Ladeis and Gentlemen:

Kindly accept this letter as my comment upon the proposed rule relating to motions to dismiss in NASD arbitrations. Please accept my apologies for the lateness of my comments; I understand that you are still considering late comments to this proposed rule.

I have been handling NASD arbitration matters for about 15 years now. A large portion of my practice is related to the representation of public customers and individual brokers against member firms in that forum.

I understand what NASD is trying to do with this motion-to-dismiss rule. The idea is to quickly get rid of cases which are clearly meritless. Indeed, I suspect that many of the "clearly meritless" cases which NASD would like to dismiss on motion are brought by public customers appearing in propria persona.

On the other hand, NASD recognizes that most cases should have an evidentiary hearing. The proposed rule tries to balance the two competing goals by limiting panels to granting these motions only in "extraordinary circumstances."

Unfortunately, I believe the NASD's approach is misguided. The unfortunate result of any rule permitting motions to dismiss will be more motions to dismiss. One can certainly expect each Respondent to view his or her case as one which represents "extraordinary circumstances."

While it is likely that most of these motions will be denied, as they are under the present rules, there is a real risk that meritorious cases will be dismissed simply because there is an incomplete evidentiary record. This risk is coumpounded where, as is often the case, the moving party has not completely responded to discovery demands. Indeed, as depositions are discouraged in arbitrations, it is unlikely that any claimant will be armed with the type of evidence which is normally used to defeat motions for summary judgment.

In my view, the risk of meritorious cases being dismissed far outweighs any benefit which would purportedly result from a rule permitting motions to dismiss. Indeed, I would expect that the increase in motion practice will add so much to the cost of bringing and defending NASD arbitrations as to dwarf the supposed savings in defending against clearly nonmeritorious claims.

I think the only appropriate way of handling this issue is to have a bright-line rule prohibiting pre-hearing motions to dismiss. NYSE's Director of Arbitration has gone on record as stating that every claimant is entitled to a hearing at that forum. This is the most workable rule, and should be clearly stated as the rule at NASD.

I also object to the inclusion of statutes of limitation as one of the "extraordinary circumstances" which would permit a dismissal upon motion. This facile statement ignores the fact that most statute of limitations questions are heavily fact-intensive, and therefore require a full evidentiary hearing. There are often factual issues relating to the date of accrual of the claim (which is when the statute begins to run), or whether a tolling statute might have application. Including statutes of limitation in the laundry list of appropriate reasons for dismissal may mislead arbitrators into believing that these fact issues may be resolved without a proper hearing.

I am grateful for the opportunity to address this very important issue.

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