

HOT TOPICS IN DEFENDING ALTERNATIVE INVESTMENT CASES

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Overview of Topics

1. Hot Topics in Alternative Investment Cases
2. Understanding the Product
3. Discovery
4. Defending Suitability Claims
5. Concentration Issues
6. Due Diligence Issues
7. Claims For Misrepresentations and Omissions
8. Supervision
9. Valuation Issues and Settlement



Hot Topics in Alternative Investment Cases

- Massive wave of FINRA arbitrations filed in 2010 over Provident, Shale, MedCap and DBSI alternative investments.
- In the following years, many FINRA arbitrations were filed regarding UDF, ARC products, Coachman Bakken and GPB products.
- A recent influx of FINRA arbitrations involve GWG Holdings, Inc. GWG filed for Chapter 11 Bankruptcy in April 2022.



Understanding the Product

- What type of 'alternative investment' is at issue?
 - Reg D private placement?
 - Non-traded REIT?
 - Publicly reporting company?
- Relevant features of the alternative investment at issue:
 - Structure of the investment
 - Did the offering change over time?
- Confirm the firm and associated person's understanding of the investment and underlying business plan



Discovery

- Documents to obtain from the firm:
 - Importance of due diligence files
 - Important to understand the process for prospectus delivery
- Documents to obtain from the claimant:
 - Importance of net worth documents
- Scope of documents to be produced by the firm:
 - Many PIABA attorneys claim these are “Product cases”
 - What ‘due diligence’ files and communications with the product sponsor should the firm produce?



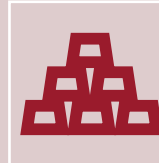
Defending Suitability Claims

- Understanding the customer/claimant
- Understanding how the investment was marketed and sold to the customer
- Understanding the level of risk associated with the alternative investment
- Understanding income and liquidity features
- Important to focus on the point of purchase and beware of post facto allegations from PIABA attorneys

Concentration Issues



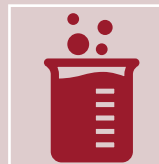
Understanding the customer's overall position in the investment at issue and other alternative/illiquid investments



Understanding the other components of the customers' overall net worth and liquid assets



How did the firm track appropriate concentration limits for the claimant?



What are 'appropriate concentration' limits?

Due Diligence Issues

- Legal basis for a firm's due diligence obligation?
- Scope of a firm's due diligence obligation?
 - Reasonable basis?
 - Ongoing duty to conduct due diligence?
- Potential red flags during the due diligence process?
- Documentation of the firm's due diligence process?
- The need for expert opinion and testimony on due diligence



Claims For Misrepresentations and Omissions

- Who is alleged to have made the misrepresentation and when?
- Importance of prospectus delivery and risk disclosure documents from the firm
- Intentional versus negligent misrepresentations
- Claims under the common law versus state and federal securities laws claims
- Can a firm be liable for repeating a misrepresentation made by the sponsor?

Supervisory Issues

- Understanding the firm's process for approving a customer's alternative investment(s)
- How does the firm monitor concentration issues?
 - Concentration limits?
- Customer net worth issues and the scope of a firm's duty to inquire into the same

Valuation and Issues Related to Settlement

- How to value an alternative investment:
 - Net Asset Value and Share Redemption Programs
 - Tender Offers and Secondary Market Value
 - Bankruptcy
- Settlement
 - Be aware of any class actions or other court proceedings which could provide a litigation stay or some other type of release.
 - Buybacks?

Questions and Answers

THANK YOU!!

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