54

GORDON & DONER, P.A.

FOR THE INJURED

STEVEN G. CALAMUSA
SCOTT J. DONALDSON
ADAM S. DONER
SCOTT M. FISCHER
ROBERT E. GORDON[1]
DANIEL G. WILLIAMS[2]

4114 NORTHLAKE BOULEVARD
SUITE 200
PALM BEACH GARDENS, FLORIDA 33410
TEL: (561) 799-5070 OR 1-800-659-1159
FAX: (561) 799-4050
WEB: fortheinjured.com

INVESTIGATORS:
MANNY NAVARRO
JOHN OROZCO
DANIEL OSREDKAR; ASE[4]
NURSE CONSULTANT:
KIMBERLY WOJTUSIK, RN[5]

October 4, 2006

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SR-NASD-2006-088
Proposed ~~NASD Rule~~ 12504*Dispositive Motions

Dear Ms. Morris:

I oppose the NASD's proposal to adopt rules providing for dispositive motions in arbitrations.

In order to preserve the fairness of arbitration, it is essential that investors be assured that they will have a full hearing to present their claims. Investors do not have the court advantages of full discovery to provide factual support for their claims prior to hearing, including such basics as depositions, interrogatories, and requests for admissions. Nor do investors have the court-granted right to appeal motions to dismiss erroneously decided by arbitrators. Even obvious errors of law by arbitrators are not subject to appeal. The only remedy for an investor whose case is dismissed on motion is to seek to vacate the decision, and courts routinely deny investors' vacatur petitions because they cannot establish the narrow grounds available for vacatur under the Federal Arbitration Act, nor can they meet the stringent standard for showing manifest disregard of the law.

The prospect for arbitrators erroneously granting motions to dismiss is great because arbitrators are not judges and, therefore, do not have research clerks. They are not even trial lawyers. Most arbitrators are businessmen, professionals, or business lawyers and have no experience in litigation.

Motions to dismiss are filed almost exclusively by the industry, and therefore, allowing motions to dismiss in arbitration gives the industry an unfair advantage over investors. This is particularly true since the industry forces investors into arbitration, and now the NASD seeks to give the industry procedural advantages available in court.

Motions to dismiss should be addressed only after claimants have submitted their case to the arbitrators in full so that the arbitrators have a true understanding of the matter before them, and not just lawyer arguments.

Even if motions to dismiss which deny a hearing are approved by the SEC, it is essential that investors receive at least some protection from erroneous decisions. It is therefore proposed that to the extent motions to dismiss are to be allowed, they should not be considered where there are material questions of fact, nor should they be used to dismiss cases on the pleadings.

Further, since there is no appeal, arbitrators granting such motions must be required to provide a reasoned opinion, which then must be subject to review by the Director of Arbitration. And investors should be awarded attorneys' fees when a motion to dismiss is denied.

The SEC should, however, recognize that motions to dismiss which deny investors a hearing are fundamentally inconsistent with arbitration and the proposed NASD rule should be rejected.

To summarize, the industry already has been provided an advantage over the customers by being allowed to require them to agree to arbitration rather than be allowed to take their potential claims to court. This proposed language provides the industry additional unfair advantage by being allowed to ask the arbitration panel not to hear the claims. In essence it provides the industry with the ability to take advantage of investors knowing that the odds are greatly stacked in the industry's favor. A firm can commit fraud on a customer causing the customer to lose his entire life savings, knowing that there is less than a 30% chance that the firm will have to face any penalty whatsoever.

We all know that respondent firms file motions to dismiss routinely – why wouldn't they when there is a chance the motion will be granted, and if it isn't dismissed they can go on about the procedures the same as if a motion wasn't filed. If motions to dismiss are allowed they will be filed in every single case and the law of averages suggests that a good portion of them will be wrongly granted, taking away an investors only recourse for the injustice that was done to him. In this case, investors would be better off if dispute resolution was dissolved and they were allowed to go to court.

If motion to dismiss language must be inserted, please limit the injustice done to investors by using the following language:

DISPOSITIVE MOTIONS MAY ONLY BE GRANTED WHERE THE MOVING PARTY CAN ESTABLISH THAT THERE IS NO POSSIBILITY OF ESTABLISHING LIABILITY UNDER ANY FACTS OR CIRCUMSTANCES.

DISPOSITIVE MOTIONS MAY NOT BE GRANTED WHERE THERE ARE DISPUTED FACTS.

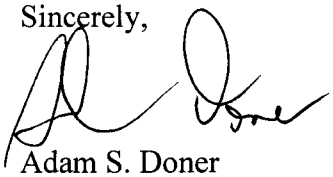
DISPOSITIVE MOTIONS MAY NOT BE GRANTED BASED UPON PLEADING ISSUES.

A PANEL DENYING A DISPOSITIVE MOTION SHALL AWARD COSTS AND ACTUAL ATTORNEYS' FEES TO THE PARTY DEFENDING THE MOTION.

THE GRANT OF A DISPOSITIVE MOTION SHALL BE ACCOMPANIED BY A REASONED DECISION AND BE SUBJECT TO A DE NOVO REVIEW BY THE DIRECTOR OF ARBITRATION.

ANY GRANT OF A DISPOSITIVE MOTION WHICH IS NOT ON ITS FACE IN COMPLIANCE WITH THE STANDARDS SET FORTH IN RULE 12504 SHALL BE REVERSED BY THE DIRECTOR OF ARBITRATION AND ACTUAL ATTORNEYS' FEES AND COSTS SHALL BE AWARDED.

Sincerely,



Adam S. Doner