

September 24, 2018

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VIA E-MAIL ONLY

Jennifer Piorko Mitchell  
Office of the Corporate Secretary – FINRA  
1735 K Street, NW  
Washington, DC 200006-1506

Re: Comments on FINRA's Proposed Amendments to the Discovery Guide to Require Production of Insurance Information in Arbitration

Dear Ms. Mitchell:

Below please find our comments on FINRA's proposed amendments to the Discovery Guide to require production of insurance information in arbitration. We respectfully request that these comments be given careful consideration by FINRA.

The genesis of FINRA's proposed amendment is that "practitioners who represent customers at the forum have told FINRA staff that insurance information is important during settlement discussions and that they believe that having knowledge of possible insurance, if any, would make them better able to advise their clients and determine a litigation strategy". Insurance information should not be per se discoverable when its sole purpose is to facilitate the opportunity to leverage a settlement, and that's really why investors' attorneys favor the proposed amendment.

To that end, with 50 years of collective experience defending broker-dealers and registered representatives in this forum, we are hard-pressed to think of a single instance where there was a legitimate dispute about the production of a firm's insurance policy and/or coverage information that resulted in either a motion to compel or an order granting same. Indeed, we have litigated and resolved hundreds of cases (many of them with lawyers and firms around the country who have written in support of this amendment) where this issue never came up at all, and the notion that our esteemed opposing counsel were unable to "properly" advise their clients about the advisability or amount of a settlement is ludicrous.

We are mindful of the Federal Rules of Civil Procedure's mandates and the varying requirements of the individual states on this subject. We are also mindful that FINRA's proposed amendment is geared more towards thinly capitalized and/or smaller broker-

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dealers. In view of our considerable experience, we believe the process is better served by permitting disclosure of insurance information on a need be, case-by-case basis.

Investors will not suffer a "chilling effect" from having to request insurance information. When a legitimate need for the information exists, FINRA's existing discovery rules support the Arbitration Chair's entry of an appropriate order in an appropriate situation and case. Further, the possibility of inconsistent rulings relating to the production of insurance information cannot be a serious concern. There is neither virtue nor value in promoting consistent arbitration rulings. Each case has different parties, facts and circumstances, and arbitrators who, through FINRA's mandate to do equity, should retain the latitude to weigh the discovery needs in each case.

Finally, we believe that FINRA's proposed amendment to the Discovery Guide will negatively affect the mediation process and settlements in general. The mere production of a member firm's or registered representative's insurance policy (or declarations page alone) would likely tend to mislead an investor who will focus primarily on the limits of coverage without fully understanding or carefully considering that the following (among other considerations) will affect available policy limits: (1) the number of claims made, (2) the liability exposure the various claims represent, (3) application of attorneys' fees against policy limits, (4) defense costs, (5) FINRA fees, (6) policy exclusions, (7) deductibles, (8) aggregate annual limits, (9) the inter-relationship of claims, etc. Simply put, mandatory production of insurance policies will unfairly inflate investors' settlement expectations, put the damages and settlement cart before the liability horse, and inevitably make it harder to resolve cases.

There are certainly instances where the production of insurance coverage information may be appropriate. Absent compelling justification, however, we see no legitimate reason to amend the Discovery Guide and disrupt the status quo.

Very truly yours,

*Gary Saretsky & Jonathan Sterling*

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