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## The Recruiting Wars Turn Nasty

By [Helen Kearney](#)

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Since the Protocol for Broker Recruiting was established in 2004, the practice of firms routinely suing each other when their advisors defected has largely faded away.

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However, some highly publicized cases over the past few weeks have advisors and their attorneys questioning whether the bad old days of claims and counterclaims - with clients stuck in the middle - are set to return.

The protocol permits advisors switching from one firm to another to take basic client contact information with them. This includes names, addresses and phone numbers, for example, but not account numbers or positions. It essentially allows advisors switching firms to contact their clients once they leave their prior firm to see if they also want to switch their accounts.

The protocol currently has over 400 signatories, according to Thomas B. Lewis, a partner-in-charge of the employee litigation group at Stark & Stark. But, he said, only around 30 of those are national firms, with the remainder made up of small firms with only a few advisors.

In particular, the "boutique" firms have been reluctant to sign the agreement, and appear to be paying the consequences. Last week, Goldman Sachs [\[GS\]](#) filed a claim against five former advisors and two employees who jumped to rival Credit Suisse [\[CS\]](#), accusing them of taking confidential information with them.

The firms quickly came to a settlement, but not before suffering through some unwanted [publicity](#).

Neither Goldman Sachs nor Credit Suisse is a signatory to the protocol, according to Lewis, and Goldman Sachs, in particular, takes the attitude that the clients belong to the firm, not the advisor, and therefore should not move if an advisor defects.

In addition, Goldman Sachs does not poach many advisors from other firms, Lewis said, and so they don't feel they need the protection of the protocol. Instead, the firm generally hires graduates from the top business schools.

"It breeds from within and elevates from within," he said.

Indeed, the lawsuit filed against the defecting advisors hints at Goldman's attitude. In the firm's non-solicitation agreements it said that advisors may develop business with people they knew before they joined Goldman Sachs, but "in developing such business, you will be acting as a representative of Goldman Sachs and will be utilizing and benefiting from Goldman Sachs' goodwill, reputation, name recognition and other assets and resources."

Therefore, these clients, except direct relatives, are also subject to the non-solicitation clause.

However, while the high-end boutiques may deliberately avoid signing the protocol to be able to enforce their own non-compete clauses, Wachovia Securities, which is now Wells Fargo Advisors, [\[WFC\]](#) is taking advantage of one regional firm's delay in jumping on the protocol bandwagon.

Wachovia has aggressively [pursued](#) former advisors who jumped to Stifel Nicolaus following Wachovia's takeover of AG Edwards in October 2007. At the time of the acquisition, Stifel was not a signatory to the protocol,

but it signed up in August 2008.

Wachovia brought some claims before Stifel signed the protocol and others afterwards, but so far, Wachovia has not been successful in most of its claims. Still, a number of arbitrations remain pending.

However, it's not just non-signatory firms that are facing these actions. Last week, Morgan Stanley [MS] brought a case against HighTower advisors Steven Ayer, Roman Ciosek, John Lang, Peter Lang and Jeffrey Sullivan, accusing them of breaching the Protocol when they moved from Morgan Stanley.

On Monday, a New York Supreme Court judge denied Morgan Stanley's request for a temporary restraining order against the advisors.

Elliott Weissbluth, the chief executive officer of HighTower, vigorously denied the claims and said they are remnant of the pre-protocol era when firms launched these suits to intimidate advisors trying to switch firms and prevent their clients from following them.

Weissbluth said that his firm is committed to following the protocol.

"We respect the integrity of the Protocol because it's a contract among market participants, and everyone needs to respect it to make it work," he said.

Alan Foxman, a securities attorney at Boca Raton, Fla.-based Fred Chikovsky & Associates, said he would be surprised if there was a sustained increase in claims at the moment, given all of the movement among brokers over the past year.

"I can't imagine we'll return to the days when the same pattern was repeated over and over again," he said. "They used to spend money, time and effort and aggravate their clients."

Foxman suggested that Morgan Stanley may have decided to take action against the advisors who went to HighTower because that firm is unlikely to be a focus of their own recruiting efforts. "There's less concern that they'll end up on the receiving end of an injunction next week," he said.