



Protecting Your Broker Rights: Strategies to Defend Yourself in a Lawsuit

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In recent years, brokerage firms have been quite successful enforcing unpaid promissory notes against departing brokers, regardless of the brokers' claims of foul play. Invoking the arbitrator's power to "do equity", financial advisors routinely ask a FINRA panel to either ignore or discount their debt because the firm failed to provide promised support, butchered their compensation plan, or perhaps destroyed their practice by terminating them on lawful but flimsy grounds.

Faced with these defenses, the firms' lawyers typically roll their eyes and point to the ironclad language in the promissory notes that the advisors either did not bother to read or failed to appreciate at the time they said "I do" and happily deposited their "up-front bonus." The notes generally become due and payable upon termination *for any reason*, whether voluntary or involuntary. They also typically state in no uncertain terms that the advisor is not relying upon any promises or representations made at the time of hire. If the broker chooses to believe the manager's rosy depiction of life at the new firm, he does so at his/her own peril.

With greater frequency, arbitrators are willing to ignore the equities, except in the most egregious cases, in order to follow strict rules of contract interpretation. If the note contains an integration clause declaring that the broker has not relied on any representations by the firm, the note is enforced whether or not the broker was seduced by false promises.

One defense strategy is to present the firm with a Hobson's choice: if it wants the law strictly enforced then it must be held strictly accountable to the law as well. If the broker was an employee and not an independent contractor, he/she does not have to look far for violations of state and federal wage and hour laws and other regulations protecting employees. In some states such as California, the violations can accrue significant damages, plus penalties and attorneys' fees.

Brokers typically pay little attention to wage and hour laws, even when they receive notices in the mail, or read headlines, about class action suits asserting claims for unpaid overtime and unlawful deductions from wages. They see themselves more as entrepreneurs than rank and file employees. Likewise, firms have done little over the years to alter their employment practices, preferring to risk litigation over “technical” violations than to modify established compensation and incentive structures.

Firms should be called to task on employment law violations, however, when they ask arbitrators to strictly enforce promissory notes. Depending on the state law, financial advisors can seek offsets against the outstanding promissory note balance for deductions from wages during employment, including trading errors resulting from mere negligence, and sales assistant salaries (whether or not the firm characterizes the deductions as “voluntary”). Depending on the broker’s duties and responsibilities, he or she may also have a viable claim for overtime and related paycheck violations, which can accrue significant penalties in addition to unpaid wages. The firm may also have violated state laws governing payment of earned commissions or vacation wages at the time of termination. Because many of these claims authorize an award of attorneys’ fees, they also neutralize the firm’s threat of recovering fees on the promissory note claim.

Firms of course argue that the employment laws are highly technical, unfairly harsh, and do not match the expectations and economic realities of their business. They may ask the arbitration panel to do what is fair and equitable. Sound familiar?