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I am a lawyer who represents customers in FINRA arbitration. FINRA has abandoned all pretense of protecting the investing public in order to provide its members with an even more biased forum. If FINRA Dispute Resolution had an institutional spine, no rule would be necessary and its members would be required to follow the same rules as the customers. If the procedure were as fair, fast, and inexpensive as FINRA advertises, its members wouldn't need short cuts.

FINRA Should be Ordered to Withdraw All Rules Concerning Motions to Dismiss Without a Full Evidentiary Hearing On the Merits as Contrary to the Public Interest

I repeat my statement in prior comments: the proposed rule is an extraordinary example of NASD (now FINRA) toadying to its member firms. Many claimants' lawyers, including PIABA, have accepted this rule as the best that individual investors are likely to get from a hostile FINRA whose abusive practices are rubber stamped by a disinterested SEC. I disagree. The potential for further harassment of customers is far greater under the proposed rules. This further encourages an abusive, expensive and anti-customer motion practice which benefits only dishonest brokers and it should not be allowed.

FINRA invented motion practice out of thin air to benefit its members. The Code does not allow for it, but FINRA instituted a practice of forwarding such motions to arbitration panels with the instruction that they were required to rule on them in direct violation of the Code and most state law. When confronted with these extra-legal motions, claimants argued that such motions were not allowed by the Code and that customers were entitled by the Uniform State Arbitration Act, "to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." This usually prevailed, but duplicative motions were repeatedly submitted to harass customers and engage their attorneys in hours of unproductive work. It was obvious that FINRA's claim that such motions were only being considered "under extraordinary circumstances" was pure hokum. The SEC should not now allow FINRA to amend its rules to deny defrauded investors the basic protection under state law to a hearing on the merits. It is regulatory capture and abuse of the worst sort and it should be squashed like the legal cockroach that it is.

Individual investors Will Find FINRA's Motion Practice Incomprehensible and Be Unable to Participate in the Forum; Denying Them Any Opportunity for Redress.

As FINRA adds layer upon layer of motion practice to its forum, individual investors can simply not compete with member defense lawyers who will paper them over with frivolous legal pleadings and inapplicable law. At the same time, the threshold amount of a claim that an experienced attorney can economically accept rises exponentially. Investors with smaller claims will effectively be denied an opportunity to recover losses due to member fraud. Customers now lose 63% of arbitration hearings and even those that "win" can only expect to receive about 30% of losses, making even "winning" cases unprofitable. A $100,000 claim in FINRA arbitration will seldom result in an award of even $50,000 regardless of the facts or outrageous fraud of a member firm. That is a lot of money to most elderly people. However, with an expected one-third contingent fee of only $15,000 for even a very strong case, most lawyers can not engage in an endless motion practice in addition to contentious discovery disputes to earn this contingent fee. Remember, on average the customer will lose almost two-thirds of all cases resulting in a zero contingent fee. It's simple economics. The effect of this new rule will be to make more cases uneconomic for the customer and his or her lawyer.

The Proposed Rule Replaces Initial Motion Harassment With Later Ambush Motions; Guaranteeing Either Delays or Insufficient Time for Effective Response.

The proposed rule limits pre-hearing dispositive motions to limited circumstances, but replaces them with unfettered motion practice after the claimant has presented his case. While this may at first glance appear fair. It isn't. There are no standards or prerequisites. "The proposal will permit member firms and associated persons to file a motion to dismiss at the conclusion of a party's case in chief, ***based on any theory of law***." (Emphasis added.) This is abusive to customers for several reasons.

First, it is contrary to the Code, Rule 12303, which requires that an answer specify all of the relevant facts and available defenses to the statement of claim. This is a rule that FINRA prefers not to enforce. Respondents routinely plead vague general facts and defenses accompanied by a refusal to provide basic documents in discovery. At the time of hearing, Claimants are normally still not sure what the defense will be; except that it will be whatever Respondents can cobble together based on the documents they have been allowed to withhold and the limited testimony that is presented. Unless the customer calls all potential witnesses, the case can be decided without key players' testimony. Arbitrators should hear all parties on successive days prior to deciding credibility.

Under the current rules, claimants normally call the broker as their first witness for tactical reasons. In the early days of arbitration, customers would put on their case without the broker and member firms would cross examine claimant's witnesses for however long it took to push the hearing into a continuance sometime into the future. There were never enough days set aside to not have a continuance for a month or more. Respondents then had that month to structure the testimony of the broker and other witnesses such as the branch office manager. This had two advantages. In the 30 or 60 day (or more) interim period, the arbitrators, notoriously old and short of memory anyway, had forgotten most of the claimant's testimony. Secondly, the broker was allowed to structure his testimony specifically to the customer's testimony. Written memorandum exactly on point miraculously appeared and registered representatives displayed astounding memories of the precise details which countered the customer's testimony. Member firms were able to carefully structure evidence on the exact issues raised by claimant who was working in the dark as to the members' defenses.

This disadvantage was partially countered by the practice of claimants calling the broker as their first witness. Without benefit of deposition testimony, and extremely weak pleading standards for members' answers, claimants had to, in effect, depose the broker at the beginning of the hearing in order to pin him down on basic facts. The Claimant could then testify concerning the made-up facts. Still, members often reserved the primary testimony by their broker until a later time so that he could be coached on what testimony to change. Over time, two-part hearings became less favored. Customers demanded a single hearing week and most arbitrators agreed, probably having forgotten why the members wanted it. This rule, if adopted, will bring the two-part hearing back.

Under the proposed rule, member firms will not be required to limit their motions to dismiss to the facts and defenses in their answer; not that they ever were before, but now it will be by rule. At the end of Claimant's case, member firms will present the panel with a motion to dismiss utilizing any facts and legal theories that they can make up. Confronted with an eighty page motion that the member is fully prepared to argue and discuss, based on facts that may or may not have been entered into testimony, what is the customer to do? There are two possible outcomes; 1) the customer asks for a continuance for some unspecified period during which counsel may research and demonstrate that each and every legal claim in the brief is inapplicable to the case and the facts relied on have never been entered into evidence, or 2) the customer can agree to a long lunch hour or, at best, an overnight postponement to analyze and refute a brief that was prepared over days or weeks. Either way, it is motion by ambush and the customer losses again, as the customer always loses in FINRA arbitration.

This is not hypothetical. I have had it happen. The client moved to Florida and had taken time and expense she could not afford to return to Kansas City for her hearing. Does the client take more time and expense to return in a month, if that's even possible, or do we ask for a short break to consider the ambush motion. In the instance, I was given 30 minutes to refute the motion to dismiss because my client could not return. The motion played freely with the facts, many of which had been pled in the answer but never documented or testified to at the hearing. It relied on law that had no application to the case at issue and was inapplicable in the state where the case arose. The client received only a partial recovery, possibly due to doubt created, possibly due to other issues. That's the dirty truth about FINRA arbitration, the customer losses 100% of the time. The only question is how badly the customer loses; from no recovery to maybe 50% of the amount to which they would be entitled by law. One never knows which arbitrator cut the award by half or more or why. But in all cases, ambush motions supported by unproven facts and inapplicable law will not benefit the customer. There will be either a rush to judgment or a long delay.

The Rule for Motions Filed Prior to the Conclusion of the Party's Case in Chief is a Sham; Authorizing a Continuing Motion Practice and Preempting State Law

The Uniform State Securities Act provides for officer and director liability for the acts of registered representatives. It shifts the burden of proof for liability of control persons if the underlying acts are proven. This law is especially important for customers defrauded by undercapitalized FINRA bucket shops which are allowed to amass customer claims hundreds of times greater than their net capital. A customer's only hope of recovery is from the principals involved. But under Rule 12504, a panel would be authorized to dismiss all officer and director or control person liability with only a summary telephone conference because "the party was not associated with the account(s), securities, or conduct at issue."

The rule doesn't apply to control persons? The arbitrators aren't authorized to act contrary to the law? Nonsense! FINRA openly and consistently encourages arbitrators to ignore the law by telling them on its website, in publications, and in training material that they are not required to follow the law. They are merely warned to not blatantly brag about it in writing which could allow a court to vacate a decision. In fact the only area where arbitrators are told to follow the law and justify it with specific authority, in writing, is if awarding customers attorney fees or punitive damages. In my state, failure to award attorney fees as well as interest in securities cases is reversible error in court. In arbitration the law has been applied only once in 20 years. That is why FINRA refuses to release its awards for statistical studies. Based on hard numbers, FINRA can not justify its corrupt system.

Further evidence of the industry-friendly nature of this rule is the continuing nature of the motions. Members may not re-file a denied motion, unless specifically permitted by panel order. In other words, upon a motion being denied, the member may file a motion for reconsideration. The only disincentive is to assess forum fees against the party filing the motion. That is of no benefit to customers. They are already in a spending contest with a multi-million dollar financial mega-firm. Further nuisance fees to Morgan, Merrill, Citi & Swiss are meaningless and will be more than offset by the thousands of dollars customers already pay in forum fees to obtain discovery that is supposed to be automatic and a hearing before sleeping arbitrators. The abuses of forum fees never end and the customer always loses.

Any talk of sanctions is also meaningless. Sanctions for clients are a zero on their claim regardless of merit, plus forum fees. Meaningful sanctions against member firms are about as common as unicorns. They have to get by FINRA. Just last October a panel chair invoked a very mild $2,000 monetary sanction on a member firm for failure to produce basic *Discovery Guide* documents pursuant to a written order. The chair was immediately forced off the panel less than a week before the hearing by the FINRA Case Administrator who then misrepresented the circumstances. Although the undersigned received an award in the case, the sanctions were lost in the FINRA black hole and the other panel members were duly impressed with the foolhardy nature of sanctioning member firms. Any talk of meaningful sanctions against member firms while FINRA personnel serve at their pleasure is nonsense.

The requirement that these motions be filed separately from the answer would not be necessary if FINRA was willing to enforce its own rules against its own members with the same enthusiasm with which it tries to dismiss customer claims. The assertion that this will ensure that parties receive an answer that responds directly to the statement of claim is ridiculous. As previously stated, answers almost never respond to the statement of claim. A general denial with few details reserving the "right" to supplement them later is the standard. FINRA has no problem with it despite it being contrary to the Code just as motions to dismiss are contrary to the Code. While arbitrators are trained and encouraged to never grant an award to a customer unless the precise claim has been made, I am aware of no similar warning concerning insufficient answers. A customer never knows the defense until a hearing begins. He or she learns of it then only by calling the broker first.

SUMMARY

Rule 12206

Under FINRA's proposal to make arbitration an endless motion practice, its member firms may file their first motion to dismiss without a hearing or any other form of due process 90 days prior to a scheduled hearing under Rule 12206, Time Limits. Or it could be 30 days or less before the hearing if the member files a motion to allow a motion out of time as provided by the subsection (a)(2) in which case the customer has to respond to both. At that time, normally a year after filing, the statutes of limitations may have run for filing in court. Does arbitration toll the statutes of limitations in court? We don't know, but FINRA hopes not. By rule it can shorten them by the year wasted in forced arbitration.

The customer is then granted a telephonic hearing . . . a great way to avoid real testimony by real customers concerning factual matters as to when an action accrued. If the panel, contrary to the best advice of the FINRA case administrator, denies the motion, it can not re-file until after its motion for reconsideration is also denied by the panel; at which time the case administrator is probably looking for replacement arbitrators. Keep in mind that if the member wants the case to be in arbitration it need not file the motion to dismiss and can fight any court filing with the arbitration agreement. The rule gives the member the option of determining where the case will be heard. If in spite of the best efforts of the FINRA case administrator, the panel decides to keep the case in arbitration because they want the hearing fees, the member still has two more opportunities to deny the customer an in-person hearing on the merits.

Rule 12504(a)

Under Rule 12504(a), the member may again file a motion to dismiss prior to the conclusion of the case in chief, hopefully before a panel with at least one replacement arbitrator due to a case administrator terrified of member reprisal for being twice denied the prior motion under Rule 12206. Few panels go from inception through hearing with the same arbitrators, but it is a deeply held FINRA secret how and when arbitrators are appointed and removed. When removed, the claimant is often told that the arbitrator voluntarily withdrew for unknown reasons.

FINRA claims that dismissal under this rule is "discouraged." Experienced attorneys know that FINRA encourages dismissal at any stage of the process. It is its raison d'etre. As stated, in addition to providing its members with the possibility of summary dismissal of control person liability without hearing or evidence, specious safeguards are traded for real evil in subsection (b) which for the first time authorizes panels to act on ambush motions to dismiss cases for any reason, theory or undocumented set of facts that the member can conjure during the customer's case.

Rule 12504(b)

Motions to Dismiss After Conclusion of Case in Chief is the most significant part of the proposed rule. It is one seemingly insignificant subsection which for the first time fully authorizes arbitrators to dismiss any claim, for any reason, at the end of the customer's case. It is a Trojan Horse allowing FINRA's notorious Category Four arbitrators to do their best work in dismissing claims without basis, explanation, or legal justification. Category Four arbitrators are those secretly selected by FINRA to be sent on a full FINRA expense account to any hearing location in the country whether they have previously qualified or volunteered to serve in that location or not. The identity of these uber-arbitrators, how they qualify for this status, and how often they are sent across the country is another closely held FINRA secret. All we know is that customer counsel fears these "travelers" above all others. Better a senile local guy with a four minute attention span than these FINRA janissaries.

A motion to dismiss is not subject to any restraints or other inhibiting rules, purportedly because the issues are so obvious and beyond argument. However, if that were the case, the members would need only close without presenting additional evidence or testimony and summarize its unquestionably overwhelming case in closing statements. There is no need for this rule. The rule will allow members to invent new facts and legal theories without risk of actually losing if the panel is not composed of two Category Four lap dogs as Respondents suspect. It's also an opportunity to voir dire the panel to see how much of a defense is necessary while putting the customer under the disadvantage of a long delay or insufficient time to respond.

Rules such as those proposed here and FINRA's legendary timidity in enforcing any rules against its members are the reason customers lose 100% of the cases in FINRA arbitration. It's not a pure 100%. Less than one percent may, as an oddity, recover all that they would be entitled in a court of law. But zero or fractional awards round to 100% and the cost can equal that of a state court trial where full damage would be awarded in a process open to the public. These proposed rules make the customer worse off, not better. The answer is for the Commission to order FINRA to stop the motion practice and afford every customer a full hearing on the merits.