invested to ensure a reasonable monthly income with a safety of principal, the complaint said.

**Taking a Distribution.** According to the complaint, McFadden advised all of the claimants to retire immediately and that they could take an annual distribution of approximately 10 percent of their invested assets without jeopardizing their retirement principal or their ability to receive sufficient retirement income in the future. In addition, McFadden allegedly advised the claimants to take their defined benefit pensions in a lump sum and transfer that lump sum and the assets in the thrift plan to him for him to invest.

Subsequently, McFadden exercised complete discretionary control over the claimants' monies in almost every case, according to the complaint. In many instances, the complaint continued, he put the monies, which were often already tax deferred, inappropriately into variable annuities, earning commissions of 5 percent and higher—a rate higher than almost any other investment product. The variable annuities also had high expenses and large surrender fees, cutting into investment performance and making it difficult for an investor to switch into a different investment once the annuity is purchased.

McFadden also bought B-share and C-share mutual funds and other high commission products for the claimants for whom he did not buy variable annuities, the complaint said. These funds were "burdened by high annual expenses and large sales charges." Allegedly, McFadden did this to "maximize his own income to the detriment of this clients." The complaint also alleged McFadden invested heavily in stock funds, inappropriately ignoring his own diversification plan.

**Less Than Half Left.** At the time the complaint was filed in 2003, several years after McFadden began advising them, the claimants said they had less than half of what they started with. "It is almost impossible that the Claimants will have any substantial portion of their retirement funds available to them again," the complaint said.

Three of the claimants said they had transferred more than \$1 million to McFadden, and four more transferred in excess of \$900,000. As a consequence of McFadden's actions, the complaint said, some of the claimants had to go back to work, some had to sell their

homes or mortgage their homes, and some had IRS problems.

By RACHEL McTAGUE

## Securities and Exchange Commission

### **SEC to Hold Seminars For Mutual Fund, Adviser CCOs**

**T**he Securities and Exchange Commission May 15 said that its examination staff from its field offices will sponsor regional seminars for mutual fund and investment adviser Chief Compliance Officers—CCOs—at various locations nationwide this spring and summer.

In a press release, the SEC explained that the seminars are part of its CCO Outreach program established last year “to support the important work that chief compliance officers perform on behalf of mutual fund investors and advisory clients.”

**Case Study.** The CCO Outreach seminars will feature a case study designed to illustrate compliance issues. According to the commission, the case study will help outline processes that can be used to create a risk inventory and determine effective risk-based policies and procedures.

“In this year’s regional seminars, fund and adviser CCOs will gain insight from the experiences of over 50 examiners as they guide discussions regarding firm operational and compliance risks,” said Lori Richards, director of the Office of Compliance Inspections and Examinations. Attendance at the regional seminars will be limited, with CCOs given priority on a first come, first served basis.

Information regarding the regional seminars is available on the SEC’s Website at <http://www.sec.gov>.

## Mergers and Acquisitions

### **Foreign But U.S. Resident Majority Investor Must Litigate Claims in France, Court Says**

**A**n investor who is a French citizen but a permanent U.S. resident must bring his securities fraud claims—that he was forced to sell his majority ownership of a French company—in France, the U.S. District Court for the Southern District of New York ruled March 22 (*Adamowicz v. Barclays Private Equity France S.A.S.*, S.D.N.Y., 05 Civ. 0961 (HB), 3/22/06).

Judge Harold Baer Jr., writing for the court, held that although the plaintiff investor was in the United States when he negotiated the various deals at issue, “the crux of the complaint relates to the alleged machinations of various European investors in predominately French corporations.”

“The locality with the greatest interest” in this dispute, the court said, “is France.” Furthermore, it held,

even though a U.S. resident plaintiff’s choice of a U.S. forum is entitled to “significant deference,” the hardship that the European defendants would face in litigating here “far outweighs any hardship plaintiff would suffer by dismissal in favor of a French forum.”

**Investor Acquires Majority Stake.** In 1998, the court recounted from the allegations, Laurent Adamowicz, a French citizen who has been a permanent resident in the United States since 1989, and a group of minority investors acquired the Fauchon Group, a privately held family of related, mostly French corporations. Adamowicz acquired the controlling interest, and served as chairman and chief executive officer of the various operating and holding entities through March 2005. However, in 2003, the Fauchon Group experienced a severe liquidity crisis and needed cash. The minority investors allegedly took that opportunity to “wrest control” from Adamowicz by “refusing to authorize any capital increase and/or invest any further capital” in the Fauchon Group unless Adamowicz agreed to sell his controlling stake.

In December 2003, Adamowicz executed a joint venture with Universal Capital Partners S.A. under which UCP would make an immediate investment in the Fauchon Group, and buy out Adamowicz’s stake in the future. Adamowicz agreed to the deal allegedly because the minority investors refused to provide other financing. However, the minority investors allegedly scuttled the UCP joint venture, as well as a later loan agreement between Adamowicz and UCP. The minority investors allegedly conspired with UCP to breach the agreements, and eventually forced Adamowicz to sell his stake at an “artificially depressed price” rather than put the Fauchon Group into bankruptcy. Two months later UCP acquired a 10 percent stake in the Fauchon Group.

Adamowicz sued the Fauchon Group, the minority investors, UCP, and others in federal court in New York, asserting federal securities fraud claims and state common law claims. The Fauchon Group was comprised of Fauchon Holding S.A.S.; Fauchon S.A.S.; Groupe Fauchon S.A.; Fauchon Inc. (U.S.); and Waldo S.A. The defendants moved to dismiss the suit on grounds of forum non conveniens, arguing that the case is better heard in France. The court agreed.

**Plaintiff’s Forum Gets Variable Deference.** Generally, the court explained, courts must defer to a plaintiff’s choice of forum. “Unless the balance of factors is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed,” it said, quoting precedent.

However, it said, deference varies based on circumstances, and under *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003), courts must first determine the degree of deference. If the plaintiff is not a U.S. citizen and the alternative forum is a non-U.S. forum, the court said, the plaintiff’s choice warrants less deference. However, it said, citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), “this notion is inapplicable when the foreign plaintiff is a United States resident.” Further, it said, a non-citizen but resident plaintiff is not limited to bringing suit only in the district where he resides, “since in many circumstances it will be far more convenient for a U.S. resident plaintiff to sue in a U.S. court than in a foreign country, even though not in the district in which the plaintiff resides.”