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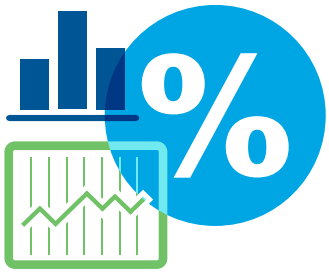

Financial Services Employment Blog

New Statistical Analysis Sheds a Light on FINRA Arbitrations

By Cliff Fonstein and Loren Gesinsky

***Seyfarth Synopsis**: A recent statistical analysis, examining three years of FINRA arbitration statistics, provides some helpful insights to practitioners, including evidence suggesting arbitrators actually do not tend to "split the baby."*

What are the chances an employer will win a FINRA arbitration? This is a tough question we've all been asked. While any answer will always be difficult, inevitably qualified and geared to your case's particular facts and the particular composition of your panel, a recent article in the Securities Arbitration Commentator provides some interesting statistical analyses that may help answer this question.

In Securities Arbitration Commentator, "FINRA Customer Awards 2015-2017: Three Full Years of Data Show Clear Patterns," Vol. 2018, No. 1 at 1, Dana N. Pescosolido analyzed 750 contested customer arbitration awards that were decided in the last three years. While Mr. Pescosolido focused only on customer arbitrations, we -- as employment lawyers -- highly recommend reading the whole article and identify a few points that struck us as relevant to our practice.

First, no side -- claimant or respondent -- seems to have a particular built in advantage. Mr. Pescosolido looked at fully contested cases, i.e., cases that went to a hearing and where claimants were represented by a lawyer. These were cases where each side presumably judged their case to be strong enough to forego settlement and to justify the risks of an arbitration. In these cases, claimants "won" a little more than half the time (53%). All public panels were slightly more generous to claimants than majority-public panels, but not by much (54% versus 50%) and, on average, awarded more money to claimants. When both the higher claimant win rate and the higher average recovery rate of all public panels were considered together, the average claimant win was between 20 to 25% more valuable in an all public panel than in a majority public panel. Mr. Pescosolido defined "win" broadly to include any award where the claimant won some money even if the demand was much higher. While this generous definition of "win" may seem to tilt the results to the claimants' side because it includes wins that are only Pyrrhic in nature, this effect may be discounted by another pattern Mr. Pescosolido found -- a trend toward there being clear winners and clear losers, a pattern that is discussed immediately below.

Second, and contrary to what some may think, arbitrators do not normally "split the baby." Damages in a particular case tend to tilt strongly in one direction, either pro-claimant or pro-respondent. In fact, claimants won nothing or 100% of their demand 57% of the time. True baby splitting, which Mr. Pescosolido defined as awards of between 40% and 59% of the compensation demand occurred less than 10% of the time. As Mr. Pescosolido notes, respondents may mistakenly think that the perceived tendency to split the baby insulates them from a runaway verdict, i.e., that while claimants may get "something," there's little risk, they'll get everything. This, however, does not seem to be the case. More often than not,

there will be a clear winner and a clear loser.

Finally, Mr. Pescosolido looked at the willingness of arbitrators to award what he calls "sweeteners," damages beyond the compensatory damages claimants sought, e.g., punitive damages, costs and attorneys' fees. In about half of the cases that claimants won they were able to get at least some of these additional damages, though punitive damages were awarded in only 9% of these cases.

The same issue of the Securities Arbitration Commentator contains an overview of the Office of Dispute Resolution's arbitration statistics for 2017. See Securities Arbitration Commentator, "Reviewing FINRA ODR Statistics, " Vol. 2018, No. 1 at 7. This analysis included intra-industry claims as well as customer claims. In 2017, the number of discrimination and harassment claims declined from the previous year from 58-37 and the number of wrongful termination claims declined as well, from 127 to 116. Strangely, however, the number of libel and slander claims increased significantly from 207 to 253. This latter trend seems a bit counter-intuitive. Perhaps claimants' lawyers are increasingly slapping on libel and slander claims to any pleading that raises an employment issue. Lastly, the statistics confirm what we already knew: the Average Turnaround Time for cases that went to hearing is way too long — 17 months in 2017.

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