



PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

2415 A Wilcox Drive | Norman, OK 73069
Toll Free (888) 621-7484 | Fax (405) 360-2063
www.piaba.org

September 24, 2018

pubcom@finra.org

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K. Street, NW
Washington, D.C. 20006-1506

Re: Regulatory Notice 18-22 (Comment on FINRA Rule Amendments Relating to Discovery of Insurance Information in Arbitration)

Dear Ms. Mitchell,

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitration proceedings. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") relating to both investor protection and disclosure. As such, PIABA frequently comments upon proposed rule changes in order to protect the rights and fair treatment of the investing public.

PIABA submits this comment because it believes amending the Discovery Guide to require disclosure of third-party insurance coverage information in customer cases would benefit the investing public. PIABA further believes that this information would reduce the number of unpaid arbitration awards, which is a matter of great concern to the organization and a major problem within the financial industry.

Background

FINRA seeks comment on proposed rule amendments to the Discovery Guide List 1 (hereinafter "List 1") that would require firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer arbitration proceedings. The proposed amendments would strictly limit the circumstances under which insurance coverage information could be presented to the arbitrators. Additionally, the proposed amendments would not require production of documents relating to self-insurance; firms with sufficient capital to pay arbitration awards would not be required to produce insurance information automatically in every arbitration case.

Comments

PIABA supports the proposed amendment to the Discovery Guide to require routine disclosure of liability insurance coverage by registered broker/dealers who are thinly capitalized or not self-insured. Many members of our organization have represented clients with the unfortunate experience of receiving an award against a brokerage firm

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or broker only to later discover the party with the award rendered against it either had no insurance coverage or the policy did not cover the wrongdoing in that particular case. Learning of the existence of insurance or, if there is insurance, the limits of coverage and/or liability could save those already wronged investors of the additional damage of proceeding with an inevitably fruitless case.

While a few comments to date indicate that some members of the industry are reluctant to provide this information, PIABA believes this proposal is in the best interest of all parties, including brokerage firms and brokers. For example, when liability coverage exists, it is in the best interest of the brokerage firm to timely disclose the existence of the claim to its carrier. When member firms do not timely report potential claims, coverage can be denied if a claim is made outside of a claim period on a “claims made” insurance policy. The result is that the member firm ends up not obtaining any benefit for the insurance it purchased. Our members have also seen this happen often where a registered representative has insurance coverage through his/her firm, but is not aware of how the policy works and therefore is unaware of how to properly invoke the insurance policy. If a claimant knows of the existence of a policy for which no claim has been submitted by a brokerage firm, the claimant can take action to alert the carrier of the claim.

When claims go unreported to carriers, the proceeding can quickly turn into a lose-lose scenario. In such a situation, a customer spends a large amount of time and effort, only to get an award against a brokerage firm that cannot pay, and then often has to close its doors, where viable coverage may have been able to protect both the firm and the investor. Similarly, a customer may have a claim against a brokerage firm that has already gone out of business, but the claims could be prematurely dropped by the customer if they are not informed about a potential method of recovery from an insurance policy.

Once notice of the claim is reported to the carrier, the insurance company will either affirmatively cover the claim, decline to cover it, or cover it with a reservation of rights in favor of the carrier. Knowledge of a carrier’s response to a claim will provide better insight to all parties on the true value of a claim, which can help claimants make better and more informed decisions regarding settlement of their claims, particularly if the policy is a “wasting policy” where a firm’s attorneys’ fees and costs are paid from the portion of the policy apportioned to the claim.

The production of insurance information will also prevent registered firms that have coverage from threatening a bankruptcy or a Form BDW to settle arbitrations for much less than their value, in order to avoid reporting the claim to its carrier. If insurance information is disclosed to the claimant, then appropriate actions can be taken to protect the rights of a potential claimant and avoid a potential settlement based upon false information. As FINRA has not mandated that its members maintain adequate capital reserves to pay for customer claims has not required its membership to maintain liability coverage, PIABA believes this is the least FINRA can do in furtherance of its stated goal of promoting investor protection.

The idea that the disclosure of insurance coverage would entice filings is an admission by the Industry that its members in fact do “plead poverty” as a tactic to avoid claims. The amendment would help put an end to such disingenuous tactics. FINRA claims should be decided on the facts and merits rather than a FINRA member’s tactical choice to withhold liability coverage information because the firm or associated person wants to avoid potential premium increases or high retentions associated with the policy.

The implementation of the proposed amendment would resolve inconsistencies with Federal law and a majority of states, which already require the disclosure of insurance coverage information at the onset of cases. The fact that the Federal Rules of Civil Procedure require initial disclosures to contain coverage information is demonstrative of how relevant this information is in all civil proceedings.

While a policy declaration page would be the preferable document required under the Discovery Guide, PIABA believes, at a minimum, FINRA’s Discovery Guide amendment should include disclosure of the name(s) of each insurer who could potentially provide coverage for a given claim, the name of the insured(s), the limits of the coverage,

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a copy of the policy and a copy of any reservation of rights letter to the insured. In addition, while PIABA appreciates that this information may not be relevant against some of the larger member firms, FINRA should be mindful of drawing clear lines as to what firms do, and what firms do not, have to disclose such information. FINRA's failure to do so could result in burdensome proceedings to resolve who has to produce insurance, thereby undermining the benefit of requiring this information under the Discovery Guide.

Conclusion

In summary, PIABA strongly supports the proposed amendment as it would benefit the investing public, as well as the brokerage industry itself, for all the reasons set forth above. PIABA further believes that this information could reduce the number of unpaid arbitration awards, a problem which currently plagues the financial industry. We appreciate the opportunity to comment on a proposal that would be of benefit to all parties participating in the FIRNA arbitration process.

Very truly yours,

A handwritten signature in black ink, appearing to read "Andrew Stoltmann". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrew Stoltmann