

# The Street

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## Lost Money in the Markets? Wall Street Thinks It's Your Own Fault

By Susan Antilla

Not that this would ever happen, of course, but let's say your stockbroker does a little unauthorized trading in your account.

And say you don't realize what's happened until your portfolio has been ravaged and you're headed to arbitration -- your only choice because brokers make you give up your right to court before they'll do business with you.

Would it surprise you to learn that it was as much your responsibility to be on watch for rogue trades by your broker as it was your brokerage firm's? That's an argument Wall Street likes to make when it comes up against investors who file complaints saying they've been ripped off.

The so-called "shared responsibility" of investors to monitor their accounts was the subject of much discussion here

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late last month at the annual meeting of the Public Investors Arbitration Bar Association, or Piaba, a group of lawyers who represent investors.

Of course, there are plenty of cases where disgruntled investors blame their broker just because their account balance dropped in a market collapse.

Investing carries risks, and there is a fine line between the client's willingness to take risks and the broker's responsibility to inform and limit those risks. Even so, some brokers do trade recklessly or recommend high-fee, risky products just to rack up commissions--and the client often doesn't realize it until it's too late.

A popular brokerage firm defense is that clients have “ratified” what’s happening in their accounts if they don’t contest the statements right away. Firms also tell aggrieved customers that oral assurances by a salesman mean noting when there’s a prospectus that tells the real story.

To illustrate Wall Street’s “We’re in this together” approach, New Orleans lawyer Joseph Peiffer shared a transcript of a May 27 proceeding before arbitrators at Finra, the self-regulatory organization that decides most disputes between investors and brokers.

Peiffer, who was representing a group of investors suing Morgan Stanley (MS - Get Report), was questioning Jay Rosen, an expert witness for the firm. Here’s an excerpt from their Q&A:

Peiffer: When comparing Morgan Stanley’s duties to detect unauthorized trades to customers’ duties to detect unauthorized trades, who has the higher duty, the customer or Morgan Stanley?

Rosen: I think both of them have equal. Morgan Stanley has the duty to try and detect if that’s going on. The customer has a duty to protect their own assets and to make sure that the trust and confidence that they have given to the brokerage firm is being followed. You can’t, you

can’t just turn a blind eye to everything.

There’s a lot packed into that exchange, but let’s parse out one important issue. People who have put their trust into someone -- particularly when that someone is a broker whose firm spends big bucks to promote its trustworthiness -- aren’t inclined to suddenly turn vigilante.

Rosen wasn’t immediately available for comment. Two spokesmen for Morgan Stanley failed to respond to email inquires about Rosen’s testimony.

“What Wall Street is really saying is ‘Hey, you screwed up because you trusted us,’” said Atlanta lawyer Robert C. Port at a Piaba session on Oct. 23. “Clients are learning that, despite the fees they paid for a broker’s expertise, they were supposed to look after the broker.”

While it’s no surprise that Piaba’s members would take a pro-investor stance, it’s instructive to hear some of the arguments that plaintiffs’ lawyers face when they wind up nose-to-nose with Wall Street’s litigators.

Christine Lazaro, director of the Securities Arbitration Clinic at St. John’s University in Queens, N.Y., told an audience of Piaba members that even in cases

where salespeople have put customers into inappropriate investments, financial firms are arguing that the client -- not the broker -- has failed at their duty to properly monitor an account.

That makes no sense, she said, because brokers have an obligation to recommend suitable investments in the first place. How can vigilant monitoring help the investor who started off with a portfolio that was never right for them?

Financial firms can be aggressive in arguing that losses are someone else’s fault. Consider the document that Oppenheimer & Co. filed with Finra on Jan. 2 in response to a complaint by an 85-year-old widow.

The widow had claimed that, over a 3-1/2 year period, she lost \$65,000 from churning and unauthorized trading in her \$186,000 account and paid \$101,000 in commissions.

In its answer, provided to me by the woman’s Kansas City, Mo., lawyer, Diane Nygaard -- arbitration filings are not available to the public -- Oppenheimer cited market volatility as one reason the portfolio turned down. But the firm also pulled out the ratification defense: Because the widow never complained about unsuitable investments, she thus gave her blessing to what was going on.

The firm went so far as to say that even if the broker had misrepresented the investments, that still wouldn't lead to a win. The woman would have to prove that the lies or omissions -- and not some other factor -- led to her losses, the firm said.

The case settled for \$90,000 in March, according to regulatory records of the widow's broker. An Oppenheimer spokesman did not respond to questions sent to him by email.

Not all investors get such a good result.

Wells Fargo Advisors Financial Network, which boasts on its Web Site its brokers are "dedicated to doing what's right for you," said in a response to a 2012 complaint that any oral statements that its broker might have made about the safety of Fannie Mae and Freddie Mac preferred stock were overridden by the language in a disclosure document.

The two stocks were a disaster for investors at many firms, but the Wells defense is a blunt example of how little it can mean when your broker assures you that an investment is low risk. Although the customer had argued his broker told him the shares were "safe," Wells responded that "safe" is nothing more than an opinion and has no relevance in a fraud charge.

The firm also said it had no duty to monitor the account after the shares were recommended and

purchased in mid-2008.

That's a curious position given Wells' online pitch, where its says its brokers work closely with you to see "where you are now and where you want to be" in five, 10, or 20 years. I don't know about you, but it sure sounds to me like they're telling the public that brokers are monitoring clients' money.

Wells won the case. Its media relations department did not respond to questions sent by email.

When it's looking like the investor might win, the industry can play another card: pointing to others who might share the tab.

When 13 investors said they'd lost \$1.2 million in a Ponzi scheme, FSC Securities Corp., a Memphis-based brokerage firm owned by American International Group, tried to apportion the potential bill among various players, including its former broker who confessed he'd run the scam.

Alas, the latter -- locked up in a federal prison in Estill, S.C. until 2040 after pleading guilty to one count each of bank fraud, wire fraud and securities fraud -- doesn't have much of a balance in his checkbook to help mitigate the losses.

A majority of the arbitrators rejected FSC's apportionment argument and awarded 100 cents on the dollar to the

customers on Aug. 11. A nice victory, but by Oct. 21 FSC was filing a motion to vacate the award in Cobb County, Ga., Superior Court, arguing that the arbitrators had both disregarded the law and denied FSC the right to cross-examine essential witnesses.

An AIG spokesman did not respond to questions sent by email.

The clients weren't surprised to hear about the challenge because by then "they'd become pretty cynical" about the hurdles to standing up to Wall Street, said John Chapman, their Cleveland-based lawyer.

Brokerage firms "trade on this whole trust thing," said Chapman. "But as soon as the hollowness of that promise is exposed, they tell you you're on your own."

You get this by now, I hope: Believe the marketing hype at your peril. ■