

Legal Representation in Securities Disputes

*Answers to Questions Most Often Asked
by Investors*

A Public Service from the
Legal Referral Service
of
The Association of the Bar
of the City of New York
and the
New York County
Lawyers' Association
(212) 626-7373
www.abcny.org

The Legal Referral Service of The Association of the Bar of the City of New York and the New York County Lawyers' Association prepared this pamphlet. We hope it will help you consider some of the issues involved in claims against stockbrokers or commodities brokers. This pamphlet is not designed to give you legal advice.

Call the Legal Referral Service at (212)626-7373 if you have questions regarding this pamphlet or would like to be referred to an experienced lawyer.

What Are The Reasons For Most Investors' Claims Against Brokers?

- (a) false or misleading information that induced you to trade [fraud]
- (b) excessive trading [churning]
- (c) unauthorized trading
- (d) recommending excessively risky investments for your circumstances [unsuitability]
- (e) forgery or theft
- (f) distributing misleading investment documents
- (g) negligent or unsuitable recommendations

What Are Some Of The Most Common Reasons Claims Are Denied?

- (a) failure to file a formal claim within the Statute of Limitations
- (b) in certain circumstances, failure to act promptly, although well within the Statute of Limitations
- (c) the brokerage firm sent you information regarding the activity you complain of, but you did not act quickly to stop it
- (d) agreeing to, or ratifying, an otherwise unauthorized transaction or other conduct that is the basis of the complaint
- (e) the claim is unrelated to the conduct of the broker

If A Broker's Improper Conduct Caused Me To Lose Money Can I Bring A Lawsuit In State Or Federal Court?

Probably not. Most brokerage firms' new account agreements and margin account agreements contain a clause that requires all disputes to be submitted to binding arbitration.

If such a clause was in the agreement you signed, the firm can compel arbitration to resolve a dispute, and only under very few circumstances would you be able to sue the firm in court. If you did not sign a customer agreement with a compulsory arbitration clause, you may compel arbitration at a self-regulatory organization of which the firm is a member or sue in any court that has jurisdiction.

What Processes Are Available To Resolve Securities Disputes?

If you did not sign an agreement with an arbitration clause, you have the choice of resolving your dispute through litigation or arbitration. Mediation may be instituted any time the parties to a dispute are willing to participate in this process. If you did sign an agreement with an arbitration clause, you will most probably be compelled to resolve the dispute through arbitration at the forum listed in the agreement.

*Litigation is the process of using the state or federal court system to resolve disputes.

*Arbitration is a process of resolving disputes by a neutral third person (arbitrator) or panel (arbitration panel).

*Mediation is a method of resolving disputes through a non-adversarial process. Mediation may occur any time both sides to a dispute are willing to meet with an impartial person who is trained in helping the parties reach a settlement. Courts and arbitration forums generally encourage mediation.

What Are Some Of The Differences Between These Processes?

*Litigation usually is begun by filing a summons and complaint (a lawsuit) in state or federal court. The rules for litigation are quite formal and the court processes usually take much longer than arbitration. This

is in part due to the large number of criminal and civil cases of all kinds that are filed in court. There is a broader right to discovery and the taking of depositions in court than in arbitration. Strict rules regulate how lawsuits must be filed and pursued. Lawsuits may be decided by a judge or a jury.

When a judge decides your case in court, you will often receive a written opinion that gives the basis of the decision. Lawsuits generally cost more in legal fees and expenses than arbitration. Either party to a lawsuit may file an appeal based upon an error of law or other factors that improperly influenced the decision.

*Arbitration in securities disputes is usually initiated by filing a Statement of Claim and certain other documents that may be required by the particular arbitration forum. The forum is the entity that will manage the arbitration. It is usually identified in your brokerage account agreement.

Under arbitration a neutral third person or arbitration panel considers the facts and arguments presented and makes a decision that is binding on the parties. The method of choosing an arbitrator (or panel) is explained in materials supplied by the various arbitration forums. Arbitration usually is completed in much less time than court proceedings.

The arbitrators are not required to, and generally will not, give a reason for their award (decision). There is only a very limited basis to appeal an arbitration decision. The means by which arbitrators are chosen and the procedures to follow are explained in materials available at the arbitration forum.

*Mediation may be initiated at any stage before or during arbitration or litigation. If the parties are willing to meet with a neutral third person to try to settle the dispute, they inform the court or the arbitration forum where their matter is pending (or will be filed). The court or the arbitration forum will generally suggest a mediator to you.

In mediation, a neutral third person called a mediator facilitates the resolution of a dispute. Mediation is a non-adversarial process that has proven successful in resolving many disputes. Many courts and arbitration forums encourage mediation as a viable alternative to contested hearings. If mediation is not successful, litigation or arbitration are still available.

Do I Need A Lawyer?

An experienced lawyer can help you decide whether you should file a claim to recover your losses. Not all losses are legally compensable. Losses may not be caused by improper conduct. A sound evaluation of your claim will make it more likely that your time and money will be spent on claims that have a reasonable chance of success. The lawyer can advise you whether litigation, arbitration or mediation is available and which may be preferable for you. If you are filing a lawsuit in state or federal court you would be well advised to hire a lawyer.

If you are filing an arbitration claim or are seeking mediation and your loss is less than \$10,000 it may not be cost-effective to hire a lawyer to represent you. However, you may still want to consult with a lawyer to help evaluate your claim, and advise you what documents you will need and how you should present your case. Sometimes a lawyer can be hired to prepare a written outline of the claim. This can often be done economically and is helpful to many investors.

Many arbitration forums have simplified small claims procedures for losses under \$25,000. Such procedures were designed at the suggestion of the Securities and Exchange Commission for persons

appearing without a lawyer. A pamphlet explaining the dollar limits and the procedures required is generally available from the forum where the dispute will be considered. The claim must be presented in an organized, credible manner.

For larger claims there are substantial reasons to hire a lawyer. Your broker and his/her firm will almost certainly be represented by attorneys. You may be better prepared, feel more secure and achieve greater success if you are represented by an attorney who is experienced in securities arbitration. Your attorney can help you anticipate the defenses your broker will raise. In addition, the rules of arbitration are often complex; an attorney with experience will be familiar with these rules and with how best to gather evidence and present your claim.

In a 1992 study of securities arbitration the General Accounting Office (GAO) of the United States Government found that persons represented by attorneys are more likely to receive an award in excess of 60% of the amount of their claim than those unrepresented.

What Will It Cost To Hire A Lawyer?

Most lawyers either charge according to hours worked (hourly rate) or charge a percentage of what you recover. Some lawyers will charge a set amount (flat fee) regardless of the time or results. Fee agreements are negotiable and can include any combination of the above. It is advisable to have all fee agreements in writing and to make sure you have a copy of the agreement before the lawyer starts working for you. A fee agreement is also called a retainer agreement.

Contingency fees are based on a percentage of the amount recovered. The fee will be the agreed upon percentage of the recovered amount plus expenses.

Hourly fees are based on the time your lawyer spends on your case. The hourly rate is the amount the lawyer will charge by the hour for any work done on your case. The lawyer's time spent on your case generally includes telephone calls, research and preparation, as well as attendance at your trial or hearing. Expenses are added to the hourly fee.

Your attorney may request a deposit or retainer before work is started. Regardless of which fee agreement is selected, all out-of-pocket expenses will generally be paid by you. These expenses are filing fees, copying charges, fees of experts, and other costs and disbursements. You should ask the lawyer what expenses you will be responsible for and should include these in the retainer agreement. Please keep in mind that no attorney can guarantee results.

What Damages Are Recoverable?

Depending on the circumstances of your case, you may be entitled to:

- (a) actual losses
- (b) brokerage commissions
- (c) margin interest
- (d) interest
- (e) rescission of the transaction

In some circumstances, attorneys' fees, costs of the proceeding and other damages may be awarded. Only in very rare circumstances can punitive damages be awarded. It is best to discuss your losses and their

potential recovery when you meet with an attorney.

What Documents Should I Save To Use If A Dispute Arises?

- (a) all agreements with your brokerage firm
- (b) all documents showing your investment objectives, investment history and net worth
- (c) all monthly account statements with all brokerage firms
- (d) all confirmation slips
- (e) year-end transaction and portfolio summaries and tax returns for all applicable years
- (f) letters between you and the brokerage firm, including any correspondence about wrongdoing

If you consult with a lawyer, these documents may be helpful.

How do I Find a Lawyer?

The lawyer you use should have experience evaluating claims and representing clients in securities disputes. If you do not know of a lawyer with this experience you may call the Legal Referral Service in New York City at (212) 626-7373. When you call the Legal Referral Service a staff lawyer or paralegal will help direct you to an appropriate lawyer from a panel of lawyers experienced in securities arbitration and litigation. When a lawyer is recommended by the Legal Referral Service, the first one-half hour consultation in the lawyer's office is only \$35.

Lawyers listed with the Legal Referral Service must have demonstrated satisfactory knowledge and experience before being placed on the recommended list. Many of them also serve as arbitrators or mediators to help resolve similar disputes. When you consult a lawyer you may want to ask the names of the schools the lawyer attended, the amount of time in practice, their experience before the particular arbitration forum or court with your type of case and what fee arrangements will be considered.

For More Information Call or Write:

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The Association of the Bar of the City of New York, founded in 1870, is an independent professional organization of lawyers and judges with over 22,000 members.

The New York County Lawyers' Association,
established in 1908, has 10,000 members.

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