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With Your Help, Mandatory Arbitration May End Soon - But SEC Oversight of SRO's Needs Fundamental Reform

Les Greenberg, who teamed together with me in restarting the proxy access movement in the summer of 2002, may soon be getting some traction in his battle to revoke mandatory arbitration. Please write to your Congressional Representatives in support of Senator Russ Feingold's Arbitration Fairness Act of 2007. Also needed is your support for a Congressional investigation of the links between the SEC and SROs (self-regulating organizations like the stock exchanges) they regulate. Join with Greenberg in demanding Congress throw off the bedcovers.

Public customers of securities brokerage firms are required to agree to arbitrate disputes. Although arbitration can be a fair and efficient way resolving disputes when both parties choose it after the dispute arises, high administrative fees, a lack of discovery protections, and a lack of meaningful judicial review of arbitrators' decisions all act as barriers to the fair and just resolution of an individual's claim. When arbitration is required rather than voluntarily chosen, customers lose.

For example, in a survey of 100 financial advisers by Vestment Advisors, nearly 20% said they knew of someone who knowingly had violated compliance rules and regulations. Cited were cheating on computerized training, signing account forms for clients, not sending e-mail to the compliance officer for review and not processing checks the day they were received. (Advisers often skirt compliance rules, survey finds, Investment News, 5/29/07)

Brokers have the upper hand in arbitrations. That's the conclusion of a 10 year study. The bigger the claim and the bigger the broker, the less likely the recovery. (Advisors Score Big in Arbitration Study, OWS Magazine, 6/2007)

Public Citizen, a Washington-based consumer watchdog group, reported that consumers won 4% of 19,000 California cases decided by one arbitration firm between January 2003 and March 2007. The study found one arbitrator who rendered 68 decisions in one day -- "one every eight minutes," said Laura MacCleery, director of the consumer advocacy group Public Citizen's Congress Watch. "Consumers won zero." Bills aim to get consumers their day in court, LATimes, 12/17/07)

Drawing on 30 years of experience serving as an NASD arbitrator and as legal counsel for either claimants or respondents, Greenberg's filed a rulemaking petition in May 2005 to the SEC and Supplement that would have required a number of reforms: Others picked up on the cause. For example, in June of 2007

Daniel R. Solin petitioned the SEC to prohibit broker-dealers from requiring investors to accept mandatory arbitration clauses and Greenberg filed a letter in support.

As indicated above, Senator Russ Feingold introduced the Arbitration Fairness Act of 2007. Passage of that bill now appears more likely than enactment of SEC rules, so we ask for your support in that effort. However, Greenberg's investigation also led down another even more disturbing path -- the relationship between the SEC and SROs.

Through FOIA requests, which sought all communications between the industry dominated Securities Industry Conference on Arbitration (SICA) and the SEC, including SICA Meeting Minutes, Greenberg determined why the SEC didn't comply with rules requiring them to respond to rulemaking petitions. Such petitions, which often deal with conflicts of interests within the SROs, are sent to the SROs for recommendation. That's fine, but It turns out the SEC has essentially rewritten the rules because they don't set a return deadline and if the SRO fails to take up the public Petitions, the SEC Staff takes no action at all.

Greenberg filed a Complaint for Declaratory and Injunctive Relief with the United States Securities and Exchange Commission (USDC Case No. CV 06-7878-GHK(CTx) alleging violation of the Federal Advisory Committee Act. Additionally, Greenberg wrote to Barney Frank, Chairman of the House Committee on Financial Services, requesting a Congressional investigation of the above-described egregious conduct of the SEC Staff, which stifles the legitimate rights of the investing public. Please join with us in writing to Rep. Frank in support of Greenberg's request. Ask Frank to open a Congressional investigation into the relationships between the SEC, SROs, and SICA to determine what reforms are needed to ensure the best interests of the investing public will be served.

How Long Should Recommendations Take?

Ten years ago the Public Investors Arbitration Bar Association (PIABA) petitioned the SEC under section 192 to: (1) establish the American Arbitration Association as an alternative venue for customer arbitrations; (2) change the composition of arbitration panels hearing customer arbitrations; and (3) provide for a rotational system for the selection of arbitrators.

The rule requires the Secretary to refer such petitions to the appropriate division or office for consideration and *recommendation* to the Commission. From documents obtained through a FOIA request by Les Greenberg, it appears the SEC's willingness to defer to SROs has no time limit, despite the legal requirement that recommendations are required. After 10 years, SEC staff has not made the required recommendation. The Staff wants what it is doing to be considered "normal," but how long should the rights of non-SRO sponsors be deferred? A pdf copy of those documents is available at

http://www.LGEsquire.com/PIABA Petition 4-403.pdf. One no longer has to wonder why securities arbitration rule reform (to level the playing field) has not occurred.

Greenberg has written extensively on how to improve the securities arbitration process. See his Petition for Rulemaking (SEC File No. 4-502) (severe problems with NASD arbitration and questionable SEC oversight). The Petition has received favorable media coverage, e.g. 9/1/05, Registered Representative Magazine, "The Real Arbitration Nightmare"; 7/31/05, San Diego Union-Tribune, "Stockbroker losses bring no trials, lots of tribulations"; 7/17/05, Pittsburgh Post-Gazette, "Systems for resolving disputes may need an overhaul." However, the SEC has failed to act on it as well. We may see international arbitration first.