

**FINRA SIX-YEAR ELIGIBILITY RULE 12206:
THE PURCHASE DATE IS OFTEN NOT THE TRIGGERING
“OCCURRENCE OR EVENT GIVING RISE TO A CLAIM”**

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I. INTRODUCTION

It is custom and practice in the brokerage firm industry to have clients sign pre-dispute arbitration agreements requiring both parties to arbitrate any dispute or controversy in an arbitration forum. In addition to requiring clients to forfeit their right to judicial adjudication, brokerage firms have attempted to preclude customers from presenting the merits of their case in the arbitration forum by filing motions to dismiss prior to the conclusion of a customer’s case-in-chief. These types of motions to dismiss deny customers their fundamental right to a full and fair evidentiary hearing. As a result, FINRA’s rules limit the circumstances when a motion to dismiss can be filed prior to the conclusion of a customer’s case-in-chief. One of these circumstances arises “where six years have elapsed from the ‘occurrence or event’ giving rise to the claim” pursuant to FINRA Rule 12206.

In an attempt to avoid liability for wrongful conduct, brokerage firms argue the “occurrence or event” is the purchase date of the investment in issue. Accepting the brokerage firm’s argument creates situations in which certain claims would be barred before they arose. This approach is contrary to the interpretation of FINRA rules, FINRA’s guidance, interpretation and policies and case law. Moreover, this interpretation rewards brokerage firms for concealment of wrongful conduct.

This article addresses who decides the six year rule of eligibility under FINRA’s Rule 12206 and its predecessors pre and post *Howsam*, the procedural requirements under the FINRA Rule 12206 and FINRA’s interpretation and guidance on applicability of Rule 12206. The article concludes that, for over twenty years, the courts and FINRA have been telling the brokerage industry that the purchase date is not, as a matter of law, the “occurrence or event” that determines the eligibility of claims under FINRA Rule 12206 and its predecessors. Rather, post-*Howsam* the “occurrence or event” giving rise to a claim is a factual inquiry left to the arbitrators and the purchase date is often not the trigger for the six-year time limit.

II. FINRA'S CURRENT MOTION TO DISMISS RULES AND ELIGIBILITY RULE 12206

FINRA, formerly known as the NASD, “is the largest independent regulator for all securities firms doing business in the United States.”¹ FINRA’s current rules governing arbitration can be found in the Customer Code, the Industry Code and the Mediation Code.² Prior to the enactment of FINRA’s current rules on motions to dismiss,³ FINRA received complaints “that parties were filing prehearing motions routinely and repetitively which had the effect of delaying scheduled hearing sessions on the merits, increasing customers’ costs, and intimidating less sophisticated customers.”⁴ In addition, through an independent study, FINRA learned there was an increase in the number of motions to dismiss filed in customer cases.⁵ As a result, “FINRA became concerned that, if left unregulated, this type of motion practice would limit investors’ access to the forum, either by making arbitration too costly or by denying customers their right to have their claims heard in arbitration.”⁶ Therefore, FINRA submitted a proposal to the Securities and Exchange Commission (“SEC”) to approve the adoption of its current rules on motions to dismiss, which became effective in February 2009.⁷

1. *About the Financial Regulatory Authority*, FINRA, <http://www.finra.org/AboutFINRA> (last visited Apr. 16, 2013).

2. *See* FINRA, Code of Arbitration Procedure for Customer Disputes, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096; *see* FINRA, Code of Arbitration Procedure for Industry Disputes, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4193; *see* FINRA, Code of Mediation Procedure, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4293.

3. *See infra* notes 9 and 10.

4. FINRA, FINRA DISPUTE RESOLUTION PARTY’S REFERENCE GUIDE at 39 (May 21, 2013), *available at* <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/sarbmed/p011178.pdf> [hereinafter “FINRA Reference Guide”].

5. *Id.* at 40.

6. *Id.*

7. *See id.*; *see also* Exchange Act Release No. 59,189 (Dec. 31, 2008), 74 Fed. Reg. 731 (Jan. 7, 2009) (File No. SR-FINRA-2007-021); *see also* FINRA, Regulatory Notice 09-07: Motion to Dismiss and Eligibility Rules (Jan. 2009), *available at*

FINRA believes that the current “rules will ensure that parties have their claims heard in arbitration, by significantly limiting motions to dismiss filed prior to the conclusion of a party’s case-in-chief and by imposing stringent sanctions against parties for engaging in abusive practices under the rules.”⁸

FINRA’s current eligibility rule is contained in the Customer Code under FINRA Rule 12206 and the Industry Code under FINRA Rule 13206.⁹ Additionally, FINRA Rule 12504 of the Customer Code and FINRA Rule 13504 of the Industry Code set forth other rules on motions to dismiss prior to the conclusion of a party’s case-in-chief.¹⁰ Currently, there are three (3) circumstances outlined in FINRA Rules when a motion to dismiss may be granted prior to the conclusion of a party’s case-in-chief at an evidentiary hearing as follows:

1. The non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release (FINRA Rule 12504 (a)); or
2. The moving party was not associated with the account(s), security(ies) or conduct at issue (FINRA Rule 12504 (a)); or
3. The claim is ineligible as defined by FINRA Rule 12206 “*where six years have elapsed from the occurrence or event giving rise to the*

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/pl17757.pdf>.

8. See FINRA Reference Guide, *supra* note 4, at 39.

9. See FINRA Rules 12206 and 13206, *Time Limits*, available at

http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4112 and

http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4209.

09. The eligibility rules were previously known as NASD Section 15 and NASD Rule 10304. NASD Rule 10304 was superseded by the Customer Code Rule 12206 and the Industry Code Rule 13206 on April 16, 2007, for claims filed on or after that date. See NASD Rule 10304, *Time Limitation Upon Submission*, available at

http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4033&record_id=11676. For purposes of this article, NASD Section 15, NASD Rule 10304, and FINRA Rule 12206 are used interchangeably.

10. See FINRA Rules 12504 and 13504, *Motions to Dismiss*, available at

http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7377 and

http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7378.

claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.”¹¹

“FINRA emphasizes that these exceptions do not constitute an invitation to parties to file motions to dismiss. The fact that a motion may be filed under one of these exceptions does not mean that the panel should or will grant a motion that does not have merit.”¹²

In addition to the six-year limitation and the requirement that the arbitrators decide any questions regarding the eligibility of a claim, FINRA Rule 12206 contains stringent procedural requirements.¹³ Specifically, the eligibility motion must be made in writing and filed separately from the answer at least ninety (90) days prior to the scheduled hearing.¹⁴ Further, motions under this rule must be decided by the entire panel after the completion of a recorded in-person or telephonic prehearing conference (unless waived by the parties).¹⁵ Moreover, if a panel grants an eligibility motion it must be a unanimous decision.¹⁶ FINRA Rule 12206 also specifies procedures for the arbitration panel to follow if a party moves to dismiss on multiple grounds.¹⁷

Furthermore, FINRA Rule 12206 provides that if a panel denies a motion it must assess forum fees against the moving party and also grants the panel the authority to award reasonable costs, attorneys’ fees, and issue sanctions if the panel deems an eligibility motion was frivolous and/or filed in bad faith.¹⁸

11. See FINRA Rule 12206, *supra* note 10 and FINRA Rule 12504, *supra* note 11 (emphasis added). This article is limited to eligibility motions to dismiss pursuant to FINRA Rule 12206 and its predecessors NASD Section 15 and NASD Rule 10304.

12. FINRA Reference Guide, *supra* note 4 at 42.

13. See FINRA Rule 12206, *supra* note 10.

14. *Id.* at 12206(b)(1)-(2). In addition responding parties have thirty (30) days to oppose and the moving party has five (5) days to file a reply. *Id.* at 12206(b)(2).

15. *Id.* at 12206(b)(3)-(4).

16. *Id.* at 12206(b)(5). If the panel denies this type of motion, a party may not re-file unless permitted by order of the panel. *Id.* at 12206(b)(6).

17. See FINRA Rule 12206, *supra* note 10, at 12206(b)(7).

18. *Id.* at 12206(b)(8)-(10); see also FINRA Rule 12212, *Sanctions* (listing possible sanctions a panel may issue for a frivolous motion or motion filed in bad faith), available at

http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=41
18.

Additionally, FINRA Rule 12206 explains that dismissal of a claim under this rule does not prohibit a party from pursuing a claim in court. While the rule does not extend the applicable statutes of limitations, the six-year time limitation does not apply to a claim that is directed to arbitration by a court. Any time limits in court will be tolled while FINRA retains jurisdiction of the claim and the six-year time limitation will not run while the court retains jurisdiction of the matter.¹⁹

III. HOWSAM RESOLVED THE CONFLICT AMONG THE CIRCUITS BY HOLDING THAT THE APPLICABILITY OF THE FINRA'S ELIGIBILITY RULE WAS PRESUMPTIVELY FOR THE ARBITRATORS TO DECIDE

Although FINRA's current Rule 12206 specifies "[t]he panel will resolve any questions regarding the eligibility of a claim under this rule," its predecessors did not make this clear.²⁰ As a result, courts had to resolve the issue of whether the court or the arbitrators decided a claim was eligible. Prior to the Supreme Court's 2002 decision in *Howsam v. Dean Witter Reynolds*,²¹ discussed *infra*, the circuits were split on the issue. The Third, Sixth, Seventh, Tenth, and Eleventh Circuits found that the language contained in the eligibility rule creates a substantive jurisdictional requirement for the court's determination.²² Contrariwise, the First, Second, Fourth, Fifth, Eighth, and Ninth Circuits found that the language in the rule creates a procedural question for the arbitrators to decide.²³

19. See FINRA Rule 12206, *supra* note 13, at 12206(c)-(d).

20. *Id.* at 12206(a); see also *infra* note 33 (Section 15 of the NASD did not specify who decided the question of eligibility and NASD Rule 10304 did not specify the arbitrators decide the question of eligibility until post-*Howsam*).

21. *Howsam*, 537 U.S. at 84 (concluded that NASD Rule 10304 was a gateway procedural matter expected to be decided by an arbitrator).

22. See, e.g., *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1378-79 (3d Cir. 1993); *Roney & Co. v. Kassab*, 981 F.2d 894, 898-900 (6th Cir. 1992); *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649, 650-51 (6th Cir. 1993); *Prudential Sec., Inc. v. Yingling*, 226 F.3d 668, 671-72 (6th Cir. 2000); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 512-13 (7th Cir. 1992); *PaineWebber, Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989); *Cogswell v. Merrill Lynch*, 78 F.3d 474, 478-81 (10th Cir. 1996); and *Merrill Lynch v. Cohen*, 62 F.3d 381, 383-84 (11th Cir. 1995).

23. See, e.g., *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 598-99 (1st Cir. 1996); *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1196, 1198-99 (2d Cir. 1996); *Conticommodity Servs. v. Philipp & Lion*, 613 F.2d 1222, 1224-26 (2d Cir. 1980);

In *Howsam v. Dean Witter Reynolds*, the Court resolved the conflict among the circuits of who determines whether a claim is eligible pursuant to NASD Rule 10304.²⁴ In that case, Dean Witter first brought suit in the District Court of Colorado seeking to enjoin the customer's NASD arbitration.²⁵ The district court dismissed the action holding that the NASD arbitrator should interpret and apply the eligibility rule.²⁶ The Court of Appeals for the Tenth Circuit reversed and found that the eligibility rule's application presented a question of arbitrability for the court to decide.²⁷ After granting certiorari, the Court reversed and held the applicability of NASD Rule 10304 was presumptively for the arbitrator, not for the court to decide.²⁸ The Court concluded that NASD Rule 10304 was a gateway procedural matter to be decided by an arbitrator and the rule did not present a question of arbitrability.²⁹ In addition, the Court reasoned "...the NASD

Miller v. Prudential Bache Secs., Inc., 884 F.2d 128, 132 (4th Cir. 1989), cert. denied, 497 U.S. 1004 (1990); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 753-54 (5th Cir. 1995); *FSC Secs. Corp. v. Freel*, 14 F.3d 1310, 1312 (8th Cir. 1994); *O'Neel v. Nat'l Ass'n of Secs. Dealers, Inc.*, 667 F.2d 804, 807 (9th Cir. 1982) (held that arbitrators are to decide statute of limitation issues).

24. See *Howsam*, 537 U.S. at 81-86. As mentioned in note 9, *supra*, for purposes of this article, NASD Section 15, NASD Rule 10304 and FINRA Rule 12206 are used interchangeably.

25. *Id.* at 79.

26. *Id.*

27. *Id.*

28. *Id.* at 79, 85-86.

29. *Howsam*, 537 U.S. at 85-86. The Court articulated that a "question of arbitrability" would exist:

...in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate. *Id.* at 83-84.

Further, the court found these circumstances to exist where there was "... a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide... Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court." *Id.* at 84 (internal citations omitted).

arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it.”³⁰ Moreover, the Court recognized:

And for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy -- a goal of arbitration systems and judicial systems alike.³¹

Thus, “*Howsam* contains a broader message recognizing the importance of minimizing judicial involvement in the arbitration process in order to promote the goal of ‘a fair and expeditious resolution of the underlying controversy.’”³²

As a result of *Howsam*, the NASD [now FINRA] amended Rule 10304 [now FINRA Rule 12206] adding language that “[t]he panel will resolve any questions regarding the eligibility of a claim under this rule.”³³ Notwithstanding that *Howsam* ended the controversy on who decides whether a claim is eligible, controversy still exists about the interpretation and application of the “occurrence or event” giving rise to a claim in FINRA Rule 12206.

IV. PRE AND POST-HOWSAM COURTS HAVE INTERPRETED THE "OCCURRENCE OR EVENT" LANGUAGE AS BROADER THAN THE PURCHASE DATE

The pre-*Howsam* split among the circuits on whether the court or the arbitrators decided whether a claim was eligible also impacted courts’ interpretations of the “occurrence or event” language in the eligibility rule. Pre-*Howsam*, if a court found the eligibility rule to be a substantive jurisdictional requirement for the court’s determination, it was also common for the court to conclude that the eligibility rule was not subject to tolling

30. *Id.* at 85.

31. *Id.*

32. Barbara Black, *The Irony of Securities Arbitration Today: Why do Brokerage Firms Need Judicial Protection?* 72 U. CIN. L. REV. 415, 418-19 (2003).

33. FINRA Rule 12206, *supra* note 13; FINRA, Notice to Members 05-10: Arbitration Time Limits, (Jan. 2005) available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p013211.pdf>.

(i.e., point of purchase claims could not be tolled).³⁴ While some of these early decisions found the triggering “occurrence or event” to be point of purchase, many of these decisions still found and/or reasoned that there could be independent arbitrable claims beyond the point of purchase.³⁵ Likewise, pre-*Howsam*, if a court found that the eligibility rule created a procedural question for the arbitrators to decide, courts often concluded and/or reasoned that the relevant “occurrence or event” giving rise to a claim was a factual inquiry left to the arbitrators that did not always mean the point of purchase.³⁶ In addition, post-*Howsam* decisions are consistent with the finding that the eligibility rule creates a procedural question for the arbitrators to decide and further conclude that *Howsam* undermined the basic premise that courts relied upon to determine the eligibility rule was not subject to tolling.³⁷

A. Pre-*Howsam* Decisions that Found the Eligibility Rule to be a Substantive Jurisdictional Requirement for the Court’s Determination not Subject to Tolling and that the “Occurrence or Event Giving Rise to a Claim” is the Purchase Date

The pre-*Howsam* decisions finding the eligibility rule to be a substantive jurisdictional requirement, not subject to tolling, for the court’s determination and the “occurrence or event giving rise to a claim” is the purchase date have been undermined by *Howsam*. Specifically, since *Howsam* concluded that the eligibility rule is a gateway procedural matter to be determined by arbitrators, the arbitrators, not the court, make a factual determination on the relevant “occurrence or event” giving rise to a claim.³⁸ Moreover, since it is a procedural question more akin to a statute of limitations, subsequent decisions have determined that the “occurrence or event” giving rise to a claim can be tolled.³⁹ Nonetheless, many of these pre-*Howsam* cases are still cited by brokerage firms in their motions to dismiss for the court’s

34. See Section V(A)-(B), *infra*.

35. See Section V(B), *infra*.

36. See Section V(C), *infra*.

37. See Section V(D), *infra*.

38. See Section III, *supra*; see also IV(D), *infra*.

39. See Section IV(C)-(D), *infra*.

interpretation that the purchase date is the “occurrence or event” triggering the six-year limitation.

For instance, the Seventh Circuit in *Edward D. Jones & Co. v. Sorrells* affirmed the dismissal of the customers’ NASD arbitration claims based on the purchase date of the investments.⁴⁰ By way of background, the NASD arbitration panel entered an award in favor of the customers for their claims alleging, *inter alia*, fraudulent misrepresentations, failure to supervise, violation of federal securities laws, and violation of NASD and NYSE rules.⁴¹ The award noted that the brokerage firm/broker moved for a dismissal of the customers’ claims pursuant to Section 15,⁴² but the award contained no further discussion of the motion.⁴³ Thereafter, the brokerage firm/broker sought to vacate the award in district court or, in the alternative, remand the case to the NASD panel to rule on the Section 15 motion to dismiss.⁴⁴ On remand, the arbitrators released an award clarification stating that the eligibility motion had been considered and denied.⁴⁵ In response, the brokerage firm/broker moved the district court to have the original award vacated or remanded to a new NASD panel.⁴⁶ Thereafter, the district court vacated the award, holding that the customers’ claims were filed late and ineligible for arbitration pursuant to Section 15 since the customers’ purchases were made over six years prior to filing their claim with NASD.⁴⁷ On appeal, the court stated it:

declin[ed] to reconsider [its] explicit holding in *PaineWebber [Incorporated v. Farnam]*, 870 F.2d 1286 (7th Cir. 1989)] that NASD Section 15 operates as an eligibility requirement which bars from arbitration claims submitted more than six years after the event which gave rise to them. Because more than six years elapsed from

40. *Sorrells*, 957 F.2d at 510, 514 (questioned by post-*Howsam* decision *Ray v. Von Bergen*, No. 2003-cv-01115, 2003 U.S. Dist. LEXIS 16560 at *5(N.D. Ill. Sept. 17, 2003) for holding the court decides the eligibility issue).

41. *Sorrells*, 957 F.2d at 510-11.

42. As mentioned in note 9, *supra*, for purposes of this article, NASD Section 15, NASD Rule 10304 and FINRA Rule 12206 are used interchangeably.

43. *Sorrells*, 957 F.2d at 511.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

the date the [customers] made the last of the ten investments which gave rise to their claims against [brokerage firm/broker] to the date on which they submitted their claims for arbitration, the district court correctly ruled that Section 15 rendered these claims ineligible for arbitration.⁴⁸

The customers attempted to distinguish their claims from *Farnam* by arguing they made allegations of fraudulent concealment, unlike the *Farnam* customers.⁴⁹ Therefore, the customers argued that where a claim for fraudulent concealment is present “the doctrine of equitable tolling suspends the running of the limitation period.”⁵⁰ The appellate court declined to accept the customers’ argument since it found the eligibility rule to operate as a jurisdictional requirement that cannot be tolled rather than a statute of limitations.⁵¹ Accordingly, the appellate court affirmed the district’ court’s order vacating the NASD award.⁵²

This line of cases can be distinguished from decisions in Sections IV (C) and (D), *infra*, since they were decided pre-*Howsam*, which concluded the eligibility rule is a gateway procedural matter to be determined by arbitrators. As such, as stated in *Mid-Ohio Sec. Corp. v. Estate of Burns*: “*Howsam* undermined the basic premise which courts relied upon to determine eligibility rules like Rule 12206 were not subject to tolling.”⁵³

48. *Sorrells*, 957 F.2d at 512.

49. *Id.*

50. *Id.*

51. *Id.* at 513-14.

52. *Id.* at 514; *see also Castellano v. Prudential-Bache Secs., Inc.*, No. 90 CIV. 1287, 1990 U.S. Dist. LEXIS 7352, at *6 (June 18, 1990) (finding that the “occurrence or event” language in NYSE’s six-year eligibility rule relates to the point of purchase [NYSE Rule 605 is virtually identical to FINRA Rule 12206 and its predecessors]); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana*, 835 F. Supp. 406, 408 (N.D. Ill. 1993) (holding that the “occurrence or event” for purposes of the eligibility rule is the date of the investment); *see also PaineWebber Inc. v. Allen*, 888 F. Supp. 53, 55 (1993) (finding the occurrence or event which triggers the six year eligibility rule is the date the customer purchased the limited partnerships).

53. *Mid-Ohio Secs. Corp. v. Estate of Burns*, 790 F. Supp. 2d 1263, 1271 (D. Nev. 2011) (emphasis added), Section IV(D), *infra*.

B. Pre-Howsam Decisions that Found the Eligibility Rule to be a Substantive Jurisdictional Requirement for the Court's Determination not Subject to Tolling and that the "Occurrence or Event Giving Rise to a Claim" can be Broader than the Purchase Date

While this line of cases is also undermined by *Howsam* for the presumption that the court rather than the arbitrator decides the eligibility issue, many of these decisions still found and/or reasoned that there could be independent arbitrable claims beyond the point of purchase. These findings and/or reasonings are consistent with pre-*Howsam* and post-*Howsam* decisions that found the eligibility rule to be a procedural question for the arbitrators to decide and the "occurrence or event" that triggers the six year time limit is broader than the purchase date. Although, these cases found that there could be independent arbitrable claims beyond the point of purchase, the current interpretation of the "occurrence or event" giving rise to a claim is even broader as discussed in Sections IV (C) and (D), *infra*.

The Third Circuit in *PaineWebber, Inc. v. Hofmann*, reasoned that active concealment could create an arbitrable claim pursuant to Section 15 of NASD.⁵⁴ In the underlying arbitration, PaineWebber requested that the NASD Director of Arbitration dismiss the customer's claims relating to purchases that were made six years prior to the initiation of the arbitration.⁵⁵ The NASD Director of Arbitration "decided that the motion would be left to the arbitrators hearing the merits."⁵⁶ Therefore, PaineWebber sought relief from the district court to enjoin the customer's NASD arbitration by arguing some of the customer's claims arose from an occurrence or event more than six years prior to the filing of the NASD arbitration claim.⁵⁷ The district court granted summary judgment in favor of the customer concluding that at least some of the customer's claims arose within the six year limitation and therefore the district court "could not say with positive assurance that the entire claim was barred" pursuant to NASD Section 15.⁵⁸ As a result, the Third Circuit vacated the district court's order granting summary judgment in

54. *Hofmann*, 984 F.2d at 1378.

55. *Id.* at 1375.

56. *Id.* at 1376.

57. *Id.* at 1373, 1376.

58. *Id.* at 1374; *see also id.* at 1376, 1377.

favor of the customer and remanded the case for further proceedings.⁵⁹ The court concluded, prior to *Howsam* that the court is the proper body to determine the eligibility issue since Section 15 is a substantive contractual limitation.⁶⁰ In so concluding, the Third Circuit determined that Section 15 was not subject to tolling or discovery arguments.⁶¹ In addition, the Third Circuit found that PaineWebber was entitled to a declaratory judgment and injunctive relief for the customer's claims that arose six years before the filing of the NASD arbitration (*i.e.*, point of purchase claims).⁶² Notwithstanding the fact that PaineWebber was "entitled to summary judgment on some of the [customer's] claims" the court found the customer alleged other claims that were not so clear and could not be determined on the current record.⁶³ These claims included, *inter alia*, the broker's advice to hold the stock, PaineWebber's active concealment of the broker's misconduct, the customer's discovery of the wrongdoing, the continuation of an integrated pattern of wrongdoing (fraudulent inducement to buy and hold stock over the time period) and the continuation of a wrongful brokerage relationship.⁶⁴ The Third Circuit instructed the customer to list each specific claim or theory of recovery and ordered the district court to conduct a hearing with extrinsic evidence (if necessary) to determine what claims are arbitrable.⁶⁵ Furthermore, the Third Circuit recognized that determining whether a claim is arbitrable is not easy.⁶⁶ The district court must distinguish between what is a cause of action and what is an argument merely tolling the six year limit and in so doing, must not rule on the potential merits of the underlying claims.⁶⁷ By way of example, the Third Circuit reasoned that active concealment could create an independent arbitrable claim as follows:

As an example of how this analysis would work, consider [the customer's] claim that PaineWebber actively concealed [the broker's] wrongdoing. This claim easily could be viewed as an

59. *Hofmann*, 984 F.2d at 1374, 1383.

60. *Id.*

61. *Id.* at 1381.

62. *Id.* at 1374; *see also id.* at 1379.

63. *Hofmann*, 984 F.2d at 1374, 1380.

64. *Id.* at 1380.

65. *Id.*

66. *Id.*

67. *Id.* at 1381.

attempt to toll the time period on claims arising out of [the broker's] underlying wrongdoing. At the same time, however, *this can also be viewed as an independent cause of action based on a duty owed by PaineWebber to its customers to inform them of a broker's wrongdoing or of the unsuitably speculative nature of their investments*. Whether PaineWebber in fact owes such a duty to its customers is a merits question that must be left to the arbitrators. In this type of situation, the court must assume for the purposes of determining arbitrability that such a duty is owed.⁶⁸

The District Court for the Western District of Oklahoma in *Prudential Securities v. Moneymaker*, found that a brokerage firm's wrongdoing after point of purchase was properly considered for arbitration under Section 15.⁶⁹ In that case, the customers filed an arbitration before the NASD alleging that various partnerships purchased from the brokerage firm were unsuitable.⁷⁰ The brokerage firm filed the action before the district court "asking the court to determine that certain of [the customers'] claims [were] ineligible for arbitration and to enjoin their prosecution."⁷¹ In response, the customers filed a motion to dismiss asserting that the eligibility determination should be decided by the arbitrators.⁷² Pre-*Howsam*, the district court found that the eligibility determination is a substantive contractual limitation for the court to decide and denied the customers' motion to dismiss.⁷³ Additionally, the court granted in part and denied in part the brokerage firm's motion for summary judgment.⁷⁴ The court found that some of the customers' claims related to the brokerage firm's wrongdoing after point of purchase should proceed to arbitration as follows:

Plaintiff has listed several limited partnership interests purchased by certain defendants more than six years prior to the NASD filing which are arguably ineligible for arbitration and on which it seeks summary judgment. However, defendants' claims are not limited to

68. *Hofmann*, 984 F.2d at 1381 (emphasis added).

69. *Prudential Secs. v. Moneymaker* No. CIV-93-179, 1994 WL 637396, *2 (W.D. Okl. July 14, 1994).

70. *Id.* at *1.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Moneymaker*, 1994 WL 637396, at *2.

purchase or sale related claims, but allegedly include claims based on ongoing systemic mismanagement, diversion of funds, misrepresentations, conflict of interest and self-dealing...

Defendants' claims which are based on purchases, mismanagement, diversion of funds, misrepresentations, conflict of interest or self-dealing which actually occurred within the six years prior to the NASD filing will proceed to arbitration.⁷⁵

The Eleventh Circuit in *Merrill Lynch, Pierce, Fenner & Smith v. Cohen*, reasoned that an affirmative misstatement made after the purchase date could create an arbitrable claim pursuant to Section 15.⁷⁶ In that case, the customers filed their underlying NASD arbitration alleging that Merrill Lynch sold them various investments that were unsuitable and fraudulently concealed the loss in the investments by reporting false values.⁷⁷ In response, Merrill Lynch sought to enjoin the customer's arbitration in state court arguing that the customer's claims were time-barred since the customer purchased the limited partnerships over six years prior to filing their NASD arbitration.⁷⁸ The customer removed the case to federal district court based on diversity jurisdiction and sought to compel to arbitration.⁷⁹ The district court found that the eligibility issue under Section 15 was for the arbitrators to decide and granted the customer's motion to compel arbitration.⁸⁰ On appeal, prior to *Howsam*, the Eleventh Circuit found that the eligibility issue was a substantive requirement for the court to decide and, since it was a substantive requirement, the court believed that it was not subject to equitable tolling.⁸¹ Nonetheless, the Eleventh Circuit recognized that an occurrence or event after the purchase date could create an independent arbitrable claim as follows:

If the [customers] prove that Merrill Lynch reported false values for their investments through bogus statements, then Merrill Lynch's act of sending the false statements, rather than the initial purchase of the

75. *Id.*

76. *Cohen*, 62 F.3d at 385.

77. *Id.* at 382.

78. *Id.* at 382.

79. *Id.*

80. *Id.*

81. *Cohen*, 62 F.3d at 383, 385, n. 4.

investments, may be the occurrence or event giving rise to their claims.⁸²

Additionally, the Eleventh Circuit specified that it did not express an opinion as to the applicable occurrence or event where a customer was fraudulently induced to purchase securities and the broker subsequently concealed the fraud:

We express no opinion, however, as to the applicable "occurrence or event" in a case in which a broker used fraud to procure the sale of securities and then continued to conceal the fraud. In this case, if the [customers'] allegations are correct, Merrill Lynch did not merely conceal the fraud, but rather affirmatively misstated the value of the [customers'] investments over a six year period.⁸³

Therefore, the Eleventh Circuit reversed and remanded with instructions for the district court to "examine each of the [customers'] claims in order to determine what is the occurrence or event giving rise to that claim."⁸⁴ The district court should then "determine if more than six years has elapsed from that event and send any claims that remain viable to arbitration."⁸⁵

As mentioned in Section V, *infra*, the Supreme Court of New York (New York's trial court) in *Goldberg v. Parker* rejected the argument that the occurrence or event that triggers the six-year limitation in Section 15 is the purchase date of the investment.⁸⁶ The customer commenced an NASD arbitration alleging that the brokerage firm recommended and purchased unsuitable investments.⁸⁷ In response, the brokerage firm initiated an action before New York's trial court seeking to bar the customer's claims on investments purchased six years prior to filing the NASD arbitration.⁸⁸ Although the court determined that the issue of eligibility was properly before it, the court rejected the brokerage firm's argument that the trigger for the six year limitation in the eligibility rule was the purchase date.⁸⁹ The

82. *Id.* at 385.

83. *Id.* n. 6.

84. *Id.*

85. *Id.*

86. *Goldberg v. Parker*, No. 94-02670, 1995 WL 396568, at *2-4 (N.Y. Sup. Apr. 12, 1995).

87. *Id.* at *1-2.

88. *Id.*

89. *Id.* at *2.

court reasoned, “[t]he effect of this interpretation in fraud cases is to reward the unscrupulous broker-dealer and to penalize the unsophisticated investor who does not discover the fraud for more than six years after the investment was purchased.”⁹⁰ The court further recognized that the First Department “has never expressly held that the only event which triggers the start of the six year eligibility period under Section 15 is the investment purchase date.”⁹¹ Additionally, as set forth in Section V, *infra*, the court acknowledged that the then current Director of NASD arbitration ruled in at least three cases that “the ‘purchase date was not the event or occurrence that gave rise to the dispute.’”⁹² Moreover, the court stated:

Similarly, in appropriate cases the Second and Third Departments have declined to interpret Section 15 as merely involving a mathematical computation, counting six years from the date of purchase of the investment. In *Corbo v. Les Chateau Assocs.*, 127 AD2d 657 (2d Dept.1987), where the customer’s claims raised issues of fraud, the Second Department held that arbitration was properly compelled, notwithstanding the allegations that the proceeding to compel arbitration had been brought more than six years after the transactions involved in the petitioner’s claim and more than four years after the petitioner should, with reasonable diligence, have discovered the fraud. The court held that where it could not be said as a matter of law that the customer failed to exercise reasonable diligence in discovering the fraud, and where the factual issues underlying the limitations period were so intertwined with the ultimate substantive issues, it was not an abuse of discretion to leave all issues to the arbitrator (cf., *Matter of Prudential Bache Sec. v. Archard*, 179 AD2d [2d Dept.1992], lv. denied 80 NY2d 754).

In *Prudential Securities, Inc. v. Purello*, 206 Ad2d 713 614 NYS2d 638 (3d Dept.1994), the Third Department held:

Due to the continuing nature of these claims and the uncertainty concerning the date of the occurrence or event giving rise to these claims, leaving these issues to the arbitrator will permit a more efficient resolution.⁹³

90. *Id.* (emphasis added).

91. *Goldberg v. Parker*, 1995 WL 396568, at *3.

92. *Id.* at *4.

93. *Id.*

Accordingly, the court held that since “[t]his case involves allegations of fraud and self-dealing by Goldberg” the discovery of the fraud rather than the purchase date is the starting point for computing the six-year eligibility period.⁹⁴

In another Eleventh Circuit decision, the court in *Kidder Peabody & Co., Inc. v. Brandt*, held that the clock on the six year eligibility rule does not start ticking until the customer suffers damages.⁹⁵ Kidder filed suit in district court seeking an injunction of the customers’ NASD arbitration and a declaration that the customer’s claims were ineligible for arbitration pursuant to Section 15 since they purchased the limited partnerships more than six years prior to filing the statement of claim.⁹⁶ The district court entered summary judgment in favor of the customers as to their RICO claim, declaring it was eligible for arbitration since the occurrence or event giving rise to that claim was a “pattern of racketeering activity,” which continued through the six-year window.⁹⁷ Kidder’s appeal followed.⁹⁸ The Eleventh Circuit vacated and remanded because the district court failed to identify precisely the last occurrence or event necessary to make the customers’ RICO claim viable.⁹⁹ In discussing the meaning of Section 15, the court held:

[W]e hold that under § 15 the "occurrence or event" which "gives rise to the ... claim" is the last occurrence or event necessary to make the claim viable. A claim is viable when all the elements of that claim can be established such that it could withstand a motion to dismiss for failure to state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6).

Of course, the last "occurrence or event" necessary to make a claim viable depends on the nature of a particular claim. In some instances, a single "occurrence or event" will establish all the elements of a claim. For example, the single act of striking another may establish all the elements of a claim for battery. In that instance, the act of striking another may be the "occurrence or event" which "gives rise" to a claim for battery.

94. *Id.*

95. *See Kidder Peabody & Co., Inc. v. Brandt*, 131 F.3d 1001, 1004 (11th Cir. 1997).

96. *Id.* at 1002.

97. *Id.* at 1002-1003.

98. *Id.* at 1003.

99. *Id.* at 1004-05.

In other instances, separate "occurrences or events" establish the various elements of a claim. For example, an action for negligence based on the defective design of a product is not viable until an injury is caused by that product. Although the duty and breach elements of such a claim are established by the company's act of marketing the product, that act does not establish the causation and injury elements of the claim. The incident in which the product causes injury, not the company's act of marketing a defective product, is the "occurrence or event which gives rise to the ... claim" within the meaning of § 15. Hypothesizing some dates for the occurrences or events in this example reveals the flaw in Kidder's position. *Suppose that the company marketed the defectively designed product in year one and that, as a result of that defective design, the product caused injury in year eight. Under Kidder's theory, even if a claimant filed an arbitration complaint the moment after his or her claim arose--the moment after he or she was injured--the claim would be ineligible for arbitration. We decline to adopt an interpretation of § 15 that would render some claims ineligible for arbitration before they even come into existence.*¹⁰⁰

Likewise, the District Court for the Eastern District of Virginia in *Smith Barney Inc. v. Vogeles*, concluded that an occurrence or event under Section 15 is not always the date of purchase.¹⁰¹ Smith Barney sought declaratory and injunctive relief barring arbitration of the customers' claims concerning investments that were purchased six years prior to the initiation of their NASD arbitration pursuant to Section 15.¹⁰² Both parties agreed to a preliminary injunction of the arbitration pending resolution of this matter.¹⁰³ Since this case was decided pre-*Howsam*, the threshold issue before the court was whether a court or an arbitrator determines eligibility of a claim pursuant to Section 15.¹⁰⁴ The court determined that it was unnecessary for it to decide who determines eligibility since both parties agreed that Section 15 was part of their contract and the interpretation of a contract is for a court to decide.¹⁰⁵ Since the issue of contract interpretation was properly before the court, the

100. *Brandt*, 131 F.3d at 1004-05 (emphasis added).

101. *Smith Barney Inc. v. Vogeles*, 967 F. Supp. 165, 170 (E.D. Va. 1997).

102. *Id.* at 167.

103. *Id.*

104. *Id.*

105. *Id.* at 168-169.

analysis turned to whether the claims were eligible.¹⁰⁶ The court recognized that while the purchase date of an investment will often be the relevant occurrence or event giving rise to a claim, “no persuasive authority holds that the purchase must be the ‘occurrence or event.’”¹⁰⁷ Additionally the court stated: “in cases considering the purchase as the relevant event, it is unclear whether customers asserted any claims except for the purchase of the contested investment.”¹⁰⁸ Moreover, the court reasoned that it was not the NASD’s intention to create a per se rule that the occurrence or event giving rise to a dispute is always the purchase date of a security as follows:

Clearly, the drafters of the NASD Code could have provided that claims be brought for arbitration within six years of the purchase of the disputed investment. Their quite different choice of language is telling, and belies any conclusion that an “occurrence or event” is [not] necessarily the date of purchase.¹⁰⁹

Nonetheless, the court agreed with prior decisions that eligibility cannot be tolled and a claim must state a genuine, independent cause of action in order to be submitted to arbitration.¹¹⁰ In this case, the court determined that the customers’ theories of recovery including, *inter alia*, fraudulent concealment, failure to advise and failure to review “[did] not attempt to recover on the basis of the original decision and advice to purchase the disputed investments.”¹¹¹ As such, the court determined that the theories constituted independent claims and were not merely tolling or discovery arguments.¹¹² In so concluding, the court determined that the customers’ claims were properly submitted to the arbitrator for resolution on the merits and denied Smith Barney’s petition to enjoin the arbitration.¹¹³

In *Osler v. Ware*, the Sixth Circuit rejected the argument that the purchase date always triggers the running of the six year period in Section

106. *Vogele*, 967 F. Supp. at 169.

107. *Id.* (emphasis added).

108. *Id.* (emphasis added).

109. *Id.* at 170 (emphasis added).

110. *Id.* at 171.

111. *Vogele*, 967 F. Supp. at 171-172.

112. *Id.* at 172.

113. *Id.*

15.¹¹⁴ In that case, the broker filed two separate actions to enjoin the customer's NASD arbitration in district court claiming that the customer's claims were barred by Section 15 since the customer purchased the investments at issue more than six years prior to filing her NASD arbitration.¹¹⁵ The first action to enjoin was voluntarily dismissed by the broker based on the impression that the customer would not be pursuing certain damages stemming from pre-February 3, 1987 wrongdoing pursuant to a letter issued by the NASD Director of Arbitration.¹¹⁶ After learning that the customer still maintained all damage claims, the broker filed the second action to enjoin.¹¹⁷ The district court's order concluded that a claim of fraudulent concealment can toll the six-year eligibility provision in Section 15 and that whether or not there was fraudulent concealment is an issue for the arbitrators to decide.¹¹⁸ Thereafter, the broker appealed the district court's decision.¹¹⁹ The appellate court found that the application and scope of Section 15 is for the court to decide and is not subject to tolling.¹²⁰ Accordingly, the appellate court reversed and remanded.¹²¹ Nonetheless, the appellate court conceded that some of the customer's claims, including false values on the customer's statements and churning, based on wrongdoing occurring after the initial investments and in those instances "the occurrence or event giving rise to the act or dispute, claim or controversy" would not be the initial investment."¹²² Moreover, the appellate court rejected the argument

114. *Osler v. Ware*, 114 F.3d 91, 93 (6th Cir. 1997) (questioned by post-*Howsam* decision in *Smith v. Dean Witter Reynolds*, 102 Fed Appx. 940, 941 (6th Cir. 2004) for holding that the court decides the eligibility issue).

115. *Osler*, 114 F.3d at 92.

116. *Id.* The court cited to a letter issued by the NASD Director of Arbitration "which provided that 'claims regarding purchases made prior to February 3, 1987 will be permitted to go to the arbitrators but only as to allegations of wrongdoing made after February 3, 1987. All allegations of wrongdoing prior to February 3, 1987 are not eligible.'" *Id.* at 92.

117. *Id.*

118. *Id.* at 91-92.

119. *Osler*, 114 F.3d at 91-92

120. *Id.*

121. *Id.* at 92-93.

122. *Id.* at 93.

that the purchase date always triggers the running of the six year period in Section 15 as follows:

Although counsel for [the broker] contended at oral argument that the only relevant date for determining whether a claim is time-barred is when the initial investment was made, this theory does not comport with either the "occurrence or event" language contained in § 15 or the caselaw that has developed thereunder... Accepting [the broker's] proposed approach would create situations in which certain claims would be barred before they even arose. Needless to say, we refuse to interpret the "occurrence or event" language, which does not otherwise suggest that the purchase date always triggers the running of the six-year period, in this manner.¹²³

On remand, the Sixth Circuit instructed the district court to afford the customer "the opportunity to list each claim and the occurrence or event giving rise to such claim." The district court should then analyze each of the claims to determine which are time-barred.¹²⁴

The Seventh Circuit in *J.E. Liss & Co. v. Levin*, found that post-purchase investment advice to retain/renew a security the customer already owned creates an arbitrable claim under NASD Rule 10304.¹²⁵ In that case, the brokerage firm and broker sought to vacate an arbitration award in favor of the customer since the customer purchased the limited partnership more than six years prior to the filing of his NASD arbitration.¹²⁶ The customer counterclaimed to confirm the award.¹²⁷ The district court vacated the arbitration award finding in favor of the brokerage firm and broker.¹²⁸ On appeal, the Seventh Circuit addressed whether NASD Rule 10304 had been waived by the brokerage firm and broker since they failed to plead it in their NASD answer and whether the court or the arbitrators make the eligibility determination.¹²⁹ The court concluded that the six-year bar is nonwaivable

123. *Id.* (emphasis added) (internal citations omitted).

124. *Osler*, 114 F.3d at 93.

125. *J.E. Liss & Co. v. Levin*, 201 F.3d 848, 851-52 (7th Cir. 2000) (overruled in part by *Howsam*, 537 U.S. 79 (2002) for the finding that the court rather than the arbitrator decides the eligibility issue).

126. *Id.* at 849.

127. *Id.*

128. *Id.*

129. *Id.* at 851.

and that the court makes the eligibility determination.¹³⁰ In so concluding, the court stated:

So the six-year bar is nonwaivable before the arbitrators and its applicability is to be determined by the court, but none of this helps [the brokerage firm and broker] because we conclude that the bar is inapplicable in the circumstances of this case. Rule 10304 does not bar a claim that arises within the six-year period merely because the securities involved in the claim were bought more than six years before the claim was filed. If the only basis for the claim were Rule 10b-5, which limits its protections to securities transactions, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975), the plaintiff could not win a case based on post-sale conduct, such as a representation designed to prevent the plaintiff from selling the security. But the claim would fail on the merits, not because of the six-year bar. *If as in this case the plaintiff bases his claim on conduct that took place after he bought the security, the six-year period begins to run as of the date of that conduct, not the date of the purchase...* Otherwise if [the broker], driven to distraction by [the customer's] incessant complaints about the dismal performance of [the limited partnership], had hit [the customer] over the head with a mallet in year seven he would be immune from any claim under the dispute-resolution provisions of the NASD's arbitration code. We can't see the sense in that. It is true that [the customer] alleged fraud in the sale of the [limited partnership], as well as post-sale fraud. But the arbitrators said they were basing their award on the latter. The fact that the post-sale fraud could be said to have arisen from the sale fraud, in the sense that had [the customer] never bought the interest in [the limited partnership] the [brokerage firm and broker] would never have represented to him that [the limited partnership] would emerge intact from bankruptcy, no more brings the six-year limitation into play than the fact that in our hypothetical case the incident with the mallet would not have occurred had it not been for the sale of the security more than six years before the claim was filed. If a claim accrues as soon as a necessary condition to its existence arises, then [the customer's] claim accrued when Columbus discovered America, if not, indeed, at the time of the Big Bang.

What is true is that if the only allegation about the post-sale conduct had been that it had lulled [the customer] into delaying the filing of a

130. *Levin*, 201 F.3d at 851.

claim based on the fraudulent inducement of the sale, he would be arguing fraudulent concealment of the wrong and we know from Sorrells that fraudulent concealment would not extend the six-year deadline for filing the claim. 957 F.2d at 512-14. *But that is not the allegation. The allegation is of an independent fraud designed not to lull [the customer] into not suing but rather to dissuade him from selling his investment in [the limited partnership].*¹³¹

The Seventh Circuit found that there was no defense to the suit to confirm the arbitrators' award and reversed the district court's judgment with directions to confirm the award.¹³²

C. Pre-Howsam Decisions that Found the Eligibility Rule Creates a Procedural Question for the Arbitrators to Decide and that the "Occurrence or Event Giving Rise to a Claim" is Broader than the Purchase Date

Although this line of cases is pre-*Howsam*, the decisions discussed below are consistent with the finding in *Howsam* that the eligibility rule is a gateway procedural matter to be determined by arbitrators. Consistent with current FINRA guidance,¹³³ these cases reject the presumption that the "occurrence or event" language always relates to point of purchase.

In 1993, the District Court of Minnesota in *FSC Sec. Corp. v. Freel*, rejected the broker-dealer/broker assertion that the language in Section 15 "clearly indicated" that the six-year limitations period commenced on the date of purchase.¹³⁴ By way of background, the customers filed an arbitration claim before the NASD alleging that the broker-dealer/broker recommended unsuitable investments.¹³⁵ The broker-dealer/broker unsuccessfully moved to dismiss the underlying arbitration claim three times based on the allegation that most of the customers' claims were barred by Section 15 since four of the six investments were purchased more than six years prior to filing of the arbitration.¹³⁶ The broker-dealer/broker first brought their motion to dismiss

131. *Id.* at 851-82 (emphasis added) (internal citations omitted).

132. *Id.* at 852.

133. *See* Section V, *infra*.

134. *FSC Secs. Corp. v. Freel*, 811 F. Supp. 439, 444 (D. Minn. 1993).

135. *Id.* at 440-441.

136. *Id.* at 441.

before the NASD staff, then before the NASD panel after their appointment, and again before the NASD panel at the arbitration hearing.¹³⁷ One month after the hearing, the NASD panel issued an award in favor of the customers.¹³⁸ The broker-dealer/broker then sought to vacate the award in district court arguing that the arbitrators exceeded their powers by rendering an award on claims not eligible for submission under Section 15 and that the arbitrators manifestly disregarded the law.¹³⁹ At the same time, the customers moved to confirm the award.¹⁴⁰ The court found that the arbitrators did not exceed their powers or manifestly disregard the law.¹⁴¹ In determining whether the arbitrators exceeded their authority, the court addressed the issue of who decides eligibility and the interpretation of Section 15.¹⁴² The court found that Section 15 is a procedural limitation to be interpreted and decided by the arbitrators.¹⁴³ Additionally, the court recognized that the six year limitation in Section 15 does not clearly relate to point of purchase as follows:

Reading section 15 as a procedural limitation to be interpreted by the arbitrator is particularly appropriate given the broad language of the section. Contrary to plaintiffs' assertion, *the language of section 15 does not clearly indicate that the six-year limitations period commences on the date of purchase; rather, it measures the six-year period from 'the occurrence or event giving rise to the act or dispute, claim or controversy.'* NASD § 15 (emphasis added and emphasis in the original). *The 'occurrence or event' triggering the claim could be the date of purchase; it could just as plausibly be some other occurrence or event.* Requiring courts to determine the point at which the six-year time limitation commenced would not only entangle courts in the merits of arbitrated disputes, but would provide an opportunity for delay and duplication of effort. These are

137. *Id.*

138. *Id.*

139. *Freel*, 811 F. Supp. at 441.

140. *Id.*

141. *Id.* at 441-46.

142. *Id.* at 441-45.

143. *Id.* at 443-445.

precisely the results that the principle of deference to an arbitrator's procedural determinations was designed to prevent.¹⁴⁴

Furthermore, as set forth in Section V, *infra*, the court acknowledged that the then current Director of NASD arbitration ruled that the “‘purchase date was not the event or occurrence that gave rise’ to the dispute.”¹⁴⁵

In *PaineWebber, Inc. v. Landay*, the District Court of Massachusetts found that Section 15 of NASD was a procedural question that could be tolled.¹⁴⁶ In that case, PaineWebber sought declaratory and injunctive relief to bar the customers from seeking arbitration of certain claims.¹⁴⁷ As grounds for its motion for a preliminary injunction, PaineWebber argued, *inter alia*, that the customers’ claims were not eligible for arbitration pursuant to Section 15 since the purchase of certain investments occurred six years prior to the filing of the NASD claim.¹⁴⁸ In response, the customers sought an order compelling arbitration arguing, *inter alia*, that “‘due to acts of fraudulent concealment they were unable to discover their cause of action’ until a later date within the six-year limitation.”¹⁴⁹ The court concluded that eligibility is a procedural question for the arbitrators to decide and nothing in Section 15 precluded tolling of the six-year time limitation.¹⁵⁰ The court stated:

[N]othing either in the terms of the parties' agreement or in Section 15 itself which compels the conclusion that issues of "tolling" are precluded from consideration under Section 15's six-year eligibility requirement. The [customers] here assert that due to acts of fraudulent concealment they were unable to discover their cause of action until 1993. If one accepts tolling as an appropriate consideration, therefore, the issue of whether their claims are time-barred cannot be resolved without inevitable engagement on the merits of the claim...

...the question of whether Section 15 of the NASD Code renders certain of the [customers'] claims ineligible for an arbitration award

144. *Freel*, 811 F. Supp. at 444 (emphasis added and emphasis in original).

145. *Id.* at 444, note 6.

146. *PaineWebber, Inc. v. Landay*, 903 F. Supp. 193, 202 (D. Mass. 1995).

147. *Id.* at 194-95.

148. *Id.* at 195, 198.

149. *Id.* at 202.

150. *Id.* at 201-03.

is a question to be determined by the arbitrator rather than the court. PaineWebber's objection to the arbitration on the ground that the bulk of the [customers'] claim is ineligible is therefore rejected.¹⁵¹

In 1995, the Court of Appeals for the Fifth Circuit in *Smith Barney Shearson, Inc. v. Boone*, also found that post-purchase wrongdoing could be an event or occurrence giving rise to a dispute under Section 15 and AMEX [now NYSE] Rule 605.¹⁵² Smith Barney separately sought injunctive relief and a declaratory judgment from the district court on both customers' claims since the claims were filed more than six years after the last investment/purchase.¹⁵³ The district court dismissed both claims holding that timeliness is a procedural question to be determined by the arbitrators.¹⁵⁴ Smith Barney appealed the district court's decision and consolidated the cases for review.¹⁵⁵ On appeal, the court affirmed the district court's decision by finding that timeliness is a procedural issue for the arbitrators to decide.¹⁵⁶ In reaching its decision, the court refused to accept Smith Barney's contention "that the last act was the last purchase by each customer as follows:"

The [customers], however, allege that [Smith Barney] continued to act fraudulently after the last purchases were made and within six years of the filing of the arbitration complaint...Finally, both [customers] argue that the time bars should be tolled since [Smith Barney] engaged in fraudulent conduct which prevented the [customers] from learning several important facts until after the six year post-purchase date. Thus, there is substantial controversy over whether the time bars will act to bar the causes of action asserted by the [customers]. This Court cannot... prevent arbitration.¹⁵⁷

151. *Landay*, 903 F. Supp. at 202-03 (internal citation omitted).

152. *Boone*, 47 F.3d at 754. American Stock Exchange Rule 605 is virtually identical to Section 15. Rule 605 states as follows: "No dispute, claim or controversy shall be eligible for submission to arbitration in any instance where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy." *Id.* at 751.

153. *Id.* at 751-52. One customer brought a claim before the American Stock Exchange [now NYSE] arbitration forum and the other customer brought a claim before the NASD arbitration forum. *Id.*

154. *Id.*

155. *Boone*, 47 F.3d at 752.

156. *Id.* at 751, 754.

157. *Id.* at 754.

D. Post-Howsam Decisions that Found the Eligibility Rule Creates a Procedural Question for the Arbitrators to Decide and that the “Occurrence or Event Giving Rise to a Claim” is Broader than the Purchase Date

Consistent with the holding in *Howsam*, recent decisions have found the eligibility rule is a gateway procedural matter to be determined by arbitrators. Additionally, these cases recognize that *Howsam* undermined the basic premise upon which courts relied to determine the eligibility rule was not subject to tolling.¹⁵⁸

In 2011, the District Court of Nevada in *Mid-Ohio Sec. Corp. v. Estate of Burns*, determined that FINRA Rule 12206 is not a strict rule of eligibility but a question for the arbitrators to interpret as they see fit including adding in tolling provisions or a discovery rule.¹⁵⁹ By way of background, the customer initiated a FINRA arbitration against the brokerage firm alleging, *inter alia*, that the brokerage firm failed to conduct due diligence, negligence and breach of contract relating to the customers’ investment in a private offering.¹⁶⁰ In the underlying arbitration, the brokerage firm filed a motion to dismiss raising the eligibility issue pursuant to FINRA Rule 12206 arguing that the relevant conduct (*i.e.*, purchase of investment at issue) occurred more than six years prior to the filing of the statement of claim which was denied

158. In our practice, brokerage firms have only cited to one post-*Howsam* decision, *Chang v. Citigroup, Inc.*, No. 3:2009cv02966, 2010 U.S. Dist LEXIS 10167 (N.D. Cal. 2010), in support of their motions to dismiss pursuant to FINRA Rule 12206. In that case, the FINRA arbitration panel dismissed the customer’s claims as ineligible and time barred pursuant to FINRA Rule 12206. *Id.* at 4-6. Thereafter, pursuant to FINRA Rules, the customer filed his claims in court. *Id.* at 1-3. In response, Citigroup filed a motion to dismiss in court. *Id.* at 4-6. In deciding Citigroup’s motion, the court interpreted and applied statutes of limitations and found in favor of Citigroup. *Id.* at 1, 15. *Chang* can be distinguish on the grounds that the court does not interpret FINRA Rule 12206 but rather interprets the application of the statutes of limitation. Additionally, since the underlying FINRA order dismissing the customer’s claims was not an explained decision, the reasoning of the FINRA panel is unknown. Nonetheless, based on the facts in the court’s decision, the customer failed to allege any continuing fraud and/or continuing wrongdoing on the part of Citigroup sufficient to warrant tolling of the applicable statutes of limitation. *Id.* at 3-6.

159. *Mid-Ohio Secs. Corp.*, 790 F. Supp. 2d at 1271.

160. *Id.* at 1265.

by the panel.¹⁶¹ The brokerage firm re-raised the eligibility issue in closing argument.¹⁶² Thereafter, the panel issued an arbitration award in favor of the customer.¹⁶³ As a result, the brokerage firm filed a petition before the court to vacate the award.¹⁶⁴ The brokerage firm argued that the arbitrators manifestly disregarded the law because the wife did not have standing and the customer's claims were ineligible pursuant to FINRA Rule 12206 since the purchase of the investment at issue occurred six years prior to the initiation of the FINRA arbitration.¹⁶⁵ In response, the customer opposed the petition to vacate and filed a cross petition to confirm the award.¹⁶⁶ In deciding the eligibility issue, the court acknowledged that pre-*Howsam* and prior to the current FINRA Rule 12206, there was a split of authority on who makes the eligibility determination (*i.e.*, the court or the arbitrators).¹⁶⁷ However, the United States Court in *Howsam* ended the controversy when it ruled that the eligibility determination is a matter for the arbitrators to decide, which in turn was recognized by FINRA in the current language in Rule 12206.¹⁶⁸ Notwithstanding the fact that the brokerage firm conceded the question of eligibility was for the arbitrators to decide, the brokerage firm argued that the arbitrators "ignored the law that Rule 12206 is not subject to tolling and the limitation period runs from the purchase of the investment in this case..."¹⁶⁹ The court rejected the brokerage firm's argument and found that the arbitrators did not manifestly disregard the law as it relates to FINRA Rule 12206.¹⁷⁰ Specifically, the court addressed the post-*Howsam* interpretation of FINRA Rule 12206 as follows:

Howsam undermined the basic premise which courts relied upon to determine eligibility rules like Rule 12206 were not subject to tolling. Those courts relied on the premise that the eligibility rule was a

161. *Id.* at 1266.

162. *Id.*

163. *Id.* at 1267.

164. *Mid-Ohio Secs. Corp.*, 790 F. Supp. 2d at 1267.

165. *Id.* at 1267, 1270.

166. *Id.* at 1267.

167. *Id.* at 1270-1271.

168. *Id.* at 1271.

169. *Mid-Ohio Secs. Corp.*, 790 F. Supp. 2d at 1271.

170. *Id.* at 1271-72.

*substantive limit on the agreement to arbitrate, not a statute of limitations. Thus, the time period was not subject to tolling. However, Howsam eviscerated that premise, finding that the eligibility time limit was not a question of arbitrability, but a gateway procedural matter for the arbitrator. Thus, the entire line of cases that suggest Rule 12206 is not subject to tolling is undermined. Therefore, it would not be manifest disregard of the law not to follow this line of cases post-Howsam.*¹⁷¹

Further, the court concluded that the arbitrators were free to interpret FINRA Rule 12206 as they saw fit:

Because Rule 12206 is not a strict rule of eligibility, but a question for the arbitrators more akin to a statute of limitations, the arbitrators were free to interpret the rule as they saw fit, including adding in tolling provisions or a discovery rule...If the arbitrators adopted tolling or discovery principles and used the [date of discovery of the fraud] as the triggering event, that would be within the six-year period in Rule 12206. The FINRA panel had comparatively more expertise about the meaning of its own rule, and it therefore could weigh the propriety of tolling or the discovery rule in any particular case. The Court therefore will deny the motion to vacate based on FINRA Rule 12206.¹⁷²

Accordingly, the court denied the brokerage firm's petition to vacate the award and confirmed the award in favor of the customer.¹⁷³

The Court of Appeals of Michigan in *Hantz Fin. Servs., v. Monroe*, concluded wrongful acts that occurred after the point of purchase such as bogus statements and fraudulent misrepresentations could have triggered the six year time limitation under FINRA Rule 12206 and as such the eligibility issue was properly decided by the arbitration panel.¹⁷⁴ In that case, the customers filed an arbitration claim before FINRA alleging negligent supervision and fraud.¹⁷⁵ Specifically, the facts demonstrate that the broker deposited the customers' funds into his personal account and provided the

171. *Id.* at 1271 (emphasis added).

172. *Id.* at 1271-72.

173. *Id.* at 1272.

174. *Hantz Fin'l. Servs. v. Monroe*, No. 301924, 2012 Mich. App. LEXIS 147, *7-9 (Mich. Ct. App. Jan. 24, 2012).

175. *Id.* at *1-2.

customers with fraudulent account statements through 2007.¹⁷⁶ The broker's embezzlement became known in 2008 and he committed suicide days later.¹⁷⁷ Thereafter in 2009, the brokerage firm assured all of the broker's former clients that it would reimburse them for their losses but failed to reimburse the customers in this case.¹⁷⁸ In the underlying arbitration, the brokerage firm's answer stated that FINRA did not have the authority to arbitrate the dispute pursuant to FINRA Rule 12206 since the customers did not deliver any funds to the broker after 2003 and the arbitrators concluded otherwise.¹⁷⁹ The arbitration panel issued an award in favor of the customers and the brokerage firm moved to dismiss the award in circuit court arguing the arbitration panel erred when it determined the claims were eligible.¹⁸⁰ The circuit court denied the brokerage firm's motion and the brokerage firm appealed.¹⁸¹ On appeal, the brokerage firm again argued that the circuit court erred and the arbitrators exceeded their powers because the occurrence or event giving rise to the claim is the date of investment and even if the occurrence or event is not necessarily the date of investment the customers' claims are still ineligible because none of the alleged wrongful conduct occurred after that date.¹⁸² The appellate court rejected both arguments concluding that the occurrence or event giving rise to the claim is not always the investment date and wrongful acts such as bogus statements and fraudulent misrepresentations could have triggered the six year time limitation under FINRA Rule 12206.¹⁸³ Therefore, the court found the panel did not exceed its authority when it determined that defendants' claims were not barred under FINRA Rule 12206 and affirmed the circuit court's decision.¹⁸⁴

In another recent decision, the District Court for the Northern District of California in *Oshidary v. Purpura-Andriola*, agreed with *Mid-Ohio Sec. Corp.*, and found that the arbitration panel was free to interpret FINRA Rule

176. *Id.* at *1.

177. *Id.*

178. *Id.* at *1-2.

179. *Hantz Fin'l. Servs.* 2012 Mich. App. LEXIS 147 at *2.

180. *Id.*

181. *Id.*

182. *Id.* at *5-8.

183. *Id.* *5-9.

184. *Hantz Fin'l. Servs.* 2012 Mich. App. LEXIS 147 at *9-10.

12206 as it saw fit.¹⁸⁵ In that case, a broker gave investment advice to multiple clients to loan money to a technology company while employed by Smith Barney.¹⁸⁶ In advising the clients to loan money, the broker made false representations about the health and stability of the technology company.¹⁸⁷ The clients originally filed suit against the broker and Smith Barney in the California Superior Court and were ordered to proceed to FINRA arbitration.¹⁸⁸ In their FINRA arbitration, the claimants alleged claims for breach of fiduciary duty, failure to supervise, intentional misrepresentation, negligent misrepresentation, conspiracy and breach of contract.¹⁸⁹ The broker counterclaimed against the claimants for harassment, interference with contractual relations, defamation and extortion.¹⁹⁰ Following the conclusion of the claimants' case in chief, the arbitration panel granted Smith Barney's request for dismissal of all claims against it.¹⁹¹ In addition, the panel dismissed all claims against the broker except for the claims for breach of fiduciary duty brought by six of the claimants.¹⁹² Additionally, the panel denied the broker's request for dismissal for violation of the statute of limitations.¹⁹³ Thereafter, the broker filed a motion to dismiss the remaining claims for breach of fiduciary duty.¹⁹⁴ The arbitration panel conducted additional hearing sessions and issued an award in favor of two of claimants (four claimants settled their claims prior to the final hearing sessions) based on the broker's breach of fiduciary duty.¹⁹⁵ Thereafter, the broker filed a petition to vacate the arbitration award in the district court and the remaining

185. See *Oshidary v. Purpura-Andriola*, No. 3:2012cv02092, 2012 U.S. Dist. LEXIS 81367, *14-18 (N.D. Cal. June 12, 2012); see also *Mid-Ohio Secs. Corp.*, 790 F. Supp. 2d at 1271-72.

186. See *Oshidary*, 2012 U.S. Dist. LEXIS 81367 at *2.

187. *Id.*

188. *Id.* at *3.

189. *Id.*

190. *Id.*

191. *Oshidary*, 2012 U.S. Dist. LEXIS 81367 at *4.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at *4-5.

claimants countered with a request to confirm the award.¹⁹⁶ The broker argued four theories on which the award should be vacated including, the panel manifestly disregarded the law since the claims were precluded from arbitration pursuant to FINRA Rule 12206 based on the purchase date (*i.e.*, date the loans were made).¹⁹⁷ The court denied the broker's petition on all four claims and confirmed the arbitration award.¹⁹⁸ In determining whether the panel manifestly disregarded the law with regard to FINRA Rule 12206, the court turned to the recent decision of *Mid-Ohio Sec. Corp.*, and concluded:

This Court agrees with [the *Mid-Ohio Sec. Corp.*] analysis and adopts it here. The Panel was free to interpret Rule 12206 as it saw fit, in particular with respect to the triggering date, *i.e.* the "occurrence or event giving rise to the claim." FINRA Rule 12206. It appears from a partial transcript of one arbitration hearing appended to [the broker's] Reply Brief that the Panel believed the triggering event was a 2006 board meeting "in which the claimants were informed that their loans and monetary investments into the company weren't worth anything..." It was not manifest disregard of the law to so find. ... There is no "well defined, explicit, and clearly applicable" law regarding whether the trigger date must be the date of investment.¹⁹⁹

V. FINRA'S INTERPRETATION AND GUIDANCE TO ARBITRATORS IS THAT THE "OCCURRENCE OR EVENT" LANGUAGE IN THE ELIGIBILITY RULE CAN BE LATER THAN THE PURCHASE DATE

"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.*"²⁰⁰

196. *Oshidary*, 2012 U.S. Dist. LEXIS 81367 at *5.

197. *Id.* *7-8.

198. *Id.* at *21.

199. *Id.* at *15-17 (internal citations omitted).

200. FINRA, FINRA DISPUTE RESOLUTION ARBITRATOR'S GUIDE at 38 (Apr. 2013)

FINRA Dispute Resolution Arbitrator's Guide ("Arbitrator's Guide") provides arbitrators with guidance on FINRA rules, practice, and procedure.²⁰¹ The Arbitrator's Guide explains the eligibility rule and "a continuing occurrence or event" under the rule as follows:

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. 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.*²⁰²

Further, the NASD has stated that the six year eligibility rule can be triggered by events occurring after the purchase date of the securities at issue, including a party's discovery of wrongdoing. In *Goldberg v. Parker*, discussed in detail in Section IV, *supra*, the New York Supreme Court observed that the NASD Director of Arbitration had determined "...that, at least in fraud cases, the 'occurrence or event' language in §15 is not automatically interpreted as the investment purchase date."²⁰³ Specifically, the court quoted a letter written by the NASD Director of Arbitration which stated:

It has been determined that the purchase date is not the event or occurrence that gave rise to this dispute. Also, Section 15 does not refer specifically to the purchase date as the time that the six year limitation begins to run. Therefore *it is equally appropriate that the*

available at

<http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p009424.pdf> (emphasis added).

201. *See Id.*

202. *Id.* at 37 (emphasis added); *see also* FINRA, *FINRA Dispute Resolution Arbitrator Training: Motions to Dismiss* at 9 (Aug. 2010) available at

<http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p122123.pdf>.

203. *Goldberg*, 1995 WL 396568 at *4.

*discovery by the claimant be treated as the occurrence or event giving rise to the dispute...*²⁰⁴

Additionally, “[i]n at least five separate rulings, the NASD Arbitration Director held that the ‘occurrence or event giving rise to the dispute, claim or controversy’ is the date claimants discovered the fraud or wrongdoing, not the purchase date of claimants’ investment.”²⁰⁵ This article cited to the NASD letter referenced in *Goldberg* and *FSC Sec. Corp* and went on to state:

Using the same exact language [as the letter referenced in *Goldberg* and *FSC Sec. Corp*], the NASD Arbitration Director denied two more NASD Code Rule 10304 "eligibility" motions to dismiss filed by respondents on the same grounds, finding that the investment purchase date was not the "event or occurrence" giving rise to the claim. Priv. Ltr. Rul. 90-01342 (Sept. 17, 1991); Priv. Ltr. Rul. (Aug. 9, 1991).

In two other fraud cases, the NASD Arbitration Director denied respondents' NASD Code Rule 10304 "eligibility" motions to dismiss and expressly held that the date claimants discovered the fraud was the date that triggered the six-year limitation period. Priv. Ltr. Rul. 91-02199 (Jan. 16, 1993) ("Jan. 1993 Ruling"); Priv. Ltr. Rul. 92-01717 (Oct. 20, 1992), ("Oct. 1992 Ruling").²⁰⁶

204. *Id.* (emphasis added); see also *FSC Secs. Corp.*, 811 F. Supp. at 444, n. 6 (citing the same letter from the NASD Director of Arbitration holding that the occurrence of event triggering a claim “could just as plausibly be some other occurrence or event” as the date of purchase).

205. Ernest E. Badway and Anthony Del Guericio, *Timing Cuts to the Heart of the Matter; In NASD Arbitration proceedings, eligibility motions are not ordinary statute of limitations filings*, 182 N.J.L.J., 182, (Dec. 26, 2005).

206. *Id.* The article cited the NASD Arbitration Director’s two other rulings in the fraud cases as follows:

As to Section 15 of the NASD Code of Arbitration Procedure, the NASD National Arbitration Committee has provided me with discretion on a case by case basis in determining the occurrence or event giving rise to the act of dispute claim, or controversy from which the six (6) year eligibility time period will be calculated.

In this matter, claimants have alleged that September 1989 was the date they learned of the continued misrepresentation and/or fraudulent inducement by the respondents. Therefore, I have determined the claim to be eligible under Section 15. See Jan. 1993 Ruling...

Moreover, the NASD Director of Arbitration's interpreted the eligibility rule in limited partnership disputes as follows:

But arbitration directors are becoming more flexible on the six-year limit. The rules say an investor must file a claim within six years of the 'occurrence or event giving rise to the act or dispute,' said Deborah Masucci, director of arbitration at the National Association of Securities Dealers Inc. In the case of limited partnership disputes, Ms. Masucci has surprised the industry by beginning to interpret the 'occurrence or event' as being the date an investor becomes aware of a precipitous decline in a partnership's value on a statement.²⁰⁷

Therefore, FINRA's guidance, policies and interpretation of its own rules evidence that the purchase date is not always the triggering event for the six-year limitation under FINRA Rule 12206 and its predecessors.

VI. ARBITRATORS HAVE INTERPRETED THE "OCCURRENCE OR EVENT" LANGUAGE IN THE ELIGIBILITY RULE AS BEING BROADER THAN ALWAYS RELATING TO THE POINT OF PURCHASE

Consistent with the law, FINRA rules, FINRA policies and FINRA guidance, arbitration panels have recognized and applied the "continuing" occurrence or event under FINRA Rule 12206 and found brokerage firms liable for wrongful conduct that occurred post-purchase of the investment at issue.²⁰⁸ Specifically, the arbitration panels denied Citigroup's motions to

In NASD #92-01717, the claimant's attorney alleges fraudulent concealment by the respondents which prevented the claimant from discovering the wrongdoing until 1989.

Since the allegations of continuing fraud fall within the eligibility requirements of Section 15 of the Code of Arbitration, that is within six (6) years of May 6, 1992, the date claimant executed her submission agreement in this matter, the Director has determined that this case shall proceed. See Priv. Ltr. Rul. 92-01717.

207. Susan Antilla, *Wall Street; When Time to Complain Runs Out*, N.Y. TIMES, (Sept. 27, 1992), available at <http://www.nytimes.com/1992/09/27/business/wall-street-when-time-to-complain-runs-out.html>.

208. It is common for brokerage firms to cite to prior FINRA awards and/or orders granting motions to dismiss. These awards and/or orders can usually be distinguished on the grounds that the customer did not set forth a "continuing" occurrence or event giving rise to the dispute. See, e.g., *Boston Prop. Exch. Transfer Group v. Merrill Lynch*, FINRA Arb. No. 10-03330; *Tweed v. UBS, et al.*, FINRA

dismiss pursuant to FINRA Rule 12206 in *Reby v. Citigroup Global Markets, Inc.* (FINRA Arbitration No. 11-00809), *McKee v. Citigroup Global Markets, Inc.* (FINRA Arbitration No. 11-02483), *Halpern v. Citigroup Global Markets, Inc.* (FINRA Arbitration No. 11-01980) and *Moskowitz v. Citigroup Global Markets, Inc.* (FINRA Arbitration No. 11-01253).²⁰⁹

These cases involved a security that Citigroup sold to its clients as a fixed income alternative that would generate tax-free returns between 6-9%. In truth, the security was high risk and speculative. Citigroup failed to disclose, *inter alia*, the high risk and speculative nature of the security to its clients, continued to misrepresent the product and continued to mismanage the security until its implosion in 2008.

In these cases, Citigroup argued that the claimants' claims should be dismissed because they purchased the security at issue over six years prior to the filing of their statement of claims. In support of this argument, Citigroup argued that the only transaction at issue was the purchase of the security, suitability is determined at point of sale, the passage of time significantly prejudices Citigroup, the six-year limitation in FINRA Rule 12206 is absolute and cannot be tolled and numerous panels have granted similar motions.

In opposition, claimants argued that even though they purchased the security outside the six-year limitation, Citigroup misrepresented the security at the point of purchase, continued to misrepresent the security, continued to mismanage the security, and failed to disclose material facts to claimants. Further, claimants argued that as a result of Citigroup's misrepresentations, omissions, and active concealment, the claimants were induced to hold their investments in the security and suffered significant damages. Additionally, the claimants argued they were not aware of Citigroup's wrongful conduct until after the implosion of the security in February 2008. In summary, claimants argued that Citigroup's wrongful conduct was part of an "ongoing fraud" that continued into 2008 (*i.e.*, within the six-year time limitation) which supports the claims of breach of fiduciary duty, breach of contract,

Arb. No. 09-01782; *Bernard v. InterSecurities, Inc.*, FINRA Arb. No. 07-01272; *Thompson v. Pavek Investments, Inc.*, FINRA Arb. No. 09-00022; and *Lien, et al., v. Morgan Stanley DW Inc.*, FINRA Arb. No. 05-01345.

209. The orders issued by the panels were not explained decisions but denied Citigroup's motions to dismiss after briefing the issue in all matters and oral argument in *Reby*, *McKee* and *Moskowitz*. Additionally, in *Metzger v. Citigroup*, FINRA Arb. No. 11-02832, the arbitration panel granted Respondent CGMI's motion to dismiss and the claimant is in the process of pursuing his claims in court pursuant to FINRA Rule 12206.

constructive fraud, failure to supervise, violation of federal securities laws; FINRA, NASD, and NYSE rules.

Claimants further pointed out to the panel FINRA's rules and guidance discussed in Section V, *supra* which state motions to dismiss prior to conclusion of party's case-in-chief are discouraged and arbitrators may find an ongoing fraud continuing within the six year limitation. Furthermore, claimants cited the relevant case law discussed in Section IV, *supra* and distinguished the cases and prior awards Citigroup cited on the grounds they did not involve an ongoing fraud. Finally, claimants set forth the policy argument that to bar claimants' claims before the ongoing fraud was discovered is contrary to the interpretation of FINRA rules and policies and, in fact, would serve to award Citigroup for its concealment of the truth. Moreover, claimants stressed that an evidentiary hearing is needed to enable them the opportunity to present evidence to the panel which will demonstrate Citigroup's "ongoing fraud" into early 2008.

After completion of parties' briefing in all matters and oral arguments in *Reby, Mckee and Moskowitz*, the panels denied Citigroup's motions to dismiss.²¹⁰

In addition to the series of product cases, the panel in *Barry Burges vs. Morgan Stanley & Co., Inc.*, FINRA Case No. 10-00040, recognized a "continuing" occurrence or event giving rise to the dispute under FINRA Rule 12206, *even though the "continuing" occurrence or event was not the issue in that case*, as follows:

Where, however, the claim alleges churning, *fraud, or other ongoing activity by the respondent* (or respondent's agent), courts and arbitrators have held that the six years does not begin to run until the conclusion of the wrongful activity. This has been extended to very last day of the parties' association...²¹¹

210. See discussion in note 209, *supra*.

211. *Id.* (emphasis added).

VII. CONCLUSION

For over twenty years, the courts and FINRA have been telling the brokerage industry that the purchase date is not, as a matter of law, the “occurrence or event” that determines the eligibility of claims under FINRA Rule 12206 and its predecessors. Rather, post-*Howsam* the “occurrence or event” giving rise to a claim is a factual inquiry left to the arbitrators and the purchase date is often not the trigger for the six-year time limit.