



COM

2009 Guide to
Investor Claims

Please Understand

Every legal situation is unique. This Guide is intended to provide general information about the law. The material does not constitute legal advice. Before making any decisions or taking any action about any claim you may believe you have, you should contact an attorney and discuss the situation. No one should act or rely on any information in this guide without seeking the advice of an attorney.

Nothing herein shall create an attorney-client relationship between the reader and OCM. Nothing herein shall create a contract for OCM to represent any reader. Before we can serve as your counsel, we must have an express, written agreement setting forth the terms of any such representation.

You should be aware that there are time limits on bringing legal claims, commonly set forth in statutes of limitations. Your time to bring a claim may be limited, and you may need to act promptly to preserve any such claim.

This guide may be considered advertising under Massachusetts Rules of Professional Conduct. Deciding whether you need a lawyer, and if so which lawyer, are extremely important decisions and should not be based solely upon any advertisement.

Please don't hesitate to contact us for further information.

Introduction

The brutal bear market of 2008 battered virtually every investor's portfolio. If your portfolio is not down compared to this time a year ago, you weren't in the market! Between January 1, 2008 and December 31, 2008, the broad market indices all dipped dramatically:

S&P 500: Down 37%

NASDAQ: Down 40.54 %

Dow Jones Ind. Aver.: Down 35%

But that does not mean that every investor suffered the same losses as everyone else or that you, in particular, should have. If you entrusted your investments to a financial professional, in most cases you were entitled to rely upon that person to diversify your portfolio and otherwise take steps to protect you from catastrophic losses.

A fundamental problem in 2008 was that a string of bull market years lulled the financial community into a sense of complacency, which in some cases led to reckless investment

practices. A bull market can cover many sins. A bear market crushes such reckless strategies.

According to the National Law Journal, investor claims surged by 90% in the first two months of 2009 as compared to the same time period in 2008. This is no surprise. Investors lost a fortune in 2008.

OCM does not believe it is fair to blame financial professionals for every investor's losses. Investing involves risk and in many cases, investors have simply been the victims of an unusually brutal investment climate.

On the other hand, there are many situations where losses are *emphatically* the fault of investment professional, and the financial firm absolutely should be held responsible and made to compensate the investor for those losses. We screen potential claims carefully and will take cases only behalf of investors we truly believe have been wronged.

Common Investor Claims

■ Fraud

You may believe that your broker or investment adviser made actual misrepresentations to you. You may have been promised a certain return, or been told certain investments were “safe.” You may have been misled by omission – your broker may not have told you that she had some personal incentive to sell you a particular investment. You may have been sold investments to maximize the broker’s commissions rather than achieve your financial objectives. If so, and those misrepresentations caused you harm, you may have a claim for fraud.

■ Breach of Contract

You hire financial advisors to give you their best, unbiased advice. If that’s not what you received, you may have a claim for breach of contract. In broad strokes, when you hire a financial professional and they fail to deliver their end of the bargain, that may support a claim for breach of contract.

■ Unsuitability

An unsuitability claim asserts that the broker recommended investments that were not appropriate for your investment goals, age, life situation and/or investment objectives.

Unsuitability is sometimes thought of as a violation of the “know thy customer” and/or “know thy product” rules. A financial professional should understand both your personal situation and the investments she recommends to you.

■ Failure to Diversify

Failure to diversify is really a subset of an unsuitability claim. A properly constructed portfolio will be diversified with regard to classes of assets (stocks, bonds, other investments), and will further be diversified within each asset class.

■ Failure to Execute

If you instruct your broker to make a trade and she fails to do so, you have a claim for “failure to execute,” which may be thought of as a form of negligence or breach of contract.

■ Breach of Fiduciary Duty

Registered Investment Advisers, and other financial professionals who hold themselves out as experts, offering advice in the best interests of their clients, may owe a client a “fiduciary duty,” or a duty of the highest loyalty and care. When a financial professional owes her client a fiduciary duty, she must put her client’s interests ahead of her own.

■ Churning

Churning is a claim that a broker caused a client to trade her account excessively in order to generate commissions. A churning claim is more clear cut against a broker who has a “discretionary account,” giving her the right to make trades on the client’s behalf. But a broker can also be liable for churning even if the client authorizes each trade, if the overall amount of trading is excessive and the client put her trust in the broker’s advice.

Frequently Asked Questions

Q How do I know whether I have been wronged?

A Sorting out the unfortunate, but blameless impact of a down market from professional negligence or intentional wrongdoing by a financial professional requires careful analysis. OCM works with financial professionals to compare your results to both the leading market indicators and to the results that you would have experienced if your portfolio had been properly constructed. We will analyze the “loads” or fees you paid for mutual funds, the commissions you have paid to your broker, and any fees paid to financial advisers. We screen potential claims carefully.

Q Does it matter whether I worked with a stockbroker, financial adviser, or other financial professional?

A Yes. It matters. Different types of financial professionals owe their clients different duties and different standards of care. If you call a stockbroker (or “registered rep”) and place a trade for an investment that you selected, that is a very different matter than if you hire a registered investment adviser to assess your personal financial situation and goals and choose your investments for you.

Q What kinds of claims should I make?

A Every situation is unique, and OCM evaluates every potential client’s situation for the correct claims to bring for that person. But in broad strokes, investor claims tend to fall into certain categories:

Q Does my financial professional owe me a fiduciary duty?

A She might. The law looks at the nature of the relationship you have with your financial professional. For example:

- Did she control over the investment account?
- Did she ordinarily need your approval of transactions in advance?
- Did she act as an investment advisor?
- Did you consistently follow her advice?
- Did your financial professional know you relied on her?
- Do you lack of investment acumen in an area in which your financial professional held herself out as expert?

Q How much money can I recover?

A The answer to this question depends heavily on the facts of your case. There is no guarantee of any recovery in arbitration. Typically, OCM would seek recovery of money to compensate you for some or even all of the losses you sustained in your portfolio, fees or commissions you may have paid, and interest on the money you recover. In some cases, you might also be able to recover the difference between your portfolio's performance and the performance you were promised, and/or legal fees and costs. In particularly egregious cases, you may be entitled to punitive damages, intended to punish the wrongdoer. Punitive damages can be a multiple of your actual losses, but an award of punitive damages is rare.

Frequently Asked Questions

Q What is arbitration and how does it work?

A An arbitration is a private dispute resolution process, similar to a court proceeding, but using privately hired judges called arbitrators, and commonly offering a faster and more streamlined path to a decision.

Q What is FINRA?

A “FINRA” stands for Financial Industry Regulatory Authority. It is the largest independent regulator of securities firms in the United States, and offers arbitration and mediation services for claims by and against its members. It was created in July 2007 by a merger of the member regulation, enforcement and arbitration functions of the New York Stock Exchange (“NYSE”) and the National Association of Securities Dealers (“NASD”).

When you opened your investment accounts, you almost certainly signed an agreement obligating you to arbitrate any claims you have against your financial professional with FINRA (or one of its predecessors).

Q How good are my chances of recovering some of my money?

A According to the Wall Street Journal, brokers settle at least 60% of investor arbitration claims, which means they agree to pay some compensation to the investor to avoid going to a hearing. Of the remaining roughly 40% of claims that go to a hearing, investors win about 42% of the time. So investors with valid claims and realistic attitudes toward settling have a better than 75% chance of recovering some of their losses. Again, however, every case is different and the answer to this is heavily dependent on your unique situation. There is never any guarantee of any outcome in a courtroom or in an arbitration proceeding.

Q Will I be able to get a fair hearing?

A You will. FINRA’s impartiality is sometimes questioned by investors and their counsel, based on the fear that financial industry representatives will dominate the panel and be biased in favor of

the brokerage firm or investment adviser. OCM does not believe there is any reason to fear bias on the arbitration panel. Panels are selected by the parties from computer-generated random lists based on Arbitrator disclosure information provided by FINRA. Each party may strike up to four of the arbitrators from each list for any reason, and then ranks the remaining arbitrators by preference. There are resources available to check on the arbitrators' prior rulings. It's simply a matter of knowing what you are doing.

Q How long will it take?

A It takes about a year in most cases, if the claim goes to a hearing.

Q How much will it cost?

A Clients are responsible for paying an upfront claim filing fee to FINRA for administering the arbitration process. The filing fee depends on the size of the claim.

Reproduced below is the FINRA filing fee chart for investor claims:

Amount of Claim*	Filing Fee
\$0.01 to \$1,000	\$50
\$1,000.01 to \$2,500	\$75
\$2,500.01 to \$5,000	\$175
\$5,000.01 to \$10,000	\$325
\$10,000.01 to \$25,000	\$425
\$25,000.01 to \$50,000	\$600
\$50,000.01 to \$100,000	\$975
\$100,000.01 to \$500,000. . .	\$1,425
\$500,000.01 to \$1million . .	\$1,575
Over \$1million	\$1,800
Non-Monetary/Unspecified .	\$1,250

**exclusive of interest and expenses*

Legal fees are separate. OCM offers several different ways to pay your legal fees, depending on your situation, including paying for our work on an hourly basis, contingency or "success" fees, or a blend of the two. You may also want to retain a financial expert to testify on your behalf, and OCM will work with you to find the right person at the right price.

OCM's Experienced Trial Attorneys

■ Engagement Leaders:



*Thomas N.
O'Connor*

Tom leads the Firm's investor claims team

because of his unique insight into the financial services industry. He formerly owned and operated an investment management company of his own, Marathon Capital Management LLC, which had some \$600 million in assets under management when he sold his interest in the business. In addition to being a partner at OCM, Mr. O'Connor currently serves as General Counsel to Baystate Financial Services, LLC, one of New England's oldest and largest financial firms. Tom holds series 7 and 63 licenses himself. He was formerly a senior partner at Hale and Dorr LLP, and has nearly 30 years of litigation experience. Tom is a Boston Magazine "Super Lawyer," and is a qualified arbitrator himself. He is a member of the commercial arbitration panel of the American Arbitration Association.



*Sean T.
Carnathan*

Sean has been an adviser to the Harvard Law

School winter trial advocacy program since 1997. He was formerly a junior partner at Hale and Dorr LLP and a member of the Securities Litigation Department. Sean is an associate editor of the American Bar Association's publication, *Litigation News*. He is also a Boston Magazine "Super Lawyer."



***David B.
Mack***

Dave was recently featured on the front page of Massachusetts Lawyers' Weekly for winning a \$3 million judgment against a life insurance company for denying benefits to a young widower after his wife died. Dave was formerly associated with Nixon Peabody LLP and served as a prosecutor with the Norfolk County District Attorney's Office.



***Benjamin S.
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Ben is a former prosecutor and seasoned trial lawyer, having tried more than 80 cases to a verdict. Ben is a Boston Magazine "Rising Star."

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