



The Quarterly Report

Volume XV, No. 2

MAXINE M. LONG, CHAIR

G. STEVEN FENDER — EDITOR

Preserving Claims For Attorney's Fees in NASD Dispute Resolution Arbitrations

by Russell C. Weigel III, Miami

Prevailing parties in Florida securities arbitrations have the absolute right to have courts decide their entitlement to attorney's fees. Most arbitrating parties, however, unknowingly forego that right to their detriment. This article examines results of current attorney's fee claims in NASD Dispute Resolution (NASDDR) arbitrations, the probable reasons for such results, and the applicable law. It then offers a simple solution for parties to preserve claims for prevailing party attorney's fees.

Recent Award Statistics

The author examined all NASDDR awards in non-settled Florida cases issued during the period between January 1, 2004 and June 30, 2004 in which at least one party made a claim for attorney's fees or reserved jurisdiction for a court to decide the entitlement to or the amount of attorney's fees to be awarded. During that period, there were 184 such cases. Of these, twenty involved contractual disputes between securities industry members or between member firms and their employees, some also containing statutory damage claims for back wages. The remaining 164 disputes each contained at least one statutory claim by a public investor against an NASD member firm. Most of these statutory claims involved allegations of securities fraud, while the remainder alleged

civil theft. Of the pool of 184 decided cases, only 38 (21%) resulted in attorney's fee awards or referrals to a court to determine entitlement to or the amount of attorney's fees. In only one case did a party reserve jurisdiction to have a court decide the issue of attorney's fees.¹

Even if these statistics are grossly understated because perhaps litigants in court are able to set aside the arbitrators' attorney's fee determinations, a twenty-one percent success rate for attorney's fee claims made to arbitration panels is very low. This statistic begs the question why arbitrating parties would submit the determination of a purely legal issue like a claim for attorney's fees to an NASDDR arbitration panel when Florida law gives them the right to have that issue decided by a court in a subsequent proceeding. Part of the answer to this question may involve the training of civil litigators to plead all possible claims or defenses under penalty of waiver,² which, if combined with unfamiliarity with the distinct procedures of arbitration, may operate to deprive a prevailing party of a potentially significant property right: the party's right to prevailing party attorney fees.

Florida Law on Attorney's Fees under the Uniform Arbitration Act

The Florida Supreme Court allows trial courts in arbitration award con-

firmation proceedings to award prevailing party attorney's fees for the arbitration proceedings and for the award confirmation proceeding in court, provided that there is a contractual provision or statute authorizing an award of attorney's fees.³ What is clear in Florida is that unless the parties confer jurisdiction on the arbitration panel, the arbitrators do not have the authority to decide the issue of attorney's fees. The determination of this issue is the province of the court.

The Florida Arbitration Code, Fla. Stat. Sections 682.01, *et seq.* (FAC)⁴ created a discrete procedural scheme for the conduct of all Florida domestic arbitrations. There are other statutory arbitration schemes in Florida for specific industries and proceedings having distinct procedural schemes.⁵ Because there is no industry-specific arbitration scheme for securities industry disputes in

See "Preserving Claims," page 10

INSIDE:

Another Spin On "Spinning"	2
SEC Guest Speaker: Glenn Gordon, Associated Regional Director	5
Case Summaries for January 20, 2004 Meeting of the Florida Bar Business Litigation Committee	6
Speak No Evil: Federal Appeals Court Rules That ESPN Did Not Defame Evel Knievel	13

PRESERVING CLAIMS

from page 1

Florida, NASDDR arbitrations conducted in Florida operate under the FAC. Section 682.11 of the FAC excludes from operative authority an arbitrator's determination of attorney's fees. Section 682.11 provides:

Fees and expenses of arbitration. Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, together with other expenses, **not including counsel fees**, incurred in the conduct of the arbitration, shall be paid as provided in the award. (Emphasis added).

By the terms of Section 682.11, the subject matter jurisdiction of an arbitration panel to award fees and expenses of the proceeding extends only to the panel's expenses and fees and other expenses it has determined to award. Payment of those items is enforceable by the "shall be paid" phrase in the statute. However, the statute expressly carves out the subject matter jurisdiction of the panel to award attorney's fees. Therefore, pursuant to the statute's exception for determinations of "counsel's fees" and its affirmative mandate that other expenses and fees "shall be paid," it is implied that "counsel fees" do not have to be paid if provided for in the award. Attorney's fee awards in a FAC arbitration therefore are unenforceable; indeed, the determination of an issue for which the panel lacks subject matter jurisdiction would be void.⁶

Whether an arbitration panel acts beyond its jurisdiction and makes a void ruling by granting or denying a claim for attorney's fees has not been made clear by the courts. All but three of the cases in the sample of 184 described above involved determinations by arbitration panels of the appropriateness of awarding attorney's fees. Of the three exceptional cases, in two cases the parties stipulated to the jurisdiction of the panel to determine attorney's fees, and in the third case one of the parties reserved the right to have the issue of attorney's

fees determined by a court. In the absence of a finding in the majority of the awards that the parties conferred jurisdiction on the panel to decide the issue of attorney's fees or without a reservation of jurisdiction by a party being part of the award, it appears, albeit without the benefit of the record from each case, that almost all of the sampled cases involved void determinations by the panel on the ancillary issue of attorney's fees.

A party can waive its right to have a court determine the attorney's fee issue by stipulating to confer jurisdiction upon the panel to decide that issue.⁷ With the record of successful applications for attorney's fees to arbitration panels hovering around 21%, and given the right to have such determinations made in a court, which is bound to follow the law and which is subject to appellate review, why would a litigant stipulate to confer jurisdiction on the panel?

Joint stipulations by the parties are very rare and certainly unwise in this environment. The danger with pleading and arguing the appropriateness of an award of attorney's fees before an arbitration panel is that it depends on which Florida jurisdiction the award confirmation proceeding will be brought because the courts in Florida are split on the issue whether parties can be deemed to have waived the right to court determination of attorney's fee awards by their conduct. This is a trap for civil litigators accustomed to pleading all causes of action and all relief including attorney's fees. Doing what is prudent in civil litigation may result in a finding in a confirmation proceeding that the party waived its right to court determination by its conduct. Proper case planning, therefore, is essential.

The First DCA has held that by its pleadings and oral argument and by its signing of an NASDDR Uniform Submission Agreement (USA)⁸ a party can effectuate a waiver of the right to have a court determine the fee issue.⁹ The Third and Fourth DCA's disagree and hold that the execution and submission of a USA, the pleading of attorney's fees, and the claim for fees before the arbitration panel are not enough to waive the

right to have a court decide the issue.¹⁰ These courts require a stipulation on the record or a finding made based upon substantial competent evidence that the parties' agreement to confer jurisdiction on the panel before a waiver of the right to court determination will be found.¹¹ In other words, in the First DCA, a party can unilaterally waive its right to court determination if the opposing party happens to file a Form USA and also make a claim for attorney's fees, whereas in the Third and Fourth DCA's a waiver must be made jointly between by the parties¹² (and there is mercy for mistaken pleading). Until the conflict between the District Courts of Appeals has been resolved, arbitrator determinations of attorney's fee issues in the Third and Fourth DCA's are almost always going to be void, subject to the running of statutory time limits to vacate, modify, or correct the award.^{13 14}

Possible Procedural Remedy

How can a party in this environment best preserve a claim for attorney's fees for determination by a court? There are several options to preserve the record for the award confirmation proceeding and the use of all of them is recommended.

The place to start is to reserve jurisdiction for a court to determine attorney's fees in the party's arbitration pleadings. An additional option is submit to NASDDR a stand-alone notice containing the following language or similar language:

[CLAIMANT'S] [RESPONDENT'S]
NOTICE OF RESERVATION OF
RIGHTS UNDER FLORIDA LAW

[Party Name] hereby reserves his/her/its rights pursuant to Florida Statute § 682.11 to have a court of competent jurisdiction decide whether any party in this arbitration proceeding is entitled to an award of attorney's fees and the amount thereof, if any.

This Notice of Reservation of Rights is intended to be a part of the record of this proceeding for all purposes. This Notice of Reservation of Rights shall not be construed as having been withdrawn by any action or conduct of [Party

Name] except by my submission in this arbitration proceeding of a corresponding written waiver and notice of withdrawal.

Dated

Party Name

One benefit of filing a stand-alone notice is that NASDDR typically mechanically documents the date and title of the filed document in the procedural summary of the ensuing award. Then, no matter what else the award may say about attorney's fees, the notice of reservation of rights should be reflected in the award's procedural history, and a reviewing court will not have to sift through the pleadings and the transcript of the proceeding to confirm a party's reservation of jurisdiction for the court to determine attorney's fees. If the notice of reservation of rights is not reflected in the award, the party could obtain from NASDDR a copy of the filed notice as evidence of the filing for attachment to the party's award confirmation proceeding application.

During opening and closing statements, the parties should announce on the record their intention to have the panel make a finding of a statutory violation, or a finding of a lack of one, and to have a court determine the attorney's fee issues. Because NASDDR arbitration proceedings typically are magnetically taped, sometimes there are failures to record parts of the record or the record at times may be inaudible. Then the pleadings and the notice of reservation of jurisdiction may be the only available evidence to establish the party's intention to reserve jurisdiction.

Also, parties should not take other actions inconsistent with their reservation of jurisdiction. A party making a reservation of jurisdiction in the arbitration proceeding should, for example, refrain from pleading relief for attorney's fees, should not offer evidence of the party's attorney's fees, and should not request an award of attorney's fees on the record during the arbitration hearing. Indeed, where statutory attorney's fees may be available to prevailing parties, the parties should focus on the merits of the case and in obtaining a commit-

ment from the panel to make or not make a finding of a statutory violation in the award. The finding in the award of a statutory violation or lack of proof of a statutory violation can later be used as the basis for an award of attorney's fees in an award confirmation proceeding. That is the forum in which to plead and prove a claim for attorney's fees.

Impact of Possible Change in Arbitration Procedure

The Uniform Arbitration Act was revised in 2000 (the "Revised Act") by its drafters, the National Conference of Commissioners on Uniform State Laws. The Revised Act has been adopted by nine states but not by Florida. Revised Act Section 21 provides that:

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

If the Revised Act is adopted in Florida, a prevailing party's right to have a court determine the issue of attorney's fees will probably be lost in most cases. If arbitration panels are given authority to award attorney's fees, it is unlikely that such panels will suddenly start awarding prevailing party attorney's fees. Prevailing parties in Florida NASDDR arbitrations would be better off in the current statutory arbitration scheme.

Conclusion

Attorneys should carefully consider their actions in a securities arbitration because their conduct could confer jurisdiction on the arbitration panel to determine the issue of entitlement to and the amount of attorney's fees. With the poor record of attorney's fee awards by arbitration panels, parties' property rights to fee awards are being unnecessarily thrown away. This result is easily avoidable with proper case planning.

Endnotes:

¹ Speculation on the reasons why attorney's fee claims fare so poorly is beyond the scope of this article.

² For example, the failure to set forth a claim for attorney's fees in a pleading or motion to dismiss in Florida civil litigation constitutes

a waiver. *Green v. Sun Harbor Homeowners' Association, Inc.*, 730 So.2d 1261, 1263 (Fla. 1988).

³ *Ins. Co. of N. America v. Acousti Eng. Co. of Fla.*, 579 So.2d 77 (Fla. 1991) (Adopting opinion in *Fewox v. McMerit Const. Co.*, 556 So.2d 419 (Fla. 2d DCA 1990)). In *Moser v. Barron Chase Securities, Inc.*, 783 So.2d 231 (Fla. 2001), the Florida Supreme Court interpreted § 517.211(6), the attorney's fee provision of the Florida Securities and Investor Protection Act (FSIPA), to require an award of attorney's fees in a securities arbitration when the investor is the prevailing party under FSIPA, holding that "[i]t would be an empty victory for [a claimant] to have prevailed in obtaining redress from her broker who violated the consumer protection provisions of the securities law if she now had to use recovered investment to pay the fees to her lawyer made necessary by defendant's violations of its statutory duty," citing *Kirchner v. Interfirst Capital Corp.*, 732 So. 2d 482 (Fla. 5th DCA 1999) (where a securities arbitration panel finds liability under FSIPA against a broker, the court is required to award attorney's fees).

⁴ The Florida Arbitration Code is Florida's version of the Uniform Arbitration Act (1956). Section 682.11 of the Florida Arbitration Code is identical to Section 10 of the Uniform Arbitration Act (1956).

⁵ For some examples, international arbitrations, motor vehicle sales warranty arbitrations, and court-annexed and private arbitrations all have their own distinct statutory procedural schemes.

⁶ Both the Federal Arbitration Act, 9 U.S.C. § 1, et seq., and the Florida Arbitration Code contain time limits to confirm, vacate, modify, or correct an arbitration award. A void determination on an ancillary matter like attorney's fees would need to be challenged at some point during confirmation proceedings or the void determination would become binding. Presumably, the ground would be that the arbitrators exceeded their jurisdiction and awarded upon a matter not submitted to them. The time limits are short to commence confirmation/vacation proceedings to challenge the award. 9 U.S.C. § 12 contains a three month time limit. Fla. Stat. §§ 682.13 and 14 contain a 90 day time limit. These time limits could distinguish the timing in civil litigation wherein a determination made by a court lacking in subject matter jurisdiction is void and can be attacked at any time, directly or collaterally. *Malone v. Meres*, 109 So. 677 (Fla. 1926). A waiver of a voidable defect in a judgment can only occur if the objection to the judgment is not made before the proceedings have become final. *Id.*

⁷ *Turnberry Associates v. Service Station Aid, Inc.*, 651 So.2d 1173 (Fla.1995).

⁸ The NASDDR form USA states that "The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related counterclaims and/or third-party claims which may be asserted, to arbitration . . ." NASDDR does not allow the parties to modify the form USA. See NASD Rule 10314; NASD Notice to Members 04-11.

⁹ *Cassedy v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 751 So.2d 143 (Fla. 1st DCA 2000). Cassedy will no doubt promote litigation on the issue of whether a stipulation was

continued, next page

PRESERVING CLAIMS

from page 11

knowingly entered. Stipulations obtained by a party's mistake are unenforceable. *Cunningham v. Standard Guar. Ins. Co.*, 630 So.2d 179 (Fla. 1994). A "stipulation" imposed upon a party by the mere signing of a USA, by its action of claiming for fees, and without knowledge that arbitrators lack subject matter jurisdiction on this issue as a matter of statute, would be a stipulation obtained by mistake and should be unenforceable.

¹⁰ *GCA, Inc. v. 90 S.W. 8th St. Enterprises, Inc.*, 696 So.2d 1230 (3d DCA 1997) (requiring stipulation or specific finding based upon substantial, competent evidence of parties' agreement to waive court determination); *D.H. Blair & Co. v. Johnson*, 697 So.2d 912 (Fla. 4th DCA), review dismissed, 728 So.2d 202 (Fla. 1998), cert. denied, 119 S. Ct. 1460 (1999) (holding that where both parties signed USA's and both pleaded attorney's fees that this does not constitute an express waiver).

¹¹ Presumably, nothing short of a joint oral stipulation on the record or the submission of a written joint stipulation by the parties would constitute an express waiver in the majority jurisdictions.

¹² Conceivably, depending on the language of the pre-dispute arbitration agreement, a party could contend that by signing an account opening agreement the parties have expressly waived their rights to have a court decide any part of their dispute. While most securities account documents make substantial disclosures about the party's waiver of a

right to a jury trial, for example, I have never seen one that made any disclosure about the waiver of a statutory right to have a court decide the issue of attorney's fees.

¹³ A void or voidable award or a void or voidable ancillary determination in an award on the issue of attorney's fees can become enforceable if not challenged during the award confirmation proceeding.

¹⁴ Curiously, some attorneys in NASDDR arbitrations in Boca Raton, Florida are known to plead for attorney's fees but then ask the panel only to make a finding of statutory liability and to reserve jurisdiction for a court to determine attorney's fee issues. This may be a dangerous practice for their clients' pending cases if the Florida Supreme Court one day resolved the conflict between the District Courts of Appeal in favor of the First DCA. Also, if this practice is widespread, then the implication is that these attorneys routinely seek to void or modify the arbitration awards during the subsequent award confirmation proceedings, and of course, that should drastically change the attorney's fee award statistics mentioned at the beginning of this article insofar as those results imply that prevailing parties are not successful at ultimately obtaining attorney's fee awards.

Russell C. Weigel III is a shareholder at Carlton Fields, P.A. and was a branch chief and special counsel at the U.S. Securities and Exchange Commission. Mr. Weigel specializes in securities litigation, arbitration, SEC defense and securities regulatory compliance counseling.



ATTENTION READERS: The editors of the *Quarterly Report* are looking for authors who would like to publish informative and timely articles in the *Quarterly Report*. For more information, please contact Alina Cooper at 850/561-5621 or email at acooper@flabar.org.



The Florida Bar Business Law Section presents

Lunch 'n' CLE

A member benefit

ADMIT ONE

Upcoming Lunch 'n' CLE

- **Electronic Discovery – Email: the Indestructible and Potentially Explosive “Paper” Trail**
- **Doing Business in Cuba Part 2**
- **Recent changes to the Fair Labor Standards Act and understanding the new Florida minimum wage law**
- **Fairness Opinions**
- **and many other interesting topics...**

This FREE 1 hour seminar and lunch is being provided to you as a Business Law Section Member benefit.