2019 Survey of Senior Investor/Elder Abuse Financial Securities Cases

The Senior Investor and Vulnerable Client Subcommittee of the Securities Litigation Committee of the Litigation Section of the American Bar Association was formed in January 2019. The ABA formed the Subcommittee in response to the increased regulatory and market focus on senior and other at-risk investors as the number of investors facing issues of diminished capacity and financial exploitation increases. The Subcommittee's mission is to cover litigation, arbitration, and regulatory developments impacting seniors and other at-risk investors.

The Subcommittee has prepared the below survey of litigation, arbitration, and regulatory proceedings in the calendar year 2019. The survey reports only on cases involving securities related matters, securities broker/dealers and RIAs, and registered persons. It does not report on actions brought against state or federal banks. The survey is divided into the following categories: Litigation and Arbitration – State Court Cases; Litigation and Arbitration – Federal Court Cases; Litigation and Arbitration – FINRA Arbitration Awards; and Regulatory and Criminal Actions.

There were only a handful of state and federal cases dealing with elder abuse claims and issues reported in 2019. This is not surprising given that most securities customer/claimants are bound by pre-dispute arbitration agreements to arbitrate disputes before FINRA. There were also only a handful of FINRA awards issued in 2019 involving elder abuse claims and issues. This also is not surprising given the performance of the market in 2019 and the resulting decrease in FINRA customer claims and awards across the board and the fact that FINRA awards do not always provide sufficient detail to determine if elder abuse was at issue. There were 28 separate regulatory matters involving elder abuse, which confirms the increased focus by the regulators on elderly and vulnerable investors.

<u>Litigation and Arbitration - State Court Cases:</u>

1. ***Cowdery v. Old Mutual Financial Life Insurance Company*, 2019 WL 2752276 (Cal. Ct. App. July 2, 2019):** The California Court of Appeals affirmed the trial court's grant of summary judgment to defendant Old Mutual Financial Life Insurance Company on the plaintiff's claims of fraud, conspiracy to defraud, and elder financial abuse under the California Elder Abuse Act (Cal. Welf. & Inst. Code §§ 15600, *et seq.*) finding that the plaintiff's claims were barred by the statute of limitations. The plaintiff, a 94-year-old veteran, alleged that an Old Mutual independent insurance agent fraudulently induced her to transfer all of her retirement assets into an irrevocable trust in order for her to qualify for benefits under the Veterans Aid and Attendance Program, a means-tested pension program administered by the VA, and to purchase several annuities. She claimed that the scheme caused emotional and monetary harm because she lost access to her retirement assets and the annuities were unsuitable. The trial court granted Old Mutual's motion for summary judgment finding that the plaintiff had discovered or, through the exercise of reasonable diligence, should have discovered at the time she purchased the annuities the facts constituting the alleged financial abuse. On appeal, the plaintiff argued that she could not have discovered the abuse until later because it was part of a sophisticated "pension poaching scam" targeting seniors pursuant to which the VAA benefits were used as a pretext for selling seniors unsuitable annuities. The Court disagreed holding that the evidence showed she took the extraordinary step of disbursing her assets, including through purchase of the annuities, with the understanding that the purpose for doing so was to qualify for the VAA benefits. The Court found that her age did not excuse her duty of

further inquiry and that she could have discovered from the documents she signed and discussions with her trustee/attorney that purchasing the annuities was not necessary to qualify for VAA benefits.

2. ***Trottier v. Morgan Stanley Smith Barney, LLC*, 2019 Cal. App. Unpub. LEXIS 4205 (Cal. Ct. App. June 21, 2019):** The executor of the deceased customer's estate brought a FINRA arbitration against Morgan Stanley for aiding and abetting a third-party's abuse of the elderly customer prior to her death. The third-party, who was later criminally convicted, charged the elderly customer over $300,000 for a home security system worth $25,000. She paid for the system with checks written on her Morgan Stanley account. The executor claimed that the Morgan Stanley adviser questioned the customer's spending on the security system and warned that she was "getting taken," but he failed to report the incident to family or law enforcement. The executor alleged that Morgan Stanley knew, or reasonably should have known, that the customer was a victim of elder abuse and was obligated to halt the transactions and contact law enforcement. The executor brought claims for aiding and abetting financial elder abuse under the California Welfare & Institutions Code, breach of fiduciary duty, negligence, breach of contract, and breach of the covenant of good faith and fair dealing. In a 2-1 decision in 2017, the all-public FINRA panel awarded the claimant $396,623, with one arbitrator filing a lengthy dissent discussing the elder abuse claim in detail. (*FINRA Case No. 15-02910)* Morgan Stanley moved to vacate the award based on arbitrator bias because the chairperson failed to disclose his prior involvement as a probate volunteer panel attorney for an elderly victim of alleged financial abuse in a conservancy proceeding, in violation of FINRA Rule 12405(a)'s requirement that a prospective arbitrator "make a reasonable effort to learn of, and [to] disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding." The trial court agreed with Morgan Stanley and vacated the award, and the Court of Appeals affirmed.

3. ***Jackson v Ffriend*, 2019 N.Y. Misc. LEXIS 2469, 2019 NY Slip Op 31386(U), Index No. 157838/2017 (N.Y. Sup. Ct. May 16, 2019):** The co-executors of the deceased's estate sued defendants Ivanhoe V. Ffriend, Ffriend Enterprises, Ltd., and Security Mutual Life Insurance Company of New York for fraudulently inducing the deceased into purchasing an unsuitable $1 million "life only" annuity issued by Security Mutual with knowledge that she was eighty years old, in poor physical and mental health, and residing in an assisted living facility. The co-executors asserted claims for fraud, fraudulent inducement, breach of fiduciary duty, negligence and negligent misrepresentation, consumer business deception, and violations of state insurance laws and regulations. The defendants moved to dismiss all claims, and the Court granted the motion except for the plaintiff's breach of fiduciary duty and negligence claims against Ffriend and Ffriend Enterprises. The Court dismissed the fraud claims because the plaintiffs failed to plead them with sufficient particularity and the record reflected that the deceased understood the facts before she purchased the annuity, including that the annuity benefit would cease at her death. The Court dismissed the plaintiffs' breach of fiduciary duty claims against Security Mutual, the insurance company, finding that as a matter of New York law, there is no fiduciary relationship between an insurance company and the insured. The Court allowed the plaintiff's breach of fiduciary duty and negligence claims to proceed against Ffriend and Ffriend Enterprises, the deceased's financial advisor, finding that the plaintiffs had alleged

sufficient facts, including her advance age and fragile physical and mental condition, to demonstrate a legal cognizable special relationship from which a fiduciary duty and duty to disclose could have arisen. The Court dismissed the plaintiffs' causes of action based on various insurance laws and regulations, finding that they did not provide a private cause of action, and that, even if they did, the plaintiffs failed to state a claim due to insufficient pleading. The Court held that Plaintiffs claims under the New York deceptive business practices code also failed to state a claim because the fraud claims between the deceased and the defendants was of a personal nature rather than a practice that was deceptive or misleading to the general public, as the statute requires.

B. **<u>Litigation and Arbitration - Federal Court Cases:</u>**

1. ***Konopasek v. Ten Associates, LLC*, 2018 WL 6177249, Case No.: 8:18-CV-00272-JVS-DFM (C.D. Cal. Oct. 22, 2018):** The plaintiff, a 74-year-old retiree, sued ten defendants—three entities and seven individuals—alleging, among other claims, that the defendants were involved in a "pump and dump" securities scheme and defrauded her out of $110,000. The plaintiff alleged that in November 2017, two of the individual defendants "cold-called" her and pushed her to sell her blue-chip stocks and to invest the proceeds in two drone manufacturers. After losing virtually her entire $110,000 investment, she filed suit asserting, among other claims, elder financial abuse under the California Elder Abuse Act (Cal. Welf. & Inst. Code §§ 15600, *et seq.*), fraud, and federal securities violations. After the plaintiff dismissed the two individuals who did the actual cold calling, the remaining three defendants moved to dismiss the fraud claims under Rule 12(b)(6) for failure to plead fraud with particularity as required by FRCP Rule 9. The defendants argued that the state and federal securities claims all sounded in fraud and were therefore all required to be pled with particularity under Rule 9(b). The defendants argued that the plaintiff failed to plead with the required particularity, instead lumping multiple defendants together and not providing details on how the three remaining defendants allegedly participated in the fraudulent scheme. The District Court granted the motion, holding that the plaintiff's complaint did not allege with any specificity what actions they took with respect to the alleged fraudulent "pump and dump" scheme. The court also held that the complaint's "allegations generally lump all of the Defendants together, which is insufficient under the heightened pleading requirements for claims sounding in fraud." The Court dismissed the state and federal securities claims because "[the plaintiff] does not allege facts indicating that [the movants] acted as investment advisers or broker-dealers." According to the Docket on PACER, the plaintiff voluntarily dismissed the action without prejudice in a stipulated agreement on April 23, 2019.

2. ***Du Pont v. Prudential Ins. Co.*, 2019 WL 4417494, Case No. 18-cv-9638-DMG (C.D. Cal. May 29, 2019):** The plaintiff brought a claim for elder financial abuse under the California Elder Abuse Act (Cal. Welf. & Inst. Code §§ 15600, *et seq.*) against several defendants, including Petra Dupont ("Petra"), The Prudential Insurance Company, Pruco Securities, LLC, and MML Investors, LLC. The plaintiff, the grandson of the deceased Eva Dupont and a purported beneficiary of her revocable living trust and her estate, alleged that Petra conspired with the court appointed trustee of the trust to seal the proceeds of three of

Ms. Dupont's annuities. The plaintiff claimed that Petra used a fraudulent power of attorney prepared by the trustee to cause Prudential to surrender three of Ms. Dupont's annuities and Petra then intercepted and absconded with the proceeds. Prudential and MML Investors moved to dismiss the statutory elder abuse claim for failure to plead the claim sufficiently. The District Court granted the motion, finding that Plaintiff failed to sufficiently allege Prudential and MML's knowledge of or involvement with Petra's alleged scheme. The Court found that even though Petra was associated with MML Investors and was employed by Prudential, the plaintiff did "not allege any facts suggesting that Petra was acting within the scope of her employment or acting at the direction of either Prudential or MML Investors when she allegedly intercepted the funds," and therefore Plaintiff failed to show that either defendant could be held vicariously liable for Petra's actions. The Court also dismissed the plaintiff's claim that MML Investors and Prudential "assisted" Petra in her alleged elder abuse because the plaintiff failed to plead sufficiently that either defendant knew that Petra's conduct was wrongful or would harm Ms. Dupont. Finally, the Court dismissed the claims against MML Investors because while the plaintiff alleged that Petra was associated with MML Investors, he did not allege any wrongdoing by that defendant.

3. ***Ryan v. Salisbury*, 2019 U.S. Dist. LEXIS 81446, 2019 WL 2111516, Case No. 18-cv-00406 ACK-RT (D. Haw. May 14, 2019):** Plaintiff Kathy Ryan, individually and as trustee of the Brody Family Trust, brought suit against ten defendants whom she claims defrauded her in connection with several annuities and life insurance policies. Among other things, the plaintiff accused the broker/dealer defendants of "churning" the trust's accounts by inducing her to purchase and surrender several annuities in order to fund the purchase of other annuities. She alleged that she incurred approximately $576,207.28 in surrender charges plus losses on the annuities. The plaintiff also alleged that the broker fraudulently induced her to purchase two life insurance policies, including a $2.5 million VOYA policy issued by Defendant Security Life of Denver ("SLD") that the plaintiff claimed was unsuitable. The plaintiff brought claims for fraud, elder abuse under the Hawaii Unfair and Deceptive Acts or Trade Practices ("UDAP"), and violations of state and federal RICO statutes, among other causes of action. SLD moved for judgment on the pleadings under FRCP 12(c), and the District Court granted the motion with leave to amend. The Court dismissed the UDAP claims against SLD because the plaintiff failed to plead the claim with sufficient particularity and failed to allege any fraudulent or unfair conduct by SLD. As for the alleged unsuitability of the VOYA policy, the Court noted that it was aware of no controlling authority for the proposition that a life insurance company must make a suitability determination prior to issuing a life insurance policy. The Court also dismissed the plaintiff's elder abuse claim under the UDAP finding that it was not a separate stand-alone claim, but rather just a claim for heightened civil penalties under the UDAP.

4. ***Garrison v. Ringgold*, 2019 U.S. Dist. LEXIS 80643, 2019 WL 2089509, Case No.: 19cv244-GPC (S.D. Cal. May 13, 2019):** Plaintiffs, Tommy Garrison (who is more than 65 years old) and his wife Christine Garrison, filed suit against Reginald Buddy Ringgold, III (aka Rasool Abdul Rahim El), Rosegold Investments, LLP, and Master Investment Group, Inc., to recover over $850,000 lost in a cryptocurrency Ponzi scheme. The plaintiffs asserted claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, the California securities laws (California Corporate Code Sections 25004 and 25009),

and the California Elder Abuse Act (Cal. Welf. & Inst. Code §§ 15610.30). Defendant Ringgold moved to dismiss the complaint for failure to state a claim, which the District Court granted in part (with leave to amend) and denied in part. The court dismissed the plaintiffs' claim under Section 10(b) and Rule 10b-5 because the complaint failed to allege fraud in connection with a purchase or sale of securities. The court denied the motion to dismiss the California securities act claims finding that the complaint sufficiently alleged that Ringgold provided investment advice and brokerage services without being properly registered and licensed.

The Court denied the motion to dismiss the plaintiffs' claim under the California Elder Abuse Act finding that the complaint pled the claim with sufficient particularity. The Court summarized the Act finding that "[a] claim for financial elder abuse requires one of the following: (1) taking of property for a 'wrongful use,' (2) taking of property with intent to defraud, or (3) taking of property by 'undue influence.'" Citing Johnson v. King, Case No. CV 09-4183 DSF(FMOx), 2009 WL 10675723, at *2 (C.D. Cal. Aug. 31, 2009) (citing Cal. Welf. & Inst. Code § 15610.30). The court noted the Act's definition of "undue influence" as excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. The court stated that the test for undue influence is governed by a series of factors, including the vulnerability of the victim, the influencer's apparent authority, the actions or tactics used by the influencer, and the equity of the result. Cal. Welf. & Inst. Code § 15610.30(b) and § 15610.70(a)(1)-(4). The court held that the plaintiffs' allegations that Ringgold had targeted Mr. Garrison as a vulnerable senior citizen with retirement assets with high pressure tactics, including crying, pleading, screaming, following the plaintiffs into their bank to convince them to liquidate investments, and calling them while they were on the way to the hospital to insist they provide additional funds pled the Elder Abuse claim with sufficient particularity.

5. ***Abbit v. ING USA Annuity and Life Insurance Company*, 774 F. App'x 351, 352 (9th Cir. 2019):** The Ninth Circuit affirmed the district court's grant of summary judgment to defendants ING USA Annuity and Life Insurance Company and ING U.S., Inc ("ING"). The retired elderly plaintiff brought a putative class action against ING alleging claims arising out of the sale of a fixed index annuity, including claims for breach of contract, financial elder abuse under the California Elder Abuse Act (Cal. Welf. & Inst. Code §§ 15600, *et seq.*), and violation of the California's securities act. The complaint alleged that the annuity failed to meet certain performance indicators or "strategies" as represented in ING's marketing and sales materials. After the District Court certified the class, it granted ING's motion for summary judgment. The Ninth Circuit affirmed the dismissal of the breach of contract claim finding that ING had honored its contractual obligations and that the plaintiffs had failed to identify any provision in the annuity contract that ING had breached. Based on that finding, the Court also affirmed summary judgment on the plaintiffs' elder abuse claim. (Citing *Stebley v. Litton Loan Servicing, LLP*, 202 Cal. App. 4th 522, 528, 134 Cal.Rptr.3d 604 (2011) dismissing elder abuse claims because a "commercial lender ... may properly assert its contractual rights.") The Court also affirmed summary judgment on the California securities act claim because the fixed index annuity was not a security under the California securities act.

6. ***Page v. Minnesota Life Insurance Co.*, 2019 WL 3059561, Case No.: 18-cv-01208-JAK-KES (C.D. Cal. March 11, 2019):** Plaintiffs Kolette and Cletus Page, retired senior citizens over the age of 65, brought a complaint in federal court against Minnesota Life Insurance Company ("Minnesota Life") and several other defendants. The complaint contained 13 counts, including claims for securities violations and financial elder abuse under the California Elder Abuse Act (Cal. Welf. & Inst. Code §§ 15600, *et seq.*). Plaintiffs alleged that the defendants conspired to fraudulently induce the plaintiffs to liquidate their IRAs and move their entire portfolio of more than $1 million in funds to defendants, and that once they did, defendants pressured the plaintiffs to invest in unsuitable and unnecessary financial products, including permanent life insurance policies from Minnesota Life with annual premiums of more than $300,000 (or 200% of their annual income) and one of the defendant's unregistered securities offering. The plaintiffs alleged that the investments all carried major risks that defendants failed to disclose, that the defendants used deceptive and aggressive sales tactics against vulnerable retirees, and that the defendants made material misrepresentations to the plaintiffs about the risks and "guaranteed" return from the products. Certain defendants moved to dismiss for lack of jurisdiction, which the Court granted. Other defendants moved to dismiss or for more definite statement under FRCP 12(b)(6) and (e) arguing that the plaintiffs failed to either attach the controlling documents to the complaint or describe them in sufficient detail and failed to plead specific facts tying the defendants to the plaintiffs' claims. The Court denied the motion to dismiss but granted the motion for more definite statement. The Court instructed the plaintiffs to file an amended complaint "setting forth (1) what terms and conditions of each relevant contract are allegedly at issue and (2) what specific actions, if any, the defendants took to form or further a conspiracy to defraud Plaintiffs," and stated that if the plaintiffs are relying on the referenced documents, they "must be clearer in the complaint about which aspects of those documents create liability, and how." The case is currently still pending in the District Court for the Central District of California.

C. <u>Litigation and Arbitration – FINRA Arbitration Awards:</u>

1. **[Sourced from SAC] *Billie Barbara Nelson v. Michael Kenneth Self*, FINRA Case No. 19-01226 (Decided Oct. 24, 2019):** Claimant asserted claims for breach of fiduciary duty, elder abuse, fraud, and unsuitability against respondent, an advisor for Scottsdale-based First Financial Equity Corp. arising out of the claimant's purchase of a Forethought Single Premium Deferred Annuity Contract. Respondent denied the claims and requested expungement. The single arbitrator denied all claims on the papers and granted respondent's request for expungement after a telephone hearing finding that the claim or allegation was false, factually impossible or clearly erroneous. Specifically, the arbitrator found that the allegation that the claimant "did not understand what was going on" when she agreed to invest in the annuity was false and the underlying documents showed that the claimant understood what she was purchasing. The arbitrator also found that the claimant and claimant's agent prematurely cashed in the annuity without consulting respondent and without taking advantage of certain of the contract's provisions, which led to claimant's losses.

2. **[Sourced from SAC] *Larry F. Grooms v. Dylan Robert Lantry*, FINRA Case No. 19-00374 (Decided July 17, 2019):** Claimant alleged breach of fiduciary duty, elder abuse,

fraud, unsuitability, unauthorized trading, negligence and sell outs by the respondent advisor in connection with the claimant's investments in several stocks. Claimant sought his alleged trading losses of $40,265.76, statutory interest, punitive damages, as well as fees and costs. The respondent denied the claims, brought a counterclaim for bad faith resulting in reputational injury and defamation, and sought expungement. The single arbitrator denied the claimant's claims on the papers finding that claimant had a nondiscretionary account and the risk profile was described as "speculation," and that the securities purchased all fell within the profile of "speculation." The arbitrator denied the counterclaim and request for expungement finding that "the claim was factually possible, the registered person was involved, and because of the nature of the claim, it is not false."

3. ***James W. Fitzpatrick, Sandra J. Fitzpatrick, and the Fitzpatrick Family Trust v. AXA Advisors, LLC Cambridge Investment Research, Inc.*, FINRA Case No. 16-03454 (Decided April 25, 2019):** In this FINRA arbitration, an all-public panel awarded the claimants Jim and Sandra Fitzpatrick, an elderly upstate New York couple, over $2.1 million in compensatory damages plus over $947,000 in costs, attorney's fees, and FINRA hearing fees against AXA Advisors. The claimants asserted claims for negligence, violations of FINRA Rules 2110 and 2111, negligent misrepresentations and omissions, and breach of fiduciary duty relating to life insurance policies and variable annuities. The claimants requested over $13.2 million in damages. AXA Advisors denied the claims and requested costs and attorneys' fees. Cambridge Investment Research denied the claims and later settled. After nine hearing days and post hearing briefing, the panel entered the award with no factual or legal explanation, except the panel stated that it was authorized to award attorneys' fees because both parties had requested them.

   Publicly available information from the claimants' counsel's website, media reports, and FINRA reveals that the case stemmed from the conduct of Francesco Puccio, a now barred AXA advisor and convicted felon. According to the claimants' statement of claim, Puccio allegedly convinced the Fitzpatricks, who were unsophisticated and in their mid-80s, to invest in inappropriate and unnecessary variable annuities, and sold them unnecessary life insurance policies, generating more than $200,000 in commissions for Puccio. Puccio and a co-defendant were later convicted of pilfering the entire life savings of Shirley Kerwin, a 75-year-old widow, and Puccio apparently used money wrongfully obtained from the Fitzpatricks to pay restitution to Kerwin. In 2015, Puccio entered into an AWC with FINRA and agreed to an indefinite ban from the industry.

4. **[Sourced from SAC] *Gerald M. Butler, Jr. Family Trust and Gerald M. Butler, Jr. Marital Trust vs. National Securities Corporation, National Asset Management, and Franklin Templeton Bank & Trust*, FINRA Case No. 15-00734 (Decided April 18, 2019):** Claimants asserted causes of action for fraud, breach of fiduciary duty, unsuitability, breach of Illinois' Consumer Fraud and Deceptive Business Practices Act, and violation of Illinois' Financial Exploitation of an Elderly Person statute, among others. The claimants alleged that the trustee and financial advisor cut them off from all account related information and engaged in unsuitable strategies including writing call options and buying put and call options, penny stocks, Chinese stocks and a leveraged exchange-traded fund. The claimants sought compensatory damages of $1.865 million, treble damages under the Illinois Financial Exploitation of an Elderly Person statute, as well as punitive damages,

attorneys' fees and costs. The three-member all-public arbitration panel found that National Asset Management "breached its fiduciary duties owed to the claimants based on its own conduct and that of its registered representative, causing damage to the claimants in the amount of $1,164,765.30." The panel, however, reduced the award to $815,335.71 because claimants "were also negligent and the Panel apportioned thirty percent (30%) of the fault to them." The panel also awarded the claimants about $330,000 in attorneys' fees and costs but rejected all of the claimants' other claims, including the elder abuse claims, because claimants "failed to prove all of the elements of those claims."

5. **[Sourced from SAC]** ***Patrick Steve Juneau and Viola Marcotte Juneau vs. Capital One Advisors, LLC, Capital One Investing, LLC and Mollie Becker Taylor*****, FINRA Case No. 18-02991 (Decided Feb. 27, 2019):** Claimants brought an action for breach of fiduciary duty, elder abuse, omission of facts, and suitability. The case stemmed from a Capital One advisor's termination of claimants' Allianz tax-deferred variable annuity and purchase of an S&P exchange-traded fund ("ETF"), which claimants alleged resulted in the loss of their tax deferral and significantly increased their personal income tax liability. The claimants sought to recover the actual tax liability of $4,615, a refund of the fees assessed to the account since the conversion totaling $1,319, their arbitration filing fee of $325, as well as attorneys' fees and interest. In a reasoned award on the papers, the arbitrator found that the advisor's decision to sell the annuity and purchase an ETF was not *per se* unsuitable for the reasons the advisor put in the Change of Investment Strategy form. With respect to customer-specific suitability under Rule 2111, the arbitrator found that the advisor thoroughly documented the benefits of the transaction in the Change of Investment and Strategy form. However, while noting that the advisor and Capital One "cannot be held liable for providing or failing to provide Claimants with tax advice or general information regarding tax-deferred investments, as this is expressly excluded from a broker-dealer's suitability obligation under FINRA Rule 2111," the arbitrator found that the respondents were aware of the potential for "significant" tax liability, did not document the claimants' ability to absorb the tax liability, and did not sufficiently make the client aware of the risk. In particular, the arbitrator noted that a "pre-printed statement to the effect that the 'transaction may result in tax consequences' is not sufficiently meaningful to negate any element of reliance that might be required by applicable law in connection with this private right of action," particularly in "the context of the tailored, handwritten disclosures regarding the benefits of the transaction" that the respondents' materials to the client provided. Nevertheless, the arbitrator declined to award claimants their increased tax liability because "the cash outlay to cover short-term taxes could eventually be recouped by Claimants or their heirs through lower fees, investment performance and elimination of the tax liability that would have occurred upon annuitization." The arbitrator instead awarded disgorgement of the $1,319 advisory fee plus the claimants' arbitration filing fee.

6. **[Sourced from SAC]** ***Mario Frank Voce, Julia Voce, and Adam DeVone, as co-trustees of the Restated Voce Marital Trust, the Voce Residuary Trust, and the Voce Family Trust vs. Morgan Stanley & Co., LLC*****, FINRA Case No. 14-01954 (Decided Jan. 29, 2019):** Claimants brought claims for violation of the California Elder Abuse Act, breach of fiduciary duty, negligent supervision, unsuitability, fraud, churning, failure to supervise, and conversion arising out of the respondents' use of margin-like loans and the purchase and trading of concentrated positions in stocks, mutual funds and options. Claimants sought

rescission of all alleged unsuitable transactions which they claim caused more than $2 million in damages, treble damages of more than $6 million under the elder abuse statute, excessive commissions of more than $1.8 million, as well as other consequential damages of more than $700,000, attorneys' fees, costs of litigation and interest. The respondent Morgan Stanley moved to dismiss under FINRA Rule 12206 argued that the claim was timed barred by the FINRA six-year eligibility period because all of the alleged trades took place between 1993 and 2003, more than six years before the claim was filed. The claimants argued the respondents' fraud and concealment of their actions should toll the period. Morgan Stanley argued that tolling was unavailable and also argued that regardless of the eligibility period, Maurice Voce, the now deceased grantor of the trusts, had a twenty-year relationship with Morgan Stanley and had actual knowledge of the actions and investments in his account. After a hearing on the motion to dismiss, the three-member arbitration panel found that the majority of the alleged conduct took place between 1993 and 1998, but that equitable tolling of the eligibility period was available under the FINRA guidelines. The panel, however, stated that it did not find good cause to award equitable tolling and dismissed all of claimants' claims finding that the deceased trust grantor was well-aware of the type, risks and costs of trading he was engaged in.

D. <u>Regulatory and Criminal Actions</u>

1. ***Securities and Exchange Commission v. NIT Enterprises, Inc., et al.*, No. 1:19-cv-24822-CMA (S.D. Fla. Nov. 21, 2019):** The SEC obtained a temporary restraining order, asset freeze, and other relief in an emergency action against NIT Enterprises and three men alleged to have used the entity to perpetrate a long-running investment scheme targeting seniors. The SEC's complaint alleged that NIT's CEO Gary R. Smith, as well as Jason M. Ganton, and James E. Cleary, Jr., operated a scheme since at least 2015 that raised $4.9 million from more than 100 retail investors, many of whom were senior citizens, claiming that their investments would fund the company's radiation protection products for medical and military applications. According to the SEC, Smith instead used approximately 25% of the investors' funds to pay for his personal expenses and another 25% to pay commissions to unlicensed brokers, including defendants Ganton and Cleary. The SEC alleged the defendants also told their victims that the company was about to go public and that their investments would double or triple. The District Court, in granting the SEC its requested relief, found that the SEC made a *prima facie* case of the defendants' securities law violations. The case is currently pending in the District Court for the Southern District of Florida.

2. ***Securities and Exchange Commission v. Burkholz, et al.*, No. 19 cv-24713 (S.D. Fla. Nov. 14, 2019):** The SEC filed an emergency action and obtained a restraining order and other relief against two Florida men and their respective business entities for a long-running Ponzi scheme that defrauded at least fifty-five investors, many of whom were senior citizens, out of more than $6 million. The SEC alleged that since at least 2014, Neil Burkholz and Frank Bianco falsely represented to their victims, many of whom were between 65 and 100 years-old, that they ran a proprietary options trading strategy that could deliver significant profits. The SEC noted in the complaint and request for injunction that as recently as September 2019, the defendants had solicited and obtained $123,000 from a new 70-year-old investor whose entire investment they immediately misappropriated. The

SEC alleged that the men actually invested less than half of their victims' $6 million, used part of it to make Ponzi-style payments to previous investors, directly pocketed about $900,000, and lost the rest through risky investments in options trading. The case is currently pending in the District Court for the Southern District of Florida.

3. ***United States v. James T. Booth*, No. 19-cr-00699 (SDNY, Sept. 27 2019):** James T. Booth of Norwalk, Connecticut, pled guilty on October 22, 2019 to criminal securities fraud charges brought by the DOJ. The indictment alleged that Booth ran a Ponzi scheme that defrauded about forty investors, many of whom were senior citizens, out of nearly $4 million. The SEC also brought a parallel civil action alleging that from at least August 2014 through June 2019, Booth solicited investments in allegedly safe and high-return investments, but instead funneled the victims' funds into his personal accounts. According the SEC, many of Booth's victims were unsophisticated investors, including seniors who invested their retirement savings with Booth. The SEC alleged that Booth used his investors' money on business and personal expenses, including meals, entertainment, and trips to casinos, as well as to make Ponzi-type repayments to earlier investors. The SEC alleged that Booth even employed accountants to prepare tax returns on certain fabricated benefit plans he told his clients he had created. The civil case against Booth remains pending the District Court for the District of Connecticut (*Securities and Exchange Commission v. James T. Booth*, No. 19-cv-1535 (D. Conn. Sept. 30, 2019)).

4. ***Securities and Exchange Commission v. Northridge Holdings, Ltd. et al.*, No. 19-CV-5957 (N.D. Il Sept. 5, 2019):** The SEC filed an emergency action and obtained a TRO against Glenn C. Mueller and his company Northridge Holdings, Ltd. and affiliated entities alleging that Mueller masterminded a $41 million fraudulent unregistered securities offering. The SEC complaint alleged that Mueller defrauded more than 300 victims in 32 states, many of whom were of retirement age. The SEC alleged that Mueller and Northridge told investors that their funds would be used to buy and improve underperforming large apartment complex properties and generate profits from the increased tenants and rents due to the improvements and/or the sale of the properties. According to the SEC, Northridge was not profitable, however, and it used investor funds in a Ponzi-type scheme to pay off other investors, pay "finders fees" for referrals, and for loans to Mueller's family members.

5. **FINRA Case ID 2017055553002, Oscar Nunez (9/27/19):** FINRA banned Nunez indefinitely after he failed to respond to charges that he stole $7,000 from an elderly customer and solicited and obtained an undisclosed loan from another customer. According to the FINRA disciplinary hearing panel, Nunez solicited the 88-year-old customer, who had memory problems, to transfer her investment accounts to Nunez's firm. He then told the client to write a $5,000 check made payable to him to cover anticipated future commissions. After receiving the check, Nunez deposited it into his personal bank account and never traded in the client's account. Nunez then told the client she needed to pay an additional $2,000 for anticipated 2017 commissions. Once again, the client made the check payable to Nunez, and he deposited it into his own personal bank account. Nunez never traded on the client's behalf and instead simply converted the client's money. After Nunez's firm learned of the $2,000 payment, it ordered him to repay the client, which he did, but he did not repay the first $5,000 payment. FINRA also found that Nunez received an undisclosed $4,000 loan from another client.

6. **FINRA Case ID 2016049321302, Charles Lawrence and Ami Forte (10/21/19):** Two former Morgan Stanley advisors entered into an Acceptance, Waiver, and Consent with FINRA suspending the pair indefinitely for allegedly churning the accounts of Roy Speer, the 79-year-old co-founder of the Home Shopping Network, who suffered from dementia. Forte first met Speer in the late 1990s and developed a romantic and business relationship with him. From September 2011 through June 2012, Forte, through the Forte Group (a business Forte founded with Lawrence), effected more than 2,800 trades in Speer's Morgan Stanley account, generating approximately $9 million in commissions. The pair also allegedly exercised discretion in Speer's account, even during a period when Speer was hospitalized and unable to communicate. In 2016, Speer's widow, Lynnda Speer, was awarded $32.8 million, plus costs and fees, from Morgan Stanley, Forte and former Morgan Stanley Palm Harbor branch manager Terry McCoy by a FINRA arbitration panel.

7. **FINRA Case ID 2017056648801, David Manor (9/23/19):** The former Wells Fargo advisor agreed to an Acceptance, Waiver, and Consent with FINRA suspending him for nine months after Manor was accused of undisclosed outside business activities. According to the FINRA Order Accepting Offer of Settlement, without the knowledge or consent of Wells Fargo, Manor assisted the Wells Fargo client, a 75-year-old retiree, in selling mineral rights, and Manor received $107,000 from the sale for his assistance in brokering the deal. After the sale, the client deposited the sale proceeds into his Wells Fargo brokerage account and asked Manor to add to the client's existing annuities with Wells Fargo. Instead, Manor convinced the client to withdraw $250,000 from the Wells Account to open an account at Charles Schwab that Manor would manage and use to trade options. Manor then used the client's Schwab account to engage in risky, unsuitable options trading that generated losses of approximately $224,000 in less than three months.

8. **FINRA Case ID 2018059735201, Fortino R. Rivera (7/29/19):** Rivera agreed to an Acceptance, Waiver, and Consent with FINRA barring him indefinitely for providing false testimony during FINRA's investigation of claims Rivera opened an undisclosed joint account away from his firm with a senior client of his firm. According to the AWC, FINRA received a tip through its Securities Helpline for Seniors that Rivera had opened an undisclosed joint account with an elderly client. During an on-the-record interview with FINRA, Rivera denied having such an account and claimed that the client must have opened a joint account using Rivera's information without Rivera's knowledge. FINRA's investigation revealed that Rivera had lied and had not only opened the account but had also accessed the account online numerous times.

9. **FINRA Case ID 2019061459801, Robert Frederico Montes (7/24/19)**: Montes, a former Morgan Stanley broker, agreed to an Acceptance, Waiver, and Consent with FINRA barring him indefinitely after he was accused of misusing an elderly customer's assets. FINRA received a tip in early 2019 that Montes may have misused one of his elderly customer's assets. FINRA alleged that Montes refused to cooperate with FINRA's investigation and refused to produce documents, which ultimately led to the AWC.

10. **FINRA Case ID 2019062412601, Thomas John Marino (7/18/19):** The former R.M. Stark & Co. trader agreed to an Acceptance, Waiver, and Consent with FINRA barring him

indefinitely after he refused to provide documents and information requested by FINRA in connection with its investigation into his possible misuse of a senior customer's funds.

11. **FINRA Case ID 2017053182001, William Mark Heiden (7/5/19):** Heiden agreed to an Acceptance, Waiver, and Consent with FINRA imposing a six-month suspension, as well as a deferred fine of $5,000, and deferred restitution to a client in the amount of $12,084, plus interest. FINRA found that the former Wedbush broker engaged in unauthorized trading and exercised discretion without permission in the accounts of four elderly clients, resulting in a loss of more than $10,000 in the account of one of the clients.

12. **FINRA Case ID 2017056094901, Scott Mason (7/3/19):** Mason agreed to an Acceptance, Waiver, and Consent with FINRA that imposed a four-month suspension and a deferred fine of $5,000 after he was accused of obtaining more than $100,000 in undisclosed loans from an elderly LPL Financial client. FINRA found in the AWC that on six separate occasions, Mason borrowed a total of approximately $108,360 from his elderly client and family friend without notifying or receiving approval from LPL. Mason used the loans to pay personal expenses and also modified the terms of one loan to provide himself additional time to repay it. LPL terminated Mason and filed an amended Form U-5 in 2018 stating that Mason was under investigation for fraud or wrongful taking of property. According to FINRA, Mason repaid all of the loans to his elderly client with interest.

13. **FINRA Case ID 2016052655301, Summit Brokerage Services, Inc., CRD#: 34643 (7/2/19):** The member firm was sanctioned more than $800,000 by FINRA after it was accused of failing to properly supervise its brokers, including an allegation that one now-barred Summit broker churned the accounts of two retired women, racking up more than $200,000 in commissions. According to a FINRA press release, the former broker allegedly placed 533 trades for one retired client over a three-year period, causing the client to pay more than $171,000 in commissions, and the same broker placed 267 trades for another retired client in a three-year period, causing that client to pay more than $61,000 in commissions. In the Acceptance, Waiver, and Consent, FINRA found that the broker's trades generated more than 150 excessive trade alerts, but those alerts were never reviewed by Summit. In total, FINRA found that Summit failed to detect and stop excessive trading in fourteen of its clients' accounts, and FINRA ordered Summit to pay more than $558,000 in restitution to the affected clients.

14. **FINRA Case ID 2018056901701, David Philip Antypas (7/1/19):** Antypas settled with FINRA by agreeing to a two-year suspension after he was accused of convincing an elderly client to name Antypas' family members as sole beneficiaries of the elderly customer's accounts. According to FINRA, LPL Financial terminated Antypas for the alleged conduct, and FINRA initiated the investigation after receipt of the Form U-5. In the letter of Acceptance, Waiver, and Consent, FINRA found that Antypas convinced an elderly female client to name Antypas' wife, and later his sister, as sole beneficiaries of the customer's transfer on death and variable annuity accounts. LPL discovered the alleged misconduct during a branch audit, contacted the customer to change the beneficiaries, and terminated Antypas.

15. **FINRA Case ID 2018057075001, Mark Gregory Raezer (6/25/19)**: The former Taylor Capital Management broker agreed to an Acceptance, Waiver, and Consent with FINRA that includes a ten-month suspension and a deferred fine of $15,000. The Colorado Springs-based broker was accused by FINRA of aiding a now-barred broker, Dennis M. Farrah, in selling more than $900,000 worth of private unregistered securities away from his firm. According to news reports and press releases from the Colorado Department of Regulatory Agencies, Raezer and Farrah were working with a purported real estate investment company called Madyson Capital Management and its owner, Joseph David Ryan, who was later imprisoned for allegedly stealing his clients' investments. The AWC shows that nine seniors, at least six of whom were clients of Raezer's firm, were the target of these transactions and that the elderly investors wound up losing their entire investments with Madyson. FINRA specifically found that Raezer aided Farrah by helping the investors complete the application and subscription paperwork and by counseling one elderly investor. FINRA further found that Raezer indirectly benefited from the scheme through a profit-sharing arrangement he had with Farrah in Farrah's retirement planning, life insurance and tax preparation business.

16. **FINRA Case ID 2017055021201, Fred Ronald Brown (6/25/19):** Brown agreed to an Acceptance, Waiver, and Consent with FINRA that includes an eight-month suspension and a deferred fine of $12,500 after the former Merrill Lynch broker was accused of borrowing $69,000 from two firm clients, including an elderly client, without notifying Merrill Lynch or obtaining its approval. FINRA found in the AWC that Brown borrowed $14,000 from an elderly client and borrowed $55,000 from a friend whose sons had accounts with Merrill Lynch, and that Brown made false statements during an internal investigation. FINRA noted that Merrill Lynch repaid the loans.

17. **FINRA Case ID 2018057382001, Patrick Neal Foley (6/14/19):** Foley agreed to an Acceptance, Waiver, and Consent with FINRA barring him indefinitely after he was accused of taking loans from an elderly client of his previous firm Merrill Lynch. According to the AWC, Merrill fired Foley for this conduct in January 2018, and in 2019 he refused to cooperate with the FINRA investigation into his alleged conduct.

18. **FINRA Case ID 2016051569601, David John Strnad (5/31/19):** Strnad agreed to an Acceptance, Waiver, and Consent with FINRA, which imposed a $10,000 fine, an 18-month suspension, and disgorgement of commissions plus interest for unauthorized transactions in the account of an elderly customer. Strnad exceeded the scope of his authority from the client by selling the elderly client's certificate of deposits prior to maturity, almost always at a loss, and then using the proceeds to buy new CDs. Strnad's trading cost the customer more than $100,572 in interest, as well as $4,268 in unnecessary commissions.

19. **FINRA Case ID 2018058266301, Buckman, Buckman & Reid, CRD #23407, (5/20/19):** FINRA ordered the member firm to pay more than $200,000 in restitution to seven customers after FINRA found that the firm failed to properly supervise two former representatives who were accused of, among other conduct, churning customer accounts, including accounts of a retired couple and an 89 year-old client. One of the representatives was accused of making fifteen short-term trades in Unit Investment Trusts in the retired

couple's account in a one-year period. That representative generated more than $200,000 in commissions and approximately $163,000 in trading losses in his customers' accounts. The other representative was accused of making more than 130 trades in the account of an 89-year-old client in one year. FINRA found that nearly all of the improper activity and other misconduct were captured in the firm's compliance reports, but no one at the firm reviewed them.

20. **FINRA Case ID 2014042022401, Brian Lawrence Stephan (4/11/19):** Stephan settled a FINRA disciplinary proceeding and agreed to a $10,000 fine, an eight-month suspension, and restitution of $29,430 plus interest arising out of his handling of the account of an 88-year old customer with significant hearing loss. Stephan dealt with the customer and her niece, under a POA, and neither were experienced or sophisticated investors. In the FINRA Order Accepting Offer of Settlement, FINRA found that Stephan's recommendations of Class A shares in twenty different mutual fund families were unsuitable because the elderly customer could have earned discounted sales charges had she aggregated the purchases in in fewer fund families. FINRA also found that on ten occasions, Stephan recommended mutual fund purchases in amounts slightly less than the level required for a discount on the sales charges, which caused the customer to incur excessive sales charges. FINRA also alleged that Stephan marked 95 trades "unsolicited" when in fact they were "solicited" and falsified mutual fund switch letters thereby causing his firm to maintain inaccurate books and records.

21. **FINRA Case ID 2014041590801, John William Cutshall (4/11/19):** Cutshall settled a FINRA disciplinary proceeding and agreed to a bar from association with any FINRA member in all capacities. In the Order Accepting Offer of Settlement, FINRA found that Cutshall had been named as a trustee of certain elderly customer trusts, that he abused his trustee position by converting and improperly using trust funds after the clients' deaths, and that he thwarted his firm's ability to supervise his trustee activities by failing to disclose that he also was named as a beneficiary. FINRA found that Cutshall wrote a series of 34 checks from one trust account totaling about $400,000. He made the checks payable to his bank to avoid detection by his firm but deposited the checks in his personal bank account. He later tried to justify his actions by producing a previously undisclosed, unsigned and unwitnessed handwritten note allegedly written by the settlor before his death that named Cutshall as a 50% beneficiary of the trust. Cutshall then hired a law firm to opine on the handwritten note's validity. The firm found it suspicious and advised him to return all of the money. He returned some, but not all, and ultimately received more than his alleged 50% beneficiary share. Cutshall also allegedly made a $2,000 ACH transfer from the account of another trust for which he served as trustee, which he used to gamble at a West Virginia casino. Cutshall did not repay the trust until someone from his firm questioned him about the transaction more than a week later. FINRA also found that Cutshall falsely claimed in a firm questionnaire that he was not named as beneficiary of any non-family member account.

22. **FINRA Case ID 2018058520801, Michael Paul Lessard Jr. (4/9/19):** Lessard agreed to an Acceptance, Waiver, and Consent with FINRA barring him indefinitely after he was accused of borrowing $60,000 from a senior customer without seeking approval from his firm, as well as borrowing more than $22,000 from another customer without firm

approval. FINRA found in the AWC that Lessard borrowed the money from the elderly client in December 2016 while employed with Southeast Investments N.C., Inc. Lessard repaid part of the loan to his elderly customer, but only repaid the entirety of the loan after her accountant confronted him in April 2018. According to FINRA, Lessard has not repaid the other customer.

23. **FINRA Case ID 2018057319702, Bradley Allen Latting (4/1/19):** Latting agreed to an Acceptance, Waiver, and Consent with FINRA barring him indefinitely. According to the AWC, State Farm terminated Latting and FINRA later investigated him for allegedly commingling and/or converting the funds of an elderly client while serving as her power-of-attorney. Latting agreed to the AWC with FINRA after he failed to appear for and provide on-the-record testimony requested by FINRA in connection with its investigation.

24. **FINRA Case ID 2017056094402, Kevin Hao Jie Zhang (3/14/19):** Pruco Securities LLC broker Kevin Hao Jie Zhang agreed to an Acceptance, Waiver, and Consent with FINRA suspending him for three months and assessing him a deferred fine of $5,000 for allegedly borrowing $5,000 from an elderly customer without the firm's preapproval and failing to repay the loan. According to his BrokerCheck report, Zhang voluntarily resigned from Pruco in September 2017 after his firm accused him of taking loans and accepting money "from multiple clients without Firm approval."

25. **FINRA Case ID 2017056077301 Salman Rasheed (2/15/19)**: Former J.P. Morgan Chase broker Salman Rasheed agreed to an Acceptance, Waiver, and Consent with FINRA barring him indefinitely. FINRA found in the AWC that Rasheed accepted five checks totaling $390,045 as gifts from an elderly customer with dementia without ever disclosing the gifts to his firm. After his firm learned of the gift and investigated, he voluntarily resigned and then deposited the checks into a savings account he opened at another bank. After the victim's appointed guardian began investigating, Rasheed issued two cashier's checks for $410,045 to repay the victim.

26. **FINRA Case ID 2017054060301, Christopher Duke Bennett (2/1/19):** Bennett agreed to an Acceptance, Waiver, and Consent with FINRA suspending him for 15 days after FINRA charged that he exercised discretionary trading authority in the accounts of customers, including a senior investor, without express or written authorization from the customers and without seeking or obtaining his member firm's prior written acceptance of the accounts as discretionary.

27. **FINRA Case ID 2014043863001, Peter Orlando (1/29/19):** In a FINRA enforcement proceeding, the FINRA hearing panel indefinitely barred MetLife broker Peter Orlando and ordered him to pay $4,000 in restitution plus interest to an elderly and infirm customer. The panel found that Orlando had defrauded the client, taken control over her financial accounts after the death of her husband, and acted unethically in violation of FINRA Rule 2010 and MetLife's policies. Among other things, the panel found that Orlando caused the elderly customer to open and fund a bank account naming him as the beneficiary, to appoint Orlando as her attorney in a healthcare power of attorney and later in a power of attorney for all financial matters, and to execute a will naming Orlando as executor and primary beneficiary. Orlando never advised his supervisor or anyone at MetLife of these events.

The panel also found that Orlando recommended the customer surrender a variable annuity without having a reasonable basis to believe that the surrender was suitable in light of the surrender fees and costs of more than $3,900, as well as the loss of the monthly payment and the opportunity for future income. Orlando claimed he took the actions to protect the customer from the evil intentions of her sons. The panel found no evidence that the sons had ever taken advantage of their mother and concluded that Orlando's mere suspicions did not justify his conduct. The panel found further that if Orlando truly thought the sons intended to harm the customer, he should have reported it to his firm, the police, or social services instead of taking matters into his own hands. Orlando appealed the panel's decision, but in March 2019 the National Adjudicatory Council affirmed.

28. **FINRA Case ID 2018059393201, Daniel Todd Levine (1/8/19):** FINRA began its investigation of broker Daniel Levine after he resigned from Morgan Stanley while under an internal investigation. FINRA eventually charged that Levine engaged in undisclosed outside business activities, solicited an elderly customer to borrow funds for an outside business activity, and executed unauthorized trades, among other alleged misconduct. FINRA sent Levine a request for documents and information, and through his counsel, Levine asked for two extensions before eventually stating that he would not comply with FINRA's request. In January 2019, Levine agreed to an Acceptance, Waiver, and Consent with FINRA barring him from the industry indefinitely.

By G. Wayne Hillis, Jr. and Erik J. Badia March 2020