

CARDOZO LAW  
BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY  
SECURITIES ARBITRATION CLINIC

Elizabeth Goldman  
Director  
Clinical Professor of Law

(646) 592-6496  
Fax (212) 790-0256  
[esgoldma@yu.edu](mailto:esgoldma@yu.edu)

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Re: Comment Letter on FINRA Regulatory Notice 22-09

The Securities Arbitration Clinic at the Benjamin N. Cardozo School of Law (“the Cardozo Clinic”) submits this letter in response to the Financial Industry Regulatory Authority’s (FINRA) proposed amendment to the Code of Arbitration Procedure to accelerate arbitration proceedings for elderly or seriously ill claimants. The Cardozo Clinic represents and advocates on behalf of low and middle-income retail investors. Our experience with our client population, the majority of whom are over 65, informs our comment. We often represent people with significant disabilities, serious illnesses, and small trusts for people with disabilities. The majority of our clients are people of color, and many clients suffer from chronic illnesses and a number of them have been diagnosed with cancer. Many of our clients have limited formal education, and many do not speak English as their primary language. The vast majority of our clients qualify for a waiver of FINRA filing fees because they have minimal income. Indeed, a number of our clients often have to choose between paying for food, rent, or much-needed medication on a regular basis. Waiting an excess of time to resolve a dispute for these clients is, therefore, an extreme hardship.

We support FINRA’s proposal for a formal rule to accelerate the cases of elderly and seriously ill retail customers. However, we recommend that FINRA use a 65-year age threshold for expedited case review. Statistical evidence from the Center for Disease Control and Prevention (CDC) demonstrates that changing the age threshold to 75 years will discriminatorily impact Black claimants, especially Black male claimants. Indeed, the 75-year threshold exceeds the average life expectancy of Blacks in America overall and is several years beyond the life expectancy for Black males.<sup>1</sup> FINRA’s proposed age limit also fails to take into account the lower life expectancy for others in our client population—namely those in poverty and with

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<sup>1</sup> Elizabeth Arias et al., *Provisional Life Expectancy Estimates for January Through June, 2020*, NVSS: VITAL STAT. RAPID RELEASE (Feb. 2021), <https://www.cdc.gov/nchs/data/vsrr/VSR10-508.pdf>. Through the first half of 2020, the life expectancy of for non-Hispanic Black males declined by three years, from 71.0 to 68.3. This does not factor in that, due to the Covid-19 pandemic, life expectancy has declined even further since June 2020. See Theresa Andrasfay & Noreen Goldman, *Reductions in 2020 US Life Expectancy Due to COVID-19 and the Disproportionate Impact on the Black and Latino Populations*, 118:5 PNAS (Jan. 14, 2021), <https://www.pnas.org/doi/full/10.1073/pnas.2014746118>.

limited education. There are strong correlations between higher mortality rates and poverty, and even stronger correlations based on limited education.<sup>2</sup>

Quite often, there are very real consequences for people over 65 forced to wait for adjudication of their claims. Clients are often in serious need of redress and do not have ongoing income from employment to carry them through periods of hardship. In one of our cases, where the broker orchestrated an improper distribution from a 66-year-old client's IRA account, the purported "income" from the distribution meant that our client's rent increased significantly, as did her Medicare payment. She also had an inordinate tax bill to pay. The Cardozo Clinic was ultimately able to reverse the consequences in various appeals to Social Security and SCRIE (Senior Citizen Rent Increase Exemption—the housing program that determined our client's rent) and obtain a Private Letter Ruling from the IRS to return the funds to our client's IRA. However, before she came to us, she was in danger of losing her apartment, risked having to use half of her retirement savings to pay taxes, and could not afford her increased Medicare payments. Indeed, it was only because we were able to obtain additional food aid for her that she had enough to eat in the interim period when we were obtaining relief on her behalf. There were thus real consequences in her having to wait for adjudication of her claim. Because we settled the claim, we were able to significantly limit the time it took for the claim to be resolved. However, trying the case to conclusion would have cost valuable time and put our client at even greater risk.

The consequences of having to wait for adjudication in a case brought by a seriously ill person are grave. Some die while waiting for relief. In other cases, we have clients who are diagnosed with a memory-impairing disease like Alzheimer's Disease. Our clients with Alzheimer's may at first suffer from limited cognitive impairment but still can ably assist in the prosecution of their case. However, even with a brief passage of time, their memories and cognitive abilities may enter into a steep decline to a point when they can no longer testify on their own behalf. Moving quickly in such a case is critical. Adverse consequences often continue even after the client's death. Although we recommend to our clients who do not yet have a will that they prepare one, and we will prepare simple wills without cost, they do not always agree to do it in time. On several occasions, in some of our court proceedings, the lack of a will (and therefore a lack of an executor of the estate) left us with no option for continuing representation of our clients' interests after their death. Once a client dies, an attorney no longer has a client she is authorized to represent. For the representation of a decedent's interest to continue, the representative of the client's estate, i.e., the executor, must enter into a new retainer agreement with counsel. On two occasions within the last several years, we had to file Federal Rule of Civil Procedure Rule 25 Death Notices in a federal court. Those cases were summarily dismissed because the clients died intestate. This meant that the wrongs committed against those clients by unscrupulous, unlicensed brokers went without redress. While those cases were federal court cases, given the relevant timing (both deaths occurred within 10 months of our initial filing), the result would have been the same if we had filed their cases against registered persons before FINRA.

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<sup>2</sup> Anne Case & Angus Deaton, *Life Expectancy in Adulthood Is Falling for Those Without a BA Degree, But as Educational Gaps Have Widened, Racial Gaps Have Narrowed*, 118:11 PNAS (Mar. 8, 2021), <https://www.pnas.org/doi/10.1073/pnas.2024777118>.

We also write to express our concerns about privacy in connection with the certification of a severe illness. Many of our clients view their medical conditions and their attendant challenges as deeply personal and are loathe to share them with strangers or doctors. We also have concerns that some arbitrators may have regarding biases against certain medical diagnoses. For example, a number of our clients are HIV positive and fear the abjectly unfair stigma that certain individuals hold against them. Accordingly, we ask that certification of serious illness be submitted to FINRA personnel specifically dedicated for such review rather than the arbitrator assigned to the case. We also ask that such information be precluded from review by Respondent. Most of our clients come to us because there has been a serious breach of their trust by the named Respondent(s). We do not believe that these claimants should suffer the additional indignity of having their private medical conditions more publicly exposed to people who have already taken advantage of them.

Finally, we propose that the rule include an option in any accelerated case, by request of the Claimant, to be returned to the regular track. In some instances, our clients feel that fast-tracking a case is too stressful and more challenging than a regular tracked case might be. We believe that at-risk people in those situations should be granted the right to change their minds and request additional time to manage through their cases.

Respectfully submitted,

Cardozo School of Law Securities Arbitration Clinic

Director: Professor Elizabeth Goldman  
Nolan Daniels (student member)  
Daniela de la Lama (student member)  
Xuan Feng (student member)  
Adam Gakin (student member)  
Laetitia Krisel (student member)  
Marc Siegel (student member)  
Matthew Vernace (student member)  
Frechette Wallen (student member)