

## David J. Libowsky

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David Libowsky is a Principal of the Financial Institutions Litigation and Regulation group. David has more than 32 years of Financial Institutions, commercial and banking litigation experience in state and federal court and in arbitration proceedings.

For over 32 years, David has represented securities broker-dealers, banks and other corporate clients in their disputes with customers and business entities. David zealously advocates for his clients' best interests whether in court, arbitration before FINRA Dispute Resolution or mediation. David has handled cases at both the trial and appellate levels throughout New Jersey and New York, as well as in arbitrations before FINRA Dispute Resolution, successfully representing clients in all such venues.

David is a hands-on litigator who employs a highly analytical approach to litigating and ultimately coming up with the best solution to his clients' cases. This typically requires that David remove his advocate's hat and look at the merits of a case from a very clinical, dispassionate, objective perspective, as well as from the perspective of the judge, jury or arbitration panel. When a case cannot be resolved, David employs the same clinical, objective approach in trying to obtain a successful litigated result for the client. Clients continue to use David because of the results that he has been able to obtain for them over years of practice.

Upon graduation from law School, David clerked for the Honorable Felix A. Martino, Judge of the Superior Court, New Jersey, Essex County.

David believes in being an active participant in organizations in his community. He serves on the Executive Board of his synagogue, is a house counsel for the synagogue, serves on the board of trustees of the synagogue's Men's Club, and is otherwise actively involved in his synagogue.

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### AREAS OF PRACTICE

Financial Institutions

Financial Institutions Litigation  
and Arbitration

### EDUCATION

- Duke University School of Law, J.D., 1986
- Brandeis University, B.A., *magna cum laude*, 1983

### ADMISSIONS

New Jersey

New York

U.S. District Court, District of  
New Jersey

U.S. District Court, Southern  
District of New York

U.S. District Court, Eastern  
District of New York

U.S. District Court, Northern  
District of New York

U.S. Court of Appeals, Second  
Circuit

U.S. Court of Appeals, Third  
Circuit

## Experience

David represented a national broker-dealer in a breach of contract case which was tried before a jury in New York Supreme Court in January-February 2008. The jury found in favor of the broker-dealer and awarded damages which, including interest, exceeded \$1,000,000. The jury also rejected the defendants' counterclaim for breach of contract in which the defendants sought damages of more than \$7,000,000.

David represented a national securities broker-dealer in a securities arbitration in which the claimants alleged that the broker-dealer's analyst reports misrepresented the analyst's opinion about several telecommunications companies that he covered. The claimants sought damages in excess of \$1,000,000. Following a multi day hearing, the arbitration panel issued an award denying all of the claimants' claims.

David represented a national securities broker-dealer in a securities arbitration in which the claimant alleged that the broker-dealer and its financial advisors recommended the purchase of unsuitable securities. The claimant sought damages of more than \$1,000,000. Following a multi day hearing, the arbitration panel issued an award denying all of the claimants' claims.

In a securities arbitration, David represented a national broker-dealer. Following 34 hearing sessions, the arbitration panel issued an award on February 14, 2013 rejecting all of the claimant non-profit organization's claims for compensatory damages totaling over \$1,000,000, except for one claim in which respondent conceded liability and the panel only awarded the amount that respondent acknowledged owing. The arbitrators also rejected the claimant's claim for \$10,000,000 in punitive damages, instead only awarding as punitive damages an amount equal to 75% of the \$168,103 in compensatory damages that respondent acknowledged owing to the claimant (or \$126,077). Finally, the arbitrators rejected the claimant's request for more than \$500,000 in attorney's fees. The claimant filed suit in New Jersey Superior Court to vacate the portions of the award limiting the claimant's recovery of punitive damages to 75% of the compensatory damages and denying the request for attorney's fees. The trial court denied the plaintiff's motion to vacate. The plaintiff appealed the trial court's order. On October 29, 2014, the New Jersey Appellate Division issued its decision affirming the trial court's order denying the motion to vacate.

In an action in New Jersey Superior Court, David represented a national securities broker-dealer. The Appellate Division held, on November 9, 2010 in a case of first impression in New Jersey, that a securities broker-dealer does not owe a duty to a non-customer. The Investor Plaintiffs had alleged that Maxwell Smith induced them to invest \$8,000,000 over a 16 year period into a limited partnership that turned out to be a non-existent investment. Smith was not an associated person, registered representative of, or otherwise employed by the broker-dealer, and the Investor Plaintiffs were not customers of the broker-dealer. Smith was a registered representative for several other brokerage firms during this 16 year period where the Investor Plaintiffs were his customers. The Investor Plaintiffs alleged that Smith instructed them to make their checks for investment in the limited partnership payable to the broker-dealer. Smith deposited these checks in his personal account with the broker-dealer and thereafter converted those funds. The Investor Plaintiffs sought to hold the broker-dealer liable for the \$8,000,000 they invested in the limited partnership, alleging that the broker-dealer failed to adequately supervise and monitor Smith's account. The trial court dismissed the Investor Plaintiffs' complaints, concluding that they could not state a claim against the broker-dealer for negligent supervision and monitoring of that account. On appeal, the Appellate Division held in a reported decision that because the Investor Plaintiffs had no relationship with the broker-dealer, and Smith had no relationship with the broker-dealer other than as owner of

the account into which the Investor Plaintiffs' funds were placed, "as a matter of law, no duty should be imposed on (the broker-dealer) to periodically examine the account's activities for indicia of fraud." The New Jersey Supreme Court denied the Investor Plaintiffs' petition for certification. In August 2011, the Investor Plaintiffs moved to vacate the dismissal of their actions, claiming newly discovered evidence and fraud on the part of the broker-dealer justified relief from the trial court's order of dismissal. On January 6, 2012, the trial court denied the Investor Plaintiffs' motion. On November 15, 2012, the Appellate Division affirmed the trial court's denial of the motion to vacate.

In related litigation, in which David represented the same national broker-dealer, the New Jersey Appellate Division ruled in a reported decision that contrary to conventional wisdom, not all disputes between members of the Financial Regulatory Authority are subject to mandatory arbitration. In this matter, the Appellate Division addressed the arbitrability of third party claims for contribution and indemnification that were asserted against the national broker-dealer by several brokerage firms that had employed Maxwell Smith; these third party claims were asserted in arbitrations before FINRA Dispute Resolution that had been initiated by the Investor Plaintiffs. In what appears to be a case of first impression, on June 27, 2012, the Appellate Division held that the broker-dealer was not required to arbitrate the third party claims under the FINRA By-Laws, the FINRA Dispute Resolution Code of Arbitration Procedure for Customer Disputes or the FINRA Dispute Resolution Code of Arbitration Procedure for Industry Disputes. As a result, the Appellate Division affirmed the trial court's order preliminarily enjoining the employing firms from proceeding with the third party claims in the Investor Plaintiffs' arbitrations and denying their cross-motion to compel arbitration. On November 5, 2012, the Appellate Division denied the employing firms' petition for certification.

David successfully tried four securities arbitrations for a national broker-dealer between February 2018 and February 2019. The primary claims in each case alleged improper withdrawals of funds and assets from the accounts in question. In all of these cases, the arbitration panels issued awards denying or dismissing all of the claims alleged by the claimants.

**David's published decisions include:**

*Nicholas v. Saul Stone & Co., LLC*, 224 F. 3d 179 (3d Cir. 2000)

- *Rowe v. Morgan Stanley Dean Witter*, 191 F.R.D. 398 (D. N. J. 1999)
- *Abrash v. Fox*, 805 F. Supp. 206 (S.D.N.Y. 1992)
- *Frederick v. Smith*, 416 N.J. Super. 594 (App. Div. 2010)
- *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc.*, 427 N.J. Super. 45 (App. Div. 2012)
- *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Incorporated v. Chan*, 38 A.D. 3d 355, 832 N.Y.S. 2d 182 (1st Dep't 2007)
- *Matter of Sobel (Charles Schwab & Co., Inc.)*, 37 A.D. 3d 877, 828 N.Y.S. 2d 720 (3d Dep't 2007)
- *Lieberman v. Worden*, 268 A.D. 2d 337, 701 N.Y.S. 2d 419 (1st Dep't 2000)

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## Civic Involvement

- Counsel, East Brunswick Jewish Center
- Member, East Brunswick Jewish Center's Executive Board

## Professional Affiliations

- New Jersey State Bar Association
- New York State Bar Association
- Securities Industry and Financial Markets Association (SIFMA), Compliance and Legal Society

## Get to Know David

An avid reader, David enjoys military history books, particularly World War II and the Civil War. He also enjoys bicycle riding, sports and spending time with his wife and family members.