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CONFIDENTIAL & WITHOUT PREJUDICE

INVESTIGATION REPORT

Date: October 3, 2012
Clients: Mr. and Mrs. I
Firm: W.H. Stuart and Associates (WHS)

CONFIDENTIALITY

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INVESTIGATION SUMMARY

Investment Advisor:	▪ Ms. W	
Accounts:	▪ Mr. I's RRSP account ▪ Mr. and Mrs. I's joint non-registered investments	
Period:	▪ 1998-2000	
Key Conclusions:	▪ Ms. W recommended that Mr. and Mrs. I purchase shares in Saga Marine while she was an investment advisor with WHS. ▪ The Saga Marine shares were unsuitable for Mr. and Mrs. I and Ms. W did not adequately disclose the risks to them. ▪ If WHS had assessed the suitability of the initial shares Mr. and Mrs. I purchased and warned Mr. and Mrs. I of the risk, Mr. and Mrs. I could have sold the shares without a loss and avoided purchasing additional shares on which they also incurred losses.	
Recommendation:	$38,536 $2,530 * $41,066*	Losses Interest Total Recommendation

OVERVIEW

This case arises from a complaint brought by Mr. and Mrs. I to OBSI on July 31, 2007. Mr. and Mrs. I are each currently 82 years old and Mr. I is not in good health.

Mr. and Mrs. I began investing with Ms. W in 1992 when she was an investment advisor with Firm A. In 1996, Ms. W transferred to WHS. In 1998, Mr. I transferred his RRSP account to WHS to continue investing with Ms. W.

On September 9, 1998, on Ms. W's recommendation, Mr. I purchased shares in an extremely small private company called Saga Marine which made sailboats in St. Catharines, Ontario. Saga Marine was a high-risk, speculative investment that was unsuitable for Mr. I given his personal and financial circumstances. Mr. I was 68 years old and retired. He was a low to medium-risk investor with limited investment knowledge, limited income and net worth, and no investment experience in individual stocks or private shares. Mr. I agreed to purchase the shares of Saga Marine because Ms. W told him it was a guaranteed, risk-free investment similar to a term deposit or GIC.

For his initial $15,000 investment, Mr. I received 150 shares of Saga Marine which Ms. W deposited in his RRSP at WHS. WHS acknowledges that the shares were high-risk, which was not in keeping with Mr. I's risk tolerance. WHS also acknowledges that it did not conduct a suitability review at the time. If it had, and questioned Ms. W about the shares, it could have warned Mr. I about Saga Marine's risks. Unfortunately it did not and in December 1999, Mr. and Mrs. I invested an additional $30,000 in Saga Marine, on Ms. W's recommendation, still believing it was a risk-free security.

In the first few years, Mr. and Mrs. I received some dividends from Saga Marine and luckily they redeemed some of their shares in 2000, but when Saga Marine went bankrupt in 2006, the remainder of their investment was lost.

WHS denies responsibility for Mr. and Mrs. I's losses claiming that Mr. I purchased his initial 150 shares of Saga Marine before he opened his account at WHS. This was clearly not the case. In any event, WHS should have reviewed the suitability of the shares when they were deposited to Mr. I's RRSP at WHS.

WHS says it was not aware Mr. and Mrs. I had invested the additional $30,000 until they complained to WHS. As it turns out, unbeknownst to Mr. and Mrs. I, Ms. W had them purchase the additional shares off the books of WHS. Ms. W concocted account statements to make it appear to Mr. and Mrs. I that they held all their Saga Marine shares at WHS.

In January 2000, another of Ms. W's clients served WHS and Ms. W, among others, with a Statement of Claim that included a complaint about Ms. W's recommendation to purchase Saga Marine while these clients were invested at WHS. This was another opportunity for WHS to warn Mr. and Mrs. I and provide them with an opportunity to sell their shares. Again, WHS failed to do so.

Ms. W was held out by WHS as a person to be trusted. Instead, she put some clients in unsuitable investments and swindled others in a pyramid scheme. She was dismissed by WHS for cause in

2001. Mr. and Mrs. I trusted Ms. W as WHS wanted them to and they relied on WHS to properly supervise their accounts. They were unsophisticated investors who had no way of knowing the shares were unsuitable for them or that some of them had been purchased off the books of WHS. WHS could have prevented this whole mess if it had simply fulfilled its supervisory responsibilities and asked Ms. W questions about and reviewed the suitability of the Saga Marine shares when they were first deposited to Mr. I's RRSP account. WHS should now accept its responsibility and compensate Mr. and Mrs. I for their losses.

BACKGROUND

- Mr. and Mrs. I met Ms. W through friends and family in the early 1980s and they were close friends with Ms. W and her husband before investing with her. In 1992, they opened a joint account and an RRSP account[1] for Mr. I with Ms. W at Firm A.

- Ms. W joined WHS in 1996. In 1998, Mr. I transferred his RRSP account to WHS. Although Mr. and Mrs. I continued to deal with Ms. W regarding the investments in the joint account at Firm A, it was never transferred to WHS. However, Ms. W provided Mr. and Mrs. I with "Investor Statements" showing their entire portfolio together, including their Firm A joint account and Mr. I's WHS RRSP account, with WHS cited at the top of the statements. As a result, Mr. and Mrs. I believed that all their investments were with WHS.

- In September 1998, while Ms. W was an advisor with WHS, she recommended that Mr. I invest in Saga Marine, a private placement that offered to pay an annual fixed dividend of 20%. On September 9, 1998, Mr. I bought 150 shares of Saga Marine at $100 per share for a total of $15,000. The shares were deposited in his RRSP account at WHS and appeared on the official account statements (as opposed to the concocted Investor Statements from Ms. W) that WHS provided them.

- On December 9, 1999, Mr. and Mrs. I jointly purchased an additional 300 shares of Saga Marine on Ms. W's recommendation at $100 per share for a total of $30,000. Ms. W did not deposit these shares in a joint account for Mr. and Mrs. I at WHS, but she made it appear that she had in the account statements she generated under the WHS name and provided to Mr. and Mrs. I.

- WHS says it no longer has complete file documents for Mr. and Mrs. I. The only documented Know Your Client (KYC) information WHS was able to provide for Mr. I was a KYC update he signed on August 15, 2000, two years after his RRSP account was opened. It contained the following information:

[1] In 2000, Mr. I's RRSP account was converted to a RRIF account. For the purposes of this report we refer to this account as Mr. I's RRSP account.

Table 1: Mr. I's KYC update for his RRSP account, August 15, 2000

Investment Objectives	Income, Growth, Wealth Accumulation
Risk Tolerance	Moderate
Investment Time Horizon	11-20 years
Total Net Worth	$150,000 - $500,000
Savings and Investment History	The following choices were available; choices 1 and 3 were circled: 1. Bank Accounts, GICs 2. Bonds, Balanced Mutual Funds 3. Blue Chip Stocks, Equity Mutual Fund 4. Small Cap Stocks, Aggressive Funds

- Between September 1999 and August 2001, Saga Marine paid a total of $15,751 in dividends on Mr. and Mrs. I's investments. Of these dividends:

  - $8,345 was reinvested in Mr. I's RRSP/RRIF. The official WHS account statements that WHS sent Mr. and Mrs. I show 29.3425 shares valued at $100/share (for a total value of $2,934.24) were deposited to Mr. I's RRSP account in September 1999. An account balance statement from Saga Marine for Mr. I dated May 2002, shows that an additional $5,410.51 was reinvested in Saga Marine; and

  - $7,406 was paid on the joint investment, of which $4,075 was reinvested in Saga Marine and $3,331 was given to Mr. and Mrs. I in cash.

- Between March and October 2000, Mr. and Mrs. I redeemed 150 of their joint shares and received $15,000. After the redemptions, Mr. and Mrs. I's net capital investment in Saga Marine was $30,000 consisting of $15,000 in Mr. I's WHS RRSP account and $15,000 in jointly-held shares.

- Mr. and Mrs. I say that in November 2000 they followed Ms. W's request to transfer the mutual funds in both their accounts to Firm B. Mr. I's shares of Saga Marine remained in his RRSP account at WHS because Firm B could only hold mutual funds in its accounts. Ms. W's relationship with Firm B is unclear as she remained registered as a mutual fund salesperson with WHS until April 2001.

- Mr. and Mrs. I became concerned about Saga Marine after it stopped paying its regular dividends in August 2001. Mr. and Mrs. I say they contacted WHS and Ms. W. WHS referred them to Ms. W. They say Ms. W said she could not do anything to help and told them to contact Saga Marine directly.

- Saga Marine went bankrupt in 2006 and Mr. and Mrs. I lost their remaining $30,000 investment.

- In 2007, Mr. and Mrs. I sought legal help to recover their losses from WHS.

- WHS terminated Ms. W's employment and mutual fund registration for cause in April 2001. Ms. W was criminally charged in 2002 and was convicted for "theft over $5,000" in 2005 for a pyramid scheme that resulted in large losses to clients of WHS.

COMPLAINT

In a letter to WHS dated August 22, 2007, Mr. and Mrs. I's lawyer said that:

- Saga Marine was too high-risk and not appropriate for Mr. and Mrs. I given their age, limited financial resources and retirement status;

- Ms. W and WHS failed to comply with the Securities Act or compliance policies when they sold Saga Marine to Mr. and Mrs. I as Ms. W provided no offering document or memorandum and no risk disclosure to Mr. and Mrs. I; and

- WHS provided Mr. and Mrs. I with share values for Saga Marine in their monthly account statements when there was no market for these securities. WHS's ascribed a value of $100 per share of Saga Marine gave Mr. and Mrs. I a false sense of security regarding their holdings.

WHS's RESPONSE

In its April 11, 2008 letter to Mr. and Mrs. I, WHS said:

- in September 1998, 150 shares of Saga Marine were transferred into Mr. I's registered account. These were shares of a private company and their assigned value was $15,000. A further 29.3425 shares of Saga Marine were transferred into Mr. I's registered account in September 1999. The assigned value of all the Saga Marine shares as of September 30, 1999 was $17,934;

- Mr. and Mrs. I's additional joint investment of $30,000 in Saga Marine was unknown to WHS;

- in 2000, before WHS terminated her employment and registration, Ms. W directed Mr. and Mrs. I to transfer their accounts from WHS to Firm B; and

- their delay in raising their concerns demonstrates that Mr. and Mrs. I understood WHS was not responsible for their losses, but that it was Ms. W and Firm B who were responsible.

Although WHS believes it has no responsibility for the losses Mr. and Mrs. I suffered, during the course of our review it offered to pay Mr. I $7,500 for half of the loss in his RRSP.

OBSI ANALYSIS

In the course of our investigation, we reviewed all documentation provided by Mr. and Mrs. I and WHS. In addition to interviewing Mr. and Mrs. I regarding the complaint, we spoke with WHS representatives on several occasions. Ms. W is no longer registered to sell securities and she was not available for an interview. We have also considered the applicable industry rules, regulations and practices.

OBSI examined the following key issues in respect of Mr. and Mrs. I's complaint:

1. Was WHS responsible to determine whether the Saga Marine shares were suitable for Mr. and Mrs. I?

2. Were the Saga Marine shares suitable for Mr. and Mrs. I?

3. Were the risks associated with Saga Marine disclosed to Mr. and Mrs. I?

4. Did Mr. and Mrs. I reasonably believe the Saga Marine shares were approved by and purchased through WHS?

5. What were Mr. and Mrs. I's losses on the Saga Marine shares?

6. Who should bear the loss?

Issue 1 – Was WHS responsible to determine whether the Saga Marine shares were suitable for Mr. and Mrs. I?

- WHS says it assumed Mr. I purchased the initial 150 shares before he became a WHS client. However, Mr. I transferred his registered account to WHS in 1998 and this account was open at WHS before he purchased and transferred his shares of Saga Marine in September 1998.

- WHS acknowledges it did not review the suitability of the Saga Marine shares when they were transferred into Mr. I's RRSP account. WHS contends that during that period of time, mutual fund dealers were not required to supervise the suitability of investments transferred in by their clients.

- While the Saga Marine share certificates were "transferred in" to Mr. I's registered account, by their nature, certificates must be issued for private placements and the dealer firm must post or "transfer" the position into the applicable account.

- In any event, we confirmed with the Ontario Securities Commission that at the time Mr. I purchased the shares, mutual fund dealers, such as WHS, were required to determine whether investments purchased or held by their clients were suitable.

- Mr. and Mrs. I, through their lawyer, provided us with copy of a Statement of Claim against WHS, dated January 20, 2000 (shortly after Mr. and Mrs. I made their joint Saga Marine purchase in December 1999), in which other clients of WHS were suing the firm and Ms. W, amongst others. The Statement of Claim alleged they allowed unsuitable investments including Saga Marine, which it characterized as high-risk. Court filings indicate that WHS, through its legal counsel, notified the courts on February 9, 2000, of its intention to defend the claim. Therefore, by February 2000, WHS knew that there may be a suitability issue with respect to its clients' holdings of Saga Marine. However, WHS did not take the opportunity to conduct a suitability assessment and warn its clients about Saga Marine's risks.

Conclusion

Mr. I purchased Saga Marine while he was a WHS client on the recommendation of Ms. W who was a WHS representative at the time. The Ontario Securities Commission confirms WHS was responsible for reviewing his investments for suitability. However, WHS acknowledges it did not do so either in 1998 when the shares were transferred in to Mr. I's RRSP or later, even though it was sued in early 2000 by other clients alleging that Saga Marine was an unsuitable, high-risk investment.

Issue 2 – Were the Saga Marine shares suitable for Mr. and Mrs. I?

- In 1998, Mr. and Mrs. I were both 68 years old and retired. They were both receiving CPP and OAS and Mr. I had taken some part-time work delivering newspapers to help with their income needs. They had a combined annual income of about $45,000, or about $3,750 per month.

- In 1998, Mr. and Mrs. I's monthly mortgage and car payments totalled approximately $1,200, or about 32% of their monthly gross income before tax. They had limited equity in their home and they sold it in 2000. They currently rent a condominium for $800 per month. We understand Mr. I will need to go to a nursing home in the near future, and Mr. and Mrs. I expect they will have to draw on their investments to help to pay for the nursing home costs.

- After selling their house in 2000, their entire net worth was invested in their RRSP and non-registered accounts which were worth less than $250,000.

- Mr. and Mrs. I were in their late 60s, retired and receiving only government pension income. Their only assets were their investments on which they would rely to help meet additional and/or unexpected medical or housing costs.

- The KYC update form Mr. I signed on August 15, 2000, indicates his investment objectives were income, growth, and wealth accumulation and that his risk tolerance was medium. However, Mr. and Mrs. I indicate that they had a low to medium risk tolerance, saying that as they got older they were less able to tolerate declines in their investments.

- Based on Mr. and Mrs. I's personal and financial circumstances we would characterize them as low to medium-risk investors since they would need income from their investments, had limited savings and were not in a position to recover from investment losses.

- We researched Saga Marine and found that it was an extremely small, privately-owned company that built sailboats in St. Catharines, Ontario. It had limited capital, limited holdings and its shares had little liquidity. As a result, we find Saga Marine was a high-risk, speculative investment. In our discussions, WHS agreed that it was a high-risk investment. Therefore, it was not suitable relative to Mr. and Mrs. I's low to medium risk tolerance or the medium risk tolerance indicated on the WHS KYC form.

- In addition, given that Saga Marine was sold without a prospectus, there were restrictions on who could buy its shares. In 1998 and 1999, when Mr. and Mrs. I purchased the shares, the Ontario Securities Act had a "minimum amount" exemption requiring investors to purchase at

least $97,000 of any security issued without a prospectus. This minimum amount exemption was meant as a threshold to identify "sophisticated" investors who could accept and/or assess the potential risks of an investment without a prospectus. Given that Mr. I only invested $15,000 and they jointly purchased only $30,000 in Saga Marine, it was not suitable and Ms. W and WHS should not have allowed the purchases.

Conclusion

WHS agrees the Saga Marine shares were high-risk. Therefore, they were not suitable relative to either the moderate risk tolerance recorded on Mr. I's 2000 KYC form or to the low to moderate risk tolerance that was in keeping with Mr. and Mrs. I's circumstances. In addition, Mr. and Mrs. I purchased $15,000 and $30,000 of Saga Marine shares, failing to meet the $97,000 minimum amount required to purchase a security without a prospectus. For all these reasons we find the Saga Marine shares were unsuitable for Mr. and Mrs. I.

Issue 3 – Were the risks associated with Saga Marine disclosed to Mr. and Mrs. I?

- We reviewed their account statements and confirmed that before Mr. and Mrs. I purchased Saga Marine, their investment experience was limited to GICs and mutual funds and they had no experience with common stocks or private placements.

- In our discussions with Mr. and Mrs. I, we found that while they understand that mutual fund values can go up and down, they could not characterize the risks of the investments they held. They could not describe general investment concepts such as the relationship between risk and return, they had no knowledge about the equity markets and could not describe or compare or contrast the characteristics and risks of common shares or other securities. We find Mr. and Mrs. I have limited investment knowledge.

- Mr. and Mrs. I confirmed that they received an Offering Memorandum, Subscription Form and Information Sheet before their purchases of Saga Marine. We reviewed the documents and none of them give any information about the potential risk of the investment. Rather, the Information Sheet says that an investment in Saga Marine would add "guaranteed earnings to your portfolio" and that unlike "term deposits, this special offering provides maximum earnings and short term commitments with a strong security package." We find the materials suggest Saga Marine would pay guaranteed income and positioned the investment as an alternative to low-risk guaranteed term deposits.

- While Mr. and Mrs. I thought the 20% "interest rate" from Saga Marine was high, they did not equate the rate of return to risk. Rather, they say Ms. W assured them that Saga Marine was a guaranteed investment and they believed it was like a GIC that would provide a regular interest payment. Mr. and Mrs. I had no reason to question Ms. W about the interest rate. They fully relied on and trusted her because she was their friend and had been their financial advisor for many years. Mr. and Mrs. I say they would not have invested $15,000 and later $30,000 in Saga Marine if they believed it was not a secure investment.

- Ms. W has no notes or other evidence of her discussions with Mr. and Mrs. I. We also see no evidence that she told them Saga Marine was a risky investment.

Conclusion

Mr. and Mrs. I had limited investment knowledge, and we accept that they relied on Ms. W's advice and recommendations. Saga Marine's offering materials represented its shares as a risk-free alternative to term deposits and GICs, and we see no evidence that Ms. W described them any differently. Therefore, we conclude that Mr. and Mrs. I did not receive accurate disclosure of the high risk of investing in Saga Marine and since they were not in a position to independently assess its risks, they did not know it was too risky and not suited to their needs.

Issue 4 – Did Mr. and Mrs. I reasonably believe the Saga Marine shares were approved by and purchased through WHS?

- WHS contends that Mr. and Mrs. I knew that the investment in Saga Marine was not made through WHS because Mr. I's share certificates were transferred into his RRSP account and because it did not authorize its agents to sell this investment.

- In our discussion with Mr. and Mrs. I, they said that Ms. W came to their home and they provided her with cheques payable to Saga Marine for the purchases. They said that Ms. W would often visit their home and they had previously given her cheques payable to mutual fund companies. Therefore, Mr. and Mrs. I found the Saga Marine purchase was no different from their other purchases.

- Further, Mr. and Mrs. I say that Ms. W always told them that all of their investments were with WHS. They believed her because the Saga Marine shares appeared on Mr. I's WHS RRSP statement and on the "Investor Statements" from Ms. W created for both the RRSP and joint account. The Investor Statements contained information about both Mr. I's RRSP and their joint investments, including their joint mutual funds (which in fact, were never transferred to WHS) and their joint investment in Saga Marine. The Investor Statements listed WHS at the top of the statement and listed Ms. W as a "representative".

- While Mr. and Mrs. I say they noticed the Investor Statements were different than the WHS RRSP statements, they were not concerned because they also received a number of other statements from mutual fund companies and they just thought the Investor Statement was one of the many different kinds of statements for their investments at WHS.

- Neither the WHS RRSP statements nor the WHS Investor Statements indicated that Saga Marine was any different from the mutual fund holdings. There was no disclaimer on the statements to say that the market value shown may not be a true representation of the share value.

- Both investments in Saga Marine occurred while Ms. W was employed with WHS. We have not seen any evidence that WHS disclosed or otherwise communicated that it and/or Ms. W was restricted to selling only certain types of investments or that Saga Marine or other private placements were not authorized or approved for sale through WHS and/or by Ms. W.

Conclusion

Mr. and Mrs. I bought Saga Marine on Ms. W's recommendation while she was a representative with WHS. Mr. and Mrs. I had no reason to believe that the statements Ms. W provided to them were not authentic, that WHS was not aware of and did not approve their investments in Saga Marine, or that this was not part of Ms. W's regular business as an investment advisor for WHS.

Issue 5 – What were Mr. and Mrs. I's losses on the Saga Marine shares?

- Mr. I invested $15,000 in Saga Marine. Mr. and Mrs. I invested $30,000, withdrew $15,000 and received $3,331 in cash dividends on their joint investment. Saga Marine went bankrupt in 2006. Mr. and Mrs. I lost their remaining capital investment.

- Since Mr. and Mrs. I believed they were investing their money in secure, GIC-like investments, we calculated what they would have earned had they invested in laddered one, three and five-year GICs. Accounting for the timing of their purchases, withdrawals and cash dividend, and assuming annually compounded interest and reinvestment of one and three-year GICs into five-year GICs at maturity, we found that at the time of their complaint on August 27, 2007:

    - Mr. I's $15,000 would have been worth $21,107 in his RRSP; and

    - Mr and Mrs. I's $11,669 net joint investment ($30,000 - $15,000 withdrawal - $3,331 cash dividends) would have been worth $17,429.

Therefore, we calculate that Mr. and Mrs. I lost a total of $38,536 ($21,107 + $17,429).

Issue 6 – Who should bear the loss?

Lack of Supervision

- WHS had several opportunities to prevent Mr. and Mrs. I from incurring losses on the Saga Marine shares. If WHS had taken the appropriate steps, Mr. and Mrs. I would not have incurred the losses they did.

- As discussed in Issue 1, WHS Stuart was responsible to determine the suitability of the Saga Marine shares. The first shares were purchased and deposited in Mr. I's RRSP account in September 1998. The joint purchase was in December 1999. WHS failed for approximately eight years, between 1998 and 2006, to warn or advise Mr. and Mrs. I that Saga Marine was not a guaranteed investment, but instead a high-risk, speculative risk investment, in which they could lose all their capital. WHS could have done this by directly contacting Mr. and Mrs. I or by requiring Ms. W to contact them. If WHS had informed Mr. and Mrs. I about the risk of investing in Saga Marine, in 1998, it is likely they could have sold Mr. I's shares without any loss, particularly since they were able to redeem their joint shares at full value as late as October 2000. Moreover, if Mr. and Mrs. I had been advised in a timely manner as to the true nature of Saga Marine, they would not have purchased the additional 300 shares of Saga Marine in December 1999.

- WHS argues that Mr. and Mrs. I, and other clients of Ms. W, trusted her so much that even if it had warned Mr. I about the risks associated with Saga Marine, he would not have sold the initial shares and Mr. and Mrs. I would still have purchased the additional shares in December 1999. In our opinion, that would have been unlikely given Mr. and Mrs. I's risk tolerance and their desire to purchase risk-free investments with the money that was invested in Saga Marine.

- Additionally, by February 2000, WHS had a further opportunity to review Saga Marine when it received the Statement of Claim from another client who indicated that Ms. W's recommendation to purchase Saga Marine was unsuitable due to its high risk nature. Even if WHS had not initially undertaken any review of Saga Marine, at this point it had been notified of Saga Marine's nature and could have easily confirmed that it was a high-risk speculative security. As of February 2000, WHS should have informed Mr. and Mrs. I that Saga Marine was not suitable, yet it did nothing. In our view, by remaining silent about a security that it knew or should have known was unsuitable, WHS neglected its supervisory duties and suitability review responsibilities.

Vicarious Liability

- The law is clear that investment firms are vicariously liable for the actions of their investment advisors in regard to securities-related business. As Mr. Justice D.J. Gordon said in *Blackburn v. Midland Walwyn Capital Inc.* (2003) 32 BLR (3d) 11 (SCJ) affirmed [2005] OJ no 678 (CA) [Blackburn] at para 191 regarding vicarious liability: "…a firm is absolutely responsible for the conduct of its stockbroker."

- In this case, Ms. W recommended unsuitable investments to Mr. and Mrs. I, on which they incurred losses. As Ms. W's mutual fund dealer, WHS is vicariously liable for their losses.

- WHS argues that it should not be held responsible for the losses on Mr. and Mrs. I's 300 joint shares because it was unaware of the purchase until Mr. and Mrs. I complained. The Supreme Court of Canada decision in *Bazley v Curry*[2] is the leading case in Canada concerning vicarious liability for actions that may be outside an agent's literal scope of employment, but that nevertheless are sufficiently connected to the employer's operations as to justify the imposition of vicarious liability. In *Bazley*, McLachlin J. (as she then was) said we should "openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'."[3] She went on to say that the "fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and that wrong accrues therefrom, even if unrelated to the employers' desires….Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer."[4]

[2] [1999] 2 SCR 534 [*Bazley*].
[3] *Ibid* at para 41.
[4] *Ibid*.

- Given that Ms. W was selling securities to Mr. and Mrs. I, there was, as McLachlin J. said in *Bazley*, "a significant connection between the creation of the risk" (registering Ms. W and employing her to sell securities) "and the wrong that accrued from it" (selling unsuitable investments off the books of WHS). Therefore, WHS should be held vicariously liable for Mr. and Mrs. I losses with respect to both the Saga Marine shares in Mr. I's RRSP and their jointly-held shares.

Client Responsibility

- WHS contends that Mr. and Mrs. I delayed raising their concerns with the firm because they knew they did not purchase Saga Marine through WHS.

- As discussed above, Mr. and Mrs. I reasonably believed that both their investments of $15,000 and $30,000 in Saga Marine were approved by and purchased through WHS.

- Mr. and Mrs. I say that in late 2001 and 2002, they had concerns regarding Saga Marine, because it had not paid its regular dividends since August 2001. In our discussions, Mrs. I said that she spoke to someone at WHS in 2001 or 2002 about her concerns regarding Saga Marine, but was told that WHS could not assist her and that she should speak to Ms. W directly. Mrs. I could not provide an exact date of the conversation or the name of the person she spoke to. WHS says it has no record of this call. Nevertheless, Mrs. I says they contacted Ms. W as instructed and she told them to contact Saga Marine directly.

- Based on Ms. W's advice, Mr. and Mrs. I wrote to Saga Marine in May 2002. In July 2002, Saga Marine responded stating that it was not able to pay dividends because of the economic downturn that followed the terrorist attacks on September 11, 2001. The letter said that Saga Marine was hoping to raise additional capital that would allow it to continue to go forward and pay its regular dividends in the future.

- Mr. and Mrs. I received a number of letters from Saga Marine in 2003 and 2004 reiterating much of the information found in Saga Marine's July 2002 letter. In May 2005, Mr. and Mrs. I received a letter from Saga Marine saying the company may be forced to file for bankruptcy, but it was working on a restructuring plan to avoid doing so. However, Saga Marine filed for bankruptcy in 2006. Thereafter, Mr. and Mrs. I realized there was no possibility of recovering their investment.

- Mr. and Mrs. I told us that after their initial attempt to raise their concerns with WHS in 2001 and 2002, they understood that most of Ms. W's former clients had hired legal counsel to pursue their claims through WHS and had to spend in the realm of $20,000 for legal costs. Mr. and Mrs. I say they could not afford the legal costs, so they chose to continue to pursue their concerns with Saga Marine in the hopes that it would return their money. In 2007, after Saga Marine declared bankruptcy, Mr. and Mrs. I hired a lawyer to help with their claim. Given the potential costs, the lawyer referred Mr. and Mrs. I to OBSI. Mr. and Mrs. I had not previously been advised by WHS that they could bring their concerns to OBSI.

- We accept Mr. and Mrs. I's explanation of why they waited to formally complain to WHS because:

    - they first contacted WHS and Ms. W about their concerns in 2001 and 2002 and were directed to Saga Marine. Given that Ms. W was their representative at WHS, this constitutes contacting WHS. We fail to see how they would contact WHS any differently;

    - they were given the impression by Saga Marine that they had a chance to get their money back and did not know until 2006 that there was no possibility of recovery of their investment;

    - given their financial situation they had concerns about the cost of seeking legal counsel to recover their losses; and

    - they were not aware that they could pursue the complaint through non-legal channels until their lawyer referred them to OBSI in 2008.

- Mr. and Mrs. I were not aware that Saga Marine was high-risk and unsuitable, they believed they made both of their investments through WHS as part of their regular business and they raised their concerns and attempted to resolve them with WHS, and subsequently Saga Marine, in a reasonable and timely manner. In all of the circumstances, we see no basis to apportion any responsibility to Mr. and Mrs. I for their losses.

RECOMMENDATION

In our view, Mr. and Mrs. I reasonably believed that all their investments in Saga Marine were part of their regular business with WHS. For its part, WHS failed to warn Mr. and Mrs. I that Saga Marine was a high-risk investment causing them to miss the opportunity to redeem their shares at no loss and to avoid making the second investment.

For the reasons outlined above, we recommend that WHS compensate Mr. and Mrs. I $38,536 and $2,530[5] in interest, for a total of $41,066.

[5]Interest is calculated using the average 3-month Canadian Treasury Bill yield of 1.25% (as calculated by the Bank of Canada) compounded annually from August 22, 2007 to the date OBSI's report is final.