

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee  
For District No. 7,

Complainant,

vs.

Robert L. Wallace  
Naples, Florida,

Respondent.

DECISION

Complaint No. C07960091

District No. 7

Dated: January 22, 1998

Robert L. Wallace ("Wallace") has appealed the May 5, 1997 decision of the District Business Conduct Committee for District No. 7 ("DBCC") pursuant to Procedural Rule 9310.<sup>1</sup> After a review of the entire record in this matter, we hold that, as alleged in the complaint, Wallace caused an advertisement that contained misleading, unwarranted, and exaggerated statements to be published in a newspaper, in violation of Conduct Rules 2110 and 2210 (formerly Article III, Sections 1 and 35 of the NASD's Rules of Fair Practice). We order that Wallace be censured, suspended for 60 days from association in any capacity with any member of the NASD, and fined \$5,000.

Background. Wallace entered the securities industry in 1978 as a general securities representative. In November 1992, Wallace was employed by Securities America, Inc. ("Securities America" or the "Firm") and was registered as a general securities principal. Wallace currently is employed by American Investment Services, Inc.

Facts. On Saturday, November 4, 1995, and Monday, November 6, 1995, the following advertisement ran in the *Naples Daily News* ("News"):

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<sup>1</sup> We cite here the Procedural Rules that were in effect at the time Wallace appealed. We will apply NASD's new procedural rules governing disciplinary proceedings to cases served on a respondent on or after August 7, 1997 and appealed or called for review. See Special Notice to Members 97-55 (August 1997).

Making a 'Killing'  
in the stock market  
needn't mean  
'Having to Shoot  
Your Broker.'  
Learn how you can realize  
up to 42% on your  
investment with  
no risk of principal.  
For information on the  
investment of the '90's, call:  
BOB WALLACE  
435-9111  
Securities offered thru  
Securities America - member  
NASD, SIPC

Although not apparent on its face, the advertisement was referring to viatical settlements.<sup>2</sup>

When advised of the existence of this advertisement, the NASD's Advertising Department began an investigation. Thomas Zielinski ("Zielinski"), Securities America's Compliance Officer, stated that Securities America had not approved the product and had terminated Wallace as a representative. Zielinski submitted a letter from Wallace in which Wallace represented that he had submitted the advertisement to the *News*, but that the *News* had published the advertisement without having sent him a proof of the advertisement for his and the Firm's review prior to publication. Wallace had attached a copy of an advertisement that he contended should have run instead.

Wallace reiterated his contention that the *News* had run the advertisement without his authorization, and that he was not aware that the advertisement had been printed until the Firm's

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<sup>2</sup> In SEC v. Life Partners, Incorporated, supra, the United States Court of Appeals for the District of Columbia Circuit defined a viatical settlement as:

an investment contract pursuant to which an investor acquires an interest in the life insurance policy of a terminally ill person -- typically an AIDS victim -- at a discount of 20 to 40 percent, depending upon the insured's life expectancy. When the insured dies, the investor receives the benefit of the insurance. The investor's profit is the difference between the discounted purchase price paid to the insured and the death benefit collected from the insurer, less transaction costs, premiums paid, and other administrative expenses.

Id. at 1-2.

compliance department notified him. Wallace attempted to obtain from his contact at the *News*, Emilie Gehrke ("Gehrke"), a written statement that the *News* had printed the advertisement by mistake, but she refused to give him such a statement

A representative of the *News* advised the Advertising Department that the newspaper's normal practice was to provide proofs to customers if the newspaper received the advertisement before its proof deadline. He stated that Gehrke had not provided Wallace with a proof because Wallace submitted the advertisement after the proof deadline. He stated that, given Wallace's long-term relationship with the *News*, he should have known about the proof deadline. He stated that the newspaper generally sent proofs only upon request, and that the *News* would not have published the advertisement without Wallace's authorization.

Discussion. It is undisputed that Wallace wrote the advertisement at issue, submitted it to the *News*, and paid for its publication. It is also undisputed that Wallace did not submit the advertisement to Securities America's compliance department for approval prior to submitting it to the *News*. It is further undisputed that Securities America did not review and approve the advertisement prior to publication. The issue before us is whether the advertisement meets the standards set forth under Rule 2210 and, if not, whether Wallace is responsible for publication of the misleading advertisement.

We find that this advertisement did not meet the standards applicable to communications with the public as set forth in Conduct Rule 2210(d), which provides that communications with the public "shall be based on principles of fair dealing and good faith and should provide a sound basis for evaluating the facts in regard to any particular security or securities." Rule 2210(d) further provides that members may not omit any material fact "if the omission, in the light of the context of the material presented, would cause the advertising or sales literature to be misleading."

We find that Wallace's advertisement was misleading and contained exaggerated and unwarranted representations. The advertisement referred to "Making a 'Killing' in the stock market" notwithstanding that Wallace was advertising viatical settlements and not listed securities.<sup>3</sup> The advertisement stated that the securities were "offered thru (sic) Securities America - member NASD, SIPC." This was not true. Securities America had not approved the product. Further, Wallace advertised a "42% return" with "no risk of principal." Although it could be argued that the purchaser would ultimately receive a return of principal because every human being eventually dies, it is impossible to predict the rate of return, since the price of the viatical settlement and the ultimate return to the purchaser is dependent upon the insured's life expectancy, which cannot be predicted with certainty.

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<sup>3</sup> We note that subsequent to the publication of this advertisement, the United States Court of Appeals for the District of Columbia Circuit held that viatical settlements are not securities. SEC v. Life Partners, Incorporated, No. 95-5364 (D.C. Cir. July 5, 1996), aff'd on rehearing (Dec. 20, 1996). This holding was contrary to the position taken by the SEC, which had determined that viatical settlements were securities subject to the full panoply of securities regulation. In any event, we find that the advertisement at issue is subject to the requirements of Conduct Rule 2210, which addresses, among other things, standards applicable to all member communications with the public.

We also find that Wallace was responsible for the publication of the advertisement. Wallace created the advertisement and submitted it to the *News*. The advertisement ran on two days, November 4 and November 6, 1995. Wallace disclaimed responsibility for the advertisement on the basis that he did not authorize the *News* to print the advertisement. He claimed that there was a miscommunication between himself and Gehrke, and that Gehrke published the advertisement without his authorization. Wallace claimed that his usual course of conduct was to submit advertisements to the *News*, but to withhold authorization to publish until he had submitted the advertisements to Securities America's compliance department and obtained clearance. Wallace blames Gehrke for publishing the advertisement prior to receiving Wallace's explicit authorization.<sup>4</sup>

The evidence is conflicting on this issue. Gehrke testified that she followed the newspaper's procedures and published the advertisement pursuant to Wallace's instructions. She testified that she and Wallace had a telephone conversation in which he specified the days on which he wanted the advertisement published. Gehrke also testified that Wallace sent her changes to the advertisement "on deadline," i.e., the changes were received on Wednesday, November 1, for publication on Saturday, November 4. This, Gehrke testified, meant that there would not have been sufficient time to prepare another proof for Wallace's approval prior to publication. Gehrke further testified that Wallace never asked her to send him a proof of the ad before it ran.

On the other hand, Wallace contended that he did not intend to run the advertisement without the Firm's approval. He testified that he consistently submitted advertisements to the *News* before submitting them to the Firm's compliance department. He contended that he would not have authorized publication of the advertisement until he had received the Firm's approval of the ad.<sup>5</sup> Wallace demanded that Gehrke apologize for printing the advertisement without his approval; she refused.

We find that Wallace is responsible for the misleading advertisement because he wrote it and submitted it for publication without first having received his compliance department's approval.

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<sup>4</sup> Wallace also indicated that had he chosen to have a hearing before the National Business Conduct Committee ("NBCC"), he would have asked a number of individuals from the Firm to testify regarding his usual procedures for obtaining approval from the Firm for his advertisements. Wallace, however, waived his right to a hearing on appeal on the basis that he did not believe that it would be fair for the NBCC to assess costs if he failed to prevail. We nevertheless find that such testimony would not be material to a determination of Wallace's responsibility for the publication of the advertisement at issue.

<sup>5</sup> Wallace claimed that the DBCC hearing panel unfairly prevented him from examining Amy Sochard ("Sochard"), a representative of the Advertising Department, as thoroughly as he wished. We note that Wallace's cross-examination of Sochard was meant to show that a series of advertisements that he had published in the *News* had been approved by Securities America prior to their publication. We agree with the DBCC that this information is not relevant to the advertisement at issue.

There is no evidence in the record that Wallace ever submitted the advertisement to the Firm's compliance department. Further, other than his contention that Gehrke should have known that the advertisement was not "time sensitive," Wallace has presented no evidence to show that he did not mean for the ad to run on November 4. Wallace neither withdrew the advertisement from running on the second day of publication nor protested timely to the *News*.<sup>6</sup> Thus, even if Wallace did not intend for the advertisement to run on November 4 and 6, we find that he is responsible for its publication.

Sanctions. Although we have affirmed the DBCC's findings, we nonetheless conclude that the sanctions imposed by the DBCC should be modified as follows. We affirm the censure, 60-day suspension in all capacities, and \$5,000 fine as appropriately remedial. We conclude, however, that the five-year bar as a general securities principal is not warranted by the facts. We therefore eliminate the five-year bar as a general securities principal imposed by the DBCC.<sup>7</sup>

We do not excuse Wallace's conduct. Wallace wrote an advertisement that was misleading on its face, and he intentionally submitted it to a newspaper. It was Wallace's responsibility to make sure that the advertisement was not misleading. It was also Wallace's responsibility to make sure that the advertisement did not run without the approval of Securities America's compliance department. Wallace failed to carry out both of these obligations. As a result, the *News* printed a misleading advertisement that had not been approved by Wallace's Firm. As a general securities principal, Wallace should have been more sensitive to the possibility that an advertisement, once submitted to a newspaper operating on close deadlines, could be published before he had the opportunity to obtain the Firm's approval. As such, it would have been more prudent for Wallace to submit his advertisements to the Firm prior to submitting them to a newspaper. We have determined, however, that Wallace's conduct does not warrant a bar as a principal for five years.

Accordingly, we affirm the censure, 60-day suspension in all capacities, and \$5,000 fine. The suspension shall become effective on a date to be determined by the President of NASD Regulation, Inc.<sup>8</sup>

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<sup>6</sup> We accept into the record the first page of the lawsuit brought by the *News* against Wallace on the basis that Wallace discussed the lawsuit in proceedings before the DBCC, and the exhibit merely documents the existence of the lawsuit. Wallace contends that his subsequent failure to pay the *News* for unrelated advertisements published by the *News* after the advertisement at issue is evidence that he wrongly paid for the advertisement at issue. We do not find that this evidence, which does not address the advertisement at issue, establishes that Wallace did not intend for the advertisement at issue to be published.

<sup>7</sup> The sanctions are within the range recommended in the applicable NASD Sanction Guideline. See NASD Sanction Guidelines ("Guidelines") (1996 ed.) at 5 (Advertisements and Sales Literature - Misleading or Failure to Comply With Specific Standards).

<sup>8</sup> We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or

On Behalf of the National Business Conduct Committee,

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Joan C. Conley, Corporate Secretary

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other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

Direct: (202) 728-8381  
Fax: (202) 728-8894

**Joan C. Conley**  
Corporate Secretary

January 23, 1998

**VIA FIRST-CLASS/CERTIFIED RETURN RECEIPT REQUESTED**

Robert L. Wallace  
Naples, Florida

Re: Complaint No. C07960091: Robert L. Wallace

Dear Mr. Wallace:

Enclosed herewith is the Decision of the National Business Conduct Committee in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the SC within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:  
Office of the Secretary  
U.S. Securities and Exchange  
Commission  
450 Fifth Street, N.W., Stop 6-9  
Washington, D.C. 20549

The address of NASD Regulation is:  
Office of General Counsel  
NASD Regulation, Inc.  
1735 K Street, N.W.  
Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC.  
The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley  
Corporate Secretary

Enclosure

cc: Alan M. Wolper, Esq. (NASD Regulation, Inc. - District No. 7)