Holmes v. Grubman:

The Supreme Court of Georgia Balances Financial Advisor Common Law Liability and Investor Protection

by Robert C. Port and Jason R. Doss

It is no surprise that the stock market has a long history of volatility that can send wild speculators to yacht dealerships and conservative retirees back to the workforce. The recent downturn of 2008 is no different. In 2008 alone, America suffered a historic loss in wealth totaling approximately $10.2 trillion.[1] Over $6 trillion of that amount was attributed to losses in the stock market.[2]

Typically, American investors hire financial professionals (commonly referred to as stockbrokers or financial advisors) to make sound investment decisions. The nature of the relationship between a stockbroker and a client is one based on a trust in that professional's perceived financial acumen. In fact, brokerage firms aggressively market themselves as skilled advisors competent to handle every aspect of their clients' financial life, from investments to mortgages, life insurance, long-term care, estate planning and charitable giving.[3] Furthermore, brokerage firms often advertise that their financial advisors will monitor investments after a recommendation to purchase a security to ensure that the investor meets his or her long term investment goals.

Studies in behavioral finance demonstrate that securities brokers are highly motivated to cultivate their clients' trust and allegiance, and clients have powerful incentives to believe that such advisors are trustworthy and acting solely in the client's best interests.[4] Obtaining a client's trust and confidence, and convincing the client that he or she should rely upon the investment advice given, is at the heart of the broker-client relationship.

As a result, Georgia courts have long held that under Georgia common law, a stockbroker's duty to account to its customer is fiduciary in nature, so that the broker is obligated to exercise the utmost good faith. Requirements of good faith demand that in the principal's interest, it is the agent's duty to make known to the principal all material facts that concern the transactions and subject matter of his agency.[5]

In an attempt to limit these common law fiduciary obligations and limit liability for unsuitable or inappropriate investment advice, the financial services industry created discretionary and nondiscretionary accounts for its retail investor customers. A discretionary account is one in which the financial advisor has full discretion to make investment decisions without obtaining prior approval from the customer.[6] A nondiscretionary account, which is by far the most common type of investment account, is one in which the financial advisor is required to get prior approval from the customer before making a trade in an investment account.[7] By implementing this approval process, a brokerage firm argues that in a nondiscretionary account, it does not owe a fiduciary duty to the customer and that the firm is merely an "order taker" because the customer—who had the right to follow or reject the broker's recommendation—was the one who actually made the investment decision. Furthermore, even though the brokerage firm may advertise to the contrary, it will typically argue that it has no continuing legal duty to monitor its customers' portfolios in nondiscretionary accounts and that its legal duty (if any) does not extend beyond the recommendation to purchase the security.

Investor advocates have long criticized the use of nondiscretionary accounts to limit liability. Studies have shown that investors are not aware of the distinction between discretionary and nondiscretionary accounts and also believe that their financial advisor is acting in a fiduciary capacity.[8] After all, the type of account does not change the trust relationship that typically exists between financial professional and investor customer. As a result, the approval process described above is in large part meaningless to the investing public because a trusting investor typically does not have the ability to evaluate independently the broker's recommendations, and will simply follow the stockbroker's investment recommendation without question with the belief that it is appropriate.[9]

Stock market crashes like the one in 2008 are often sudden and dramatic. For example, the S&P 500 Index, a stock index comprised of 500 large cap common stocks actively traded in the United States, fell more than 52 percent between October 2007 and November 2008, which was the largest decline since the Great Depression.[10] When these types of events occur, retail investors frequently contact their

financial advisors looking for advice on how to stem the losses. The typical response by the financial professional is to hold on and "stay the course" and wait for the stock prices or investment values to come back. This recommendation to "hold" is often made without any analysis by the financial advisor regarding whether a customer's investment portfolio is suitable for their current investment objectives and risk tolerance.

Indeed, recommendations to hold sometimes may be the correct and suitable course of action. After all, the stock market has proven to be resilient and with every downturn there is typically an equally large, if not larger, upturn.[11] On the other hand, these statistics represent the performance of the broad-based stock market over time and do not reflect the performance of individual stocks. There are certainly a large number of individual stocks that have not bounced back. Furthermore, it is certainly possible for an investment to be suitable at the time of purchase and then become inappropriate for that investor due to a change in circumstance for the investor (e.g. health problems, death of a spouse, etc.), or change of circumstance for the investment (e.g., loss of a large contract, a product recall or change of investment strategy for a mutual fund). As a result, the recommendation to hold may not be appropriate.

When does the recommendation to hold become the wrong investment recommendation? Does a financial advisor have a duty to monitor investments after a recommendation to purchase to ensure that the investor meets his or her long term investment goals? What legal claims and remedies are available to investors to recoup losses stemming from an improper recommendation to hold a particular stock or overly risky portfolio?

With regard to federal securities laws, the answer to the last question is that there is no viable claim or remedy. This is because Section

10(b) of the Securities Exchange Act affords investors a securities fraud claim based on misrepresentations or omissions made only in connection with the *purchase or sale* of a security, not a recommendation to hold a security.[12]

Without a remedy under the federal securities laws, does an investor have a viable claim under Georgia common law against a stockbroker or the brokerage firm for an improper recommendation to hold a security? As described in more detail below, the Supreme Court of Georgia recently addressed this issue in *Holmes v. Grubman*, and held that aggrieved investors, subject to some limitations, can maintain common law tort claims such as fraud and negligent misrepresentation based on an improper recommendation to hold a security.[13] The Supreme Court of Georgia also re-affirmed that the relationship between a financial professional and customer is fiduciary in nature and that the brokerage firm and the investment professional will owe a heightened duty to the holder of a security even if the account is nondiscretionary.[14] Each of these holdings furthers the protection of public investors who rely upon brokerage firms to provide them sound investing advice and recommendations.

Factual Background and Procedural History of *Holmes v. Grubman*

Appellant William K. Holmes and his four entities controlled by him (Holmes) had nondiscretionary accounts with Citigroup Global Markets, Inc. f/k/a Salomon Smith Barney & Co., Inc. (SSB).[15] As of June 1999, Holmes "owned 2.1 million shares in Worldcom, Inc., the major telecommunications company which went bankrupt after the revelation of massive accounting fraud in 2002."[16] Holmes brought an action against SSB as well as its well-known telecom analyst, Jack Grubman, alleging that Holmes verbally ordered his broker at SSB to sell all shares in Worldcom stock, which was at that time trading at approximately $92 per share. Holmes further alleged that his SSB broker convinced him not to sell, based on recent research reports by SSB's Grubman. The suit further alleged that SSB and Grubman were operating under a conflict of interest because they promoted Worldcom, although knowing that it was grossly overvalued, in order to retain Worldcom's lucrative investment banking business. Instead of selling, Holmes purchased additional shares as the stock price declined. In October 2000, Holmes was forced to sell all WorldCom shares in order to meet margin calls, resulting in an alleged loss of nearly $200 million.[17]

In 2003, Holmes filed for bankruptcy and brought this action for damages under Georgia law. The case was transferred to the U.S. District Court for the Southern District of New York and the district court dismissed the complaint, which brought claims based on fraud, negligent misrepresentation, negligence in making disclosures, and breach of fiduciary duty. On appeal, the U.S. Court of Appeals for the Second Circuit certified the following questions to the Supreme Court of Georgia that are pertinent to this article:[18]

1. Does Georgia common law recognize fraud claims based on forbearance in the sale of publicly traded securities?; and
2. Under Georgia law, does a brokerage firm owe a fiduciary duty to the holder of a nondiscretionary account?[19]

Georgia Common Law Recognizes Holder Claims and that a Brokerage Firm Owes a Fiduciary Duty to the Holder of a Nondiscretionary Account

In answering the first certified question, the Supreme Court of Georgia held that aggrieved investors can bring viable common law fraud claims based on a recommendation not to sell or to hold a security.[20] In doing so, the Court stated that, "although this Court has never specifically addressed such claims, it is well settled that one of the elements of the tort of fraud in Georgia is an intention to induce the plaintiff to act or refrain from acting."[21] The Supreme Court of Georgia also approved of the approach taken by the Restatement (Second) of Torts §525 (1977), which states that "induced forbearance can be the basis for tort liability."[22]

The Supreme Court of Georgia also went beyond the scope of the certified question and stated that "[w]e see no reason why our authorization of common-law fraud claims based on forbearance in the sale of publicly traded securities . . . should not extend to . . . other common-law tort claims" such as negligent misrepresentation."[23]

The Court did, however, articulate limitations on these types of claims and held that a plaintiff bringing a holder claim must prove specific reliance on the defendants' representations.[24] The plaintiff must allege actions "as distinguished from unspoken and unrecorded thoughts and decisions" that would indicate actual reliance on the misrepresentations.[25]

With regard to the second certified question as to whether, under Georgia law, a brokerage firm owes a fiduciary duty to the holder of a nondiscretionary account, the Court answered affirmatively, approving the analysis of prior decisions of the Court of Appeals of Georgia that "recognized that a stockbroker and his customer have a fiduciary relationship as principal and agent pursuant to O.C.G.A. § 23-2-58," and accordingly, "a stockbroker has limited fiduciary duties towards a customer who holds a nondiscretionary account."[26]

The Court's decision recognized that the essence of the broker-client relationship is that of principal (customer) and agent (brokerage firm). By statute, such a relationship "of mutual confidence . . . requires the utmost good faith."[27] The *extent* of the broker's fiduciary duty may vary under differing factual circumstances, but the Court's decision makes clear that the *existence* of the duty cannot reasonably be questioned.[28] Accordingly, the obligations of a broker handling a nondiscretionary account are more than simply being an "order taker" who executes a securities transaction.[29] The duties undertaken by a broker handling a nondiscretionary account—such as the duty to recommend an investment only after sufficient investigation of the investment, the duty to avoid self-dealing, and the duty to inform the customer of the risks of an investment—impose upon the broker a higher duty of care than would otherwise be found in the garden variety agent-principal relationship.[30]

Moreover, finding that a stockbroker is a fiduciary is entirely consistent with both the statutory and regulatory environment in which brokers operate. Securities laws reject the concept of *caveat emptor* as it applies to securities transactions.[31] Instead, as a matter of public policy, the rule is "Let the seller beware." Thus, under Georgia's current and former legislative scheme, it is the seller who has the burden of proof to show that he or she did not know, and in the exercise of reasonable care could not have known, of material misstatements or omissions made in connection with the sale of securities.[32]

Securities regulators also have recognized that the special and distinct role of a securities broker in securing the trust and confidence of his or her clients imposes fiduciary responsibilities upon the broker. Under the so-called "Shingle Theory" of liability developed from the law of agency by the Securities & Exchange Commission (SEC), a broker who solicits and accepts orders from the public implicitly represents that he will deal fairly with his customers.[33] According to the SEC, it is a "basic principle" that by holding itself out to the public as a broker-dealer, a firm represents that it will act in the customer's best interest.[34] The SEC has therefore concluded that the law of agency, coupled with the rules of such "self-regulatory organizations" (SROs)[35] as the Financial Industry Regulatory Authority (FINRA), also give rise to a fiduciary duty owed by brokers.[36]

Ramifications of *Holmes v. Grubman*

The brokerage industry annually spends tens of millions of dollars attempting to convince the investing public that they are skilled and competent advisors able to counsel clients successfully through the labyrinth of investment choices available. The average investor who has relied on his or her broker for investment advice is therefore shocked and dismayed when the brokerage firm thereafter claims that it owes no duty to its clients other than to faithfully execute the trade its broker had recommended. By specifically finding that a brokerage firm owes a fiduciary duty to the holder of a nondiscretionary account, the Supreme Court of Georgia not only reaffirmed the law on this point, but also confirmed that the legal relationship of investors and brokers is consistent with what the public expects, and what both the legislative and regulatory schemes demand.

Holmes makes clear that financial advisors can be held liable under Georgia common law for thoughtless or inappropriate recommendations to stay the course in the face of downturns in the market. The recommendation to hold should be a well-informed decision by the financial advisor after a complete analysis of the customer's current investment objectives and risk tolerance. In addition, coupled with the Court's finding that "holder claims" are viable under Georgia law, there is now substantial support for the argument that brokerage firms have a continuing duty to monitor their customers' nondiscretionary accounts to ensure that the investments selected continue to be suitable and appropriate for the investor.

That positive result for the public investor cannot be dismissed at a time when many investors are losing faith in the financial system.[37] Although the decision in *Holmes* will not, by itself, calm Georgia investors' anxiety caused by news of massive Wall Street frauds, lax enforcement by regulators, and disclosure of Wall Street's conflicts of interest, it does, in some small measure, encourage investor faith and confidence in the financial industry by reaffirming that a brokerage firm and its broker owe their public investors a duty of utmost good faith and loyalty in handling their nondiscretionary accounts.

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Endnotes

1. http://www.businessinsider.com/2009/2/america-lost-102-trillion-of-wealth-in-2008.
2. *Id.*
3. *See, e.g.*, the web site of Merrill Lynch, http://www.totalmerrill.com/TotalMerrill/pages/WhatMattersMostToYou.aspx (suggesting that "a Merrill Lynch Financial Advisor [can] help you align your portfolio with your personal goals," including "Balancing Today's Expenses & Future Goals," "Caring For My Family," "Preparing for Retirement," "Pursuing My Dreams," "Estate Planning & Philanthropy," and "Growing My Business.").
4. Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics about Stockbrokers and Sophisticated Customers*, 84 Cal. L. Rev. 627 (May 1996).
5. Glisson v. Freeman, 243 Ga. App. 92, 99, 532 S.E.2d 442, 449 (2000), citing Minor v. E.F. Hutton & Co., 200 Ga. App. 645, 647, 409 S.E.2d 262 (1991) and E.F. Hutton & Co. v. Weeks, 166 Ga. App. 443, 445, 304 S.E.2d 420 (1983).
6. Webster's New World Finance and Investment Dictionary (2010).
7. *Glisson*, 243 Ga. App. at 99, 532 S.E.2d at 449.
8. A recent study found that more than 60 percent of investors believed that brokers have a fiduciary duty. *See, e.g., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Institute for Civil Justice (2008) at 31, (commissioned by the U.S. Securities and Exchange Commission) (citing 2006 survey of 1,000 investors by TD Ameritrade).
9. *See, e.g.*, Mihara v. Dean Witter & Co., 619 F.2d 814, 821 (9th Cir. 1980) (investor routinely followed the recommendations of the broker); Carras v. Burns, 516 F.2d 251, 258-59 (4th Cir. 1975) ("The issue is whether or not the customer, based on the information available to him and his ability to interpret it, can independently evaluate his broker's suggestions.").
10. http://www.cnbc.com/id/27826038, Stocks Plunge, Leaving Dow Below 7600.
11. For example, the annualized growth rate for the S&P 500 was a decline of -37.00% in 2008, followed by a 26.47 percent increase in 2009 The Callan Periodic Table of Investment Returns, *Annual Returns for Key Indices (1990-2009) Ranked in Order of Performance* (2010), http://www.callan.com/research/download/?file=periodic/free/360.pdf.
12. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).
13. 286 Ga. 636, 691 S.E.2d 196 (Feb. 8, 2010), reconsideration denied March 15, 2010.
14. *Id.* at 643.
15. *Holmes*, 286 Ga. at 636.
16. *Id.*

17. *Id.*
18. 286 Ga. at 636-37.
19. The Second Circuit certified a third question to the Supreme Court of Georgia, which is as follows:

    With respect to a tort claim based on misrepresentations or omissions concerning publicly traded securities, is proximate cause adequately pleaded under Georgia law when a plaintiff alleges that his injury was a reasonably foreseeable result of defendant's false or misleading statements but does not allege that the truth concealed by the defendant entered the market place, thereby precipitating a drop in the price of the security?

    Holmes, 286 Ga. at 637. This issue is not relevant to this article because the fact patterns addressed here involve misrepresentations or omissions by financial professionals that do not affect the price of a security. In *Holmes*, the plaintiff was asserting that Jack Grubman's fraudulent research reports caused the price of WorldCom to be artificially inflated. Put another way, when the truth about Jack Grubman's research reports came to light, the price of WorldCom precipitously dropped. This theory of liability is known as a "fraud on the market." As described by the U.S. Supreme Court, "[t]he fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." Basic, Inc. v. Levinson, 485 U.S. 224, 241–42 (1988) (omission in original) (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)). The Supreme Court of Georgia held that in fraud on the market cases, a plaintiff must prove at trial that the truth concealed by the defendant entered the marketplace, causing a drop in the price of the security. *Holmes*, 286 Ga. at 642. The "fraud on the market" analysis has no application to the large segment of claims, typically brought by individual public investors, which do not allege a widespread dissemination of false information that does not enter the marketplace. In those instances, the claim is not that there has been a "fraud on the market," because there was no widespread dissemination of false information; instead, the claim is that "but for" the misrepresentation or omission specifically directed at and relied upon by the individual investor, the stock purchase or sale never would have occurred. Rather, in those cases, the sufficiency of a pleading alleging proximate cause need only meet the requirements of notice pleading required by the Civil Practice Act. As a result, this certified question will not be discussed any further.

20. Holmes v. Grubman, 286 Ga. 636, 637.
21. *Id.*, quoting Stiefel v. Schick, 260 Ga. 638, 639, 398 S.E.2d 194 (1990) (internal quotations omitted; emphasis omitted).
22. *Id.* at 637.
23. 286 Ga. at 640-641.
24. *Id.* at 640.
25. *Id.*, quoting Small v. Fritz Cos., 30 Cal. 4th 167, 184, 132 Cal.Rptr.2d 490, 65 P.3d 1255 (2003).
26. 286 Ga. at 643, approving the analysis of *Glisson v. Freeman*, 243 Ga. App. 92, 532 SE 2d 442 (2000). In support of its decision, the Court also relied upon *Minor v. E.F. Hutton & Co.*, 200 Ga. App. 645, 647, 409 SE 2d 262 (1991) ("A stock broker's duty to account to its customer is fiduciary in nature, so that the broker is obligated to exercise the utmost good faith. Requirements of good faith demand that in the principal's interest it is the agent's duty to make known to the principal all material facts which concern the transactions and subject matter of his agency.") (citations and internal quotations omitted); E.F. Hutton & Co. v. Weeks, 166 Ga. App. 443, 445, 304 S.E.2d 420, 422 (1982) (same); *see also* Tigner v. Shearson-Lehman Hutton, Inc., 201 Ga. App. 713, 716, 411 S.E.2d 800, 802 (1991) (finding of fiduciary relationship in which broker exercised a "controlling influence" over the customer and the customer relied on the relationship).
27. O.C.G.A. § 23-2-58 (1982); *see also* Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 314, 105 S. Ct. 2622, 2630 (1985) (a broker-dealer "owes a duty of honesty and fair dealing toward his clients."); Koch v. Cochran, 251 Ga. 559, 560, 307 S.E.2d 918, 919 (1983) ("The relationship of principal and agent . . . demands of the agent the utmost loyalty and good faith to his principal.").
28. *In re* Merrill Lynch Sec. Litig., 911 F.Supp. 754, 768 (D.N.J. 1995) ("The fiduciary duty is fundamental to the broker/client relationship."), *rev'd on other grounds*, 135 F.3d 266 (3rd Cir. 1998).
29. *See, e.g.*, Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953 (E.D. Mich. 1978), aff'd, 647 F.2d 165 (6th Cir. 1981); *see also* Glisson v. Freeman, 243 Ga. App. 92, 99, 532 S.E. 2d 442, 449 (2000) ("With respect to a nondiscretionary account, . . . the broker owes a number of duties to the client, including the duty to transact business only after receiving prior authorization from the client and the duty not to misrepresent any fact material to the transaction."); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng, 901 F.2d 1124, 1128 (D.C. Cir. 1990) (basic agency law establishes fiduciary duties in nondiscretionary accounts, including duties (1) not to make unauthorized trades, (2) to inform client of right to reject unauthorized trades, and (3) generally, to disclose "information which is relevant to affairs entrusted to him of which he has notice."); Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987) (citing *Leib* with approval as to the duties of broker in a nondiscretionary account). These duties are mirrored in Rule 2310 of the National Association of Securities Dealers, ("NASD"), the largest independent regulator for all securities firms doing business in the United States. Entitled *Recommendations to Customers (Suitability)*, and also known as the "Know Your Customer" or "Suitability" Rule, it provides that, "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." FINRA MANUAL, *NASD Rules* (August 20, 1996), http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=4315&element_id=3638&highlight=2310#r4315.
30. *See, e.g.*, Opper v. Hancock Sec. Corp., 250 F. Supp. 668, 676 (S.D.N.Y. 1966) ("the duties of a securities broker are, if anything, more stringent than those imposed by general agency law."), *aff'd per curiam*, 367 F.2d 157 (2d Cir. 1966). As a result, a securities broker is required to adhere to a standard of more than ordinary care in its handling of a client's account. The broker is judged against the standard of prudence and care expected of a trained and experienced financial professional:

    > [I]t is normally not sufficient for a broker to exercise ordinary care and judgment in discharging his duties, he must employ such care, skill, prudence, diligence and judgment as might reasonably be expected of persons skilled in his calling. If his customer's money is lost because the broker undertakes his duties without possessing the requisite skills, or because of his negligence, the broker is liable for the loss.

    NORMAN S. POSER, BROKER-DEALER LAW & REGULATION, § 2.03[A][1] 2-50, (3rd ed, 2002 Supp).
31. In the words of the U.S. Supreme Court, a "fundamental purpose [of the securities laws is] . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*, and thus to achieve a high standard of business ethics in the securities industry." SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186, 84 S. Ct. 275, 280 (1963); *see also* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151, 92 S. Ct. 1456, 1471 (1972).

32. O.C.G.A. § 10-5-14(a)(2) (1973 Securities Act) (2009); O.C.G.A. § 10-5-58(b) (Georgia Uniform Securities Act of 2008).
33. Charles Hughes & Co. v. SEC, 139 F.2d 434 (2d Cir. 1943); *see also* Kahn v. SEC, 297 F.2d 112, 115 (2d Cir. 1961) (Clark, J., concurring).
34. *In re* D.E. Wine Investments, Inc., Admin. Proceeding File No. 3-8543 Release No. ID-134, 1999 WL 373279 (June 9, 1999).
35. Pursuant to Sections 15A and 19 of the Securities Exchange Act of 1934, Congress authorized the establishment of "self-regulatory organizations" (SROs), which have promulgated rules which are, *inter alia*, "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest . . . ." 15 U.S.C. § 780-3(b)(6) (October 5, 2010).
36. *See, e.g.*, *In re* E.F. Hutton & Co., Exchange Act Release No. 25,887 [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,303 (July 6, 1988). FINRA Conduct Rules impose upon a brokerage firm and its members the obligation to make only suitable investment recommendations to their clients after learning the essential facts concerning those clients. FINRA Conduct Rule 2310. Recognizing that the broker-investor relationship is fundamentally different from a garden variety consumer relationship, the Conduct Rules of the FINRA also require that its member firms, for both discretionary and nondiscretionary accounts, "shall observe high standards of commercial honor and just and equitable principles of trade." FINRA Conduct Rule 2110. Indeed, both the current Chairwoman, as well as the past two Chairmen of the SEC, have recognized that brokerage firms act in a fiduciary role with respect to their clients. For example, Harvey L. Pitt, Chairman from 2001 to 2003, observed that "[r]egulation can never substitute for people doing their jobs honestly, dedicated to serving their customers *as the fiduciaries they are*." Securities Industry and Financial Markets Association, *Remarks of Harvey L. Pitt, Chairman, SEC, at the Securities Industry Association Annual Meeting* (November 8, 2002), http://archives2.sifma.org/speeches/html/pitt02.html (emphasis added). During the recent "credit crisis," Chairman Christopher Cox affirmed that "[n]ow more than ever, companies need to take a long-term view on compliance and realize that *their fiduciary responsibility requires a constant commitment to investors*." U.S. Securities and Exchange Commission, *Speech by the SEC Chairman, Address to the 2008 CCOutreach National Seminar* (November 13, 2008), http://www.sec.gov/news/speech/2008/spch111308cc.htm (emphasis added). And the current Chairwoman, Mary Schapiro, testified before Congress that "*all* financial service providers that provide personalized investment advice about securities *should owe a fiduciary duty to their customers or clients*." U.S. Securities and Exchange Commission, *Testimony Concerning SEC Oversight: Current State and Agenda, Before the U.S. House of Representatives Committee on Financial Services` Subcommittee on Capital Markets, Insurance and Government-Sponsored Enterprises* (statement of Mary L. Schapiro, SEC Chairwoman) (July 14, 2009) http://www.sec.gov/news/testimony/2009/ts071409mls.htm (emphasis added).
37. A May 2010 poll found 58% of respondents no longer believe the markets are fair and open. NBC News/Wall Street Journal Survey, Hart/McInturff Study # 10316, at 19 (May 6-10, 2010), http://online.wsj.com/public/resources/documents/wsjnbcpoll-05122010.pdf.