CORPORATE LAW AND PRACTICE
Course Handbook Series
Number B-1755

Securities Arbitration in the Market Meltdown Era:

Achieving Fairness in Perception and Reality

Volume Two

Chair

David E. Robbins

To order this book, call (800) 260-4PLI or fax us at (800) 321-0093. Ask our Customer Service Department for PLI Order Number 18567, Dept. BAV5.

Practising Law Institute
810 Seventh Avenue
New York, New York 10019

36

THE STATUS OF CONTROL PERSON LIABILITY IN THE ERA OF FINRA'S NEW MOTION TO DISMISS RULE

Michael Schwartzberg
Thomas Vays

Winget, Spadafora & Schwartzberg LLP

© 2009 Michael Schwartzberg and Thomas Vays

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

INTRODUCTION

It is 2:00 p.m. on a Friday in July and you are about to leave the office for a weekend trip to the Hamptons when you get a phone call from the Chief Executive Officer of a broker-dealer from which you have been trying to get business for several months. The CEO tells you he just received an arbitration Statement of Claim in which *he and several other senior executives* have been personally named as Respondents in a FINRA arbitration proceeding claiming that one of the firm's brokers made unsuitable investment recommendations to one of the firm's customer's. The Statement of Claim, you are told in exasperation, does not allege that the CEO or any of the senior executives were involved in the transactions at issue. In fact, the only factual averments in the Statement of Claim relating to the executives are their names, titles and a conclusory allegation that they are each "control persons." and thereby subject to the arbitrator's jurisdiction. The customer is seeking to hold the executives jointly and severally liable for his investment losses under the theory of "control person liability."

The CEO tells you this is your opportunity to dazzle him with your legal acumen. He instructs you to immediately (if not sooner) file with FINRA a Motion to Dismiss the claims against him and the other executives. Excited at the prospect of landing a new client, you tell the CEO he will have a draft of the motion papers on his desk by Monday morning (and hang up the phone and call your spouse to explain why your weekend trip to the beach will once again have to be rescheduled).

As you will soon discover, however, there are two issues you will need to address by Monday morning: (i) the law regarding control person liability and (ii) FINRA's new rule on motions to dismiss. And, of course, there is the fact, probably unknown to your new client, that FINRA itself does not decide such motions – you first have to go through the exercise of filing an Answer, filing a separate motion to dismiss and selecting an arbitration panel.

With respect to the motion, first you will have to sort through the surprisingly convoluted and sometimes inconsistent standards that federal courts have applied in evaluating control person liability claims. As it turns out, the federal circuits are divided on the elements of a control person liability claim, with the two leading tests — "culpable participation" and "potential control" – often producing inconsistent outcomes. Indeed, the likelihood of your motion to dismiss succeeding may ultimately hinge on which standard the arbitrators decide to apply to your case and your ability to explain the applicability of that standard in

its most basic terms of a panel of three arbitrators that does not necessarily consist of attorneys.

The next issue you must address is Rule 12504 of FINRA's Code of Arbitration Procedure for Customer Disputes, the new Motion to Dismiss rule. As most securities arbitration practitioners know, Rule 12504 was recently enacted with the purpose of limiting Motions to Dismiss filed prior to the conclusion of the Claimant's case-in-chief. Pursuant to the new rule, apart from a few limited exceptions, Respondents are prohibited from filing prehearing motions to dismiss under pain of financial sanctions and being potentially precluded from re-filing the motion at a subsequent time.

Fortunately for your purposes, one of the limited grounds upon which a party may move for dismissal under the new rule is that "the moving party was not associated with the account(s), security(ies), or conduct at issue." As you read through Rule 12504 and come upon this exception, you are initially overwhelmed with joy at finding that a provision of the new Motion to Dismiss rule specifically allows for the dismissal of the claims against the executives. You send your new client an e-mail to tell him the good news and finish drafting the motion papers in time to hit the beach by Saturday afternoon.[1]

A few weeks after filing the motion (which takes place after filing the Answer and selecting the panel) you receive your adversary's opposition papers. In it, she excoriates you for filing a prehearing motion to dismiss in contravention of the new Motion to Dismiss rule and asks the panel to deny the motion and issue sanctions against your client for filing what she claims to be a frivolous motion. You disregard your adversary's bluster as typical lawyer hyperbole and assure your client that the panel would not allow the Claimant to force the senior executives of the brokerage firm to defend themselves at an arbitration hearing against claims arising out of events with respect to which they had *absolutely no connection*.

After preparing and filing your reply papers, the Motion to Dismiss is submitted to the arbitration panel for a decision. The outcome of the decision will have a dramatic impact on the livelihoods of these individuals, as well as the potential outcome of the arbitration proceeding.

In the current political climate in which the image of the securities industry, including brokerage firms and their regulators, is at a relative low point and with the fairness of the FINRA arbitration forum itself

---

1. The complete Customer Code rule, which is similar to the Industry Code rule, appears at the end of this chapter.

under scrutiny, it is foreseeable that arbitrators may be disinclined to dismiss otherwise frivolous Statements of Claim against senior executives who had absolutely no connection to the conduct at issue. It is the authors' contention, however, that the plain language of Rule 12504 could and should be interpreted to permit pre-hearing Motions to Dismiss claims that are brought against senior executives who were not alleged to have been associated with the transactions at issue.

WHO IS A CONTROL PERSON?

Control person liability claims with respect to broker-dealers are generally brought under §20(a) of the Exchange Act of 1934, which provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a).[2]

The statute itself does not define what it means to "control" a person, which is defined to include entities. In the absence of a clear explanation of what qualifies as "control" under the federal statutes, the Securities and Exchange Commission has offered clarification by promulgating the following definition: "control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[3]

In addition, according to the Uniform Application for Broker-Dealer Registration ("Form BD"), "control" with regard to broker-dealers is defined as:

> The power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any person that (i) is a director, general partner or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25% or more of a class of a voting security or has the power to sell or direct the sale of 25% or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive upon dissolution, or has

2. Control person liability claims may also be brought under state blue sky laws. This chapter focuses only on the federal statute.
3. 17 C.F.R. § 240.12b-2 (2008).

contributed, 25% or more of the capital, is presumed to control that company. (This definition is used solely for the purpose of Form BD.)

It stands to reason that just because a person is a majority owner or chief executive of a broker-dealer, he or she is not automatically a proper party to each arbitration proceeding filed against the firm. In many instances, however, members of senior management are named as respondents in arbitration proceedings under the theory of control person liability purely as a means to add settlement value to an otherwise meritless claim. Notwithstanding the various defenses to control person liability claims, unless such claims can be dismissed prior to a costly and time-consuming evidentiary hearing, the financial and emotional costs of having senior members of management tied up in a multi-day arbitration hearing can force Respondents to settle claims that are otherwise completely frivolous.

Prior to the enactment of the new Motion to Dismiss rule, it was not uncommon for senior executives to be dismissed from arbitration proceedings at the outset of the proceeding based on a demonstration that they had no involvement in, or even knowledge of, the transactions at issue. Although it is too early to gauge the impact of the new rule on prehearing Motions to Dismiss control person liability claims, there is certainly a strong argument to be made that the language of the new rule should enhance the likelihood that a movant will prevail on a pre-hearing Motion to Dismiss unsubstantiated control person liability claims.

THE CASE LAW ON CONTROL PERSON LIABILITY

Describing the disagreements among the Federal Circuit Courts as a "Circuit split" is understating what is more accurately described as complete disarray. Indeed, it seems that the only thing the federal courts unanimously agree upon is that under any test for control person liability, there must be an underlying violation of a securities law. The divergent standards set forth by the Circuits can be generally divided into two main categories: "culpable participation" and "potential control." However, there are various differences among the Circuits even within these two camps.

The Circuits that subscribe to the culpable participation test have a comparatively stricter standard for control person liability that discourages frivolous claims by requiring plaintiffs to allege some level of conduct or participation on the part of control persons named in the matter. Thus, simply alleging that a Respondent is the CEO and therefore has the power to control the conduct of the broker is insufficient to state

a claim. On the other hand, the Circuits that have adopted the potential control standard subscribe to very broad definitions of control that are susceptible to abuse by litigious claimants who bring claims against control persons based on dubious grounds.

At times, the success or failure of a pre-hearing Motion to Dismiss will depend upon a Respondent's ability to convince the arbitrators to adopt the "culpable participation" standard. Arbitrators, after all, are free to apply whichever standard they deem appropriate, regardless of the venue of the arbitration. Although defective control person liability claims can be dismissed under the "potential control" standard, as discussed below, it generally behooves Respondents to argue in favor of the application of the "culpable participation" standard.

THE "CULPABLE PARTICIPATION" STANDARD

In order to survive dismissal, under the "culpable participation" standard, plaintiffs must state with particularly facts giving rise to a strong inference that the controlling person in some meaningful sense culpably participated in the controlled person's primary violation of the securities laws. Thus, in addition to the essential underlying violation, a claim for control liability must have two elements: (1) the Respondent must have exercised control over the primary violator, and (2) the controlling person must have "culpably participated" in the violation.[4]

The courts that have adopted this standard maintain that the language of the control person liability statutes clearly require some participation beyond mere potential to control. See e.g., Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2d Cir. 1973). In that regard, the "culpable participation" standard includes an element of control person liability that the "potential to control" test ignores, which is Congress' intent that control persons possess the same requisite *scienter* as the primary violator. See Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 885 (3d Cir. 1975); Cromer Finance Ltd., et al. v. Berger, et al., 137 F. Supp. 2d 452, 484 (S.D.N.Y. 2001) (holding that controlling person must be in some meaningful sense a culpable participant in the primary violation) (citing

4. See Rich v. Maidstone Financial, Inc., 2001 U.S. Dist. LEXIS 3167 (S.D.N.Y 2001); Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2d Cir. 1973); Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 885 (3d Cir. 1975); In re Mills Corp. Sec. Litig., 2009 U.S. Dist. LEXIS 32376 (E.D. Va. Apr. 16, 2009); Drobbins v. Nicolet, 631 F.Supp. 860, 884 (S.D.N.Y. 1986); In re WorldCom, Inc. Sec. Litig., 294 F. Supp 2d 392, 415-416 (S.D.N.Y. 2003); In re Mills Corp. Sec. Litig., 2009 U.S. Dist. LEXIS 32376 (E.D. Va. Apr. 16, 2009) (citing In re Global Crossing, Ltd. Sec. Litig., 2005 U.S. Dist. LEXIS 26942.

Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998); Ellison v. American Image Motor Co., Inc., 36 F.Supp.2d 628, 642 (S.D.N.Y. 1999); In re Livent, 78 F. Supp. 2d 194, 221 (S.D.N.Y. 1999); Burstyn v. Worldwide Xceed Group, Inc., 2002 U.S. Dist. LEXIS 18555 (S.D.N.Y. Sept. 30, 2002).

The "culpable participation" standard is grounded in the United States Supreme Court's decision in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), in which the Supreme Court stated:

> Each of the provisions of the 1934 Act that expressly create civil liability…contains a state-of-mind condition requiring something more than negligence. [Section] 20, which imposes liability upon "controlling person[s]" for violations of the Act by those they control, exculpates a defendant who "acted in good faith and did not… induce the act… constituting the violation [.]

425 U.S. 211 n.28.

In Kohn v. American Metal Climax,[5] the court evaluated the legislative history of Rule 10b-5 and concluded that Congress, through the use of words such as "*lack of good faith,*" intended that liability would not attach unless the element of culpability was present. Kohn, 458 F.2d 255, 280 (3d Cir. 1972). Referring to Kohn, the court in Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 885 (3d Cir. Pa. 1975) stated:

> [s]ince the standard of culpability is ever-present in the securities laws, it is reasonable that the same standard should be included in Section 20(a). Section 20(a) also provides a good faith defense. If we were to apply respondeat superior, the availability of this good faith defense would be bypassed. Therefore, to use respondeat superior for imposing secondary liability would not advance the legislative purpose of the 1934 Act and in fact would also undermine the Congressional intent by emasculating Section 20(a).

In essence, courts that have adopted the "culpable participation" test reason that, since the control liability statute relate to claims of securities fraud — which, after all, is the true nature of a suitability or churning claim — Claimants should be required to show *scienter* on the part of the control person respondent in a manner similar to what they must plead in a § 10(b) claim against the primary actor. Burstyn v. Worldwide Xceed Group, Inc., 2002 U.S. Dist. LEXIS 18555 (S.D.N.Y. Sept. 30, 2002); In re Bayer AG Sec. Litig., No. 03 Civ. 1546 (WHP), 2004 U.S. Dist. LEXIS 19593, at *49 (S.D.N.Y. 2004).

---

5. 458 F.2d 255 (3d Cir. 1972) (Judge Adams dissenting and concurring) cert. denied, 409 U.S. 874, 93 S. Ct. 120, 34 L. Ed. 2d 126 (1972).

THE "POTENTIAL CONTROL" STANDARD

The various "potential control" standards that have been applied by the federal courts all differ from the "culpable participation" standard in that they seemingly do not require the claimant to prove *scienter* on the part of the controlling person. Beyond that, there does not appear to be much uniformity among the various different iterations of the "potential control" test. For example, some courts adhere to a "potential control" standard that requires allegations far greater than the mere potential to control. See e.g., Pirelli Armstrong Tire Corp. Retiree Med. Bens. Trust v. Dynegy, Inc., 339 F. Supp. 2d 804, 828 (S.D. Tex. 2004) (holding that a plaintiff needs to allege some facts beyond a defendant's position or title to show that the defendant had actual power or control over the controlled person).

In Metge v. Baehler, 762 F.2d 621 (8th Cir. 1985), the Eighth Circuit articulated what is regarded as the most widely accepted interpretation of control person liability under Section 20(a). Similar to the Fifth Circuit test described above, the mere potential to control the company does not suffice for control person liability because some ability to control the specific violative transaction must be shown. Under the Eighth Circuit test, the allegations must set forth specific allegations demonstrating that the control person 1) "actually participated in (i.e. exercised control over) the operations of the corporation [or person] in general" and 2) possessed the potential to control the specific transaction upon which the primary violation is predicated." Metge, 762 F.2d 621, 630-31; Martin v. Shearson Lehman Hutton, Inc., 986 F.2d 242, 244 (8th Cir. 1993) (quoting Myzel v. Fields, 386 F.2d 718, 738 (8th Cir. 1967)). See also Harrison v. Dean Witter Reynolds, Inc., 974 F.2d 873, 881 (7th Cir. 1992); Donohoe v. Consol. Operating & Prod. Corp., 982 F.2d 1130, 1138 n.7 (7th Cir. 1992).

The Tenth Circuit applies a test requiring a role in the day-to-day operations of the company. For example, in Adams v. Kinder-Morgan, Inc., 340 F.3d 1083 (10th Cir. 2003), the allegations against the defendant corporation's CEO were found to be sufficient to state a claim for control person liability, however, they were inadequate to state a claim against the directors. The operative difference, according to the court, was that the CEO managed day-to-day operations, while the directors did not. Significantly, the Court of Appeals held that mere allegations that a control person has the ability to acquire control are patently inadequate and insufficient to withstand a motion for summary judgment. Id. See also Aldridge v. A.T. Cross Corp., 284 F.3d

72 (1st Cir. 2002) (holding that the controlling person must have the general power to control the company *and* actually exercise control over the company); Brown v. Enstar Group, Inc., 84 F.3d 393, 396-97 (11th Cir. 1996) (requiring that an individual named as a controlling person must have had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities law and the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability); Brody v. Stone & Webster, Inc., 414 F.3d 187, 193 (1st Cir. 2005).

The above is just a sampling of the different versions of the "potential control" standard. Although each of these tests require more than just a conclusory allegation that the named executive is a control person, they do not impose the more stringent elements required by the "culpable participation" standard.

EVALUATION OF THE COMPETING STANDARDS

The differences between the "potential to control" test and the "culpable participation" test have significant consequences in terms of pleading requirements and burden of proof. Under the culpable participation test, the Claimant must plead, and bears the burden of proving, that the alleged controlling person lacked good faith or directly or indirectly participated in the primary wrongdoing. Under the potential control test, however, the Claimant need only establish that the alleged controlling person had the authority and could have exercised control over the act constituting the primary wrong, and then the burden shifts to the respondent to prove good faith or absence of participation or knowledge.

The "potential to control" test makes it extremely difficult for Claimants to obtain the dismissal of unsubstantiated control person liability claims and encourages Claimants to file frivolous claims. These negative consequences are heightened in FINRA arbitrations, where Claimants routinely argue that pre-hearing motions to dismiss are prohibited.

In this regard, FINRA's new rule on Motions to Dismiss expressly provides arbitrators with the authority to grant pre-hearing Motions to Dismiss when the moving party was not associated with the accounts, securities or conduct at issue. The language of the new rule reaffirms the power of arbitrators to dismiss a Statement of Claim that does not plead sufficient facts to meet the "culpable participation" standard. Beyond that, Respondents can cite to the language contained in the new rule to

buttress their arguments in favor of the "culpable participation" standard versus the "potential to control" standard.

FINRA'S NEW MOTION TO DISMISS RULE

FINRA's new rules on motions to dismiss became effective on February 23, 2009, and now govern all motions to dismiss in customer and industry arbitrations.[6] The rules have significantly altered the playing field in arbitrations by limiting the grounds upon which arbitrators may grant a motion to dismiss prior to the close of the claimant's case-in-chief. The new rules, however, include a few limited, yet very significant, exceptions under which arbitrators are specifically authorized to grant pre-hearing motions to dismiss.

Rule 12504(a)(6) for customer claims and Rule 13504(a)(6) for industry cases provide, in part:

> The panel cannot act upon a motion to dismiss a party or claim under paragraph (a) of this rule, unless the panel determines that:
>
> (A) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or
>
> **(B) the moving party was not associated with the account(s), security(ies), or conduct at issue.**

In the context of control person liability claims, Rule 12504(a)(6)(B), on its face, seemingly authorizes a panel to grant a prehearing Motion to Dismiss a claim against a senior executive where the Statement of Claim does not allege facts sufficient to establish a *prima facie* case of control person liability. Moreover, by allowing for dismissal of claims that do not allege that the alleged controlling person had *any connection* to the transactions at issue, Rule 12504(a)(6)(B) implicitly ratifies the "culpable participation" standard's requirement that the Statement of Claim must allege that the controlling person was in some meaningful sense a culpable participant in the fraud perpetrated by the controlled person.

As most securities arbitration practitioners know, the new Motion to Dismiss rule was the subject of much debate and commentary prior to its enactment. According to a September 15, 2008 correspondence from FINRA to the SEC responding to the Comment Letters received by the SEC on the proposed rule change (the "FINRA Response"), the SEC

---

6. *See* FINRA Rules 12504 (customer disputes) and 13504 (industry disputes).

received 118 comment letters on the proposed rule change.[7] Some of the Comment Letters sought clarification regarding how Rule 12504(a)(6)(B) would be applied, with some letters advocating for the exception to be interpreted broadly so that senior executives could be covered. Others argue that a broad interpretation could wrongly exempt persons not directly associated with the transactions but who are liable under applicable statutes or case law.

In response to these comments, FINRA proclaimed that "It intends for the exception to apply narrowly, such as in cases involving issues of misidentification." As examples, the FINRA Response cited situations where (i) a party files a claim against the wrong person or entity, (ii) a claim names an individual who was not employed by the firm during the relevant time period, or (iii) a claim names an individual that had no control or was not connected to an account, security or conduct at the firm during the time of the dispute.

FINRA reiterated this interpretation in Regulatory Notice 09-07, which states, in pertinent part:

> FINRA intends [that Rule 12504(a)(6)(B)] apply in cases involving issues of misidentification. For example, the panel could grant a motion to dismiss under this exception if a party files a claim against the wrong person or entity, or a claim names an individual who was not employed by the firm during the time of the dispute, or a claim names an individual or entity that was not connected to an account, security or conduct at the firm during the time of the dispute.[8]

Significantly, however, neither the FINRA Letter nor the Regulatory Notice provide specific guidance as to when a party is sufficiently "connected to" — or, as the rule states, "associated with" — the account, security or conduct at issue so as to be removed from the exception. It is clear, however, that Rule 12504(a)(6)(B) is not limited to claims against the wrong person or claims against an individual who was not employed by the firm during the time of the dispute. Such an interpretation would render the "not connected" language of the Regulatory Notice superfluous. It is thus perfectly reasonable to construe the new Motion to Dismiss rule as preserving arbitrators' authority to dismiss frivolous control person liability claims prior to an evidentiary hearing.

---

7. Representative Comment Letters were re-published in Chapter 10 of PLI's *Securities Arbitration 2008* course book.
8. FINRA Regulatory Notice 09-07; see also Exchange Act Release No. 59189 (December 31, 2008), 74 Federal Register 731 (January 7, 2009) (File No. SR-FINRA-2007-021).

CONCLUSION

It is too early to tell whether the new Motion to Dismiss rule will be interpreted by arbitrators in a fair and even-handed manner, so as to prevent Claimants from extorting settlements by naming a brokerage firms' entire management team. There is no question that, based on the applicable law and the pain language of Rule 12504(a)(6)(B), arbitrators have ample authority to grant prehearing Motions to Dismiss control person liability claims that do not set forth facts alleging that the controlling person was associated with the transactions at issue.

The only question is whether arbitrators will be willing to exercise their authority in the face of the unsubstantiated criticisms of the FINRA arbitration forum. For the sake of the integrity of the FINRA arbitration forum, we hope that fairness and common sense ultimately prevail.

FINRA Rule 12504. Motions to Dismiss

(a) Motions to Dismiss Prior to Conclusion of Case in Chief

(1) Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration.

(2) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(3) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion.

(4) Motions under this rule will be decided by the full panel.

(5) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 12606.

(6) The panel cannot act upon a motion to dismiss a party or claim under paragraph (a) of this rule, unless the panel determines that:

(A) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or

(B) the moving party was not associated with the account(s), security(ies), or conduct at issue.

(7) If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation.

(8) If the panel denies a motion under this rule, the moving party may not re-file the denied motion, unless specifically permitted by panel order.

(9) If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.

(10) If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(11) The panel also may issue other sanctions under Rule 12212 if it determines that a party filed a motion under this rule in bad faith.

(b) Motions to Dismiss After Conclusion of Case in Chief

A motion to dismiss made after the conclusion of a party's case in chief is not subject to the procedures set forth in paragraph (a).

(c) Motions to Dismiss Based on Eligibility

A motion to dismiss based on eligibility filed under Rule 12206 will be governed by that rule.

(d) Motions to Dismiss Based on Failure to Comply with Code or Panel Order

A motion to dismiss based on failure to comply with any provision in the Code, or any order of the panel or single arbitrator filed under Rule 12212 will be governed by that rule.

(e) Motions to Dismiss Based on Discovery Abuse

A motion to dismiss based on discovery abuse filed under Rule 12511 will be governed by that rule.

Amended by SR-FINRA-2009-026 eff. Apr. 17, 2009.
Adopted by SR-FINRA-2007-021 eff. Feb. 23, 2009.

NOTES

NOTES