



Some Brokers Can't Flee Past

*Court to Rule on What Wall Street Firms
 Show in the 'U5' Record of Ex-Employees*

By JOANNA SLATER

IN 2003, Wachovia Securities told securities regulators that it had fired broker Joseph Esposito for improperly recruiting customers before joining the brokerage firm. The information, filed on a standard form, was entered into a database on brokers' employment records maintained by the National Association of Securities Dealers, the industry's self-regulatory body.

There was one problem: Mr. Esposito had never worked at Wachovia. The Richmond, Va., firm offered him a job, but then withdrew the offer after finding out he had improperly lobbied clients. It took nearly four years and a costly arbitration process before Wachovia, a unit of **Wachovia Corp.** bank, agreed to an amendment that removed the accusation and that said the form had been filed by mistake.

Mr. Esposito's experience provides a glimpse into an issue that affects thousands of Wall Street employees and, potentially, millions of investors. Each time a broker, trader or investment banker leaves a firm, the employer has to file a so-called U5 form to the NASD that

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Some Brokers Can't Flee From the Past

Continued from the prior page explains the reasons for the departure. That information is reviewed by the NASD's enforcement department and is put into a database that prospective employers can peruse to check brokers' backgrounds, to see, for example, if they have been fired for cheating clients. The U5 forms aren't available to the public, but sometimes information from them, including customer complaints, ends up in another database that is publicly accessible.

Yet it is very difficult for employees to challenge what is on the form once it is submitted, especially in New York, the heart of the country's financial community. In several other states, court rulings protect firms from defamation lawsuits only if they didn't knowingly or recklessly file something false on the form—known as “qualified privilege.”

In New York, some courts have ruled that information on U5 forms is completely immune to libel claims via an “absolute privilege.” This month, the New York Court of Appeals, the state's top court, will hear arguments on whether those rulings should be overturned to make it easier for brokers to dispute what employers say about them.

It is a hot issue on Wall Street. Most disputes about U5 forms end up in arbitration, and arbitrators often follow local laws when

deciding cases. So it would become even more difficult—if not impossible—for brokers to win in New York if the top court grants employers absolute protection, lawyers for brokers say.

Brokerage firms argue the information on a U5 form should receive absolute protection because it allows them to provide an unvarnished account of an employee's departure without fear of a lawsuit. The Securities Industry and Financial Markets Association, Wall Street's lobby group, says without such protection, firms “will be inclined to understate the reasons for an employee's termination.”

Some employees say firms knowingly put false information on the form, either to derail the career of a potential competitor or to deflect attention during an investigation. “Certain firms are absolutely ethical and won't use the U5 as a negotiating ploy,” says David Wechsler, a lawyer specializing in employment cases who represented Mr. Esposito. But others use the form to “hold employees hostage,” Mr. Wechsler said.

Mr. Esposito now works at another brokerage firm. Mr. Wechsler denies his client solicited business in anticipation of moving to Wachovia. Though the firm agreed to remove that accusation from the U5 form, it insisted to arbitrators that it was truthful.

◆ **The Issue:** Every time a broker or trader leaves a firm, the employer must explain the departure in a form submitted to an industry database.

◆ **The Players:** Wall Street firms argue they should receive immunity from defamation lawsuits by employees based on the form. Brokers say that would be a license for abuse.

◆ **Keep an Eye On:** New York's top court, which is scheduled to examine the issue Feb. 13.

There is no official count of how many brokers have successfully fought a negative U5 filing, but an analysis by law firm **Liddle & Robinson** indicates that since 2000, arbitrators found more than 170 instances of U5 forms containing information on brokers in New York and elsewhere that was wrong and, in some cases, defamatory.

Terminated employees receive copies of their U5 forms. Once the form is submitted, the “reason for termination” can only be changed through arbitration or a court proceeding.

When Kethe Cicconi was fired from the New York branch of McGinn, Smith & Co. in 2002, the firm wrote in his U5 that he was dismissed for poor performance. Mr. Cicconi sued, citing defamation.

Both the trial court and an appellate court ruled against his defamation claim, relying on a previous ruling that the U5 was subject to absolute privilege.

The appellate court ruling came on a 3-2 vote, but Mr. Cicconi received backing from an unexpected source: One of the dissenting judges, who had voted for the original ruling in favor of an absolute privilege in 1991, changed her mind.

“The cloak of absolute privilege has generated...distorted and false filings,” wrote Justice Betty Weinberg Ellerin of the Appellate Division's First Department. The state's top court is scheduled to take up the issue Feb. 13. The case involves a suit by Chaskie Rosenberg, an insurance broker fired by MetLife Inc. The New York insurer, which must file U5 forms on certain insurance agents, wrote on Mr. Rosenberg's form that he was “a possible accessory to money-laundering violations.” He denies the allegation. A MetLife spokesman declined to comment.