

## Welcome to Arbitration Nation - A Blog About Arbitration and the Law

[Contact](#)

Arbitration is meant to be an alternate to litigation. Yet arbitration is itself the subject of much litigation over who must arbitrate, what must be arbitrated, whether and how the arbitration should proceed, and the deference courts must show to arbitration awards. This blog is intended to be a resource for litigators, in-house counsel, arbitrators and anyone else who wants to stay on top of the many thorny issues that arise under the Federal Arbitration Act. Our Bloggers →


[Arbitration Information](#)

[Search](#)

### Eighth Circuit Rules Investors Are Not "Customer" Of Managing Broker-Dealer Under FINRA, So Arbitration Not Required

By *Liz Kramer* | October 3, 2012 in *Scope of Arbitration Agreement, Validity of Arbitration Agreement*

In an opinion that runs less than three pages, the Eighth Circuit ruled that a managing broker-dealer is not obligated under the FINRA rules to arbitrate with a group of investors who purchased securities from another party. *Berthel Fisher & Co. Fin. Servs., Inc. v. Larmon*, \_\_\_ F.3d \_\_\_, 2012 WL 4477433 (8th Cir. Oct. 1, 2012). The Eighth Circuit found that because the managing broker-dealer provided its services to other broker-dealers, who in turn offered the securities directly to the investors, the investors were not "customers" of the managing broker dealer within the meaning of Rule 12200 of the FINRA Code.



Rule 12200 of FINRA requires its members (including the managing broker-dealer here, Berthel) to arbitrate disputes with customers if the dispute arises in connection with "the business activities of the member or the associated persons." The parties agreed that their dispute was connected to Berthel's business activities, so the entire appeal related to whether the investors were Berthel's "customers" within the meaning of the FINRA Code. The Eighth Circuit held the investors were not customers because: they had no direct contact with Berthel; and Berthel's services were provided to the issuing company and to the group of broker-dealers that sold directly to investors. "Simply put, there is no "relationship" between Berthel and the Investors as required..."

An interesting note about this decision is that the Eighth Circuit never mentioned a recent case from the Second Circuit, also interpreting who is a "customer" entitled to arbitrate under Rule 12200 of the FINRA Code. That fact is more striking given that the case, *UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643 (2d Cir. 2011), was one of only two cases cited by the *Berthel* Appellants as "apposite authority" in their brief's statement of the issues. In that case, UBS argued unsuccessfully that because a hospital system that used UBS as an underwriter to issue municipal bonds was not an investor, but an issuer of securities, the term "customer" did not apply to it. However, the Second Circuit in *UBS* rejected a number of narrow definitions of customer, before holding that the hospital system was a customer of UBS within the meaning of FINRA Rule 12200 because the hospital system purchased auction services from UBS.

Given that the Second Circuit recently interpreted the word "customer" in FINRA Rule 12200 broadly, while the Eighth Circuit interpreted it rather narrowly in *Berthel*, this seems like an area of law that will likely see more litigation before the circuit courts of appeal come to some common understanding (or SCOTUS steps in).

[Share / Save](#) [f](#) [t](#) [+](#)



#### Topics

- Uncategorized
- Validity of Arbitration Agreement
- Scope of Arbitration Agreement
- Arbitration Rules/Procedures
- Appealing Arbitration Decisions
- Litigation vs. Arbitration
- Waiver of Right to Arbitrate
- Year In Review
- ← Back to Home

#### Subscribe

[Follow Arbitration Nation on Twitter](#)

#### Related Links

- [Federal Arbitration Act](#)
- [Uniform Arbitration Act](#)

The bloggers' view points are their own and not those of Leonard, Street and Deinard or any client. | Disclaimer  
WordPress Website by RoosterComm