



Advisors test new strategy to duck arbitration losses. Will it work?

By Andrew Welsch

Published August 07 2018, 1:25pm EDT

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Can a technicality overturn \$765,000 worth of arbitration losses?

Four advisors are banking that it can, having filed lawsuits this year to vacate arbitration awards won by their former employers against them on the basis that FINRA never properly notified the advisors of the proceedings.

The legal wrangling pits the advisors against some of the biggest names in wealth management: Merrill Lynch, Morgan Stanley, Raymond James and Wells Fargo. The brokerages were seeking in arbitration what they said were the remaining balances on promissory notes owed to them by the advisors who had moved to other firms. Wells Fargo finds itself both pressing to get its award confirmed against one of its former advisors while two of its new hires make the same argument to get awards against themselves overturned.

In an added twist, the advisors are represented by the same attorney: Joshua Brinen of Brinen & Associates in New York.

FINRA "rules are designed to prevent this problem," Brinen says of the regulator's allegedly misplaced mailings.

A FINRA spokeswoman declined to comment on the cases.

While it's not unheard of for brokers to not attend arbitration proceedings, it is unusual for them not to receive notice of an arbitration claim. The regulator typically serves pleadings by regular and certified mail at the broker's current or last known address listed in their CRD.

If an advisor fails to appear at an arbitration hearing after having been notified, arbitrators may order the hearing to move forward without them, per FINRA regulations.

"I've never seen an incident where FINRA did not properly serve notice in a promissory note case," says Ross Intelisano, an attorney with Rich, Intelisano & Katz, a New York law firm that represents financial advisors.

The stakes are high for these four cases.

"FINRA will punch their tickets and prevent them from practicing their chosen profession if they don't pay these notes," Brinen says.

He did not respond to a follow-up question as to how he met his clients.

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In the most recent case, former Morgan Stanley broker Richard A. Williamson is seeking to overturn a \$128,000 award handed down by an arbitrator in a case that Williamson never attended.

Williamson had worked at Morgan Stanley for six years before jumping to Wells Fargo in November 2017, according to FINRA BrokerCheck records.

Morgan Stanley filed a FINRA arbitration claim against him in February, seeking what they said was the remaining balance on promissory notes owed to them.

Williamson, who filed his lawsuit in a federal court in New York last week, says FINRA failed to get a hold of him after he moved to a new home. In June, he went to his prior residence to pick up mail that was not forwarded to his new address, discovering the notifications the regulator mailed to his old home. By then, it was too late — the sole arbitrator in the case issued his award on July 2, 2018, according to a copy of the decision.

A Morgan Stanley spokeswoman declined to comment.

Emails contained in legal filings show Williamson contacted FINRA in June and was having trouble accessing the portal. It is not clear why the arbitration proceeded without him. He never made an appearance during the arbitration, according to the award.

Although the four advisors work and live in different states, the promissory notes they signed are a common feature of each case. The advisors signed notes that required repayment in the event that their employment at the brokerage firm came to an end. For example, Williamson signed a promissory

note on September 30, 2011, in exchange for \$359,800 to be forgiven in annual installments of \$39,977.78 over a nine-year period.

Would the advisors presumably have expected arbitration proceedings to be filed against them or for their former employers to reach out independent of FINRA?

"That's not the point," Brinen says. "Just like when I sue you in a regular court of law, my client is, let's say, Bob. Bob does not hand you the summons of complaint. I go to process server because they have no axe to grind. FINRA here acts as the process server."

In other words, the self-regulatory organization has an obligation to each party.

Ex-Merrill Lynch advisor Bruce Newell Townsend presented similar claims in his bid to vacate an arbitration award of more than \$141,000. Merrill Lynch filed the claims after he jumped to Wells Fargo in November 2017. Townsend did not make an appearance during the arbitration proceedings, according to a copy of the award.

Townsend says in his lawsuit that FINRA sent correspondence to a temporary residence rather his permanent address. He had moved out temporarily while his floors were being replaced, according to the lawsuit which was filed in June. Townsend only found out about Merrill's arbitration claims against him in March when FINRA contacted his new employer just nine days before the arbitrator awarded damages to Merrill.

A Merrill Lynch spokesman declined to comment on the case.



Jessica Mathews

Wells Fargo, meanwhile, is contesting a move to vacate an arbitration award by one of its former employees, Heath Justin Harris, who makes similar claims about misdirected mail from FINRA.

Wells Fargo, which is the only one of the firms so far to file a legal response to the lawsuits, claims that Harris had a responsibility to advise FINRA of a change in mailing address.

"If Harris in fact did not receive service of the underlying FINRA arbitration, it would be the direct result of Harris' failure to meet his basic obligation, set forth in the FINRA by-laws, to advise FINRA of his new address," Wells Fargo says in its legal filing.

For his part, Harris contends he did so through his new employer, Citigroup, and that FINRA never contacted him at his new workplace.

Wells Fargo, which has asked a federal judge to reject his suit and confirm the firm's arbitration award, also claims that it was in communication with Harris "by letter and by phone, regarding payment of the outstanding balance on his promissory notes."

A Wells Fargo spokeswoman declined to comment.

In the fourth case, advisor Andrew Michael Lawrence is challenging Raymond James' \$134,000-plus arbitration award against him. Like the others, his argument rests on FINRA's alleged inability to contact him. Lawrence, who had worked on Raymond James' independent side until moving to Cuso Financial Services in October 2017, filed his suit in July.

A spokeswoman for Raymond James declined to comment on the case.

As for their long-term plans, Brinen and his clients are focused on the immediate battle at hand, according to the New York-based attorney. If they succeed in vacating the awards, then they can be reheard in arbitration by a new panel or settled.



Andrew Welsch

Andrew Welsch is senior editor of *Financial Planning* and *On Wall Street*.



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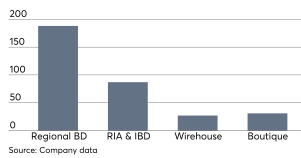


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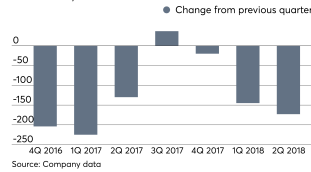


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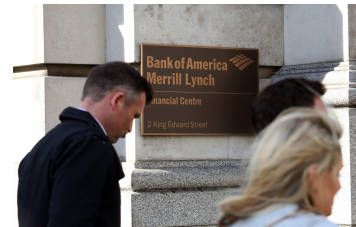
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