

FINRA Dispute Resolution Arbitrator Training

Motions to Dismiss

Training Module Release Date August 2010
(Rule Effective Date February 23, 2009)



Introduction to Motions to Dismiss

In this training module you will learn about FINRA's motions to dismiss rules. Specifically, you will be able to answer the following questions:

- What are the three types of motions to dismiss?
- How do I address motions to dismiss during an arbitration?

Background

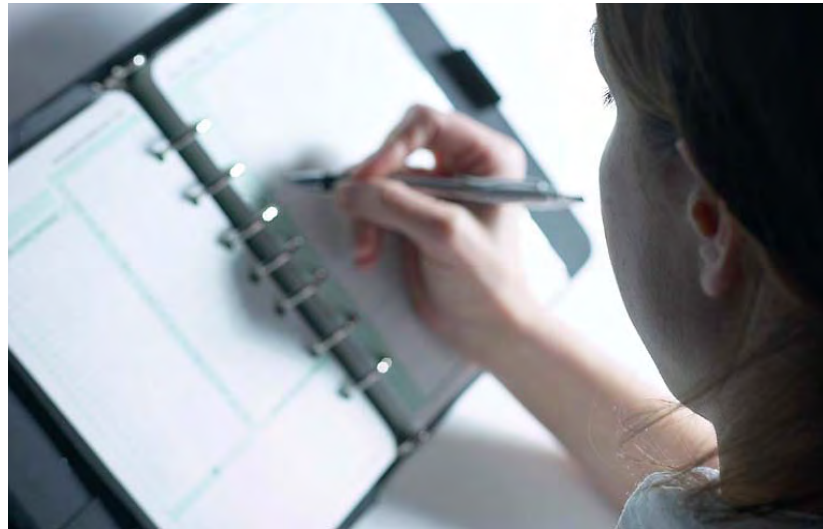


On December 31, 2008, the Securities and Exchange Commission (SEC) approved a rule change to adopt Code of Arbitration Procedure for Customer Disputes (Customer Code) Rule 12504 to limit motions to dismiss filed in the arbitration forum and to impose strict sanctions against parties who engage in abusive motion practices.* In the approval order, the SEC also approved an amendment to Rule 12206 to address motions to dismiss on FINRA's six-year eligibility grounds.

*This training references the Customer Code (12000 series) only. Please refer to the 13000 series of FINRA's rules for comparable Industry Code provisions.

Effective Date

- The motions to dismiss rules became effective on **February 23, 2009**. The rules apply to all motions to dismiss filed on or after the effective date.



Commonly Used Terms in Motions

Before we address “What Is a Motion to Dismiss,” let’s review a list of commonly used terms related to motions:

- Case-in-chief: the main case presented by the party who files the statement of claim, through the use of documentation, witnesses and other evidence at an arbitration hearing.
- Moving party: party making a request for dismissal in a motion, typically seeking a ruling or order.
- Non-moving party: party to the arbitration other than the one that has filed a motion currently under consideration. Generally, the non-moving party is the subject of the opponent’s motion.
- Motion papers: written request for a ruling or order.
- Response: written response to the motion of another party, often in opposition.
- Dismissal with prejudice: a ruling that prevents a party from re-filing a claim.
- Dismissal without prejudice: a ruling that does not prohibit a party from re-filing a claim.

What Is a Motion to Dismiss?

A motion to dismiss is a request made by a party—prior to or after the conclusion of the case-in-chief—to the arbitrator(s) to eliminate some or all claims raised by the party filing a claim.

Under the Code, there are three types of motions to dismiss the panel may consider:

- **Rule 12206(b) Eligibility Motions:** motions to dismiss based on FINRA's six-year eligibility rule (*i.e.*, Rule 12206). These motions are usually made before a party has concluded its case-in-chief.
- **Rule 12504(a) Motions:** motions to dismiss filed before a hearing on the merits (*i.e.*, prehearing motions) or motions filed during the hearing on the merits but before a party has concluded its case-in-chief.
- **Rule 12504(b) Motions:** motions to dismiss made after a party has concluded its case-in-chief.

Rule 12206(b) Eligibility Motions

- A respondent may file a motion to dismiss a case because of eligibility under Rule 12206 of the Code. Rule 12206 states that no claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim.



Procedural Requirements For Rule 12206(b) Eligibility Motions



Rule 12206 has several procedural requirements:

- A party must file an eligibility motion in writing, separately from the answer, and only after filing the answer.
- A party must file the motion at least 90 days before a hearing, and the other parties have 30 days to respond.
- FINRA staff forwards the eligibility motion and all response papers to the full panel for review.
- If a party files a motion to dismiss on multiple grounds, including eligibility, the panel must decide eligibility first.
- Before granting a motion under this rule, the panel must hold a hearing on the record, unless waived by the parties.
- If a panel grants an eligibility motion, the decision must be unanimous and, must be accompanied by a written explanation.
- If the panel determines that a claim was filed after the six-year eligibility deadline and grants the eligibility motion, it cannot rule on any other grounds for dismissal.

Ruling on Rule 12206(b) Eligibility Motions

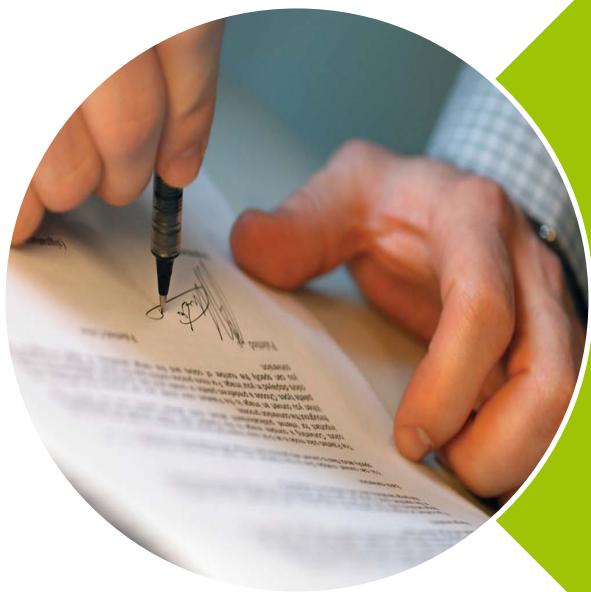
- Although a party must file an eligibility motion at least 90 days before a hearing, the panel may grant a motion to dismiss on eligibility grounds at any stage of the proceeding if the claim is not eligible for submission to arbitration because six years have elapsed from the occurrence or event giving rise to the claim. Parties seeking this exception should provide the arbitrators with documents that indicate when the occurrence or event took place.
- The panel determines whether a claim meets the six-year eligibility requirement by reviewing the submissions, pleadings and arguments of the parties. When appropriate, the panel may give the parties a reasonable opportunity to conduct discovery. As with any discovery request, arbitrators have discretion to grant, deny or modify the request.

Ruling on Rule 12206(b) Eligibility Motions



- If the arbitrators have additional questions about the eligibility of the claim, they should ask the parties to brief the issue. The arbitrators may find that there is a continuing occurrence or event giving rise to the dispute. For example, although a customer purchased stock 10 years ago, there are allegations of ongoing fraud starting with the purchase, but continuing to a date within six years of the date the claim was filed.

Costs, Fees and Sanctions Associated With Rule 12206(b) Eligibility Motions



If the panel denies an eligibility motion, the panel must assess forum fees associated with any hearings on the motion against the moving party.

If the panel deems that an eligibility motion was frivolous, the panel must award reasonable costs and attorneys' fees to any party that opposed the motion.

If the panel determines that a party filed an eligibility motion in bad faith, it may issue sanctions under Rule 12212.

Rule 12504(a) Motions to Dismiss Before a Party Concludes Its Case-in-Chief

FINRA believes that parties have the right to a hearing in arbitration. Therefore, motions to dismiss filed prior to the conclusion of a party's case-in-chief are discouraged and should be granted only under limited circumstances.

According to Rule 12504(a), the panel cannot act upon a motion to dismiss a party or claim filed before the conclusion of a party's case-in-chief, unless the panel determines that:

- the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or
- the moving party was not associated with the account(s), security(ies) or conduct at issue.

Procedural Requirements For Rule 12504(a) Motions to Dismiss

Parties' Obligations

- A party must file a Rule 12504(a) motion in writing, separately from the answer, and only after filing the answer.
- These motions must be filed at least 60 days in advance of the hearing, and the other parties will have 45 days to respond. FINRA staff will forward motions and responses to the full panel for review.

Arbitrators' Obligations

- The panel may not grant a Rule 12504(a) motion unless an in-person or telephonic prehearing conference on the motion is held on the record or waived by the parties.
- If the panel grants the motion (in whole or part), the decision must be unanimous and accompanied by a written explanation. If the panel denies the motion to dismiss, a party may not re-file it, unless specifically permitted by panel order.

How Should Arbitrators Apply the Exceptions?

■ Prior Settlement or Release

A panel cannot act on a motion to dismiss under Rule 12504(a) unless the panel determines that the non-moving party previously released the claims in dispute by a signed settlement agreement and/or written release.

Parties seeking this exception should provide the arbitrators with documents that indicate that the claims in the current dispute have been resolved in a previous dispute.



How Should Arbitrators Apply the Exceptions?

■ Not Associated with the Account, Security or Conduct at Issue

- A panel cannot act on a motion to dismiss under Rules 12504(a) unless the panel determines that the moving party was not associated with the accounts, securities or conduct at issue. FINRA intends this exception to apply typically 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, *i.e.*, naming someone who has never worked at the firm (in dispute) in which the claimant has maintained an account. Misidentification could also involve naming an individual who was not employed by the firm during the time of the dispute.

Fees, Costs and Sanctions Associated with Rule 12504(a) Motions to Dismiss

- If the panel denies a Rule 12504(a) motion, the panel *must* assess forum fees against the party who filed the motion.
- If the panel deems the motion frivolous, it *must* also award reasonable costs and attorneys' fees to any party who opposed the motion.
- If the panel determines that a party filed a motion to dismiss in bad faith, it *may* issue sanctions under Rule 12212 of the Code.



Panel Grants Rule 12504(a) Motion to Dismiss

- The panel should ask the parties to provide briefs if it needs additional information to decide a Rule 12504(a) motion to dismiss.
- Before the panel grants a Rule 12504(a) motion and dismisses all claims, the panel must complete the following requirements:
 - conduct an in-person or telephonic prehearing conference on the motion, unless waived by the parties;
 - render a unanimous written award with a brief explanation, under Rule 12904; and
 - assess forum fees and costs among the parties under Rule 12504(a).

Panel Grants Rule 12504(a) Motion to Dismiss

- The following is an example of an award containing appropriate language to be used when a panel grants a Rule 12504(a) Motion to Dismiss:

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OTHER ISSUES CONSIDERED AND DECIDED

On June 1, 2010, the Panel heard oral arguments on Respondents' Motion to Dismiss. The Panel granted Respondents' Motion to Dismiss and stated as follows:

1. The Panel finds that the Claimant and Brokerage Firm signed a settlement agreement that persuades the Panel that the claims in the current disputes have been resolved in a previous dispute.
2. The Panel further finds the Named Associated Person was not associated with the Claimants' account at the time of the previous dispute.

Rule 12504(b) Motions to Dismiss After a Party Concludes Its Case-in-Chief



- The restrictions set forth in Rule 12504(a) do not apply to Rule 12504(b) motions to dismiss *after* a party concludes its case-in-chief.
- After the claimant has presented documentary evidence and testimony, but before the respondent presents its case, the respondent may ask the panel to dismiss the claim on any grounds—including that the claimant failed to prove the allegations in the statement of claim or failed to prove a right to recovery.

Rule 12504(b) Motions to Dismiss After a Party Concludes Its Case-in-Chief

- When ruling on motions to dismiss after a claimant has concluded its case-in-chief, arbitrators should always view the evidence in a light most favorable to the claimant.
- If the claimant has presented credible evidence to support a recovery, the panel should deny the motion. However, if the testimony and documents do not support any possible recovery, the panel may grant the motion to dismiss the claim.



Rule 12504(b) Motions to Dismiss After a Party Concludes Its Case-in-Chief

- The parties have invested a great deal of time and effort in the arbitration. Arbitrators must be sure that all parties had a full opportunity to argue the motion to dismiss. The panel should consider the following issues before granting a motion to dismiss:
 - Did the claimant have the chance to call all witnesses? Why or why not?
 - Did the claimant prove its case? When determining this, remember to look at all evidence presented in the light most favorable to the claimant.
 - Does the claimant have any further witnesses, evidence or testimony to offer?
- Even if the claimant's case seems weak and the respondent's motion has some validity, the panel may direct the respondent to present its case. Only if the panel is convinced that a sufficient case has not been made and rebuttal by the adversary would be a waste of time should they grant dismissal.

Panel Grants Rule 12504(b) Motion to Dismiss

- Before the panel dismisses the claim after the presentation of the claimant's case, the panel must still complete the following responsibilities:
 - render a written award under Rule 12904; and
 - assess forum fees and costs among the parties.



- Note that Rule 12504(b) does not preclude arbitrators from issuing an explanation or awarding costs or fees in connection with the motion. It also does not prevent a panel from issuing sanctions under Rule 12212 of the Code if it determines that a party filed a motion to dismiss in bad faith.

Available Resources for Motions to Dismiss

- Links to the information referenced in the training are posted below the link for this training module. The following is a summary of the information provided:
 - Copy of this presentation
 - [SEC Rule Filing and Approval Order \(SR-FINRA-2007-021\)](#)
 - [Regulatory Notice 09-07](#)
 - [Codes of Arbitration Procedure](#)
 - [February 24, 2009 Neutral Workshop](#)
 - [The Neutral Corner, Volume 1- 2009](#)

Conclusion



- In this training, you learned about FINRA's motion to dismiss rules and how they affect your role as an arbitrator. Now, let's walk through some practice questions together.

Practice Questions

■ Question 1:

- The chairperson of the panel rules on all motions to dismiss without the input of the rest of the panel.

■ True or False

Practice Questions

■ Answer:

■ **False.**

■ **The full panel must convene and decide ALL motions to dismiss. Furthermore, Rule 12504(a) on motions to dismiss filed before a party concludes its case-in-chief and Rule 12206 on motions to dismiss based on eligibility require the panel to convene a hearing on the record, unless waived by the parties. If the panel grants either of these motions to dismiss, it must do so by unanimous decision and must issue a written explanation.**

Practice Questions

■ Question 2:

- Claims are not eligible for arbitration where six years have elapsed from the occurrence or event giving rise to the claim.

■ True or False

Practice Questions

■ Answer:

■ True.

■ Under Rule 12206, no claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel should determine whether the claim meets the six-year eligibility requirement by reviewing the submissions, pleadings and arguments of the parties.

Practice Questions

■ Question 3:

- In deciding a motion to dismiss before a party concludes its case-in-chief, the entire panel must hold a hearing on the motion with the parties before making a unanimous decision.

■ True or False

Practice Questions

■ Answer:

■ True.

■ For motions to dismiss filed before a party concludes its case-in-chief, the full panel must convene a telephonic or in-person hearing with the parties, unless waived by the parties, before ruling on the motion to dismiss. The decision must also be unanimous and accompanied by a written explanation. If the panel denies the motion to dismiss, a party may not re-file it, unless specifically permitted by panel order.

Practice Questions

■ Question 4:

- The panel cannot act upon a motion to dismiss a party or claim before a party concludes its case-in-chief, unless the panel determines that: the non-moving party previously released the claim in dispute by a signed settlement agreement and/or written release; the moving party was not associated with the account, security or conduct at issue; or the claim does not meet the criteria of the eligibility rule.

■ True or False

Practice Questions

■ Answer:

■ True.

■ FINRA believes that parties have the right to a hearing in arbitration. Therefore, motions to dismiss filed prior to the conclusion of a party's case-in-chief are discouraged and granted only under limited circumstances.

Practice Questions

■ Question 5:

- If the panel denies a motion to dismiss, it must always assess forum fees against the party who filed the motion.

■ True or False

Practice Questions

- Answer

- False.

- The Code does not require the panel to assess forum fees against the moving party if it denies a motion to dismiss after a party concludes its case-in-chief.
- However, the panel *must* assess forum fees against the moving party if it denies a motion to dismiss under Rules 12504(a) and 12206(b). Additionally, if the panel deems the motion to be frivolous, it must also award costs and reasonable attorneys' fees to the party who opposed the motion. If the panel determines that a party filed a motion to dismiss in bad faith, it may issue sanctions under Rule 12212.

Conclusion

- To receive credit for this training and to have it included on your Arbitrator Disclosure Report, please confirm completion by sending an email to:

ArbitratorTraining@finra.org

Please include your name and neutral identification number.

Thank you for participating in this training.