

Litigating Employment Disputes in FINRA Arbitration



**OSB SECURITIES SECTION
(JUNE 20, 2012)**

Is Arbitration Required?



Yes *with one big exception and one smaller exception
and one small caveat*

➤ **Code § 13200**

- Arbitration required for all disputes among or between
 - ✦ members
 - ✦ members and associated persons
 - ✦ associated persons

➤ **U4**

- 15A (Individual/Applicant's Acknowledgement and Consent), ¶15

➤ **Registered representative agreement**

Disputes Between Registered Reps and Broker Dealers

- ✓ Statutory Discrimination & SOX Whistleblower*
- ✓ Class Actions*
- ✓ Raiding Cases*
- ✓ Note Cases
- ✓ Everything Else

Statutory Discrimination & Whistleblower*



➤ Code § 13201

- Claim alleging employment discrimination (including sexual harassment) in violation of a statute
 - ✦ Arbitrated only if parties agree
 - ✦ Special rule, § 13802

➤ Regulatory Notice 12-21

- ✦ Amended § 13201 to include whistleblower claims under Sarbanes-Oxley
 - Dodd-Frank Act
 - No special rule applies

Other Matters



➤ *Class Actions, § 13204**

- No FINRA jurisdiction

➤ *Raiding Cases, § 13804**

- May seek TRO in court but then everything else goes to FINRA

➤ *Promissory Note Cases, § 13806 (or §13800)*

- On the papers or possibly single arbitrator
 - Raising additional claims in defense

Everything Else/Types of Claims



- **Breach of contract**
- **Breach of implied contract/good faith**
- **Breach of fiduciary duty/negligent misrepresentation**
- **Fraud/fraudulent inducement**
- **Interference with contractual relations**
- **Wrongful termination**
- **Reliance/estoppel**

What if a party refuses?

TROUBLE

➤ IM-13000

- ✓ May be a violation of Rule 2010 for a member or associated person to fails to:
 - ✦ Submit to arbitration
 - ✦ Comply with an injunction issued by FINRA
 - ✦ Appear or produce documents
 - ✦ Pay an award

The Law



Common law claims are governed by state law

- **At-will employment**
 - *Fish v. Trans-Box Systems, Inc.*, 140 Or App 255 (1996)
- **Duty of Good Faith and Fair Dealing**
 - *Uptown Heights v. Seafirst Corp.*, 320 Or 638 (1995)
- **Negligent misrepresentation/breach of fiduciary duty**
 - *Conway v. Pacific University*, 324 Or 231 (1996)
- **Interference**
 - *McGanty v. Staudenraus*, 321 Or 532 (1995)
- **Wrongful Termination**
 - *Patton v. J.C. Penney Co., Inc.*, 301 Or 117 (1986)

What about securities law?

There's No Law



*"Badges? We ain't got no
badges. We don't need no
badges. I don't have to
show you any stinking
badges!"*

There's No Law



- Arbitrators have no real background in employment law
- No guaranty that arbitrators will even be lawyers
- Arbitrators may not apply choice of law
- Arbitrators may not apply statute of limitations
- Legal issues may be completely and fully disregarded

Forum Issues



Claimant

- Hearing location
- No summary judgment
- No discovery
- No rules
- File and try

Respondent

- Industry arbitrator on panel
- Expensive & Slow
- No jury

Court of Equity, Plus



- **Focus on the two things the panel will be most comfortable with:**
 - Damages
 - Credibility

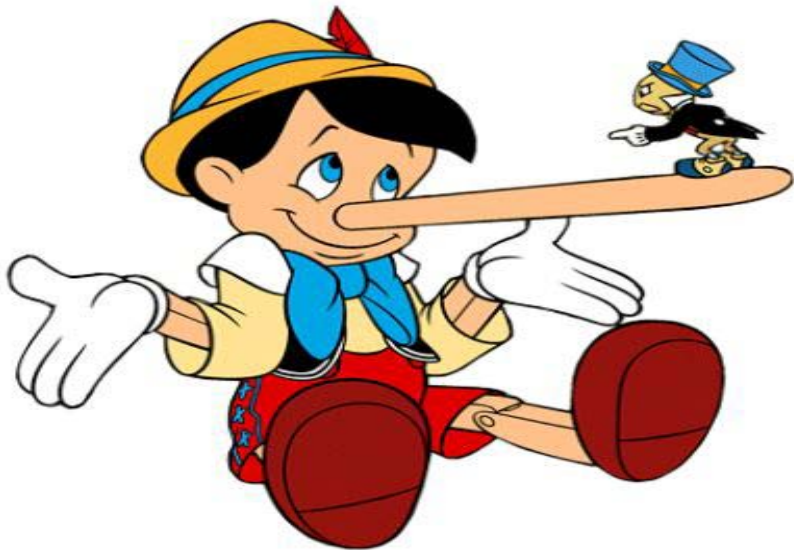
Focus on Damages



- **Lost income**
 - Who owns the clients?
 - ✦ *Merrill Lynch v. Ran*, 67 F. Supp. 2d 764 (ED Mich. 1999)
 - ✦ *Protocol for Broker Recruiting*
 - ✦ *Rule 2140 – Interfering with transfer of customer accounts*
 - ✦ *Registered rep. agreement with BD*
 - Expectation of income in an at will contract
 - ✦ *Porter v. Oba, Inc.*, 180 Or App 207 (2001)
- **Emotional Distress (non-economic)**
 - ✦ Medical records
 - ✦ Little sympathy from panel
- **Punitives**
 - ✦ Even less sympathy from panel
 - ✦ ORS 31.735

Focus on Credibility

Credibility is determinative



I'm not upset that you lied to me, I'm upset that from now on I can't believe you.

Friedrich Nietzsche

Half the lies they tell about me aren't true.

Yogi Berra

If you tell the truth, you don't have to remember anything.

Mark Twain