Ohio

Department of Commerce
Division of Securities

SECURITIES BULLETIN

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RELYING ON A LIE ISN'T NECESSARY:

Fraud and Reliance in the Ohio Securities Act

By D.Michael Quinn, Securities Division Counsel

On their face, common law fraud and statutory securities fraud appear to be similar, but there is a significant difference between the elements of these distinct causes of action. Understandably, the similarities in name cause a tendency to apply similar elements, but care must be taken not to lose sight of the differences. The most notable difference is that fraud under the Ohio Securities Act (the "Act") does not – with one exception – require that the investor "relied" on the fraudulent behavior in making their investment.

Different Elements

Common law fraud requires proof of five elements. There must be: 1) actual or implied representations (or omissions) of a material matter of fact; 2) such representation must be false; 3) such representations must be made by one party to the other with knowledge of their falsity; 4) such representations must be made with an intent to mislead a party to rely thereon; and, 5) such party must have relied on such representations with a right to rely thereon. A failure of proof as to any one of these essential elements bars a recovery.[1] Common law fraud recognizes both fraudulent misrepresentation and fraudulent omissions.[2]

Unlike common law fraud, securities fraud cases brought under the Act almost never require that the harmed party prove reliance on the misrepresentation or omission. (The one exception will be discussed below.) Because there continues to be confusion about requiring reliance within the Act, it is important to analyze the specific statutory language.[3] The fundamental beginning point of that analysis is that fraud under the Act is statutory rather than a common law cause of action.

Throughout the Act, behavior generally identified as fraud is proscribed.[4] Section R.C. 1707.44 prohibits different activities generally identified as fraud, the two most commonly referred to being 1707.44(B), prohibiting misrepresentations, and R.C. 1707.44(G), prohibiting any "fraudulent" behavior. R.C. 1707.042 prohibits fraud in relation to control bids. R.C. 1707.41 through 1707.43 provide for a right of civil actions based on, *inter alia*, fraudulent activity by, variously, sellers of securities, those that receive the profits accruing from a sale of securities, someone who advises a person to purchase a security, or someone who has aided in making a sale of securities in violation of the Act.

Fraudulent Misrepresentations Prohibited by the Ohio Securities Act

Fraudulent misrepresentations are specifically prohibited by R.C. 1707.44(B).

> No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes:

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[1] *Cross v. Ledford*, 161 Ohio St. 469, 475 (1954)
[2] *See, e.g., Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St. 3d 69 (1986); *Cope v. Metro. Life Ins. Co.*, 82 Ohio St. 3d 426, 436 (1998); *Parker v. Berkeley Premium Nutraceuticals, Inc.*, No. 04CV1903, 2005 Ohio Misc. LEXIS 605, 30-31 (Ohio Ct. Com. Pl. Apr. 20, 2005).
[3] Justifiable reliance is outside of the securities context and will be beyond the scope of this article. Likewise, federal securities law, specifically under Rule 10(b)5, contains different requirements and is not applicable to Ohio securities law on the question of reliance.
[4] The definition of "fraud" in the Act is found at RC 1707.01(J).

U.S. DEMOGRAPHICS ARE SHIFTING, IS YOUR ORGANIZATION PREPARED?

Jacqueline T. Williams, Director
Ohio Department of Commerce

It should be no secret that the world is changing and demographics are shifting. Recent U.S. Census Bureau data demonstrates how fast our country is becoming a "majority of minorities." The government projects that in five years, minorities will make up more than half of children under 18. Not long thereafter, the U.S. white population will begin to decline due to aging baby boomers and the growing trend toward fewer births among non-Hispanic whites. According to census projections, ethnic and racial minorities will comprise a majority of the nation's population in little more than a generation.

Businesses and organizations of all kinds need to take action to deal with this reality. This market represents an opportunity for those in the financial services, as well as those businesses that support the industry in regulatory, legal or other capacities.

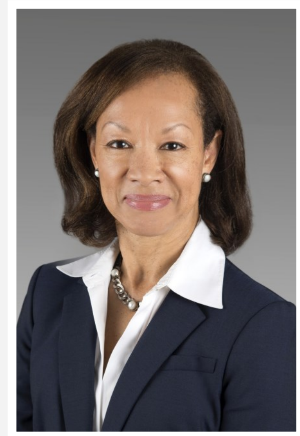
According to a 2016 study released by the Corporation for Enterprise Development (CFED) and the Institute for Policy Studies:

- From 1983 to 2013, the average wealth of white families grew by 84 percent, 1.2 times the growth rate for Latino families and three times the rate for black families.
- By 2043 – the year that people of color in the U.S. are projected to become the majority – the wealth divide between white families and Latino and black families will have doubled, on average, from $500,000 to $1 million.
- If average wealth for a Latino family continues to grow at the same pace as in the past three decades, it would take 84 years to amass the same amount of wealth as white families have today. For black families, it would take 228 years.

Consider also that the majority of wealth held by blacks and Latinos is in their homes, not in securities. According to a November 2013 article by Edward Wolff, "The Asset Price Meltdown and the Wealth of the Middle," the collapse of home prices in 2008-2009 hit minorities especially hard. Because a disproportionately high percentage of their assets were tied up in home ownership versus investments in securities, their chances for a rebound hinge almost exclusively on what happens to the housing market.

What this says to me is that there is an opportunity to reach out to underserved markets that could benefit from investment diversification. Financial services firms either aren't serving this market, or haven't been able to make inroads. That may be because statistics indicate that there isn't as much opportunity in reaching out to this group of consumers. However, being on the forefront of serving these consumers can help increase opportunities for them to amass greater wealth, and helps to position your business for the future.

One key step to make inroads into serving this group of consumers is to look at your organization. Businesses should reflect what America looks like today and into the future. Does your organization reflect changing demographics? If not, you're missing an opportunity. Seeking diverse talent with different thinking, problem-solving skills and life experiences is critical to connecting with prospective customers. People are more comfortable working with businesses that can relate to them.



It also supports your success. Research compiled by the *Journal of Small Business Management* suggests that "employers who recruit diverse workforces open their businesses to a wide range of ideas. Businesses compile these varied opinions and ideas as they make decisions about how to start, run and finance their operations and market their products or services."

According to the Department of Labor, women account for 47 percent of the U.S. workforce and 54 percent of the workforce in financial services. However, women account for fewer than five percent of CEOs and fewer than 15 percent of executive officers at Fortune 500 companies. In a study of nearly 22,000 publicly traded companies in 91 countries published by the Peterson Institute for International Economics and EY (formerly known as Ernst & Young), gender-diverse companies – defined as having at least 20 percent of females on their boards or in higher management – exhibited higher profitability. The study showed that an increase from zero to 30 percent in the share of women in top management positions would be associated with a 15 percent rise in profitability.

The same study showed American companies were roughly in the middle of the pack with respect to female representation in top positions, with 12 percent of board seats going to women and 16 percent of executive positions. Norway's companies were the most gender diverse, with women filling 40 percent of board seats and 20 percent of executive positions. It should be noted that in Norway this is a legal requirement for all publically traded companies. Imagine if we had the same requirement in the U.S.

I strongly encourage you to make diversity initiatives a priority. Develop a strategy and plan for these demographic changes that are coming. Organizations that fail to adapt to change quickly aren't likely to survive.

Jacqueline T. Williams was appointed Director of the Ohio Department of Commerce by Governor John R. Kasich in April 2015. She serves as a member of the Governor's cabinet and is responsible for the overall leadership and direction of the department, which comprises seven divisions including Securities.

(Continued from page 1)

(1) Registering securities or transactions, or exempting securities or transactions from registration, under this chapter;
(2) Securing the qualification of any securities under this chapter;
(3) Procuring the licensing of any dealer, salesperson, investment adviser, investment adviser representative, bureau of workers' compensation chief investment officer, or state retirement system investment officer under this chapter;
(4) Selling any securities in this state;
(5) Advising for compensation, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities;
(6) Submitting a notice filing to the division under division (X) of section 1707.03 or section 1707.092 or 1707.141 of the Revised Code.

This section prohibits a person from 1) knowingly[5]; 2) making or causing to be made; 3) any false representation; 4) of a material and relevant fact; 5) in any oral statement or in any prospectus, circular, description, application, or written statement; 6) for one of the enumerated purposes – the most commonly used of which is "selling securities in this state". Absent from the foregoing elements of fraudulent misrepresentation in R.C. 1707.44(B) is any requirement that the victim must have relied on the misrepresentation for there to be a violation. Ohio courts have taken note of this distinction:

> [C]ommon law fraud differs from R.C. 1707.44 in that common law fraud has the additional element of reliance by the purchaser where a claim under R.C. 1707.44 does not mandate such reliance.

Ferritto v. Alejandro, 139 Ohio App. 3d 363, 368 (2000) (citing *Nickels v. Koehler Mgt. Corp. (C.A.6, 1976), 541 F.2d 611, 616, overruled on other grounds Ockerman v. May Zima & Co. (C.A.6, 1994), 27 F.3d 1151*).

Materiality

As set forth above, R.C. 1707.44(B) requires that the misrepresentation be "material". While the focus of this article is to highlight the absence of a reliance element in actions based on the Act rather than to examine each element of R.C. 1707.44(B), the element of materiality is sufficiently confused with reliance that further discussion of materiality is warranted here.

The United States Supreme Court has discussed materiality on multiple occasions. In a widely cited case, the Court stated:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. ***Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

TSC Indus. v. Northway, 426 U.S. 438, 449 (1976).[6] Ohio courts have followed the *TSC Industries* definition of what is material.[7]

Materiality, then, is the examination of whether a reasonable investor *would* place importance on the facts misrepresented or omitted. The question of reliance involves whether the *particular* investor committed to actions based upon the statements or omissions. *See Chelsea Assocs. v. Rapanos*, 527 F.2d 1266, 1271 n.2 (6th Cir. 1975) (citing *List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2nd Cir. 1965), *cert. denied*, 382 U.S. 811 (1965)).

Fraudulent Acts and Omissions Proscribed in the Act

In addition to the fraudulent misrepresentation prohibition, the Act contains a more sweeping, generalized prohibition against fraud in R.C. 1707.44(G)[8]:

> No person in purchasing or selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited.

In the definitional section of the Act, R.C. 1707.01(J), fraud is expansively defined as:

> "Fraud," "fraudulent," "fraudulent acts," "fraudulent practices," or "fraudulent transactions" means anything recognized on or after July 22, 1929, as such in courts of law or equity; any device, scheme, or artifice to defraud or to obtain money or property by means of any false pretense, representation, or promise; any fictitious or pretended purchase or sale of

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[5]For a discussion of "knowingly" as a negligence standard, see *State v. Warner*, 55 Ohio St. 3d 31 (1990) and an article in this same issue of the *Bulletin* on page 6.
[6]*See also Basic Inc. v. Levinson,* 485 U.S. 224, 240 (1988). Note, though, that the elements for a federal securities fraud cause of action are different in that they may require reliance. *See, e.g.*, *Riedel v. Acutote of Colo.*, 773 F. Supp. 1055 (S.D. Ohio 1991) ("To recover under section 12(2) of the Securities Act, a plaintiff does not have to show scienter or reliance. … In contrast with a claim under section 10(b) of the Securities Exchange Act, negligence is sufficient." (Citations omitted.)).
[7]*Isroff v. Westhall Co.*, C.A. NO. 15063, 1991 Ohio App. LEXIS 5856 (Ct. App. Nov. 27, 1991); *Saxe v. Dlusky*, 2010-Ohio-5323 (Ct. App.).
[8]"R.C. 1707.44(G) prohibits not only affirmative misrepresentation, but also fraudulent nondisclosure where there is a duty to disclose." *State v. Warner,* 55 Ohio St. 3d 31, 54 (1990).

(Continued from page 3)

> securities; and any act, practice, transaction, or course of business relating to the purchase or sale of securities that is fraudulent or that has operated or would operate as a fraud upon the seller or purchaser.

Like R.C. 1707.44(B), R.C. 1707.44 (G) does not contain any reliance requirement, in contrast to common law fraud. *Pharos Capital Partners, L.P. v. Touche, L.L.P.* (In re Nat'l Century Fin. Enters.), 905 F. Supp. 2d 814, 832 (S.D. Ohio 2012) ("[P]aragraphs (B)(4), (G), and (J) of § 1707.44 do not appear to require a plaintiff to prove reliance upon a false statement.") (citing *Wilson v. Ward*, 183 Ohio App.3d 494, 502 (Ohio Ct. App. 2009); *Ferritto*, 139 Ohio App.3d at 368). These are statutory prohibitions and have different elements than common law.

The definition of "fraud" in R.C. 1707.01(J) is intended to be sweeping. "In order to further the intended purpose of the Act, its securities anti-fraud provisions must be liberally construed." *Holderman v. Columbus Skyline Sec.* (*In re Columbus Skyline Sec.*), 74 Ohio St. 3d 495, 498 (1996). The element of reliance does not appear anywhere in R.C. 1707.44 and "[i]n matters of construction, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Cleveland Elec. Illuminating Co. v. Cleveland*, 37 Ohio St. 3d 50, 52 (1988).

Consequently, when an action is brought pursuant to R.C. 1707.44(G), just as for R.C. 1707.44(B), the language of those statutes indicate that reliance is not an element requiring pleading or proof.[9] In addition, when an enforcement action is brought by a regulatory agency like the Division, it is recognized that reliance is not an element because the government is seeking to deter and punish wrongdoing rather than recover a lost investment.[10] The regulatory agencies would not be able to fulfill their public protection mandate if they were required to wait for a harm to materialize before addressing a risk to the public.

Specific Fraudulent Actions

Other sections of the Act specifically prohibit actions that constitute fraud: R.C. 1707.44(E) (misrepresentations in sales); 1707.44(F) (deceptive sales of insolvent issuer); 1707.44(J) (deceptive statement or advertisement); 1707.44(K) (deceptive report of transaction); 1707.44(M) (prohibition against any fraudulent act by an investment advisor or representative); 1707.44(N) (mislead another involved in the financial statements); 1707.44(O) (defraud any state retirement system); and 1707.44(P) (defraud the workers' compensation system). Many of the sections have a "knowledge" or an "intent" element, but none require that reliance be proven.

In addition, R.C. 1707.042 and 1707.043 prohibit any person who makes or opposes a control bid, or seeks to acquire a corporation in Ohio to engage in any misrepresentations, or manipulative or fraudulent conduct. As in R.C. 1707.44, there is no requirement that there be reliance to find a violation of R.C. 1707.042 and 1707.043.

Civil Actions Arising From the Ohio Securities Act

The sections providing for civil actions under the Act can be found in R.C. 1707.41 through 1707.43.[11] Each section has been structured differently.

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The Division encourages members of the securities community to submit for publication articles on timely or timeless issues pertaining to securities law and regulation in Ohio.

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[9] *Ferritto*, 139 Ohio App. 3d at 368.
[10] *SEC v. Senex Corp.*, 399 F. Supp. 497, 503 (E.D. Ky. 1975). ("[R]eliance need not be demonstrated in an enforcement proceeding…")
[11] R.C. 1707.40 states that the Act "create[s] no new civil liabilities, and do[es] not limit or restrict common law liabilities…". *See DeChant v. Developers*, No. 37745, 1978 Ohio App. LEXIS 8128 (Ct. App. Oct. 28, 1978); *Silverberg v. Thomson McKinnon Sec., Inc.*, No. 48545, 1985 Ohio App. LEXIS 6140 (Ct. App. Feb. 14, 1985); *Federated Mgmt. Co. v. Coopers & Lybrand*, 2004-Ohio-4785, 13 (Ct. App. Sept. 9, 2004). A discussion of how that section has been interpreted is left for another article.

Relying On A Lie Isn't Necessary:
Fraud and Reliance in the Ohio Securities Act (Continued)

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R.C. 1707.41 provides for civil liability of the seller for fraud:

> (A) In addition to the other liabilities imposed by law, any person that, by a written or printed circular, prospectus, or advertisement, offers any security for sale, or receives the profits accruing from such sale, is liable, to any person that purchased the security relying on the circular, prospectus, or advertisement, for the loss or damage sustained by the relying person by reason of the falsity of any material statement contained therein or for the omission of material facts, ….

It is important to note that this section, *unlike any of the other sections in the Act*, requires that the purchaser "relies" on the false statement or omission and the damage must has resulted from the reliance.[12] The requirement of reliance in this section juxtaposed to the exclusion from all other sections makes clear the specific intention of the General Assembly was to omit reliance as an element in the other civil, administrative or criminal actions contemplated by the Act.[13]

R.C. 1707.41 goes on to provide for liability of each director of a corporation, absent good faith lack of knowledge. Knowledge will be attributed to a person who does not exercise reasonable due diligence.[14] Subsection (C) of R.C. 1707.41 states that there will be a presumption of knowledge if there is lack of "reasonable diligence in ascertaining the fact of a publication or the falsity of any statement contained in it or of the omission of a material fact…"

R.C. 1707.42 addresses civil liability for fraudulent investment advice.There are two separate sections. Section (A) provides that "[w]hoever, with intent to secure financial gain to self, advises and procures any person to purchase any security, and receives any commission or reward for the advice or services without disclosing to the purchaser the fact of the person's agency or interest in such sales, shall be liable …". Section (B) addresses anyone who acts as an investment adviser or investment adviser representative in violation of the Act and holds them liable for damages.

There is no requirement that the individual allegedly harmed by the conduct of the adviser must have relied on any representation. The core principle of the section is that the adviser omitted to disclose a conflict or the adviser violated the Act. Reliance is irrelevant in those conditions.

R.C. 1707.43 is the most cited of the civil provisions, and the most readily applicable to a larger universe of fraudulent conduct. The salient portion of the section states:

> (A) Subject to divisions (B) and (C) of this section, every sale or contract for sale made in violation of Chapter 1707 of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.

The purchaser need only prove a violation of the Act and tender the securities sold, either to the seller or in open court. Any person who has participated in or aided the seller *in any way* are jointly and severally liable.[15] Importantly, again, there is no requirement that the purchaser relied on any fraudulent statement or misrepresentation or any other violation of the Act.[16] The section only requires that any violation be proved[17] and that the court does not find the violation did not materially affect the protection.[18]

In comparing the civil sections, above, and the presence or absence of rescission, R.C. 1707.41 requires the misstatements or omissions must be in written form and is intended as an individual remedy for a situation where the fraud was an inducement. Recognizing that any violation of the Act harms the investment community as a whole, as well as the individual, R.C. 1707.42 and 1707.43 are, rather, focused on the bad behavior of the selling agent. *(Continued on Page 7)*

READ THE 2016 DEPARTMENT OF COMMERCE ANNUAL REPORT

Each year, all State of Ohio agencies are required to publish an annual report, which highlights the work of the departments and each division within an agency. This year's Commerce report (http://com.ohio.gov/AnnualReports.aspx) theme – "Safe, Sound and Secure" – shows the many ways our agencies help businesses operate safely while helping Ohioans protect what's important to them.

The Division of Securities section can be found on pages 16 and 17 of the report, with additional highlights found on page 7 and page 23, which provides several examples of how we administer and enforce the Ohio Securities Act.

[12] *See In re Nat'l Century Fin. Enters.*, 905 F. Supp. 2d at 832.
[13] *See Cleveland Elec. Illuminating Co.*, 37 Ohio St. 3d at 52.
[14] R.C. 1707.41(C); *see Baker v. Conlan*, 66 Ohio App. LEXIS 1815; *State v. American Equitel Corp.*, 60 Ohio Misc. 7 (1979).
[15] *Hild v. Woodcrest Asso,* 59 Ohio Misc. 13, 28-29 (Ct. Com. Pl. 1977).
[16] *Wilson*, 183 Ohio App. 3d at 502; *In re Nat'l Century Fin. Enters., Inc.*, 755 F. Supp. 2d at 884.
[17] *See Bronaugh v. R. & E. Dredging Co.*, 16 Ohio St. 2d 35 (1968).
[18] For a discussion of what "materially affects the protection" means, *see Pencheff v. Adams*, 5 Ohio St. 3d 153 (1983). *See, also, Bell v. Le-Ge, Inc.*, 20 Ohio App. 3d 127, (Ct. App. 1985).

DEFINING "KNOWINGLY" IN SECURITIES FRAUD CASES

By Ana Hinchliffe

The Ohio Revised Code (R.C.) Chapter 29 imposes criminal liability for distinct types of fraud as defined in R.C. §2913. This provision contains specific causes of action for fraud, including Medicare fraud, insurance fraud, and identity fraud.[1] Under Chapter 29, criminal liability for the distinct types of fraud exists when one "knowingly obtain[s], by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another."[2] Importantly, R.C. §2913 does not contain a provision for securities fraud.[3] Instead, the Ohio Legislature explicitly passed a fraud provision unique to the Ohio Securities Act. The fraud provision of the Ohio Securities Act, R.C. §1707.44(G), states, "No person in purchasing or selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited."[4]

Both R.C. §2913.01(B) and R.C. §1707.44(G) use the term "knowingly" to establish scienter.[5] R.C. §2901.22(B) defines the knowingly standard for criminal liability under Chapter 29, stating:

> A person acts knowingly…when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.[6]

If R.C. §2901.22(B) defines the scienter required for a cause of action under R.C. §1707.44(G), actual knowledge of fraudulent activity must be evidenced to show a violation.[7] However, the Ohio General Assembly did not adopt this higher level of scienter when drafting the Ohio Securities Act. Rather, the Legislature enacted R.C. §1707.29, which states:

> In any prosecution brought under sections 1707.01 to 1707.45 of the Revised Code, except prosecutions brought for violation of division (A) of section 1707.042 of the Revised Code, the accused shall be deemed to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge.[8]

In contrast to R.C. §2901.22(B), the language R.C. §1707.29 does not require actual knowledge. Instead, the scienter requirements of the Ohio Securities Act are met if the defendant merely should have known the facts and circumstances at issue.[9] When a dichotomy between Chapter 29 and Chapter 17 arises, the Supreme Court of Ohio has held that the statutory provision of Chapter 17 will prevail as the appropriate authority in *State v. Frost*.[10] In *Frost*, the Court upheld the conviction of a defendant for the sale of unregistered securities and acting as an unlicensed sales person.[11] While holding that R.C. §1707.45 is the correct standard to use to determine the burden of proof for Chapter 17 violations, the Court stated that the General Assembly, by enacting a provision of Chapter 17 incongruous to Chapter 29, intended to subjugate Chapter 29 in favor of Chapter 17 as it pertains to violations of Chapter 17.[12] Absent clear indication to the contrary, the Court concluded it is reasonable to assume that the General Assembly intended the provisions in Chapter 17 inconsistent with Chapter 29 to control over violations of Chapter 17.[13] The Ohio General Assembly enacted language in R.C. §1707.29 that provides a different standard of "knowingly" than R.C. §2901.22(B), thus "knowingly" under R.C. §1707.29 is the correct standard of scienter to use to determine if violations of the Ohio Securities Act occurred.[14]

In *State v. Warner*, the Court used R.C. §1707.29 as the appropriate definition of "knowledge" for criminal violations of R.C. §1707.44.[15] In this case, the Court denied an appellant's argument that R.C. §1707.29 unconstitutionally shifts the burden of proof from the state to the defendant by presuming knowledge of pertinent facts.[16] Citing a Tenth District Court of Appeals decision, *State v. Walsh,* the Court rejected the premise that "knowingly" under R.C. §1707.29 is synonymous with "knowledge" under R. C. §2901.22 (B).[17] Instead, the Court confirms that R.C. §1707.29 effectively imparts a standard more equitable to the negligence standard under R.C. §2901.22(D),[18] which states:

> A person acts negligently when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that such circumstances may exist.[19]

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[1] Ohio Rev. Code §§ 2913.40-2913.49.
[2] Ohio Rev. Code §2913.01(B).
[3] *See generally* Ohio Rev. Code §§ 2913.05, 2913.32-2913.33, and 2913.40-2913.49.
[4] Ohio Rev. Code § 1707.44(G).
[5] *Id.*; Ohio Rev. Code § 2913.01(B).
[6] Ohio Rev. Code § 2901.22(B).
[7] *Id.*
[8] Ohio Rev. Code § 1707.29.
[9] *Id.*
[10] *See* State v. Frost, 57 Ohio St. 2d 121, 125, 387 N.E.2d 235 (1979).
[11] *See id.*
[12] *See id.* at 124.
[13] *See id.* at 125.
[14] *See* Ohio Rev. Code §1707.29 and §2901.22(B).
[15] *See* State v. Warner, 55 Ohio St. 3d 31, 56, 564 N.E. 2d 18 (1990).
[16] *See id.*
[17] *See id.* at 57, *citing State v. Walsh*, 66 Ohio App. 2d 85, 95, 420 N.E.2d 1013 (10th Dist. 1979).
[18] *See. id.* at 56.
[19] Ohio Rev. Code § 2901.22(D).

Relying On A Lie Isn't Necessary:
Fraud and Reliance in the Ohio Securities Act

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Conclusion

The various securities acts, state and federal, are interpreted with the remedial purpose in mind, and the protection of the public is paramount.[19] Those purposes could not be accomplished, and would be hindered, if reliance was required in order to pursue a violation of the Act.[20] "Yet we have repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & Maclean v. Huddleston*, 459 U.S. 375, 386-87 (1983) (quoting *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 195 (1963)); *accord Superintendent of Insurance* v. *Bankers Life & Cas. Co*., 404 U.S. 6, 12 (1971); *Affiliated Ute Citizens*, 406 U.S. at 151.

> [An earlier version of the Ohio Securities Act was] enacted for the obvious purpose of guarding investors against fraudulent enterprises, to prevent sales of securities based only on schemes purely speculative in character, and to protect the public from swindling peddlers of worthless stocks in mere paper corporations. It should be so administered as to fully meet the purpose of its enactment.

Groby v. State, 109 Ohio St. 543, 550 (1924).

The Act was designed for the protection of the investing community and that part of the industry that adheres to ethical practices and statutory directives. Actions based on alleged violations of the Act are instituted on behalf of the entire securities community, either by the government or a harmed investor. To require reliance within an administrative or criminal prosecution by the government for a violation of the Act would undermine the nature and purpose of the securities regulatory scheme.[21] Since the powers of the Division of Securities in R.C. 1707.23 indicate that the Division has authority to bring an action for the offer of securities, absent any actual sales, it evident that reliance was never intended to be an element in administrative and criminal cases. Likewise, because some violations are of a type that reliance may not be proven yet tend to cause a substantial harm to the investing community as a whole, it is appropriate that those types of civil cases not require reliance either.

[20]*Capital Gains Research Bureau, Inc.*, 375 U.S. at 195.
[21]*SEC v. KPMG LLP*, 412 F. Supp. 2d 349, 375 (S.D.N.Y. 2006) ("The SEC, unlike a private plaintiff, is not required to prove reliance when it brings enforcement actions under the securities laws.") (citations omitted); *see also Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999) (mail fraud, wire fraud and bank fraud).

Defining "Knowingly" In Securities Fraud Cases

(Continued from page 6)

In holding that "knowingly" in R.C. §1707.29 is analogous to a negligent standard, the Court adopted a "knew or should have known" standard for violations of the Ohio Securities Act.[20] Criminal liability for violations of R.C. §1707.44(G) exists if a person "'presents fact to be different than he should have known them to be if he had exercised reasonable diligence to ascertain the facts.'"[21] In determining if an individual should have known the true nature of the facts, a jury should consider two factors: first, did the individual use reasonable due diligence, and two, in the exercise of the due diligence, should the individual have learned of the true facts.[22]

While both *Warner* and *Walsh* address knowledge under R.C. §1707.29 in a criminal context, the "knew or should have known" standard of "knowingly" is not confined to criminal actions brought against alleged violators of the Ohio Securities Act. In *State v. American Equitel Corp.*, the Franklin County Court of Common Pleas rejected the state's request for a permanent injunction from further violations of the Ohio Securities Act for a corporation's board of directors, but applied R.C. §1707.29 to its analysis of scienter.[23] The Court held R.C. §1707.29 applies to all causes of action under the Ohio Securities Act.[24] "Use of the words 'prosecution', 'accused' and 'offense' seem to imply that this section applies to criminal cases, but as the Ohio Securities Act is a remedial law, this section should be construed liberally to include any litigation, not just criminal."[25] Therefore, the definition of knowingly under R.C. §1707.29 will be the standard of scienter for civil and administrative actions, as well as criminal.

In conclusion, the burden needed to prove scienter in civil, administrative and criminal actions for violations of the Ohio Securities Act, including securities fraud under R.C. §1707.44(G), is not established under Chapter 29. Instead, the General Assembly passed a separate statute, R.C. §1707.29, which courts have declared to be analogous to the negligence standard of R.C. §2901.22(D). Under R.C. §1707.29, a fact finder must determine if a defendant exercised due diligence, and in the exercise of that due diligence, should have ascertained the existence of the pertinent facts. If a defendant has not exercised due diligence or failed to determine facts that he or she should have known, the scienter requirement will be met.

Analiese Hinchcliffe is an Enforcement Attorney for the Ohio Division of Securities. Prior to her employment at the Division, she assisted in Baker Hostetler's representation of the SIPC trustee in litigation related to Bernard L. Madoff Investment Securities LLC. Analiese graduated magna cum laude from the Cleveland-Marshall College of Law in 2009. While in law school, she interned with the Enforcement Division of the U.S. Securities and Exchange Commission in Atlanta and served as Business Editor of the Journal of Law and Health. She graduated from Loyola University Chicago with a Bachelor of Business Administration in Accounting and Finance in 2006.

[20]*See* Warner, 55 Ohio St.3d at 56-57.
[21]*Id., quoting Walsh*, 66 Ohio App. 2d at 95.
[22]*See id.* at 57; *see also Walsh*, 66 Ohio App. 2d at 95.
[23]*See generally State v. American Equitel Corp.,* 60 Ohio Misc. 7, 395 N.E.2d 1355 (C.P. 1979).
[24]*See id.* at 24.
[25]*Id., citing* Ohio Rev. Code § 1.11.

A to Z
with L & E

This section of the Bulletin, the Licensing & Examination Section of the Division ("L & E"), discusses timely and important topics impacting our licensees. The goal is to cover a wide-range of issues – from "A to Z" – that are of greatest interest to you!

We welcome your suggestions for future topics.

OHIO DIVISION OF SECURITIES

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A to Z with L & E

LICENSING STATISTICS FOR FISCAL YEARS 2015-2016

The Division's Licensing Section is responsible for licensing the professionals who sell securities-related products. The chart below shows the number of professionals – including broker-dealers, securities salespersons, investment adviser representatives and investment officers – who were licensed with the state of Ohio in fiscal years 2015 and 2016.

Professional Licenses	Fiscal Year 2015	Fiscal Year 2016	Percentage Increase/Decrease
Securities Dealers	2,079	2,053	1.25% ↓
Securities Salespersons	172,898	178,586	3.29% ↑
Investment Advisers (State Licensed)	801	814	1.62% ↑
Investment Adviser Representative	17,870	18,421	3.08% ↑
Investment Advisers (Notice Filers)	1765	1,822	3.22% ↑
Bureau of Workers' Compensation Chief Investment Officer	1	1	--
State Retirement System Investment Officer	80	96	20% ↑
TOTALS	195,494	201,793	3.22% ↑

FINRA CHAIRMAN RICK KETCHUM RETIRES

Board names Robert Cook as CEO and John Brennan as Chairman

FINRA Chairman and CEO Richard Ketchum announced earlier this year his plan to retire in August. Ketchum, 64, has been one of the foremost industry regulators for more than three decades.

He came to FINRA from the New York Stock Exchange (NYSE) where he was CEO of NYSE Regulation. He also spent 12 years at the National Association of Securities Dealers (NASD) and Nasdaq, where he served as president of both organizations. Prior to that, he was the director of the SEC's Market Regulation division.

Under his leadership, the organization developed and grew several important programs, including the High Risk Broker program, made improvements to BrokerCheck, expanded TRACE for reporting of asset-backed securities, and the expansion of FINRA's responsibilities across stock and options trading. These programs helped to create stronger investor protections and greater market integrity.

In mid-June, FINRA's Board of Governors announced that Robert Cook would take over as president and CEO, and in mid-July it named John Brennan as the new chairman. Both positions became effective in August.

Cook was most recently a partner in Cleary Gottlieb's Washington, D.C., office, where he focused on the regulation of securities markets and market intermediaries, including broker-dealers, exchanges, alternative trading systems and clearing agencies.

Brennan was a former chief executive and now chairman emeritus and senior adviser at Vanguard Group. He joined the Board of Governors of the NASD and remained on the Board following the merger of the NASD and New York Stock Exchange Regulation in 2007. He has served as FINRA's Lead Governor since 2011.

Q&A

Q: Do state licensed Investment Advisers (IAs) have to include a hyperlink on their website to FINRA's BrokerCheck?

A: No, this is not required of state licensed IAs, as this rule only specifically applies to FINRA member firms and those individuals working for those firms.

On June 6, 2016, the SEC-approved amendments to FINRA Rule 2210 went into effect, requiring FINRA member firms' websites to include a readily apparent reference and hyperlink to BrokerCheck on: (1) the initial web page that the firm intends to be viewed by retail investors; and (2) any other web page that includes a professional profile of one of more registered persons who conduct business with retail investors. See FINRA Regulatory Notice 15-50, *(http://www.finra.org/sites/default/files/Notice_Regulatory_15-50.pdf)* December 2015.

FINRA believes that by providing an easy route to BrokerCheck, customers will use this tool to "check before they invest" - by looking up the registered person and the firm that they work for before making decisions regarding their investments. For a complete review of the changes to FINRA Rule 2210(d)(8), refer to the text of the rule here: *http://finra.complinet.com/en/display/display_main.html?rbid=2403&record_id=16964*.

State licensed IAs with no affiliation to a FINRA member firm may elect to follow this business practice by posting a link on their website to the Investment Adviser Public Disclosure website: *http://www.adviserinfo.sec.gov*. Like BrokerCheck for FINRA members, the IAPD was created to provide information about IAs and their investment adviser representatives (IARs) to the investing public. The site displays information about IAs and IARs through their most recent form filings, including information about a firm's advisory business and any reportable disclosure matters.

SPOTLIGHT

LICENSING

RICHARD PAUTSCH RETIRES

After more than 26 years of service, Rich retired from the Division on Sept. 30, 2016. He has been the Examination Program Administrator for the Division, which included supervising the five field examiners and the administration of all Division field examinations in the Licensing section. Rich was also responsible for the review of examination reports and deficiencies that may be noted in the examination findings. The Division's examination program works to provide a consistent approach to the registration and licensing of all state licensed investment advisers, broker dealers and registration issuers who conduct business in Ohio and with Ohio investors.

We thank Rich for his many contributions and dedicated service, and wish him a long and fulfilling retirement.

EDUCATING SENIORS AT THE OHIO STATE FAIR

Several staff members from the Securities Division helped educate Ohioans during Senior Day at the Ohio State Fair in August. The annual Senior Expo, sponsored by the Ohio Department of Aging, provided an opportunity for organizations to connect with seniors in myriad ways, from conducting health checks to educating them on programs to enhance their lives.

Compliance Counsel, Kelly Igoe performing a BrokerCheck during Senior Day at the Ohio State Fair

Our team focused on keeping seniors safe, sound and financially Secure by providing information and literature on how to avoid becoming a victim of financial fraud. Attendees participated in interactive games with prizes, as well as researching their investment advisor by accessing BrokerCheck.

Approximately 300 seniors visited our booth during the one-day event.

Enforcement Section Update

ENFORCEMENT SECTION UPDATE

The Division's Enforcement Section is a criminal justice agency authorized to investigate and report on all complaints and alleged violations of the Ohio Securities Act and related rules.

The Enforcement Section attorneys represent the Division in prosecutions and other matters arising from such complaints and alleged violations.

OHIO DIVISION OF SECURITIES

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ADMINISTRATIVE ACTIONS

Division Order No. 16-014
Primesolutions Securities, Inc.
CRD No. 46017
Cleveland, Ohio

On May 11, 2016, the Division issued a Cease and Desist Order with Consent against Primesolutions Securities, Inc. (PSSI) based on findings that PSSI was not of good business repute based on FINRA arbitration awards disclosed on PSSI's CRD record. Through the Consent Order, PSSI agreed to withdraw their Ohio investment adviser license and further agreed to never reapply for licensure as an Ohio investment adviser or Ohio securities dealer.

Division Order No. 16-015
Gustafson Baxter Financial Services, Inc. CRD No. 110289
Bruce W. Baxter CRD No. 1315705
Powell, Ohio

On May 20, 2016, the Division issued a Notice of Opportunity and Notice of Intent to Suspend or Revoke the Ohio investment adviser license of Gustafson Baxter Financial Services, Inc. and the Ohio investment adviser representative license of Bruce W. Baxter based on allegations that Baxter and his firm failed to respond to repeated requests from the Division to schedule an on-site examination. An administrative hearing was not requested. The hearing pursuant to *Goldman v. State Med. Bd. of Ohio*, 110 Ohio App.3d 124(1996) was held September 9, 2016.

Division Order No. 16-016
Lincoln Financial Advisors Corporation CRD No. 16-016
Fort Wayne, Indiana

On July 1, 2016, the Division issued a Cease and Desist Order with Consent against Lincoln Financial Advisors Corporation (Lincoln) based on findings that Lincoln solicited and sold non-traded REIT securities to Ohio clients in amounts exceeding 10% of the clients' liquid net worth in violation of the terms of the REIT prospectuses and without reasonable inquiry to determine the suitability of the investments for those clients. The Order further found that Lincoln failed to enforce reasonable supervisory procedures to insure compliance with state law.

Division Order Nos. 16-017 and 16-025
Hidalgo Alfalfa Company, LLC
Rancho Hidalgo, LLC
Firewater Hydrogen Fuel, LLC
Timothy Edward McShane
Joseph Mersnik
Animas, New Mexico
Stow, Ohio
Akron, Ohio

On July 8, 2016, the Division issued a Notice of Opportunity and Notice of Intent to issue a Cease and Desist Order against Timothy Edward McShane, Joseph Mersnik and affiliated companies based on allegations that McShane and Mersnik, acting as unlicensed securities dealers or salespersons, sold unregistered securities to at least 53 investors, including Ohio residents, without disclosing that the investors' funds would be used to pay personal draws and commissions to McShane and Mersnik, as well as to pay expenses incurred by McShane's construction business in Ohio. On September 30, 2016, the Division issued a default Cease and Desist Order against Hidalgo Alfalfa Company LLC, Rancho Hidalgo LLC, Firewater Hydrogen Fuel LLC, and Timothy Edward McShane. Mersnik requested an administrative hearing in this matter, which is scheduled to begin November 14, 2016.

Division Order No. 16-018
Jason M. Orsky Wealth Management, LLC CRD No. 170277
Jason M. Orsky CRD No. 5652030
Westlake, Ohio

On August 2, 2016, the Division issued a Notice of Opportunity and Notice of Intent to Suspend or Revoke the Ohio investment adviser license of Jason M. Orsky Wealth Management, LLC and the Ohio investment adviser representative license of Jason M. Orsky based on allegations that, after repeated requests made by the Division, they

(Continued on page 11)

Administrative Actions (Continued)

(Continued from page 10)

failed to timely provide requested information concerning the investment advisory business.

DIVISION ORDER NO. 16-019
ULU CAPITAL, LLC
CRD NO. 173351
ANDREW NIEHUS
CRD NO. 4406399
FAIRFIELD, OHIO

On August 2, 2016, the Division issued a Notice of Opportunity and Notice of Intent to Suspend or Revoke the Ohio investment adviser license of ULU Capital, LLC and the Ohio investment adviser representative license of Andrew Niehus based on allegations that, after repeated requests made by the Division, they failed to timely provide requested information concerning the investment advisory business.

DIVISION ORDER NO. 16-020
NBI FINANCIAL SERVICES
BARKER & DAUGHTERS, INC.
D/B/A NEW BEGINNINGS
OAKWOOD VILLAGE AND
AGAMORE HILLS, OHIO

On August 16, 2016, the Division issued a Notice of Opportunity for Hearing and Notice of Intent to Issue a Cease and Desist Order against NBI Financial Services and Barker & Daughters, Inc. d/b/a New Beginnings based on allegations that they sold investment contracts to an Ohio investor in exchange for an aggregate investment amount of $35,600 through assurances that the money would be invested "like a mutual fund" and that the investor would receive returns of 400%. The Division alleges that the investor funds were used for personal use, including food, utilities and other miscellaneous expenditures.

DIVISION ORDER NO. 16-021
THOMAS P. GILMARTIN, JR.
CAPITAL FINANCE GROUP, LLC
YOUNGSTOWN, OHIO

On August 16, 2016, the Division issued a Notice of Opportunity for Hearing and Notice of Intent to Issue a Cease and Desist Order against Thomas P. Gilmartin, Jr. and Capital Finance Group, LLC (Capital) based on allegations that Gilmartin and Capital solicited investments for the Western Reserve Port Authority without disclosing material facts, specifically Gilmartin's criminal history and the permanent injunction issued against him by the SEC. The Division alleges that Gilmartin and Capital proposed to secure capital for the Western Reserve Port Authority in the amount of $1 billion in exchange for a fee of $4 million or 4%. In 1994, Gilmartin pled guilty in the U.S. District Court for the Northern District of Ohio to 35 felony counts, including wire fraud, conspiracy to commit fraud, money laundering and securities fraud. In 1995, the SEC issued a permanent injunction against Gilmartin, enjoining him from violations of the antifraud and books and records provisions of federal securities law, as well as enjoining him from violating the registration provisions of the Securities Act of 1934 and the Investment Advisers Act of 1940. The Respondents requested an administrative hearing, which is scheduled to begin December 6, 2016.

DIVISION ORDER NO. 16-022
LISA A. BLOCK CRD NO. 2413976
DAYTON, OHIO

On August 30, 2016, the Division issued a Cease and Desist Order with Consent against Lisa A. Block based on findings that she acted as a securities salesperson without proper licensure. The Order further found that Block opened bank accounts in the names of securities licensees reporting to her for the purpose of receiving commissions for her work. Block has agreed to an undertaking as part of the Consent Order to repay those clients who paid commissions to her for unlicensed activity.

DIVISION ORDER NO. 16-023
MICHAEL W. WIESEMANN, SR.
CRD NO. 4918499
MAH INVESTMENT MANAGEMENT, LLC CRD NO. 155092
PRIME CONSERVATIVE FUND, LP
BROOKVILLE, INDIANA

On September 21, 2016, the Division issued a Notice of Opportunity for Hearing, Notice of Intent to Suspend or Revoke, and Notice of Intent to Issue a Cease and Desist Order against Michael W. Wiesemann, Sr. (Wiesemann), MAH Investment Management, LLC (MAH), and Prime Conservative Fund, LP, based on allegations that Respondents engaged in fraudulent, deceptive or manipulative conduct, breached their fiduciary duty to their investment advisory clients, improperly commingled client funds with personal assets and provided false testimony to the Division during an investigative hearing. Wiesemann is an Ohio-licensed investment adviser representative and owner of MAH, an Ohio-licensed investment adviser firm. The Notice Order alleges that Wiesemann sold limited partnership interests in Prime Conservative Fund, LP, to his advisory clients and failed to disclose that $2.1 million of the investors' funds would be used to pay Wiesemann for the purchase of his insurance company in Indiana and that a portion of the investors' funds would be used to purchase a vacation home in Florida titled in the individual names of Wiesemann and his wife.

DIVISION ORDER NO. 16-024
ROBERT EUGENE HANES D/B/A
EARTH RESOURCES
PITTSBURGH, PENNSYLVANIA

On September 23, 2016, the Division issued a Notice of Opportunity for Hearing and Notice of Intent to Issue a Cease and Desist Order against Robert Eugene Hanes D/B/A Earth Resources based on allegations that they cold-called an Ohio investor and sold him a working interest in an oil well in Haskell County, Texas, in exchange for $22,375. Instead of applying the investor funds to the oil well, the Division alleges that Mr. Hanes used the funds for airline tickets, hotels and meals at casino resorts.

CRIMINAL CASES

CARL D. MOSS
SUMMIT COUNTY COURT OF COMMON PLEAS
2016CR041333

On April 22, 2016, following a criminal referral by the Division, Carl Dellreco Moss was indicted on one count each of securities fraud, misrepresentation in the sale of a security, sale of unregistered securities and theft in the Summit County Court of Common Pleas. The indictment is based on allegations that Moss solicited a client to invest in Moss One Entertainment, Inc. for the purpose of putting together a musical concert to be held in Columbus, Ohio. At the time of the solicitation Moss was on probation through Cuyahoga County for multiple counts of theft and unauthorized use of property/computer system. At the time of his indictment, Moss was subject to outstanding warrants issued by the Akron Municipal Court for allegations of passing bad checks. This case is being prosecuted by the office the Summit County Prosecutor, Sherri Bevan Walsh.

BRUCE DURR
DELAWARE COUNTY COURT OF COMMON PLEAS
16CR1I-07-0368

After a referral from the Division of Securities, a Delaware County Grand Jury returned a 24-count indictment against 38-year-old Bruce Durr of Westerville on July 29, 2016. The indictment stems from allegations that Durr solicited and received $69,400 from four Ohio residents to invest in The Denture Place, a new company touted as a denture manufacturer. Instead of investing the money, Durr is alleged to have used the funds for personal expenses. The company never opened. Durr is charged with 12 counts of securities fraud – all third-degree felonies, and 12 counts of theft – all fourth-degree felonies. The indictment spans from September 2014 through January 2015. The case is being prosecuted by the office of the Delaware County Prosecutor, Carol O'Brien. Arraignment is scheduled for October 21, 2016.

MARY HACKNEY
PHILIP CURTIS
LOVELL JONES
FRANKLIN COUNTY COURT OF COMMON PLEAS
16CR004771

On August 30, 2106, after a referral from the Ohio Division of Securities, a Franklin County Grand Jury returned a 19-count indictment for securities fraud, misrepresentations in the sale of securities, selling unregistered securities and theft, naming three defendants who operated businesses in the Columbus area. The indictment includes 19 criminal charges against Mary Hackney of Cook County, Illinois, formerly of Franklin County, 16 criminal charges against Philip Curtis of Orange County, North Carolina, and three criminal charges against Lovell Jones of Franklin County. The indictment stems from allegations that the defendants jointly operated Hackney Consulting Group, Inc., doing business as HCG and HCG-770, previously located at 1224 Fair Ave. in Columbus. In addition, Jones operated another corporation, 800 CSN, LLC, from 1755 Shanley Drive in Columbus. The indictment alleges that through these businesses, the defendants solicited funds from six residents of Ohio, Kansas and North Carolina to invest with Hackney Consulting Group, Inc. and its affiliated companies. Instead of using the money for investment, the indictment alleges that the money was used for personal expenses. The indictment alleges conduct between September 2011 and February 2013. The case is being prosecuted by the office of the Franklin County Prosecutor, Ron O'Brien, and presented by Assistant Prosecuting Attorney, Thomas Allen. The Defendants failed to appear for the arraignment and Court indicated that a capias will be issued.

FRANK KAUTZMANN
(DR. FRANK KAUTZMANN III)
WARREN COUNTY COURT OF COMMON PLEAS
2016CR041333

On September 21, 2016, Frank Kautzmann entered a plea of guilty to theft, a felony of the fifth degree based on the receipt of $30,000 in relation to the merger and formation of ANTS Software, Texas, which were used for personal expenses. The sentencing hearing is scheduled for November 4, 2016. Information about this case was previously published at: http://www.com.ohio.gov/documents/secu_Bulletin2016FirstQuarter.pdf

ENFORCEMENT'S EFFORTS HELP RECOVER LOST INVESTMENTS

Investigations by the Division of Securities' Enforcement staff have led to criminal restitution orders for the previous fiscal year in the aggregate amount of $5,993,732.47 for the benefit of at least 30 Ohio investors.

Additionally, criminal referrals resulted in the voluntary return of $368,400 in investment losses to an additional 31 Ohio investors.

ENFORCEMENT SECTION UPDATE (Continued)

ADMINISTRATIVE AND CRIMINAL APPEALS

TIMOTHY K. FIFE V. STATE OF OHIO, DEPARTMENT OF COMMERCE

Case No. CV-16-862093,
Cuyahoga County Court of Common Pleas
Appeal from Division Order No. 16-012
January 12, 2017 (Oral Arguments)

PETER A. BECK V. STATE OF OHIO

Case No. C 1500539,
Ohio Court of Appeals, First District, Hamilton County
Appeal from criminal conviction in case no. B1304320A

CRIMINAL TRIALS, ARRAIGNMENTS AND SENTENCINGS

STATE OF OHIO V. BRUCE DURR

Case No. 16 CR I 07 0368,
Delaware County Court of Common Pleas
October 21, 2016 (Arraignment)

STATE OF OHIO V. JON PATRICK HORVATH

http://www.com.ohio.gov/documents/secu_Bulletin2014ThirdQuarter.pdf
Case No. B1307440,
Hamilton County Court of Common Pleas
November 28, 2016 (Sentencing)

STATE OF OHIO V. CARL D. MOSS

Case No. 2016 CR 041333,
Summit County Court of Common Pleas
September 28, 2016 (Jury Trial)
Pending Continuance - Date TBD

STATE OF OHIO V. FRANK KAUTZMANN (DR. FRANK KAUTZMANN III)

Case No. 2016CR041333,
Warren County Court of Common Pleas
November 4, 2106 (Sentencing)

ADMINISTRATIVE HEARINGS

IN RE: JOSEPH MERSNIK, DIVISION ORDER NO. 16-017

November 14-15, 2016

IN RE: THOMAS P. GILMARTIN, JR. AND CAPITAL FINANCE GROUP, LLC

Division Order No. 16-021
December 6-10, 2016

WELCOME NEW STAFF MEMBERS

JOHN CRIST is the new Control Bid Attorney on the Registration team. John will be responsible for reviewing registration filings and responding to inquiries on securities and exemption matters. He comes to Securities after two years with the Ohio EPA as a senior staff attorney dealing with non-environmental issues.

CORY HOFFMAN joins the Enforcement team as an attorney. He will investigate alleged violations of the Ohio Securities Act, manage enforcement cases, and coordinate with local prosecutors as necessary. Prior to joining us, Cory owned his own practice where he advised small businesses and start-ups that sought private investment. Before that he was in private practice working on corporate transactions and securities matters.

TIM JONES is an Investigator on the Enforcement team. Tim will research and investigate complaints of possible violations of the Ohio Securities Act, including conducting interviews with related parties, scheduling and reviewing financial account records, preparing preliminary investigative reports, as well as requesting and serving subpoenas. He'll interact with legal counsel and government agencies, and will also conduct announced and unannounced on-site inspections for possible securities law violations.

LAURA LITTLEJOHN is the new Office Assistant. Laura will provide the Enforcement team with a variety of office-related support and assist with other duties within the Division. She was most recently with Licking Memorial Hospital in Newark, Ohio, working in the Health Information department.

DAN ORZANO is our new Educational Outreach Manager, responsible for managing our efforts to educate Ohioans about how to prevent financial fraud. His background will also help us with several communications efforts such as The Bulletin newsletter, website content and much more. Dan will coordinate those efforts with the Department of Commerce communications team as needed.

SECURITIES EXCHANGE

POINT
COUNTER POINT

From the Editor: **In this issue of the Ohio Securities Exchange, we're unveiling a new column called Point / Counterpoint, which is designed to provide varying points of view on a specific issue. In this edition, we've asked three attorneys – Dennis Concilla, Hugh Berkson and Marnie Lambert – for their opinions on the issue of Expungement.**

Q1. Expungement of customer complaints is and has always been classified as an extraordinary remedy, reserved for the deletion of information having no meaningful regulatory value. In December of 2013 ("The Neutral Corner" Volume 4-2013, December 18, 2013), FINRA issued guidance to its arbitrators reminding them that expungement is an "extraordinary remedy" that "should not be recommended unless certain rules, requirements and procedures are met." The national media and other interested parties have stated they are not persuaded that the 2080 Expungement process qualifies as an extraordinary remedy. They argue that the remedy has become a routine occurrence, granted almost as a matter of course when requested, particularly in settled disputes. Is that fair commentary? How would you respond to those criticisms?

DENNIS CONCILLA:
As the attorney who has actually brought and fought for expungements, I can say unequivocally that the remedy is neither routine nor granted as a matter of course. The panels take their responsibility very seriously and I have never tried an expungement case where the customer was not notified and the panel did not interview witnesses.

HUGH BERKSON & MARNIE LAMBERT:
Unfortunately, our experience with expungements is largely different than Dennis'. In our experience, expungements are granted far too often in circumstances in which it is inconceivable that a brokerage firm would have paid the complaining customer the amount of money it did if the customer's broker did nothing wrong. For example, one case comes to mind where we represented a client against B-D for a sales practice violation by its broker. The B-D paid **100%** of the losses we sought in the FINRA Statement of Claim and the involved broker then sought expungement. Our client appeared by phone and testified in "defense" of the expungement request, even being cross-examined about the facts of the claim that the broker's firm paid **in full** as part of a settlement. After the settling client and we, her lawyers, volunteered our time and effort to make sure that the broker's record would accurately reflect his violations, we received an award that *granted* the broker expungement on the ground that our client's claim was *false*. Naturally, we could not help but doubt the effectiveness and value of an expungement process that resulted in a broker having no mark on his regulatory record despite the fact that his firm paid six figures to settle our client's claim. The only thing "extraordinary" about that expungement is the fact that it was granted.

Putting our own anecdotal experiences aside, statistics also demonstrate that expungement is not the extraordinary remedy it is intended to be. Overall, in cases filed between January 1, 2012, and December 31, 2014, that were settled before a final hearing and award, expungement was granted an incredible 87.8% of the time it was requested by a broker or his/her firm. The particularly alarming thing about this statistic is that it also shows that, even after additional guidance and training by FINRA reminding arbitration panels that expungement should be an extraordinary relief (and not merely ordinary), expungements are being granted more often rather than less often. The Public Investor Arbitration Bar Association analyzed the expungement awards referenced above and they revealed the following with respect to requests for expungement relief in cases involving stipulated awards or settled customer claims: (1) for such cases filed in 2012, expungement relief was granted in 86.5% of the cases; (2) for such cases filed in 2013, ex-

(Continued on page 15)

OHIO SECURITIES EXCHANGE

The Ohio Securities Exchange provides a platform where views and opinions relating to the securities industry can be shared from sources outside the Division.

The Division encourages members of the securities community to submit articles pertaining to securities law and regulation in the state of Ohio.

If you are interested in submitting an article, please contact the Editor-In-Chief, Dan Orzano
Daniel.Orzano@com.state.oh.us

(Continued from page 14)

pungement relief was granted in 89.8% of the cases; and (3) for such cases filed in 2014, expungement relief was granted in 91.7% of the cases. *See* Scott Ilgenfritz, *Update to the 2013 Expungement Study of the Public Investors Arbitration Bar Association* (October 20, 2015), available at https://piaba.org/system/files/pdfs/Update%20on%20the%202013%20Expungement%20Study%20of%20PIABA%20%28October%2020%2C%202015%29.pdf.

DENNIS:
The statistics offered above by Hugh and Marnie completely miss the point. As a result of the process being extraordinary, expensive and difficult, practitioners like me are very selective in what matters we seek to get expunged. Personally for every expungement case I accept, I may reject a dozen or more.

Q2. Another criticism that was historically levied against the expungement process in the context of settled claims was that a broker could simply "buy" a clean record by having the complaining investor agree to expungement as a term of settlement. In response, FINRA passed the anti-quid pro quo Rule 2081 in July 2014, which strictly prohibits parties to an arbitration from conditioning a settlement on an agreement not to oppose expungement. The rule change was well received by investor advocates, but some commentators expressed concern that the practice would continue on uninterrupted with a "wink and a nod." Has expungement truly been taken off the table for settlement negotiations or it is still a functional part of the process, albeit more hush-hush? How has this rule change impacted – positively or adversely – settlement negotiations in the securities arbitration space?

DENNIS:
I'd be lying if I didn't admit to including expungement as a term of settlement before the rule change. However, the rule change has put an end to such discussions. Ironically it has made settlements more difficult; not because you can't "buy" a clean record but because the expungement process is so difficult and expensive that it makes sense to try the case to completion and ask the panel most familiar with the facts to expunge the matter.

HUGH & MARNIE:
Brokers and firms have, in our experience, abided by the rule change so that we're no longer seeing settlement offers contingent on agreements not to oppose expungement. We're certainly not seeing efforts to avoid the rule using the "wink and nod" strategy. Notwithstanding the fact that Dennis' experience is that settlement has become more difficult, FINRA's statistics reflect that the rate of cases resolved by settlement don't appear to be significantly different since the rule change. In 2012 and 2013, FINRA's statistics demonstrated, respectively, 60% and 59% of customer cases settled. In 2014, the year in which the change went into effect (on July 30th), 60% of customer cases settled. And in the first full year since the rule change (2015), there was still a 59% settlement rate for those cases.

DENNIS:
Statistics don't lie but… Seriously, statistics can never tell the whole story. FINRA arbitrations are down almost 50% over the last five years and have been generally declining over the last 15. There are a number of factors that have impacted the number. First and foremost, the market has performed well over the last five years. Nothing prevents lawsuits like investment gains! The firms also do a better job in supervising their brokers with the addition of new compliance procedures and sophisticated computer-generated reports. There has also been a significant effort by the industry to settle cases before they become arbitrations.

Q3. Although much of the recent criticism regarding the expungement process has originated with investor advocates arguing that valuable information is too easily erased from regulatory databases, some industry practitioners have long expressed their own countervailing concerns with the process and the underlying disclosure regime that leads to the reporting of customer complaints. From their perspective, the expungement process is already too costly and burdensome to purge information they believe creates more harm than good. What is your take on that perspective? How costly is the current process? How valuable are non-litigated customer complaints to an investor and/or regulators? What are the real life consequences of a broker having to report nearly all customer complaints regardless of merit?

DENNIS:
In my opinion, the current rule amounts to a denial of due process and an unfair burden for registered representatives. In an over-abundance of caution, firms routinely file disclosures for complaints that are not related to sales practices and are completely without merit. Perhaps a war story would be appropriate here: I recently filed and successfully tried an expungement case for two brokers who had never been the client's adviser and only met him 11 months after the client himself had made a withdrawal from an annuity that had the effect of cancelling certain benefits. The client's broker had left the firm and when he appeared, these two tried to help. The gist of the client's complaint was "I made a mistake and these brokers couldn't fix it." The matter took 14 months to complete between arguing with the firm that it should not be disclosed, filing for expungement, trying the case and moving in State court to have the Arbitration Award confirmed (also a requirement). My humility prohibits me from saying what the matter generated in le-

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gal fees but a plain vanilla expungement can routinely cost $8,000 to $10,000.

HUGH & MARNIE:
We don't represent brokers or firms in the expungement process, and can't comment on how expensive it is for a broker or firm to sanitize a record. We can, however, comment on the fact that we're often called upon to represent investors in the expungement process, on a totally *pro bono* basis, and thereby donate our time to ensuring investors have access to a full set of disclosures as they decide to hire a stockbroker.

It seems the two most common types of disclosures that brokers/firms seek to have expunged from their public records are: (1) those that reflect claims filed in arbitration and settled before hearing; and, (2) those that reflect complaints made by customers for which no arbitration was never filed. We believe that both types of disclosure offer an investor shopping for a broker potentially critical information. Claims and complaints can, and should, prompt questions from an investor performing due diligence as they select a broker. In arguing that disclosures should be limited, the industry advocates that it should be free from facing relevant questions from investors. Instead, the industry takes the position that investors are incapable of distinguishing valid claims/complaints from invalid ones, even though the industry gives those very same investors credit for being able to distinguish good investments from unsuitable ones.

Regarding the first category – claims filed in arbitration – we point out that had investors not been forced into a mandatory arbitration process, the court filing would be a matter of public record and there would be no expungement. The ability to erase an arbitration filing is a unique benefit to brokers of the arbitration process. And, regarding the second category — complaints but no arbitrations filed – we say that investors should know about complaints against a broker they want to hire. Sometimes there are what we would call "one-off" complaints, such as when a broker is accused of making a trade without having authority from the customer. In those situations, investors should find out enough about the complaint that they can factor it into their analysis and decide if is important to them. Other times, there are a string of nearly identical complaints noted on a single broker's or firm's CRD. While those complaints never rose to the level of arbitration filings, the sheer number may require further investigation by investors looking to hire a broker. Sometimes multiple, similar complaints suggest that there may have been a pattern of wrongdoing by the broker, but sometimes there is another explanation. Investors should be trusted to be able to vet this information with the broker or firm until they are satisfied.

We understand brokers don't like to report the complaints lodged against them, and think it's unfair that they have to do so. However, for investors trying to make sure they can trust the broker and firm to which they are giving control over their retirement savings, it actually seems unfair to investors to erase select information from CRD records so that it is as though it never happened.

DENNIS:
I would take specific issue with the comment above on the most common types of matters firms/brokers seek to expunge. Unquestionably, the most common expungement request involves a complaint where no settlement occurred and there was no basis for the complaint. Every complaint, no matter how unfair or frivolous, uses terms like "fraud" and "deception." The disclosure form required only allows a truncated explanation of the matter and the final resolution. In this age of sound bites and big data, it's impossible to determine whether there is any legitimacy to the complaint. More often than naught, it doesn't lead to a discussion, it leads to a rejection of the broker in favor of one who has no disclosures.

Q4. In December of 2015, the FINRA Dispute Resolution Task Force issued its Final Report and Recommendation, recommending: (1) creation of a Special Arbitration Panel, "consisting of specially trained arbitrators to decide requests for expungement"; (2) enhanced expungement training for arbitrators; and (3) guidance from FINRA emphasizing the narrowness of the "not-involved" basis for expungement relief. What are your reactions to these specific suggestions? Are these changes a step in the right direction or simply patches holding a broken system together?

DENNIS:
It is a broken system and needs a complete overhaul. The necessity to disclose needs to be revised and revamped to provide some due process **before** a matter becomes part of an individual's permanent record. Consideration should be given to situations where a bad product results in multiple complaints not related to the brokers ability or honesty. If the disclosures were limited to legitimate complaints and issues that would be meaningful to a potential investor there would be no need for expungement at all!

HUGH & MARNIE:
We agree with Dennis that the expungement process is broken and in need of a complete overhaul, but for different reasons. As we discuss earlier, we think that investors should be given all available information about brokers and firms, even if it is blemished. That is certainly preferable to the alternative where selective information is deleted, never to be seen again. The permanency of the deletion, and the impact of its absence on investors trying to research a broker or firm, is one of the reasons that the expungement process needs to be improved. Brokers and firms regularly have (and

take) the opportunity to put their best face forward when they sell themselves through their advertising and marketing. However, investors should be permitted to look behind the curtain to see what is really there.

We do not believe that the recommendations of the FINRA Dispute Resolution Task Force referenced above are the best way to fix the expungement process. Enhanced expungement training is definitely not the answer, as most recently evidenced by a California appellate court decision. The California court of appeals had to step in and confirm the vacation of an expungement granted to a former Royal Alliance Broker, Kathleen J. Tarr (who has over 40 customer complaints and a termination in her BrokerCheck report). Ms. Tarr's expungement was granted by a FINRA arbitration panel *after* FINRA offered additional training on the subject. Similarly, we do not believe that additional guidance from FINRA would be nearly enough to stop FINRA arbitration panels from granting far too many requests for expungement in circumstances that do not justify such results under the FINRA rules. The only recommendation from the Task Force that may have some hope of resulting in proper application of the FINRA rules regarding expungement is the one of having specially trained arbitrators serve on special expungement panels. Even then, many existing flaws in the expungement process would remain. The bottom line is that expungement has to be put back into the hands of the regulators, who would also need to be equipped with the resources to fight expungement requests when appropriate.

Q5. Given the longstanding debate regarding the fairness and efficacy of the FINRA expungement process, some have concluded that the best course may be to scrap the process altogether so that customer complaint data is never erased. Others have suggested taking expungement out of the hands of arbitrators by removing it from the FINRA arbitration process and turning it over to securities regulators, owners of the data. Do you have any reactions to those suggestions? If you had the power to change the existing expungement process, what, if anything, would you change?

DENNIS:
Any system has to include fundamental due process where a charge can be disputed without waiting 14 months and spending $10,000. I would support a system where a hearing officer, appointed by the regulators, could determine whether the matter should be disclosed at all.

HUGH & MARNIE:
In our view, one of the biggest problems with the current expungement process stems from the fact that the parties to the arbitration, their counsel and even the arbitrators find themselves being forced to act as regulators – they must prosecute, defend and/or decide (or re-decide) cases that have already been settled or decided in FINRA's mandatory arbitration process. We believe there are several potential ways to fix the process that were not adequately addressed by the FINRA Dispute Resolution Task Force (if addressed at all). One way to fix the process is for FINRA to propose a rule change to make hearing officers in its already-existent Office of Hearing Officers be the impartial adjudicators of requests for expungements in settled customer cases. In such proceedings, a FINRA enforcement attorney should be assigned to review and investigate the broker's request for expungement and oppose the request, if appropriate. Complaining customers must be allowed to testify, by phone if requested, offer documents (or other evidence), and/or offer a written statement in the form of a declaration or affidavit (with or without exhibits) contesting the request for expungement. Another way the expungement process could be fixed is for FINRA to ask the SEC to approve amended procedures for post-settlement expungement requests. The amended procedures would be intended to: (1) address the need for state securities regulators to be provided with notice of a broker's request for expungement more promptly, thus allowing them additional time to investigate and oppose expungement requests, when appropriate; (2) formally assign all costs of all expungement proceedings to the broker; (3) formally establish a presumption that the facts set forth in the customer's statement of claim are true (rebuttable only if the broker can prove by "clear and convincing" evidence that they are false); (4) require that requests for expungement only be granted if the broker has proven his/her case by "clear and convincing" evidence; and (5) establish a time limit in which a request for expungement must be sought. FINRA could also fix the expungement process by proposing changes to Rules 2080, 12805, and 13805, limiting the circumstances in which FINRA can waive the requirement that it be named a party in court proceedings seeking expungement relief to *only* when the information sought to be expunged has no meaningful investor protection or regulatory value. Finally, another way to fix the expungement process would be for FINRA to prohibit brokers from seeking expungement of any customer complaint or claim by initiating an arbitration proceeding against the customer whose case was settled or the broker/dealer with which the broker was affiliated at the time the customer claim was initiated and settled.

DENNIS:
As much as it pains me, I think the recommendation by Hugh and Marnie above has merit as long as it occurs before the item appears as a disclosure. That decision could then be appealed to a full panel. The example I shared earlier is a classic example of a disclosure that should never have appeared in the first place, and I believe a trained hearing officer or a regulator would agree.

Q6. Any final thoughts on expungement?

DENNIS:
No other occupation has the equivalent of the CRD. Not lawyers, doctors or nuclear plant operators, who arguably can do a lot more damage than a broker, are required to post online every time a complaint is made regardless of merit. We all have the same goal of giving the investing public important information so they can choose their investment adviser wisely. The current system isn't doing it. More often as naught, the information is being used by competitors to gain a competitive advantage. I have represented the industry for 30 years. I know excellent advisers who have negative disclosures on their record and advisers with perfect records who shouldn't be in the business. We need a system that provides fundamental fairness and useful information. And the issue has nothing to do with the requirement for arbitration; frankly, I am not one who believes that arbitration has served the industry well. The process is certainly not faster or cheaper and there is no equivalent of Rule 11, the civil rule that permits sanctions for filing a frivolous law suit. The issue is not how or where one gets due process from the system; the issue is that it occurs.

HUGH & MARNIE:
We cannot speak to the issue of competitors using proper disclosures of a broker or firm for their own advantage, but we certainly do know our share of brokers with "perfect records" that should not be permitted to remain in the securities industry. Then again for all we know, some brokers with what appear to be "perfect records" may really just have imperfect records that have been expunged so that they appear "clean."

The expungement process itself is the result of a mandatory arbitration system created by, and for, the securities industry. If the industry wants to enjoy the benefits of mandatory arbitration, it must also accept the costs. The cost of having to report all claims (while also being given the opportunity to: (1) offer explanations on the CRD record; (2) offer explanations to inquiring investors; and, (3) expunge certain claims) does not, under any analysis, outweigh the significant benefit that full disclosure offers investors trying to select a qualified and principled broker to whom they can trust their life savings.

If customers could elect to bring their claims in court, the information would be in the public domain for all to see and digest. Expungement of those public records is impossible. Lawyers, doctors, and nuclear plant operators are all at the mercy of anyone who chooses to bring a suit against them. If questioned, those folks must explain why they were sued and why the case was resolved the way it was. What makes stockbrokers so special that they should be able to erase their records in similar circumstances?

DENNIS CONCILLA *practices securities law, business law and litigation at Carlile Patchen & Murphy LLP, where he heads the firm's Securities Litigation and Regulation Practice Group. Dennis joined CPM in April, 1985, and his focus is in the area of securities industry employment arbitration and regulation. The Securities Law Practice Group recently received a top tier ranking from Best Lawyers in America®.*

Dennis served as Legal Counsel to the Ohio Senate Majority, was District Director of the 12th Ohio Congressional District, and is a former Assistant Attorney General for Ohio. Dennis served as an arbitrator for the National Association of Securities Dealers and has appeared before FINRA, its predecessors, the NASD and New York Stock Exchange, the Commodities and Futures Trading Commission, the Securities and Exchange Commission, and the Ohio Division of Securities.

Dennis has spoken at NASD-sponsored arbitrator training seminars throughout the Eastern United States and has been a presenter at the Ohio Division of Securities annual conference. Dennis has been featured as a securities litigation instructor for Continuing Legal Education seminars sponsored by the Columbus, Cleveland and Ohio State Bar Associations and has been a speaker at CLE seminars on Restrictive Covenants & Ohio Administrative proceedings.

Dennis is a member of the Securities Industry and Financial Markets Association, Compliance and Law Division, and the Ohio State, and Columbus Bar Associations. He received his undergraduate degree from the University of Pittsburgh in 1973 and his law degree from Capital University in 1979.

Since 2009 Dennis has been listed in Best Lawyers in America® in the specialty of Litigation-Securities, Securities/ Capital Markets, and Securities Regulation Law. He was named the Best Lawyers in America® "Lawyer of the Year" for his securities practice for 2013 and 2015. Dennis has also been chosen as an "Ohio Super Lawyer" and has received the Martindale-Hubbell top peer rating of AV® Preeminent™.

HUGH D. BERKSON *is a Principal attorney with McCarthy Lebit and focuses his practice in securities arbitration and litigation. After gaining extensive trial experience in both business and personal injury litigation, he began representing injured investors. Hugh tries and arbitrates investment cases and performs much of the required technical analysis. He works carefully with his clients as the case strategy develops because he believes that a close relationship allows the client to fully understand the value of their case and be able to make decisions accordingly. While Hugh prides himself on his ability to settle both small and large, complex cases, he has considerable experience taking cases to trial or arbitration with successful results.*

Hugh obtained a business degree in Finance from the University of Texas at Austin and is a graduate of Case Western Reserve University School of Law, where he was a member of the Order of the Barristers and received both the American Jurisprudence Award (National Mock Trial) and the Jonathan M. Ault Mock Trial Prize. He later served as an Adjunct Professor at Case Western Reserve University School of Law, where he taught trial practice.

Hugh is the current President of the Public Investors Arbitration Bar Association (PIABA), an international legal association composed of practitioners who represent investors in disputes with the securities industry. He also serves on PIABA's Board of Directors. Hugh regularly participates as both a moderator and panelist at PIABA's national meetings and seminars and also has been a panelist at the annual nationally simulcasted PLI Securities Arbitration Program in New York City, as well as the Ohio Securities Conference. He has served as a resource regarding important issues concerning American investors, and has been quoted by the Wall Street Journal, Investment News, On Wall Street, Financial Planning, Cleveland Plain Dealer, Pittsburgh Post-Gazette and other media outlets. Hugh maintains a Martindale-Hubbell® Peer Review rating of AV® Preeminent™.

MARNIE LAMBERT *is the founding member of Lambert Law Firm, LLC, with offices in Ohio and California. Since 2005, Marnie has primarily represented investors across the country against brokerage firms in FINRA arbitrations (and in court), handling hundreds of such cases. She is also an active advocate for the investing public, generally, through her service on the Board of Directors of the Public Investors Arbitration Bar Association (PIABA). She is currently Executive Vice President and will ascend to the Presidency next month when Mr. Berkson's term is over. Marnie has spent most of her 23-year legal career representing consumers against wrongdoers and has always found the work very fulfilling.*