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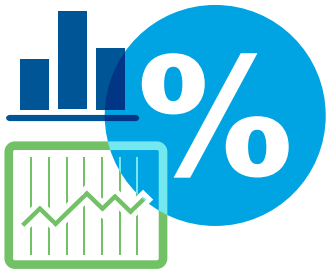

Financial Services Employment Arbitration Q&A

Staying in Court on an Arbitrable Claim: Against FINRA Rules?

By: Robert S. Whitman

The scenario is not uncommon: a Registered Representative sues a FINRA Member Firm in court, asserting claims arising out of his employment and well within the scope of his U-4 obligation to arbitrate. Under longstanding case law, the Member Firm has grounds to bring a motion to compel arbitration that will almost certainly be granted.

But what if the Member Firm would rather stay in court? Let's say the complaint asserts claims that would be vulnerable to a motion to dismiss on the merits. This would enable the Firm to (hopefully) get rid of the case early, without the expense of discovery and hearings. In a FINRA arbitration, where pre-hearing dispositive motions are largely disallowed, the case will have to go nearly "all the way" before dismissal is an option.

Is the Member Firm violating any obligation under FINRA's rules if it decides to stay in court rather than invoke the U-4 and compel arbitration?

Ostensibly, FINRA disapproves of this practice. In section 13000 of its Interpretive Material (kind of a preface to its Code of Arbitration Procedure), it states:

> It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to:
>
> (a) fail to submit a dispute for arbitration under the Code as required by the Code.

In the scenario described above, if the parties litigate the claims in court, then both could arguably be "fail[ing] to submit a dispute for arbitration under the Code as required by the Code" and therefore acting in a manner "inconsistent with just and equitable principles of trade."

But Rule 2010, referred to in this passage and styled "Standards of Commercial Honor and Principles of Trade," states only that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." The passage also references two Notices to Members, but neither speaks to this issue.

In other parts of the Code, FINRA does draw clear distinctions between claims that may – or must – be brought in arbitration rather than court. Rule 13803, for example, provides a detailed procedure for the coordinated handling of statutory employment discrimination claims (which may but need not be arbitrated) with other "related arbitration claims" (i.e., common law or non-discrimination statutory claims). And Rule 13209 states, "During an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration."

Other than the language of the Interpretive Material quote above, there doesn't appear to be any prohibition against a Member Firm choosing, for its own strategic reasons, to remain in court if the case is filed there initially. We are also not aware of any situation where FINRA has taken enforcement action against a Firm, or made an inquiry, under these circumstances. (If you are aware, please let us know by email.)

This is not to suggest, of course, that FINRA couldn't or wouldn't look askance at a firm's decision to remain in court. And firms ought to be careful not to waive arbitration so freely and repeatedly as to call into question the enforceability of the arbitration requirement itself. But on balance, the decision whether to remain in court should and likely will continue to be based on strategic considerations in the particular case rather than concerns about regulatory compliance.

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