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Securities Arbitration Alert

Expungement Relief Survey (1 of 2)

SAC Alert Issue: 2009-26 (7/15/09)

UPDATE, EXPUNGEMENT RELIEF STATS: *Ask yourself what you anticipated after arbitrators' findings of expungement relief became governed by the restrictive procedures of Rules 12805 and 13805. Did you think requests for expungement relief would be abandoned? Would arbitrators, compelled to hold hearings and give explanations for their affirmative rulings, grow stingy and cautious? Would party settlements forego as futile approaching the panel with a joint request for expungement?* The new rules went into effect on January 26, 2009 and, as we understand it, they were applied virtually immediately to all Awards issuing after that date. Indeed, if an Award was ready to issue on the effective date and the Arbitrator(s) proposed to grant expungement relief, the Panel had to return to the parties and arrange a hearing on the relief issue before issuing the Award.

Requests for Relief: On this premise of immediate effectiveness to all pending cases, we recently conducted a survey of all customer-initiated FINRA Awards with a start date of January 26, 2009, in order to see if arbitrator patterns and attitudes towards expungement relief may be changing. Overall, we found 71 Awards in which expungement relief was requested among 303 that have issued. Comparing that volume to the final six months of 2008, before the new procedures became effective, we found 95 requests among 295 customer Awards. Thus, relief was requested by parties in 23% of the Awards versus 35% in the prior period, signifying that, indeed, parties have grown more cautious.

Success Rate: We did detect a somewhat more restrictive stance by Panels in the percentage of successful requests. In the 2008 period, 66 requests were granted, or 69% of those made, whereas in the 2009 period, only 43 requests were granted, or 61% of those made. That could be explained, though, by other variables; for instance, the "customer "win" rate has been more favorable for customers this year.

Stipulated Awards: In a separate review of Stipulated Awards, where parties settle their dispute and jointly approach the Arbitrators with a request to "seal the deal" with an expungement order, we found surprisingly little change. It has been routine for arbitrators to encourage settling parties and, despite the new hurdles, that tendency appears to

persist. There were 26 Stipulated Awards among the 71 requests (37%) in the 2009 period versus 36 Stipulated Awards among the 95 requests (38%) in the 2008 period, so settling parties are continuing to approach panels with similar frequency. Not without results, either, as the arbitrators are responding positively. Of the 26 requests in settlement contexts, Panels granted expungement orders in 24 of the instances.

Type of Dispute: When we separated the customer-initiated Awards into Small Claims Awards and those with larger claims (Customer-Member Awards), we found 15 Small Claims matters and 56 Customer-Member Awards among the 71 expungement-request Awards. Expungement relief was granted in only 7 of the Small Claims matters (47%), whereas 35 of the 56 Customer-Member Awards contained expungement relief (63%). Again, there was a substantial difference in “win” rates between the two categories and that could explain why Small Claims arbitrators were more stingy in their response. Still, we suspect there might be a real difference here. In half of the instances where a single Arbitrator denied expungement relief, the Respondents actually won. Among the three-person Panel denials, Respondent victories were in evidence only a third of the time. *(ed: *With the move towards using single Arbitrators in all FINRA cases \$100,000 and under, we will have an opportunity to test whether a broker’s chance for expungement is diminished before a single arbitrator. **Tactical Tip: Another word on Small Claims matters – Respondents have a new and hefty tactical tool in cases where the Claimant accepts the default procedure and elects no hearing. By requesting expungement relief, Respondents invoke the requirement under Rule 12805 for a hearing on the request. That means, at the least (and most probably), a telephonic “hearing,” where counsel for the Respondents can make the case for expungement and, in the process, defend against all claims. Claimant has the same opportunity obviously, but Claimant (a) could have called for a hearing if s/he had wanted one, and (b) Claimant is likely unrepresented. This could explain, in part, why 15 requests (21%) for expungement relief were made in the 2009 period versus only eight requests (9%) previously and why the small claims “win” rate on the 15 requests was just 33%.) ***Tactical Tip: On Claimant’s side, this is one more reason why Small Claims Claimants should generally opt for a live hearing.)* (SAC Ref. No. 2009-26, 7/15/09)

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Securities Arbitration Alert

Expungement Relief Survey (2 of 2)

SAC Alert Issue: 2009-27 (7/22/09)

MORE EXPUNGEMENT RELIEF STATS: *Following up on last week’s survey of expungement-related Awards, we looked further at those Awards that granted expungement relief to see which affirmative findings governed and whether and what the arbitrators said by way of explanation when granting relief.* In last week’s edition of the Arb Alert, we provided Award statistics regarding how often expungement relief

has been requested in FINRA Awards since the beginning of 2009, the general success rate on expungement requests, how those requests related to stipulated Awards were faring, and whether respondents seeking expungement in Small Claims Awards fared better or worse than those in the larger category of Customer-Member Awards. Of the 56 Customer-Member Awards in our survey group, 35 granted expungement relief.

Stipulated Awards: 23 of those 35 were Stipulated Awards. Among the 23 Stipulated Awards, there was a definite tilt toward using the “Not Involved” affirmative finding. Fourteen panels used “Not Involved,” three used “False,” and the rest were multiple affirmative findings (4x, 2 of 3; 2x, 3 of 3). All of these cases were settlements, by definition, so we also checked how many hearing sessions were held before settlement was reached. Settlement terms were reached almost always prior to the start of the merits hearings, rather than in their midst. The required expungement “hearing,” whether telephonic or live, was held in all but two of the cases. Those two cases also failed to give explanations for their affirmative findings. The 21 explanations that were provided in the Stipulated Awards varied widely in their quality or content. We viewed four as being “circular,” in the sense that they said nothing except that the panel reviewed documents and held a hearing and, based on that, came to their conclusions. We classified six as short, but somewhat helpful, and 11 as providing reasons; in one instance, the reasoning could be termed extensive. There was one dissent among the 23 Stipulated Awards.

Decided Awards: Among the 12 decided Awards, special expungement hearings were not generally necessary, because the arbitrators heard the merits of the matter. However, there were special hearings in two cases, one where the panel granted a pre-hearing dismissal after oral argument at the pre-hearing conference and the other where a live hearing was evidently waived by the parties. Affirmative findings were made in all 12 cases and, again, “Not Involved” was the dominant finding (5). Four panels chose “false” and two used “factually impossible/clearly erroneous” as the basis for expungement. In the remaining instance, the panel cited two of the three affirmative findings. Perhaps, because the arbitrators had the chance to hear the merits of the case in full hearing, the required explanations were of a higher quality among the decided Awards. First, explanations were provided in conjunction with affirmative findings in all cases. We viewed only one explanation as “circular” in nature. All of the rest were either short, but helpful explanations (5) or provided some reasoning (6). One of the six reasoned explanations was extensive in character, as it was part of an Explained Award. (SAC Ref. No. 2009-27, 7/22/09)