



FINRA Stats, 9/19: Big Surge in August Filings Ebbs; Return To Calm Seas

Remember in August, case filings suddenly shot up to 501 for the month, from an average of about 300 during the first seven months? That surge ended quickly, as new submissions for September totaled 294 and customer-related case filings dropped to 171 for the month of September from 368 the month before.

In our coverage of the August statistical report (SAA 2019-38), we attributed the big August spurt to the Puerto Rico bond price collapse that dates back to the summer months of 2013 and a rush to beat the six-year eligibility deadline. At the October 22-26 PIABA Annual Conference in Austin, TX, FINRA-DR officials confirmed during presentations that the spurt was attributable to the Puerto Rico cases and to a perceived eligibility event. With nine months of the year passed, FINRA-DR is now reporting 2,886 new cases filed, as compared to 3,282 at this juncture last year, a 12% decline from 2018. Customer claims are down 9% (1,859 vs. 2,087) and intra-industry claims are off 14% (1,027 vs. 1,195).

Closed/Open Cases and Turnaround Times

We also heard confirmation at the PIABA Conference that the Puerto Rico cases are settling at a rate that hits the high 90s. We know, too, that these cases, due to arbitrator resources and other logistics, take much longer than the usual FINRA customer claim to reach hearing readiness. That means that the relatively few Puerto Rico cases that are heard will have a negative impact on FINRA average turnaround time (ATT) for Hearing Decisions, but the greatest impact is likely on the Overall ATT, as that measurement includes the many Puerto Rico-related settlements. Thus, despite the fact that closed cases number more through the

first nine months of 2019 than same-period 2018 (2,987 vs. 2,791) and despite the gradual decline in Open Cases that is underway (4,982 in 1/19 vs. 4,958 in 9/19), Overall ATT has moved back up to 14.1 months (vs. 12.9 in 1/19) and Hearing Decision ATT has returned to 17 months (17.4 mos.) from 16.0 last year at this time and 16.5 at the start of 2019.

Controversies & Products

Of the 1,859 customer claims filed in 2019 to date, as many as 1,618 claim Breach of Fiduciary Duty, 1,442 assert Negligence, and 1,368 charge Failure to Supervise. Yet, among the 15 top Controversy Types in FINRA-DR's September Report, the only Controversies that stand higher in number than they did last year are Manipulation (287 vs. 213), Errors-Charges (71 v. 62) and Margin Calls (69 vs. 65). Thus, the claims on the customer side do not appear to be altering much from the norm. Similarly, on the "Security Type" chart, Municipal Bond Funds, Municipal Bonds, and Mutual Funds dominate, but are down 15-20% from same-period last year. Government Securities, REITs, Options, Private Equities, and Variable Annuities/Annuities stand higher in number — and certainly percentage-wise — than last year's comparative figures, reflecting (except for Options (but, think covered calls)) the thirst for yield that surely plays a role in these claims. Where are the "Common Stock" cases? Fifth on the list and down 27% from the nine-month period in 2018.

How are Customers Faring?

With only 13% of the closed customer-claimant cases decided by arbitrators, Awards have been seemingly relegated to a minor role, although settlements and other resolutions short of hearing are affected by the panels that parties select, the time to hearing, and perceptions relating to win rates and recovery rates. Customers who do seek an arbitral decision are actually doing quite well in 2019, relative to past years. The overall win rate of 47%, according to FINRA break-out charts on customer-claimant Awards, is the best for customers in six years. Similarly, those who brave hearing win 46% of the time — again, the highest in six years; even the "Paper-Only" cases are on a tear, so to speak, with a 2019 win rate of 49%. That's a big leap from the mid-to-low 30s that characterize most prior, recent years. The stand-out win rate, of course, is the three-person Public Panel Awards that have

consistently been in the mid-50s (now 55%) for the whole of 2019. With 107 such cases decided so far this year, this rate merits credit; with a rate this high, one wonders why so many cases are settling?

(ed: We had expected that FINRA's aggressive arbitrator recruiting efforts would have pushed the Neutral Roster ranks over the 8,000-mark by now. In July, FINRA was reporting a total of 7,952 neutrals onboard (4,273 NPAs & 3,679 PAs). The roster total has been dropping the last two months. In September, the overall figure dropped to 7,888. Public Arbitrator numbers continue to grow (3,722), but Non-Public Arbitrators now tally only 4,116.) (SAC Ref. No. 2019-41-01)

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FINRA Stats, 7/19: Customer Claims on a Slow Rise from Earlier Months of 2019

Here's the difference we're seeing: back in January of this year, FINRA's Office of Dispute Resolution reported in its monthly statistical disclosures that 336 cases had been filed, 176 (52%) of which were customer-related and 160 (48%) of which were intra-industry matters.

In FINRA-DR's [latest monthly report](#), with 2,091 cases filed in the first seven months, the distribution of cases is 63% customer and 37% intra-industry.

Take that further and look at just the month of July, when 292 cases were submitted in this latest month, and we see that 71% of the new cases (208) are customer-related. Other than that, the number of new cases is *remarkably* close to average, relative to the initial seven months. Relative to last year at this time, when 2,579 cases had been filed, or a monthly average of 368, the current case inflow is *remarkable*, only in that it's down 19% YOY. Breaking that down into the two dispute categories, we note that customer cases are down 18% YOY and intra-industry cases are down a bit more, 21%. So, we see some strength in the customer numbers.

Cases Closed, Open, and Measured

FINRA-DR is closing cases at an accelerated rate, up 9% (2,365 vs. 2,170) from last year at this time. This is the first year in a long time when the closed-case number has been significantly higher than the new case filing number; that's likely because 2018 recorded the highest number of new case submissions since 2011. That surge pushed the "Open Case" or pending docket figures up 10% or more, so there were more cases in progress and, thus, more cases have been concluding. We'll be "talking more" about the new Special Proceeding Rule further in this Alert — here, we note that FINRA has added a new column to the Report that isolates the Special Proceedings cases from all others for purposes of measuring average turnaround time (ATT). That set of closed cases (still a handful of cases) is recording a 6.2 month ATT. Compared to the ATT for "Paper" close-outs, which is reflecting a historically quick ATT of 5.9 months (2018-6.7 mos.; 2017-6.7 mos.), the average Special Proceeding case might take a bit longer to process.

Win Rates for Customers

We've noted in recent analyses of FINRA-DR statistical reports that FINRA has broken out the win rates for customers in a number of ways, so that viewers can see the different results for the different routes taken. Special Proceedings have been added to this group of

charts, so we can see that, on the customer side, claimants have completed only four Special Proceeding cases. In none of those matters has the customer prevailed — disappointing for the Clinics and other investor advocates who have hope for this new procedure — but still a very small sample. In the “paper” cases that follow the Simplified route, customer-claimants are experiencing a banner year, with wins for the customer up to 50% from the low to mid-30s rates recorded in recent years.

Overall, customer-claimants are still only entrusting their disputes to arbitrators 14% of the time, but they are experiencing a relatively high 46% “win” rate. FINRA breaks out customer disputes on the high end as well, where three-person panels and much larger sums are the norm. There, a real anomaly continues to form — whereas, in last year’s tally, customers utilizing Majority Public Panels were winning monetary damages in 47% of the decided cases, this year, that percentage is a dismal 29% (10/34 cases). MPPs delivered a higher win rate for customers in 2018 than did APPs (All-Public Panels), which awarded monetary damages to customers in only 42% of the cases decided; this year, APPs have moved into high gear so far this year, ruling in the customer’s favor 57% (50/88) of the time!

(ed: FINRA’s recruiting efforts in 2019 have added to neutral roster growth virtually every month. The total continues to hover just below 8,000 (7,952), with 3,679 Public Arbitrators on board and 4,273 Non-Public Arbitrators.) (SAC Ref. 2019-33-01)

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FINRA Stats, 6/19: First Half Results Steady; ODR Adds New Feature to its Monthly Report

At the half-year mark, FINRA's Office of Dispute Resolution is on track to receive about 3,600 case filings for 2019. With 1,799 new case submissions through June, the forum is running 21% behind the pace for 2018, while the composition of the cases (customer/intra-industry) remains proportionally about the same.

In the month of June alone, 314 new case filings were received, according to FINRA's latest online [statistical report](#), which remains within a close grouping of monthly inflows that are averaging about 300 per month for the year-to-date. As we have noted before, the annualized 3,600 would place this year's case volume squarely in the middle of the results for the past six years, excepting 2018 (3,600E vs. 4,325). Were case close-outs to continue at the rate achieved through June, the annualized 4,100 would be the highest result since 2013, when 3,714 cases were filed and 4,498 cases were closed. The FINRA staff are currently administering 4,813 cases, only a 1% difference with cases-in-process in June 2018 (4,849).

Special Proceedings Highlighted

Small claims were the original focus of SICA, when it began its role in the 1970s and the affordability (speed, efficiency, finality) of redress for small investors properly remains a FINRA priority. The [Special Proceedings rule](#) that took effect in September 2018 provides the option for an "abbreviated telephonic" hearing that has captured interest. FINRA changed its reporting format in the June Report to display separate statistics for the Special Proceeding cases, relative to average turnaround times, manner of resolution, and the

result. Over time, as more cases are decided using this hybrid option, these statistics will gain greater meaning. So far, five cases have been closed after using the Special Proceeding option.

Customer Cases by Controversy & Product

FINRA reports on the nature of the newly filed claims by classifying them by the top 15 types of controversy. Breach of fiduciary duty leads the way and its prominence can only be further solidified in future disputes by the SEC new Reg BI and state initiatives to tie brokers to a more defined fiduciary standard. Among those categories that have increased in prominence, relative to prior years, the only items with more cases than last year (remember, there's a 21% gap) are some minor categories, like "Manipulation" (166 v. 128) and "Margin Calls" (50 v. 38). The security types involved in the filed disputes are similarly categorized; investment instruments with more claims than YOY 2018 include "Options" (118 v. 103) — these derivative instruments are often tied to investment strategies, like naked puts, writing options, and others, that arise from a search for greater yield. In the same vein, "REITs," "Private Equities" and "Variable Annuities" stand out from the rest of the pack — REITS especially, VAs not so much.

Arbitrators & Hearing Locations

Last year at this time, FINRA-ODR boasted 7,527 arbitrators on its Neutral Roster. As of June 30, 2019, FINRA had added a net of 361 arbitrators, bringing the total to 7,888 — and more than two-thirds of the new additions are Public Arbitrators. New arbitrators have to become Chair-qualified, so we anticipated less progress in those ranks. We checked both the Local Chairs by Hearing Location and the Non-Local Chairs. Comparing the number of Local Chairs in July 2018 to the number in June 2019, we counted 27 Hearing Locations in which the numbers actually decreased over the 11-month period. Only 12 locations rose in number (the rest were the same). Non-Local Chair numbers were either the same or down from July 2018; only location rose in number. This latter trend bespeaks a move by FINRA to de-emphasize a program that is both unpopular with many and not particularly needed, given the slowing of new cases.

*(ed: *We also compared the number of pending cases by Hearing Location from July to June and found that 44 of the locations were down from last year, while only 23 displayed an increase (the rest were the same in number). **FINRA has made tremendous strides in upping the number of ready arbitrators and increasing diversity. That FINRA is losing Chairpersons, especially Local Chairs, invites treatment; it may be a matter of attrition, nothing more and, with claims down, FINRA has time to deal with that issue.) (SAC Ref. No. 2019-28-01)*

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Award Survey: 2001-18 Clearing Broker-Dealer Liability

Broker-dealers who engage with customers as “introducing broker-dealers” don’t perform the “back office” tasks needed to clear and settle transactions. Rather, they rely on specialized clearing broker-dealers to perform those functions for the introducing BDs, relying on information provided by the latter.

Traditionally, clearing firms have enjoyed a low liability rate, when sued by customers of the

introducing BDs, in part, because they generally have no direct communications with the customer and because they rely on information provided by the introducing BD. In this survey, we investigate if the clearing broker-dealer (“CBD”) liability rate has changed since 2001 in claims made against them, compared with the rates for non-CBD respondents in the same set of Awards and compared with the customer win rate in Customer-Member Awards generally.

Methodology

This survey covers the calendar years 2001 through 2018, broken out into three-year periods. We provide the same set of statistics for each period and for the entire period. We limit our universe to Customer-Member Awards (those brought by customers against brokerages, excluding Small Claims cases, which currently are limited to a maximum \$50,000 damage request). We also exclude stipulated Awards, those issued by consent after all of the parties settle. Our focus is on Awards issued in cases brought against CBDs (which we will call “Claims v. CBD Awards” for short). We determine the total number of such Awards, the number of those in which CBDs were held liable, and the liability rate for CBDs, expressed as the percentage of Claims vs. CBD Awards in which the CBDs were held liable (which we will call “Successful Claims v. CBD Awards”). By way of comparison, we likewise determine the number of claims v. CBD Awards in which CBDs were not liable but non-CBD respondents were, together with the liability rate in those cases. Finally, as a further comparison, we determine the win rate in non-stipulated Customer-Member Awards regardless of whether they were brought against CBDs or not. We present our findings in the Chart below:

LIABILITY OF CLEARING BROKER-DEALERS (CBDs) TO CUSTOMERS IN NON-STIPULATED CUSTOMER-MEMBER AWARDS				
Non-Stipulated Customer-Member Awards with Claims Against CBDs				All Non-Stipulated Customer-Member Awards
Years	Claims vs. CBDs	Successful Claims vs. CBDs (Liability Rate in %)	Successful Claims vs. Only Non- CBDs (Liability Rate in %)	Wins/All Non- Stipulated Customer- Member Awards (Win Rate in %)
2001-03	74	14 (19%)	31 (42%)	1955/3752 (52%)
2004-06	84	15 (18%)	35 (42%)	1804/3898 (46%)
2007-09	42	6 (14%)	16 (38%)	576/1448 (40%)
2010-12	55	7 (13%)	18 (33%)	757/1539 (49%)
2013-15	22	1 (5%)	12 (55%)	392/884 (44%)
2016-18	27	5 (23%)	3 (11%)	313/736 (43%)
Total	313	51 (16%)	115 (37%)	5797/12,257 (47%)

How Often Are

Clearing Firms Sued?

Before addressing liability rates, it is worth pointing out that, when viewed against the entire set of Customer-Member Awards in the survey period, the incidence of Claims v. CBD Awards is very small (313/12,257). The numbers have also declined over the years and in three distinct six-year phases: the figures for 2007-12 were almost half those of 2001-06, but twice those in 2013-18. These numbers do not actually reflect a decline in the likelihood of CBDs facing off with disappointed customers in arbitration. Rather, they track a declining trend in Customer-Member cases overall that occurred in the same six-year increments (7,650; 2,987; 1,620). In fact, the drop-off in the latter was even sharper between 2001-06 and 2007-12, falling by about 60%, and the later drop-off between 2007-12 and 2013-18 was comparable to Claims vs. CBD Awards.

Clearing Firm Liability

CBD liability is significantly more stable, although we do discern a slight decline in liability rates between 2001-06 and 2007-12. The liability rate fluctuates erratically between 2013-15 and 2016-18, but we interpret this as statistical “noise” due to the relatively small

sample in those final two periods. The liability figure for 2013-18 is actually 12% (6/49), comparable to the two preceding periods in the Chart. Claims vs. CBD Awards in which only non-CBD respondents paid damages saw an equally moderate drop in liability rates from 2007-09 to 2010-12, and a fluctuation in the next two periods — similar to the one we saw in the number of Claims vs. CBD Awards — but which, when combined, produced a more moderate liability rate of 31% (15/49), comparable to 2010-12's figure. Generally speaking, only 16% of customers in Claims vs. CBD Awards win damages against CBDs, while non-CBD respondents in those same cases are tagged with liability 37% of the time, *even when* the CBD respondent is not. Overall, CBD respondents are shielded from liability, at 16%, far more than the “average” respondent in all Customer-Member Awards, who, for the length of the full survey period, incurred liability 47% of the time.

*(ed: *Our survey counts all non-stipulated Customer-Member Awards in which CBDs were named, even when the CBD settled out. In this way, we hope, we maintained an “apples to apples” comparison of the liability rates for CBDs with those in which only non-CBD respondents were held liable, since some of those also settled out. However, as a result of this choice, the customer win rates for CBD Awards is usually (but not always) greater than those for Customer-Member Awards in general. **SAC h/t to Harry A. Jacobowitz, a research lawyer of thirty years and SAC's former Award Database manager. Mr. Jacobowitz now serves in a consulting capacity to SAC and is available to perform customized Award searches — such as the one performed for this article — for SAC subscribers and others. He can be reached at harryjacobowitz@optimum.net or by calling SAC.) (SAC Ref. No. 2019-27-02)*

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The Neutral Corner 2-2019: FINRA-ODR Updates Arbitrators and Mediators on the Authority's Latest Activities

[The Neutral Corner](#), the FINRA Office of Dispute Resolution's newsletter for neutrals serving its dispute resolution forum, issues now on a quarterly basis; while the newsletter usually has a feature article, the latest edition is filled with short squibs on a variety of interesting topics. After covering the latest [case filing statistics](#) (down 22% YOY through May 2019), *TNC* approaches the Portal, FINRA-ODR's Web-based claim filing and processing system, from several angles (changes, registration and video assistance). Staff announce that the replacement of the IPHC Order, converting the form from a PDF to a fully integrated Portal document, has graduated to the next step: removal of the PDF from the Portal, absent a specific arbitrator request to use the old format. General dismissal and postponement orders can also be completed and submitted through the Portal.

Events, Rules & Recent Decisions

Next up, the staff previews the September 10, 2019 PLI-sponsored "[Securities Arbitration 2019](#)," which typically features a team of staff members from FINRA-ODR. This program "will provide practical tips for litigating and arbitrating elder abuse claims and strategies for knowing when and which claims are ripe for mediation." Ethical issues, diversity efforts, and future trends will fill the schedule. FINRA neutrals will receive a 25% discount over the modest \$1,850 registration fee. FINRA will, of course, report, as it does in *TNC*, on recent rule approvals. Amendments to Rules 12512/13513 ([RN 19-20](#), eff. 7/1/19) will assist third-parties who wish to oppose subpoenas or other arbitral orders (on the topic of third-party subpoenas, see the recent decision in [Next Level Planning v. Prudential Ins. Co.](#)).

Mediation in the Limelight

FINRA-ODR achieved a fantastic 89% success rate on the mediation front in the first five months of this year. New cases in agreement rose 6% during the YOY period. In the small claims area, in particular, where telephonic mediations have proven popular, FINRA has been running a 90% settlement rate. FINRA doesn't provide figures on how often this process is used, but its virtues extend beyond facilitating resolutions. FINRA indicates that the program serves mediator training objectives and aids seniors in particular. Mediator disclosures inform parties of frequency of service, success rates, and the types of cases mediated. Mediators are encouraged to keep their reports current and to provide references — an oft-requested item. The affirmation date is automatically updated when an arbitrator submits the Arbitrator Oath

Reminders, Advice & Counseling

Back to the Portal, FINRA-OacDR reminds arbitrators that they should regularly update their disclosure reports by logging on to the Portal and accessing their bios and case information. Parties look for updating information and FINRA, since 2017, discloses when reports were last revised or affirmed. Finally, the staff fields some questions from arbitrators about arbitrator classifications and awarding attorneys' fees. Consider this: a contract attorney who, otherwise qualifies as a Public Arbitrator becomes Non-Public for two years after working as a contract attorney for a law firm that meets the "\$50K or 10%" revenue test. As to attorneys' fees, FINRA-DR staff cannot advise on the law, but they do counsel not doing independent legal research on the subject.

(ed: Arbitrators want to do the "right thing," and some think that experienced staff should just go ahead and tell them what that is. TNC does an excellent job of straddling the line between informing and training its neutrals, while avoiding the trap of offering substantive advice on legal and procedural matters.) (SAC Ref. No. 2019-27-01)

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FINRA Stats, 3/19: March Case Filings Continue Weak, Leading to a Quarterly YOY Decline of 28%

New case submissions by customers are down 29% from the first quarter's tally for 2018 and industry cases have declined 27%. Overall, 830 new cases were filed in the first quarter; the number for the month of March is 250, more than February (244) and fewer than January (336).

The latest FINRA-DR [statistical report](#), posted recently by the Dispute Resolution division on its Arbitration-Mediation section of the Authority's Website, indicates that the 491 customer claims filed through March comprise 59% of the whole. That's a drop from 60% and 63% registered in the first quarters of 2018 and 2017, respectively. When we look among the FINRA-DR statistics for a reason, FINRA's "Security Type" Chart offers the most telling possibility: Municipal Bond and Municipal Bond Fund cases are off by approximately 30% year-over-year. Now, so are common stock cases and customer cases in general. The difference is, that, in 2018, about one of every three customer claims filed involved either Municipal Bonds or Municipal Bond Fund cases. There's a clear shift in direction and the

dominant reason, we'd project, has to be a fall-off in Puerto Rico bond disputes.

Interesting Stand-Outs: ATT & Settlements

We analyze these monthly reports from FINRA fairly closely and one of the ways we'll look for trend or pattern changes is simply to scan the report for stand-out numbers. For instance, in the March report, the Overall Average Turnaround Time (ATT) currently stands at 13.5 months. Memory tells us that's the first time in years ATT has dropped that low. We might dismiss that as an anomaly, given that sole expungement proceedings have constituted a large segment of the concluded cases. We might, except that sole expungement proceedings, by their nature, require an arbitral decision and Award, yet "Hearing Decision" ATT for 2019 exceeds by a month its 2018 counterpart (16.9 mos. v. 15.9 mos.). On the other hand, settlements constitute more than 70% of all concluded cases. That's another stand-out, because that level of negotiated resolutions is almost radical. And, if all those settlements are happening earlier in the process than in prior years, that could explain the improved Overall ATT.

Arbitral Decisions & Win Rates

We're not necessarily a fan of settlements. If settlements were universally a good thing, litigation in the courts would be doing a terrific job. Settlements for the wrong reasons (cost, time spent, time endured, lack of finality) represent the "why" behind arbitration. Speed, efficiency, finality are the virtues that offer arbitrating parties their proverbial "day in court." So, we're pleased to see a potential turnaround in the hearing figures (despite the very high settlement rate). Customer claimants are relying upon arbitrators for a decision 15% of the time — up from an historic low of 14% in 2017. Overall, the figures have risen to 18% from 17% last year. Overall win rates are about the same as they have been for customers — 41% thus far in 2019 (40% last year), but, in the small claims category, there's a stark difference. The sample for 2019 is small as yet, but "paper only" cases are sporting a 45% customer win rate in 2019 (9/20)! Last year's average was 35%; the 30s is where win rates for small claimants have been for years. Is there a change brewing (*meh!*)?

Hearing Decision - Win Rates

Customer Claimant Cases decided after hearing actually reflect a win rate that's lower than the small claims rate (*ed: that's a first - probably means the small claims rate will drop as more cases are concluded*) — 40% vs. small claims' 45%. Interestingly, when one views just the three-panel cases, the early lead that Mixed Panels showed in the prior 2019 reports has reversed. All-Public Panels are now reflecting a 54% win rate for customers who select All-Public Panels and a far-different 37% win rate for Panels with a Non-Public Arbitrator among the three (Majority Public Panels). That was quick! Still, the statistics are not sufficiently large enough, case-wise, to be reliable. Let's wait for the second quarter.

(SAC Ref. No. 2019-16-02)

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