

Jeffrey B. Pape\*  
Scott R. Shewan

**BORN, PAPE & SHEWAN, L.L.P.**  
**ATTORNEYS AT LAW**

Timothy Born (Retired)

\* Certified Specialist by the State Bar of  
California Board of Legal Specialization in  
Taxation Law

642 Pollasky Avenue, Suite 200  
Clovis, California 93612

Telephone: (559) 299-4341  
Facsimile: (559) 299-0920

April 1, 2008

Via E-Mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Nancy M. Morris, Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-0609

*Re: Proposed Revisions to Rules 12206, 12504, 13206 and 13504 of the FINRA  
Code of Arbitration Procedure—Motions to Dismiss  
SR-FINRA-2007-021*

Dear Ms. Morris:

I am writing to express my strong support of the above-referenced rule changes concerning motions to dismiss in FINRA arbitrations. I join with many of my colleagues in asking that the SEC approve the proposed revisions on an accelerated basis.

A significant portion of my legal practice is devoted to the representation of public investors against brokers and broker-dealers in FINRA arbitrations. I have also handled several arbitrations on behalf of individual registered representatives against broker-dealers. Accordingly, I have a great interest in the procedural rules which govern the proceedings in which my clients seek redress.

I have long been aware of the abuses propagated by counsel representing the industry in connection with pre-hearing motions to dismiss. I have been required to respond to several such motions, based on various defenses, all of which were denied. Every such motion was based on disputed factual allegations which required a hearing in any event, and so the motion was doomed to failure from the start. Despite the denial of each such motion, my client was assessed half of the hearing fee in every case.

### Motions to Dismiss Are Inappropriate in FINRA Arbitration

The rule revisions which are the subject of this filing attempt to strike a balance between the right of respondents to be free of frivolous claims and the right of claimants to present their evidence in support of their claims. The simple truth is that the vast majority of customer claims involve factual disputes between a public investor and his or her broker, which can only be resolved by the panel after an evidentiary hearing. Accordingly, there is a very strong argument for the concept that no motions to dismiss should be granted in securities arbitrations. FINRA's effort to reconcile these competing interests is salutary. The resulting rule, while far from perfect, represents a fair compromise.

It is universally accepted that arbitrations should be less formal, less time-consuming and less expensive than litigation. Notwithstanding these commendable qualities, it must be remembered that arbitration is generally thrust upon the public investor by the brokerage firm through the use of pre-dispute arbitration clauses. Thus, investors are required, as a condition to opening a brokerage account, to give up their right to have their disputes heard by a judge or jury before they even have an inkling that a dispute may develop. Similarly, an arbitration provision is contained in the U-4 which is signed by each new registered representative, thereby requiring the broker to arbitrate claims ranging from failure to pay commissions to wrongful termination and discrimination cases.

It is therefore very important that the arbitration tribunal identified under the pre-dispute agreement preserve basic due process protections to the users of the system. For a claimant, this includes the right to develop and present all of his or her evidence in support of the claim; for a respondent, it includes the right to notice of the claim and a hearing to determine the validity of the claim.

In a litigation context, a defendant is entitled to test the sufficiency of a pleading by way of a motion to dismiss. In court, a plaintiff is required to set forth certain elements of a cause of action before the court will recognize the validity of the claim. In arbitration, respondents denominate their pre-hearing motions as "motions to dismiss;" however, it is the rare case where the respondent actually bases the motion on deficiencies in pleading. Indeed, under the rules which govern FINRA arbitrations, it would be difficult to justify such a motion. Under FINRA's rules, a statement of claim need only specify "the relevant facts and remedies requested." This is an extremely liberal pleading requirement, which is only right for a forum which has so many self-represented parties. Thus, a "motion to dismiss" within the meaning of most rules of civil procedure is simply inapposite.

In truth, nearly all of the motions filed by respondents in FINRA arbitrations are more akin to motions for summary judgment. In court, both plaintiff and defendant are permitted to demand documentary and testimonial evidence during the discovery process. These demands are enforceable through the contempt power of the courts. When discovery is completed, the parties have a good sense of the evidence supporting each position. At that point, a defendant might file

a motion for summary judgment, asserting that, based on the evidence adduced through discovery, there is no valid claim to be asserted. The plaintiff, having had the benefit of full discovery under oath, is free to use such previously-developed discovery to establish to the court's satisfaction that there is a material issue of fact which will require a trial. If the court disagrees with the plaintiff and orders a summary judgment in defendant's favor, plaintiff cannot be heard to complain that there was no chance to present evidence in support of the claim—indeed, plaintiff had every opportunity to develop and present material evidence. Perhaps more importantly, the plaintiff will have an opportunity to challenge the court's granting of the motion by way of an appeal.

By contrast, arbitrations under FINRA have limited discovery, and limited enforcement mechanisms. There are no depositions. Nor are there any discovery responses under oath. When a respondent makes a "motion to dismiss," the motion nearly always presents issues of fact. Yet the claimant lacks the usual discovery record, which might be required to establish the need for an evidentiary hearing. This situation is magnified when panels, at the request of respondents, stay discovery until after the hearing on the motion to dismiss. Finally, there is neither a procedure for providing evidence in opposition to a motion to dismiss, nor an appeal mechanism if the motion is improperly granted. Quite simply, the entire concept of a dispositive motion should be anathema to the arbitration process.

#### The Proposed Rule Revisions Strike a Fair Balance Between Competing Interests

This rule represents FINRA's efforts to find some middle ground on motions to dismiss, balancing the interest of early dismissal of invalid claims against the interest of claimants in having a hearing on the merits. Although I support this rule as a reasonable compromise, I believe that pre-hearing motions to dismiss should not be permitted in any circumstance. Even the three narrow grounds permitted under this proposed rule for motions to dismiss will require fact-oriented motion practice. There may be tolling provisions applicable to motions made under the eligibility rule; these issues require an evidentiary hearing. Similarly, it seems apparent that the last prong will encourage pre-hearing motions from branch office managers, control persons, clearing firms, and the like. These potential respondents, who may be liable under federal and state securities statutes, might seek dismissal on the ground that they were not directly involved with the account which is the subject of the claim. These motions will require the claimant to spend significant time to marshal and present evidence to establish to the panel's satisfaction the need for an evidentiary hearing. None of this is consistent with the stated objectives of arbitration, to streamline procedures and provide a cost-effective dispute resolution mechanism.

I have read some of the concerns expressed by some of my colleagues who believe the rule does not go far enough to rid the process of motions to dismiss. Many of these commenters feel that the rule almost encourages motions to dismiss at the close of claimant's case. These concerns are valid. In my view, it is appropriate for a respondent to have the opportunity to move for a dismissal after claimant has presented his or her evidence. However, I wonder

whether respondents will attempt to use the implicit approval of such motions to delay a case. One can easily envision situations where a respondent would wait until the close of claimant's case, then present the panel with a lengthy brief together with an oral motion to dismiss. Claimants would regularly be caught without the ability to respond to the last-minute brief, and might feel required to request a delay in the hearing in order to respond. It is my hope that

FINRA will monitor this aspect of motions to dismiss to guard against the claimant being "sandbagged" by this tactic, and will institute briefing schedules if the problem develops.<sup>1</sup>

Despite these concerns, I am supportive of this rule. The clear delineation of the grounds for a motion to dismiss will greatly reduce the filing of frivolous motions to which public investors have been subjected. To its credit, FINRA has built into the rule several provisions, including cost-shifting provisions, which will discourage all but the most meritorious motions. These provisions give me some comfort that the proposed rule will indeed have the intended effect of making the filing of motions, and certainly the granting of such motions, a rarity. The rule changes should go a long way toward rectifying a situation which has unjustly caused delays and driven up the cost of arbitrations to claimants who simply want their "day in court." I urge the approval of the rule revisions, and join with those asking the Commission to approve this rule on an expedited basis.

Respectfully,



Scott R. Shewan

---

<sup>1</sup> Such a provision would not be difficult to implement. The current rule proposal, for example, already requires that motions to dismiss on eligibility grounds must be filed at least 90 days before the hearing, which is intended to prevent the kind of "sandbagging" I am concerned about. Likewise, a rule which would require all legal briefs to be filed in advance of the hearing would prevent both surprise and delay, avoiding the gamesmanship which might develop under this rule.