

PIABA BAR JOURNAL

VOLUME 18, No. 2 • 2011

**SEC WHISTLEBLOWER INCENTIVES UNDER THE
DODD-FRANK WALL STREET REFORM ACT**

Scott L. Silver and Janine D. Gärlitz

**DISCOVERY OF REGULATORY DOCUMENTS:
DEBUNKING THE MYTH OF AN “SEC PRIVILEGE”
IN SECURITIES ARBITRATION**

*Philip M. Aidikoff, Robert A. Uhl
Ryan K. Bakhtiari and Jeff Aidikoff*

**BROKER-DEALER LICENSING – UNDERSANDING THE
ROLE AND LIMITATIONS OF THE SERIES 6 LICENSE**

Adam Gana

**ETHICAL ISSUES THAT MAY ARISE IN SETTLEMENT
NEGOTIATIONS IN MASS ARBITRATION REPRESENTATION**

Lisa Catalano

THE VXX ETN AND VOLATILITY EXPOSURE

Tim Husson and Craig McCann

RECENT ARBITRATION AWARDS

Jason Kueser

CASES AND MATERIALS

Birgitta Siegel

Where We Stand

a publication of

Public Investors Arbitration Bar Association

Arbitrators: Jerry Schuchman (Public Chairperson); Ian S. Grieg (Public); Robert Kevin O'Mara (Non-Public)

The award is significant because the panel awarded interest at the Tennessee statutory rate of 10% which presently adds another \$155,000 to the amount of the award. Morgan Keegan has filed a Motion to Vacate, as they are now doing whenever there is a sizable award entered against them. Morgan Keegan put on an extremely aggressive attack mode defense in this case against a religious educational institution that is located in the city where Morgan Keegan has its home office. Lastly, Claimant's counsel contends that the testimony of Morgan Keegan's experts, in many instances could not be supported by facts or existing laws or regulations.

Steven Russell & Ronni Pitiger, as Trustees of the David N. Russell 2000 Trust v. Morgan Stanley Smith Barney, LLC
FINRA Case No. 10-02604

David Russell passed away on May 29th, 2009. In January 2009, David Russell made his mandatory required distribution ("MRD") from his IRA with Morgan Stanley Smith Barney ("MSSB") for \$100,000.00. On September 24, 2009, the tax laws changed when Congress enacted notice 2009-82, which provided relief for taxpayers by waiving a required minimum distribution ("RMD") for 2009 and granted taxpayers an extension to November 30, 2009 (from the normal 60 days) to redeposit or "rollover" a RMD back into taxpayer's IRA.

Six months after David Russell passed away, his son Steven Russell, acting in his capacity as executor, attempted to roll over David Russell's RMD into his MSSB IRA account. MSSB wrongfully rejected the rollover stating that they couldn't accept any new money into the account as the account has been coded as "deceased" and therefore no new money could come in. As a result, David Russell's estate incurred additional tax liability of \$33,831.00.

The Internal Revenue Code "IRC", under 7701(a)(8) defines an executor as a fiduciary. IRC Section 6903(a) defines a fiduciary's rights and obligations as "assuming the powers, rights, duties and privileges of such other person in respect of a tax imposed." In essence, a fiduciary (or in this case the executor) steps into the shoes of the tax payer. The most analogous case pertaining to the Claimants situation was *Gunter v. U.S.*, 573 F. Supp. 126 (1982), which stands for the proposition that a fiduciary, steps into the shoes of the decedent and if the decedent had lived and could have completed a tax-free rollover then so can the fiduciary.

Claimants asserted the following causes of action: (1) negligence; (2) breach of fiduciary duty; and, (3) negligent supervision. In the Statement of Claim, Claimants requested: (1) Compensatory damages in the approximate amount of \$ 33,000.00; (2) Interest; (3) Costs; and, (4) Further relief as the Arbitrator deemed just and proper. At the close of the hearing, Claimants requested compensatory damages in the amount of \$ 33,831.00, interest, costs, and attorneys' fees.

Respondents denied the allegations in the Statement of Claim and raised various affirmative defenses.

Award: The Panel found that Respondent was liable and ordered Respondent to pay Claimant: (1) compensatory damages in the amount of \$ 33,831.00; (2) statutory prejudgment interest at the rate of 6% from November 24, 2009 through August 23, 2011; (3) reimbursement of expert witness costs in the amount of \$ 3,750.00; and, (4) reimbursement of the non-refundable portion of Claimants' filing fee in the amount of \$ 150.00.

Claimants' Counsel: Lars K. Soreide, Esq., Soreide Law Group, PLLC, Fort Lauderdale, Florida.

Respondent's Counsel: Timothy B. Atkins, Esq., Morgan Stanley Smith Barney, Legal and Compliance Division, Pensacola, Florida.

Claimant's Expert: Gary Sellari, CPA, Divine, Blalock, Martin & Sellari, LLC, West Palm Beach, Florida.

Respondent's Expert: Roberta C. Watson, Trenam Kemker, Tampa Florida.

Arbitrators: James A. Hayes (Public Chairperson); Michelle S. Minor (Public)

The award is significant because it represents full recovery of the tax liability incurred by Claimant and demonstrates that brokerage firms have liability even after death on accounts coded as "deceased" if they do not follow the rules relating to fiduciaries and IRC 7701(a)(8).