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Data Sheds Light on All-Public Arbitration Outcomes

By CAITLIN NISH

NEW YORK--New data on a revamped arbitration system support what a lot of people have believed all along: Arbitrators without ties to the industry are more likely to side with investors.



But brokers shouldn't be too upset by the statistics. The sampling of cases is small and lawyers for brokers say the merits of a claim far outweigh the backgrounds of the panelists who hear a case.

The data, released last week, reflect the outcomes of cases heard under a new program that allows investors the choice of a panel comprised of all public arbitrators - that is, three people who aren't affiliated with the industry. The Financial Industry Regulatory Authority, which oversees the arbitration forum, regularly contends with the charge that the system favors brokerages; the all-public panel option, implemented in February, 2011, was viewed by investor advocates as a big step toward ensuring a fair playing field.

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Cases brought by customers and involving disputes of more than \$100,000 are heard by a three-person panel. Under the program, the customer can choose between a panel with three public arbitrators or a panel made up of one arbitrator with securities industry experience and two public arbitrators.

The data show that so far this year, in cases decided by three public arbitrators, customers were awarded damages 51% of the time. In cases decided by a panel including one person with industry ties, investors prevailed only 32% of the time.

The sample group only includes cases decided after the option was allowed and, since it can take more than a year for a case to wind through the system, there's a relatively small total of 174 decisions. Still, "this certainly seems to bear out the notion that claimants and their counsel should, in the vast majority of cases, opt for the all-public panel," says Scott Ilgenfritz, a partner at

Johnson Pope in Tampa and president of the Public Investors Arbitration Bar Association.

Finra determines how to classify arbitrators based on their answers to more than a dozen questions about their professional experience. For instance, arbitrators are marked as having ties to the industry if they are registered with a broker or dealer, or have been within the past five years, as well as if they are retired from or spent a substantial part of their careers in such a role.

Public arbitrators aren't required to have any knowledge of the securities industry and are often lawyers, accountants or even doctors. Finra said this summer that it is targeting its arbitrator recruitment efforts toward real estate professionals and university professors.

Investors who choose the all-public panel option don't automatically receive that type of panel. They still get 10 names of industry-tied arbitrators from which to choose -- but they also have the option of striking all 10 to ensure there are no industry panelists.

"The data bears out that you don't need an industry person on these panels and that not only do you not need them, it's a detriment in most cases," says Richard Lewins, a Dallas-based securities attorney who represents investors.

But the statistics might not be as clear cut as they first appear. It's still quite early, and a larger sampling might tilt differently. Also, the customers opting into the program tend to have more experienced attorneys. And the win rates only reflect cases that went to hearings with a decision, while the vast majority of customer claims are resolved before a decision is reached.

The cases that aren't settled are simply outliers, says Jonathan Uretsky, a New York-based securities attorney who often represents broker-dealers. The facts are either extremely good for the claimant or the defense, he says, or the defendant simply doesn't have the money to settle.

"You're taking a small amount of the worst possible ones to look at," Mr. Uretsky adds. "Brokers shouldn't worry -- not until I see a whole lot more data and it might be difficult to ever get it because we're only going to have information about the outliers."

He and other attorneys for brokers argue that the outcome of a case truly depends on the individual facts.

"Because each case is a snowflake, you can never accurately predict," says Marc Dobin, a Florida-based securities lawyer who has represented both investors and brokers. "I'm still not convinced that an all-public panel is biased in favor of a customer. I think arbitrators are smarter than that."

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