April 10, 2008

Comment concerning Proposed Rule SR-FINRA-2007-021: Motions to Dismiss

This firm, and I, generally represent significantly more time representing claimants than respondents in arbitrations. Notwithstanding this, I have significant negative reservations concerning this proposed rule.

I am also a frequent FINRA arbitrator. In that capacity, my experience is that there are many more claims filed with totally insufficient facts supplied in the claims than there are frivolous dispositive motions filed. And indeed I believe that there are a significant number of attorneys for claimants who file claims which are, by intention, devoid of the detail necessary for the respondent(s) to develop a defense. A good example was a recent claim I saw which simply stated that in the course of making recommendations over a period time the registered representative recommended unsuitable investments, without disclosing what those investments were, whether the unsuitability was with the particular securities, or in lack of diversification, or some other aspects of inappropriateness. I believe that both the respondents and the arbitrators have the right, and the need, to know more than this well prior to the hearing. A motion to dismiss in such case would not be frivolous.

Another motion which would be appropriate, if it was allowed, would be a motion to require the claimant to be more specific in his claim. But the rules do not indicate whether such motions are allowed, and this proposed rule may be read as implying that such motions are not allowed. I say this because the end objective of a motion for more specific statement would be to have the case dismissed if the claimant refused to provide the necessary detail, perhaps by ignoring the order of the arbitrators to provide it. It is possible that some arbitrators may consider this a motion to dismiss (if, say, the movant adverted to his desire that the claim be dismissed if eventually the necessary detail is not provided.)

If the proposed rule made it clear that respondents (or claimants in the event of counterclaims) could make motions necessary to require such specific information, and that such motions would not be considered as "motions to dismiss", or would not otherwise be subject to the stringent discouraging penalties imposed on dispositive motions, and made it clear that such "non-dispositive" motions could lead to dismissal in the event the resulting orders of the arbitrators were ignored, the problem I see with the proposed rule could be reduced. But without some meaningful threat or pressure on claimants to provide the detail necessary to allow the respondents and the arbitrators to understand the claimants' cases before the hearing, claimants counsel will increasingly file claims with insufficient information. Indeed, the strategic advantage to be

obtained by a claimant from giving insufficient facts in the claim arguably will require claimants' counsel to so structure their claims, or be guilty of malpractice.

It may be argued that, in small cases in which claimants typically appear pro se, such claimants are unable to respond to motions to dismiss, and need the protection of the proposed rule. But such objection is insufficient to allow claimants' abuses of the sufficient pleading standards of fairness to continue and even increase, which will happen with the proposed rule. Perhaps the proposed rule could be applied only to prohibit dispositive motions in the smaller cases, say, claims of under $50,000, in which typically the claimant is not represented by counsel.

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