Analysis&Perspective

Class Actions

Are Class Actions Against Broker-Dealers Dead?

BY RICHARD L. STONE AND MARK A. STRAUSS

More than a decade ago, following debate and industry comment, the SEC approved the NASD's implementation of amended rules with respect to class action litigation by customers against broker-dealers.[1] The new rules were aimed at stopping the practice of thwarting class actions by subjecting the putative class representatives and class members to individual arbitrations through enforcement of the separate arbitration provisions of their customer agreements. The amended rules were straightforward: Broker-dealers and their associated persons were prohibited from seeking to enforce "any" agreement to arbitrate claims initiated as class actions or encompassed by class actions;[2] all new agreements between broker-dealers and their customers were required to contain a prescribed arbitration clause consistent with such rule;[3] and class claims were "ineligible" for arbitration at the NASD.[4] Since that time, class actions against broker-dealers, under the Securities Laws and otherwise (including the well-publicized actions against many of Wall Street's largest investment banks in connection with the alleged IPO abuses of the late 1990s), have proceeded in court, unimpeded by motions to compel arbitration.

A barely noticed, two-paragraph decision issued in July, however, now throws into doubt the continued viability of this long-standing, SEC-approved exception from broker-dealer arbitration. In *Levitt v. Lipper Holdings, LLC*,[5] Judge Richard Owen provided an apparent roadmap for broker-dealers essentially to "opt out" of the NASD's rule prohibiting enforcement of arbitration clauses with respect to class actions. The question is

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[1] *Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings*, Release No. 31371, Release No. 34-31371, 52 S.E.C. Docket 2189, 1992 WL 324491 (SEC Oct. 28, 1992) (the "SEC Order").

[2] NASD Code of Arbitration Procedure § 10301(d)(3) ("No member or associated person shall seek to enforce any agreement to arbitrate against a customer, other member or person associated with a member who has initiated in court a putative class action or is a member of a putative or certified class with respect to any claims encompassed by the class action unless and until: (A) the class certification is denied; (B) the class is decertified; (C) the customer is excluded from the class by the court; or (D) the customer elects not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.").

[3] NASD Code of Conduct § 3110(f) ("Requirements When Using Predispute Arbitration Agreements With Customers") ("(4) No agreement shall include any condition which limits or contradicts the rules of any self-regulatory organization . . .") ("(6) All agreements shall include a statement that "No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court.").

[4] NASD Code of Arbitration Procedure § 10301(d)(2) ("Any claim filed by a member or members of a putative or certified class action is also ineligible for arbitration at the Association if the claim is encompassed by a putative or certified class action filed in federal or state court. . . . However, such claims shall be eligible for arbitration in accordance with paragraph (a) or pursuant to the parties' contractual agreement, if any, if a claimant demonstrates that it has elected not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court. . . .").

[5] 2003 WL 21523986 (S.D.N.Y., July 7, 2003).

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thus raised: Are customer class actions against broker-dealers and their associated persons dead?

Levitt was one of several investor class actions arising from the collapse last year of Lipper Convertibles, LP, the convertible arbitrage hedge fund that was registered as a broker-dealer and was managed by Kenneth Lipper, the so-called "Money Manager to the Stars," and former Deputy Mayor of New York City. In early 2002, Lipper admitted to his approximately 200 investors, who were limited partners in Lipper Convertibles, that the reported performance of the fund going back 5 years was inaccurate and that its valuation was overstated by hundreds of millions of dollars. Several of Lipper's investors brought class actions against Kenneth Lipper and related entities. Lipper's hedge fund was organized as a broker-dealer and he and the other defendants were associated persons of the broker-dealer.

Lipper moved to compel arbitration of the claims of the putative class representatives in each of the class actions on the basis of the arbitration clause contained in the Lipper Convertibles partnership agreement.[6] Contrary to the requirements of the NASD Code of Conduct,[7] such clause did not include a provision prohibiting the arbitration of class action claims. Instead—in language sure to be mimicked by other broker-dealers desiring to achieve the same result that was obtained by Lipper in *Levitt*—it provided that disputes arising under the agreement must be "submitted to arbitration before and in accordance with the rules of the National Association of Securities Dealers or, *if such organization shall decline jurisdiction*, to the American Arbitration Association for arbitration under its rules."

Lipper argued in *Levitt* that the provision of the NASD Code which holds class claims "ineligible" for arbitration at the NASD,[8] constituted a declination of "jurisdiction" by the NASD within the meaning of the clause contained in the partnership agreement. Lipper additionally argued that, although NASD Code of Arbitration Procedure § 10301(d)(3) by its literal terms prohibits broker-dealers from seeking to enforce "any" agreement to arbitrate a class action claim, such prohibition properly read in context applied only to agreements calling for arbitration at the NASD, not those providing for arbitration at other fora, such as the AAA.

The Court agreed with Lipper, holding that because "the rules of the NASD prohibit arbitration of [the plaintiffs'] actions in *that* forum, [the action is] to be sent for arbitration before the American Arbitration Association ('AAA')." Without discussion, the Court also stated that it was "not convinced by plaintiffs' argument that the NASD rules also preclude arbitration before the AAA." The Court found that "the recently decided Supreme Court case of *Green Tree Financial Corp. v. Bazzle*, [123 S.Ct. 2402 (2003)] allows me to send these cases to arbitration and leave the question of whether putative class actions can be arbitrated under this arbitration clause, to the arbitrator."

The decision in *Levitt* has the potential to transform the landscape of class litigation against broker-dealers and to permit broker-dealers to prevent class action litigation by shifting arbitrations to non-SRO forums where there are no procedures for hearing class action claims. In essence, forcing all claims to proceed as individual arbitrations. Prior to *Levitt*, courts consistently denied motions to compel arbitration of claims brought as class actions against broker-dealers.[9] In *D.E. Frey & Co. v. Wherry*,[10] for example, the Southern District of Texas explained that:

> The purpose in proposing Rule 10301(d)(2) was to prevent NASD firms or associated persons from using an existing arbitration agreement to compel a customer to arbitrate a claim that was encompassed by a class action in order to defeat class certification or participation. In effect, the rule armed investors with a means to object to an attempt to compel arbitration when they would rather pursue class action litigation in a court."[11]

The leading case holding that NASD member firms are forbidden from compelling arbitration of class claims is the Seventh Circuit's *Nielsen v. Piper, Jaffray & Hopwood, Inc.*[12] There, defendants moved to compel arbitration based on an arbitration clause which provided that all disputes " 'shall be determined by arbitration to the *fullest extent provided by law*.' "[13] The defendants maintained that such language required arbitration "regardless of the amended [NASD] rules." *Id.* at 149. The Seventh Circuit, however, disagreed, holding that:

> [T]he extent of the 'law' of arbitration was *cut back* by the SEC when it pronounced that claims which had been previously filed as a class action or were encompassed by a class action were now ineligible for arbitration. In other words, in adopting these rules *the SEC placed these types of claims outside the reach of otherwise enforceable arbitration agreements*. . . . The SEC *changed the law so that PJH's arbitration agreement could no longer be enforced* against [plaintiff].[14]

[6] The partnership agreement stated, in pertinent part:

"All disputes and questions whatsoever between or among the parties to this agreement or their legal representatives that shall arise during the term of this Agreement or after the Termination date with respect to the rights, obligations and remedies hereunder of such parties or legal representatives or with respect to the construction or application of this Agreement shall be submitted to arbitration before and in accordance with the rules of the [NASD] or, if such organization shall decline jurisdiction, to the American Arbitration Association for arbitration under its rules."

[7] NASD Code of Conduct § 3110(f).

[8] NASD of Arbitration Procedure 10301(d)(2).

[9] *See Berger v. E*Trade Group, Inc.*, 2000 WL 360092, at *2 (N.Y.Sup. Ct. March 28, 2000) (denying motion to compel arbitration of class action claims since "[t]he arbitration provision expressly exempts from arbitration all claims asserted within putative and certified class actions."); *In re Regal Communications Corp. Sec. Litig.*, 1995 WL 550454, at *12 n.3 (E.D.Pa. Sept. 14, 1995) (denying motion to compel arbitration of representative plaintiff's claims and noting that defendant withdrew initial motion "to exclude all its customers from any class certification . . . in light of recently promulgated amendments to the arbitration rules of the National Association of Securities Dealers . . . [which] provide essentially that until a class action is denied or decertified, the broker/dealer may not compel arbitration."); *May Olde Discount Corp. v. Hubbard*, 4 F. Supp.2d 1268, 1271 n.3 (D.Kan. 1998) (denying motion to compel arbitration of claim "encompassed" by class action but indicating that defendant "may be able to compel Mr. Hubbard to arbitrate his claim at a later date if certification is denied in Mr. Hubbard's lawsuit, the class is later decertified, or Mr. Hubbard withdraws or is excluded from the class.").

[10] 27 F. Supp.2d 950, 951 (S.D.Tex. 1998).

[11] 27 F. Supp.2d at 951.

[12] 66 F.3d 145, 147 (7th Cir. 1995).

[13] 66 F.3d at 146 (emphasis added).

[14] 66 F.3d at 149 (emphasis added).

The denial of motions to compel arbitration of class claims against broker-dealers was said to be "consistent with the principles behind the . . . NASD rules"[15] as articulated by the SEC in approving them. In particular, back in 1992, the SEC had indicated that "[a]rbitration of class claims is disfavored because arbitration of such claims generally is 'difficult, duplicative and wasteful,' . . . [whereas] 'the judicial system has developed the procedures to [efficiently] manage class action claims.' "[16] As the SEC then stated:

> [T]he NASD believes, and the Commission agrees, that the judicial system has already developed the procedures to manage class action claims. Entertaining such claims through arbitration at the NASD would be difficult, duplicative and wasteful. . . . As approved, the rule will exclude all class actions from arbitration at the NASD. The Commission agrees with the NASD's position that, in all cases, class actions are better handled by the courts and that investors should have access to the courts to resolve class actions efficiently. In the past, individuals who attempted to certify class actions in litigation were subject to the enforcement of their separate arbitration contracts by their broker-dealers. Without access to class actions in appropriate cases, both investors and broker-dealers have been put to the expense of wasteful, duplicative litigation. The new rule ends this practice.
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> . . . Over the years of the evolution of class action litigation, the courts have developed the procedures and expertise for managing class actions. Duplication of the often complex procedural safeguards necessary for these hybrid lawsuits is unnecessary. The Commission believes that investor access to the courts should be preserved for class actions and that the rule change approved herein provides a sound procedure for the management of class actions arising out of securities industry disputes between NASD members and their customers. In addition, [the rules] will ensure that arbitration agreements clearly state that class action claims are specifically outside the scope of arbitration contracts entered into by members.
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> [T]he proposed rule change will ensure that class actions and the claims of individual class members are not eligible for arbitration at the NASD, *regardless of any previously existing agreement to arbitrate.* The only exceptions to this rule are in the circumstances where a class action certification has been denied, the class has been decertified, or the party that was a member of a class action has withdrawn or been excluded from the class. . . . After the effective date of the instant rule filing, arbitration agreements *cannot require arbitration of class action disputes. Moreover, [the amendment] clearly prohibits NASD members from enforcing existing arbitration contracts to defeat class certification or participation.*[17]

Accordingly, the precedents and regulatory history of the amended NASD rules appear to be irreconcilable with *Levitt*. Moreover, *Levitt* would appear to be inconsistent with the views of the NASD Staff. On February 27, 2003, the chief counsel of the NASD, in connection with another class case arising from the collapse of Lipper Convertibles,[18] issued an opinion letter indicating that, although the NASD clearly has jurisdiction over claims involving the business of member firms and customer disputes, it has exercised its jurisdiction by adopting rules that require resolution of class claims in court. The staff opinion indicated that the type of class claims pled in *Levitt* must be resolved, in the first instance, in court. In light of this conflicting authority, and of the NASD's interpretation of its own rules, which, under the case law, is entitled to deference,[19] it is important that *Levitt* be examined more closely.

The nub of the Court's holding in *Levitt* is two-fold: first, that the rules of the NASD with respect to class actions are optional and can be superseded by private agreement, and, second, that the NASD rule which provides that class claims are "ineligible" for arbitration at the NASD,[20] constitutes a declination of NASD "jurisdiction" with respect to class action claims.

There is authority for the proposition that certain rules of the NASD are default rules which may be superseded by more specific agreement between the NASD member and its customer; for instance, the rules relating to choice of fora for mandatory arbitration.[21] It is apparent, however, that such superseding private agreements are not allowed across the board. In particular, case law indicates that certain NASD rules represent explicit policy decisions which the NASD (and the SEC through its rule-making approval authority) declared, to be mandatory. With respect to such mandatory rules, case law holds that NASD member firms and their associated persons cannot contract away their obligations through private agreement. Inconsistent agreements are held to be unenforceable.[22] By virtue of

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[15] *May Olde*, 4 F. Supp.2d at 1271.

[16] *May Olde*, 4 F. Supp.2d at 1271 (*quoting SEC Order*).

[17] SEC Order at *2-3.

[18] *Morgado Family Partners, et al. v. Kenneth Lipper, et al.*, Supreme Court of the State of New York County of New York, Index No. 02/604396 ("*Morgado*"). In that the *Levitt* and *Morgado* actions are proceeding independently, this letter was not presented to the Court in *Levitt* until the plaintiffs filed their now-pending motion for reconsideration.

[19] *See F.N. Wolf & Co. v. Bowles*, 610 N.Y.S.2d 757, 760, 160 Misc.2d 752, 758 (Sup. Ct. 1994) (following NASD interpretation of its own rules since "[t]he principle that an interpretation by an administrative agency of its own regulations is entitled to the greatest weight and that a court should defer to such interpretation provided that it is not irrational or unreasonable has been applied to self-regulatory agencies."); *National Planning Corp. v. Achatz*, 2002 WL 31906336, at *2 & n.16 (W.D.N.Y. Dec 17, 2002) ("courts should be wary about disregarding NASD Rules and should accord deference to the NASD's interpretation of its Rules. . . . NASD rules . . . must be followed where—as here—the parties agreed to be bound by such.").

[20] NASD of Arbitration Procedure 10301(d)(2).

[21] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109 (2d Cir. 1990) (agreement superseding NASD rule and limiting choice of arbitration fora permissible); *Credit Suisse v. Pitovsky*, NYLJ, Vol. 229 (Sup. Ct., N.Y. Co. March 25, 2003) (same).

[22] *Thomas James Associates, Inc. v. Jameson*, 102 F.3d 60 (2d Cir. 1996) (broker-dealer could not contract out of obligation to submit to arbitration upon demand of employee in light of NASD resolution holding such obligation mandatory) (agreement providing otherwise, unenforceable); *F.N. Wolf & Co., Inc. v. Bowles*, 610 N.Y.S.2d 757 (N.Y.Sup. 1994) (same); *E. Liss & Co. v. Levin*, 201 F.3d 848, 850 (7th Cir. 2000) (agreement to waive limitations period contained in NASD arbitration rules unenforceable) ("by joining the association, a brokerage firm agrees to abide by its rules, and the rules of this association [the NASD] forbid members to opt out of the provisions governing arbitration."); *Qadri v. PointDirex, L.L.C.*, 823 So.2d 861, 863 (Fla. Dist. Ct. App. 2002) ("even an express waiver of [NASD] arbitration [rules] . . . has been held to be

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the broker-dealer's NASD membership, such mandatory NASD rules are binding on member firms and their associated persons.[23]

As interpreted by courts prior to *Levitt*, the NASD class action rules fell into this latter category of mandatory rules which could not be superseded by private agreement. This interpretation was based on the rules themselves, and upon the SEC's statement of policy contained in the SEC adapting release. Other NASD rules also make clear that the NASD class action rule was not precatory but mandatory. In particular, NASD Code of Conduct § 3110(f) provides that broker-dealer agreements with customers "shall include a statement" prohibiting the enforcement of arbitration agreements with respect to class claims.[24] As for any non-compliant pre-existing agreements, NASD Code § 10301(D)(3) provides that "[n]o member or associated person shall seek to enforce any agreement to arbitrate against a customer" with respect to class claims.[25] Moreover, in approving these rules, the SEC set forth a lengthy policy analysis of why arbitration agreements should not preclude class actions proceeding in court, stating that it "agrees with the NASD's position that, in all cases, class actions are better handled by the courts and that investors should have access to the courts to resolve class actions efficiently." SEC Order at *2.

The exclusion of class claims from arbitration would thus appear to be mandatory, and any agreement to the contrary, a nullity. In the words of the Seventh Circuit in *Nielsen v. Piper, Jaffray & Hopwood, Inc.*,[26] the SEC, by virtue of approving the 1992 amendments to the NASD rules, "placed these types of claims outside the reach of otherwise enforceable arbitration agreements. . . . The SEC changed the law so that [the defendant]'s arbitration agreement could no longer be enforced against [a class plaintiff]."

Additionally, prior to *Levitt*, there appeared to be no dispute that class claims against broker-dealers involving the business of such broker-dealer, fell within the scope of the NASD's "jurisdiction." Although the case law did not specifically address NASD "jurisdiction" as such, the concept that the NASD had jurisdiction over class action claims against member firms was implicit in the decisions that recognized the binding nature of the NASD class action rules which sent class actions to court. By enforcing this class action rule, courts recognized the NASD's jurisdiction over member firms and

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void as a matter of public policy"). The Second Circuit explained in *Thomas James*:

"[I]n this case, we are presented with a much more specific indication of federal policy: in 1987, the NASD adopted a resolution, approved by the SEC, stating that:

'It has come to the NASD's attention that certain broker/dealers have been including in their agreements with registered representatives language that purports to waive the representative's right to obtain arbitration of any disputes arising out of the agreement. . . . This . . . conflicts with the NASD's Code of Arbitration Procedure, which requires industry disputes to be arbitrated at the instance of either party. 52 Fed.Reg. 9232 (1987).'

The NASD therewith provided that:

'it shall be considered conduct inconsistent with just and equitable principles of trade and a violation of Article III, section 1 of the NASD's Rules of Fair Practice for a member to require its associated persons to waive the arbitration of disputes arising out of their association with the member.' Id.

When a self-regulatory association of securities firms, under direct federal supervision, ordains that its members may not require their employees to waive arbitration rights, it would be inappropriate for us to enforce such a waiver. We therefore hold that the arbitration waiver provision in the TJA-Jameson Employment Agreement violates public policy, and is unenforceable."

[23] *See First Montauk Sec. Corp. v. Four Mile Ranch*, 65 F. Supp.2d 1371, 1379 n.10 (S.D.Fla. 1999) ("the NASD rules in and of themselves constitute a written agreement obligating NASD members to arbitrate according to their provisions"); *Flynn v. Greenwich Global*, 2002 WL 1573422, at *3, 32 Conn. L. Rptr. 397 (Conn.Super. Ct. June 19, 2002) ("A brokerage firm's membership in the NASD, in and of itself, is a written agreement to arbitrate according to NASD Code."); *American Exp. Fin. Advisors, Inc. v. Zito*, 45 F. Supp.2d 230, 233 (E.D.N.Y. 1999) ("Zito officially registered with the NASD, so that any rules of that organization became binding on Zito.") (referring to NASD arbitration provisions); *Drexel Burnham Lambert Inc. v. Pyles*, 701 F. Supp. 217, 220 (N.D.Ga. 1988) ("Respondent fails to recognize that by virtue of his association with a member institution of the National Association of Security Dealers [Pyles] is bound by the NASD Code of Arbitration Procedures."); *E. Liss & Co. v. Levin*, 201 F.3d 848, 850 (7th Cir. 2000); *Prudential Securities, Inc. v. American Capital Corp.*, 1996 WL 280830 (N.D.N.Y. 1996) ("membership in NASD binds members to all NASD provisions, rules, and regulations") (same); *Oppenheimer & Co. v. Neidhardt*, 1994 WL 176976, at * 1, *2 n.2 (S.D.N.Y. May 5, 1994) ("Pursuant to NASD Manual By-Laws, Art. I, membership in the NASD binds members to adhere to all of the provisions, rules and regulations of NASD. . . . As a member of NASD, all that is required under NASD's rules to which [defendant] is bound and has bound itself in writing is that a customer demand arbitration. . . . [T]he NASD [membership] agreement is sufficient to constitute the 'agreement in writing' under" N.Y. C.P.L.R. § 7501 (McKinney 1993)), *aff'd*, 56 F.3d 352 (2d Cir. 1995); *Scobee Combs Funeral Home, Inc. v. E.F. Hutton & Co.*, 711 F. Supp. 605, 606, 608 (S.D.Fla. 1989) ("Membership in the NASD binds members to adhere to all the provisions, rules and regulations of the NASD. . . . The NASD has . . . promulgat[ed] rules . . . Those rules are binding on NASD members. Specifically, the provision requiring submission to arbitration upon the demand of the customer is binding on Defendants in the instant case"); *see generally* NASD Manual § 0115 ("These Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules.").

[24] NASD Code of Conduct § 3110(f) ("Requirements When Using Predispute Arbitration Agreements With Customers") ("(4) No agreement shall include any condition which limits or contradicts the rules of any self-regulatory organization . . .") ("(6) All agreements shall include a statement that "No person shall bring a putative or certified class action to arbitration, nor seek to enforce *any* pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court.").

[25] NASD Code of Arbitration Procedure § 10301(d)(3) ("No member or associated person shall seek to enforce any agreement to arbitrate against a customer, other member or person associated with a member who has initiated in court a putative class action or is a member of a putative or certified class with respect to any claims encompassed by the class action unless and until; (A) the class certification is denied; (B) the class is decertified; (C) the customer is excluded from the class by the court; or (D) the customer elects not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.").

[26] 66 F.3d 145, 147 (7th Cir. 1995).

over class actions asserted against them. Furthermore, the opinion issued by the NASD Staff in February in connection with the related Lipper Convertibles case has addressed the issue squarely. According to the Staff, the NASD possesses "jurisdiction" over any dispute if the subject matter thereof falls within the definition of a "required submission" under the NASD Code of Arbitration Procedure.[27] This is distinct, however, from the concept of whether a matter is, in addition, "eligible" for arbitration (which a class action is not).[28] The NASD Staff concluded that "NASD appears to have jurisdiction" over the claims of the Lipper Convertibles investors, even if such claims were "ineligible" for arbitration in that they were asserted in a class action.

Furthermore, it is unclear whether *Greentree* compels a different result. That case hinged on whether the arbitration clause in question clearly precluded "class arbitration."[29] The Court held that whether it did was a disputed issue of contract interpretation under state law and that "[a]rbitrators are well situated to answer that question." *Levitt* presents the contrasting case of an arbitration clause which did by virtue of binding NASD rules, incorporated by reference, had to be read to explicitly preclude arbitration of class actions.

The plaintiffs in *Levitt* have asked the Court to reconsider its decision and likely will appeal to the Second Circuit. They have also filed a disciplinary Complaint against the NASD-registered defendants seeking to have them sanctioned for their clear violation of NASD rules. Nevertheless, the ruling in *Levitt* is bound to have implications beyond the class litigations relating to Lipper Convertibles. Under *Levitt*, we can expect to see broker-dealers attempting to insulate themselves from class litigation through the adoption of language similar to that contained in pre-dispute arbitration agreement used by Lipper with his investors. If successful, this would foreclose resort to the class format in actions under the Securities Laws and otherwise against broker-dealers and their associated persons. This would override the intent of the SEC when it approved the amended NASD class action rules[30] back in 1992, and would significantly change the established order of federal practice under Rule 23. The resolution of this issue will depend upon two factors. First, the likely decision upon appellate review by the Second Circuit Court of Appeals and second, whether the NASD takes action to enforce its rule against Lipper and other member firms who attempt to opt out of the bar against class-action arbitration. Surprisingly, the NASD has not sought to intervene in *Levitt* nor has it taken other action to make clear that member firms cannot opt out of these rules. Given its mandate to protect customers and its industrial interest in enforcing its rules as against member firms clear decisive action on its part seems appropriate.

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[27] *See generally* NASD Code of Arbitration Procedure § 10301(a) ("Required Submission") ("[a]ny dispute, claim, or controversy . . . between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons . . . shall be arbitrated under this code . . . upon the demand of the customer.").

[28] *See generally* NASD of Arbitration Procedure 10301(d)(2).

[29] 123 S.Ct. at 2407.

[30] Oddly, the NASD has not sought to intervene in the *Levitt* action.

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