

Some Investors Win, Others Lose in YES Arbitration Battles With UBS. Here's Why.



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By [Andrew Welsch](#)

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[UBS](#) lost two arbitration cases late last month to investors pursuing damages over how a complex options strategy was marketed. Arbitrators ordered the Swiss bank to pay more than \$2 million in total.

Those cases are among a slew of arbitration claims against UBS over what it calls the yield enhancement strategy, or YES. Clients invested about \$2 billion in the strategy before it went awry in late 2018, leading to steep losses, [according to an SEC regulatory settlement](#).

Investors have won about half of the roughly three dozen arbitration cases that have concluded so far, while UBS has won about half. Given that the disputes all involve the same investment strategy, why are some investors winning seven-figure awards while others come away with nothing?



Experts note that proceedings are private, so documents aren't made public. The notion of precedence doesn't apply, because arbitration panels are not required to follow how others have ruled in similar cases. Finally, many of the cases focus on how the yield enhancement strategy was presented to the individual investors in those cases.

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The mixed arbitration results occur as UBS agreed June 29 to pay \$25 million to [settle charges brought by the Securities and Exchange Commission](#). The regulator said that the bank did not provide adequate training to its financial advisors and did not share with advisors and clients "the possibility of significant risk in YES investments."

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In settling the case, UBS neither admitted nor denied the allegations. The company declined to comment on the two arbitration cases it lost last month.

How to get to YES. The yield enhancement strategy consists of put and call options, is intended to generate modest income from an existing portfolio of securities, and is managed on a discretionary basis, according to the SEC settlement. It was developed by an advisor team at [Credit Suisse](#). UBS recruited the advisors in late 2015, paying them upfront hiring bonuses of approximately \$50 million, [according to the SEC settlement](#).

Between February 2016, when UBS opened YES to new clients, and February 2017, approximately 600 customers invested approximately \$2 billion in it, according to the SEC. The strategy began experiencing losses in early 2018 as market volatility increased and ultimately suffered an 18% loss for calendar year 2018, the SEC said.

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Though the strategy at issue in investors' arbitration cases is the same, little else is.

which parties to an arbitration exchange documents. In a sense, each case is tried anew, attorneys say.

“One arbitration panel may determine that certain documents have to be exchanged, and another panel may not,” says Christine Lazaro, director of the Securities Arbitration Clinic at St. John’s University’s Law School.

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In the UBS/YES matter, there’s a lot of information to digest, according to Stefan Apotheker, an attorney at Miami-based law firm Erez Law who is representing UBS customers in arbitration.

“There is a tremendous amount of evidence in these cases, and it can be challenging to pare down the information to what you want to present to the panel,” Apotheker says.

His law firm has won four arbitration awards for UBS customers, including the two cases that concluded last month. The firm represents more than a dozen other UBS customers still pursuing claims.

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Many of the arbitrations that have concluded included claims of negligent supervision and misrepresentation, focusing on how UBS advisors marketed the strategy to individual investors.

“In the cases we’ve been involved with, we presented evidence that we believe showed that this was presented as a low-risk strategy, but it was in fact a high-risk strategy,” Apotheker says. “That’s not how it was sold to investors and in some cases to UBS advisors.”

Both cases that Apotheker’s law firm won last month included claims of negligent supervision and breach of fiduciary duty. In one case, Jacques and Jennifer Soileau [won approximately](#) \$900,000 in damages and fees. In the other, Jeff and Karen Misner [won more than](#) \$1.3 million.

In its settlement, the SEC [said it found](#) that UBS provided inadequate training about YES to advisors, some of whom did not understand the risks involved.

Another factor behind investor wins and losses: Not all plaintiffs' attorneys are equal in skill, and they differ in their approach to arguing cases. Attorneys may rely on different expert witnesses to buttress their cases.

Arbitration claims themselves are heard by a variety of arbitrators, who are not bound by how other panels have ruled, Lazaro says. Finra arbitrators, who are paid as independent contractors, decide what evidence is admitted and choose how to enforce rules. They are not required to explain their rulings.

Those and other factors make arbitration different from the courts, Lazaro says. She adds that in the courts "because of the possibility of appeal, at the appellate level you can weed out some of the inconsistencies. There's also more public information, and the parties can rely on those pleadings."

Finra's [website](#) says its arbitration proceedings are fair, fast, and affordable. The private organization is funded by its member firms, and its arbitration forum is one of the most widely used for disputes involving securities. It has faced criticism that brokerage firms have an unfair edge in Finra arbitration. A [research study by three academics](#) found that brokerages had an information advantage over consumers in selecting arbitrators, in part because the firms are repeat players. The study, which was distributed by the National Bureau of Economic Research, examined roughly 5,000 disputes between consumers and financial advisors. Finra has previously disputed the study's findings.

Although most investors pursuing claims against UBS have opted for Finra's arbitration forums, one customer [has filed a lawsuit against UBS](#). Christian Dumontet's lawsuit, filed in a federal court in New York Dec. 5, is seeking class-action status on behalf of himself and other YES investors. He is asking a judge for damages, restitution, and disgorgement of allegedly ill-gotten gains.

An attorney representing Dumontet did not respond to a request for comment. UBS has previously disputed the allegations.

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