Holly Stein Sollod

Partner
303.295.8085
Denver
hsteinsollod@hollandhart.com

10th Circuit Affirms FINRA Arbitration Award—Adopts Face-of-the-Award Rule

Publication — 04/15/2020

On April 14, 2020, the 10th Circuit U.S. Court of Appeals adopted the "face-of-the-award" rule for dealing with arbitrator errors in damage calculations under Section 11(a) of the FAA, affirming the district court's refusal to modify an arbitration award despite granting "double recovery" to an elderly couple. Noting this was a question of first impression in the 10th Circuit, the court widened an existing split among the circuits.

The couple, Beverly Bien and husband David Wellman, filed a FINRA arbitration against Mid Atlantic Capital Corp (MACC) in Boulder, Colorado in 2015 alleging their broker had put them into two high-risk investments resulting in a loss of at least $300,000. At the arbitration, the couple's expert submitted two *alternative* measures of damages – "net out-of-pocket losses" and "market-adjusted damages." The couple's expert testified their out-of-pocket losses were about $292,000 and their actual damages, based on returns from appropriate investments, were between $485,000 and $610,000. MAAC did not present any expert testimony on damages. In their final prayer for relief at the hearing, the couple asked only for market-adjusted damages.

The FINRA arbitrators found for the couple and awarded them **both** their net out-of-pocket and their market adjusted damages of $777,092, plus interest, attorneys' fees, and costs.

MAAC filed suit to modify the award and correct the purported double recovery based on Section 11(a) of the Federal Arbitration Act, which allows a court to correct "an evident material miscalculation of figures" in the award. The couple moved to confirm the award, arguing the court could modify the award to correct the alleged double recovery only if there was an "evident material miscalculation of figures" on the face of the award. U.S. District Judge Matsch agreed with the couple and adopted the "face-of-the-award" rule which holds that a miscalculation or mistake is "evident" only if it appears in the award.

With this decision, the 10th Circuit joins the 4th, 6th, and 11th Circuits in affirming the "face-of-the-award" rule, widening the split in the circuits. The 5th and 7th Circuits allow courts to consider some parts of the record. The 10th Circuit rejected MACC's argument that Section 11(a) allows the courts to dig through the arbitration record to find significant miscalculations, holding "Section 11 authorizes courts to review an arbitration award—not the arbitration record."

The 10th Circuit also upheld the district court's decision that interest did not accrue on the attorney's fees and costs awarded to the couple and that post-judgment interest was properly applied at the federal rate.

The case can be found at *Mid Atl. Capital Corp. v. Bien*, No. 18-1195, 2020 WL 1860125 (10th Cir. Apr. 14, 2020).