COMMENTS

SECURITIES ARBITRATION: THE SIX-YEAR ELIGIBILITY RULE

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Without consultation, plans are frustrated,
But with many counselors they succeed.
A man has joy in an apt answer,
And how delightful is a timely word![1]

Arbitration is by far the most common method of dispute resolution within the securities industry, regardless of whether the dispute arises between a customer and a brokerage firm, between a broker-employee and his firm, or between two firms.[2]

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1. *Proverbs* 15:22–23 (New American Standard).

2. Although the industry is self-regulated, the Securities and Exchange Commission ("SEC") oversees the regulation of the securities industry. SHELDON M. JAFFE, BROKER-DEALERS AND SECURITIES MARKETS 7 (1977 & Supp. 1994). All policies and practices adopted by the self-regulatory organizations require SEC affirmation. The National Association of Securities Dealers ("NASD") and the exchanges are industry self-regulatory organizations [hereinafter referred to collectively as "SROs"]. *Cf. id.* at 12 (discussing the regulatory structure of the securities industry).

For a list of the SROs, see *infra* note 44. A broker-dealer must be registered with the SEC. JAFFE, *supra*, at 14. If the registrant engages in a general securities business, he or she must file with the NASD and/or one of the registered exchanges. In some instances, the registrant will be registered with more than one SRO. *Id.* at 48. A broker-dealer must be a member of the NASD if it carries customer accounts. *Id.* at 2 (Supp. 1994).

As a result, any dispute between a firm and a customer may be brought to the NASD for arbitration. Clients may, but are not required to, force brokerage firms to arbitration rather than to the courts. *See* CODE OF ARBITRATION PROCEDURE § 8 (Nation-

A party selecting the National Association of Securities Dealers (NASD) as its arbitration forum is subject to the *NASD Code of Arbitration Procedure*.[3] For a claim to be heard by the NASD, the

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al Association of Securities Dealers, Inc., 1995) [hereinafter NASD ARB. CODE]. However, rather than giving the customer a judicial alternative, most account agreements require that clients submit disputes to arbitration. Further, the agreement customarily limits the arbitration forum by its terms, thus, *inter alia*, the agreement may preclude arbitration through the American Arbitration Association ("AAA"). *See, e.g.*, *infra* note 13 (comparing Merrill, Lynch, Pierce, Fenner & Smith, Inc. account agreement (only SROs for a choice of arbitration forum) with Robert W. Baird & Co. account agreement (SROs or the AAA for a choice of arbitration forum)). For a discussion of how a claim against a member of the American Stock Exchange ("AMEX") may result in a mechanism to force firms to arbitrate at the AAA, despite contrary language in the account agreement, see *infra* notes 28–30 and accompanying text. One of the key remaining differences between the AAA and the SROs is that AAA does not have an eligibility provision. *See, e.g.,* NASD ARB. CODE, *supra*, § 15; *see also* George H. Friedman & Florence M. Peterson, *When You Have a Choice of Forum: The Differences Between Securities Arbitration at the AAA and the SROs*, *in* SECURITIES ARBITRATION, at 555 (Corporate Law & Practice Course Handbook Series No. B4-7107, 1995).

3. NASD ARB. CODE, *supra* note 2, § 12. The current NASD Code of Arbitration Procedure is modeled after the Uniform Code of Arbitration Procedure developed by the Securities Industry Conference on Arbitration ("SICA"). *See infra* notes 44–45 and accompanying text.

Over 6,600 securities-industry arbitration cases are filed each year. Martin L. Budd, *Securities Industry Arbitration — Recent Issues, in* ALI-ABA COURSE OF STUDY MATERIALS — BROKER DEALER REGULATION, at 207 (American Law Institute 1995) [hereinafter Budd 1995]. The NASD handles about 75% of the cases, the AAA handles about 10% of the cases with the various other SROs handling the balance. *Id*.

While the arbitration rules are not identical among the SROs, they track one another very closely; the NASD's rules are by far the most influential because of the number of cases and the breadth of disputes which may be brought in the forum. The reason for the great influence is that a customer can force a member of the NASD to arbitrate any claim founded on a wrong associated with the member's performance as a member of the securities industry. NASD ARB. CODE, *supra* note 2, § 8. Almost every member of the industry is a member of the NASD. *Cf.* JAFFE, *supra* note 2, at 48 (stating that a broker-dealer who carries customer accounts must be a member of the NASD).

Throughout this Comment, the NASD rules are used as representative of the issue. However, where a non-NASD forum has a substantially different approach, the author notes such difference.

The litigation discussed in this Comment revolves around disputes between a customer and a brokerage firm. However, the NASD Code of Arbitration Procedure is applicable to most disputes between brokerage firms and their employees as well as between member firms. *See* NASD ARB. CODE, *supra* note 2, §§ 1, 12.

While arbitration is a non-judicial proceeding, it certainly has not done away with the need for counsel. Section 27 of the NASD Code of Arbitration Procedure provides that "[a]ll parties shall have the right to representation by counsel at any stage of the proceedings." *Id*. § 27. There now exists a plaintiffs' bar of over 250 members representing claimants with claims against brokerage firms. For more information contact, Public Investors Arbitration Bar Association ("PIABA"), Brook Geiger, Executive Di-

NASD staff must first determine that the claim is "eligible" for arbitration.[4]

NASD Code of Arbitration Procedure section 15[5] provides:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.[6]

Section 18, a related rule, provides:

> (a) Where permitted by applicable law, the time limitations which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is

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rector, 3490 Piedmont Road, N.E., Suite 900, Atlanta, Georgia 30305, 404/365-0150. Budd 1995, *supra*, at 207; Telephone Interview with law office of Seth E. Lipner, Esq., President of PIABA (Sept. 6, 1995).

4. NASD ARBITRATION PROCEDURES (1992) [hereinafter ARBITRATION PROCEDURES]. The NASD makes available, upon request by the general public, a pamphlet about arbitration. The pamphlet states:

> An additional factor to be noted is that a controversy is not eligible for submission to arbitration if six or more years have elapsed from the date of the event giving rise to the dispute. The arbitrators also may dismiss a claim barred by shorter applicable state or federal statutes of limitations.

Id. However, the pamphlet is not required to be disseminated to new customers. The eligibility rule can be analogized to state statutes of limitations and statutes of repose which, likewise, are not disclosed by the brokerage firm. *Cf.* Miller v. Prudential-Bache Sec., Inc., 884 F.2d 128 (4th Cir. 1989) (affirming lower court's holding that broker has no duty to advise client of rules of the arbitration facilities); Acme Propane, Inc. v. Tenexco, Inc., 844 F.2d 1317, 1323 (7th Cir. 1988) ("Sellers of securities need not `disclose' the statutes at large of the states in which they operate.").

5. The six-year time period is contained in the Uniform Code of Arbitration ("UCA"), which is the basis for the SROs' codes. MARILYN B. CANE & PATRICIA A. SHUB, SECURITIES ARBITRATION LAW AND PROCEDURE 147 (1991). Rule 603 of the NYSE Arbitration Rules is almost verbatim. Budd 1995, *supra* note 3, at 208.

6. Regarding the impact of a statute of limitation, the NASD's *Legal Assistants' Pleadings Procedure Manual*, F-13, asserts that the six-year eligibility requirement is within "staff discretion" while an assertion of a statute of limitation should be raised as an affirmative defense by the Respondent in his Statement of Answer. The Manual further provides that the arbitrator will determine the effect of such a statute of limitation on the claim.

For a discussion of judicial interpretation of the six-year time limit not "apply[ing] to any case which is directed to arbitration by a court of competent jurisdiction," Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 513 (7th Cir. 1992), see *infra* notes 165–69 and accompanying text.

> filed by the Claimant(s). The tolling shall continue for such period as the Association shall retain jurisdiction upon the matter submitted.[7]

During recent years, the meaning and application of section 15 have been hotly litigated.[8] Litigants have asked the courts to construe the provision notwithstanding the drafters' comments and the SROs' application of the provision.[9] Claimants argue that the section is a procedural rule, subject to tolling, and applying arbitration. Defendants argue that the section is a jurisdictional provision, not subject to tolling, requiring the court to determine if the parties agreed to subject a particular dispute to arbitration.

This Comment will provide a brief overview of how arbitration became key to industry dispute resolution. Thereafter, the Comment will discuss the opinions and holdings of courts of various jurisdictions construing the eligibility issue of claims brought to an SRO for arbitration. There is little agreement among jurisdictions as to the reach of the SROs' arbitration codes even though the parties have contractually agreed to be subject to the arbitration procedures of SROs.

Much of the applied law construing agreements containing arbitration provisions is that of New York since most customer agreements provide a "choice-of-law" clause and New York is the predominant choice.[10] For that reason, this Comment discusses New York's

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7. NASD ARB. CODE, *supra* note 2, § 18. A claim that is not subject to arbitration or which is determined to be ineligible for arbitration may be judicially resolved. For a discussion of judicial disagreement on the remedies available for an ineligible claim, see *infra* notes 143–63 and accompanying text. Section 18 provides that a party who submits a claim to the NASD is agreeing to toll a statute of limitation defense in a judicial proceeding while the NASD considers whether the arbitrators should consider the claim.

8. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995); Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750 (5th Cir. 1995); Roney & Co. v. Kassab, 981 F.2d 894 (6th Cir. 1992); PaineWebber, Inc. v. Hartmann, 921 F.2d 507 (3d Cir. 1990); PaineWebber, Inc. v. Farnam, 870 F.2d 1286 (7th Cir. 1989).

9. *See* Zerdoner v. Dean Witter Reynolds, Inc., No. 94-CV-6362L (W.D.N.Y. Mar. 17, 1995); Calabria v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 172 (N.D. Tex. 1994).

10. *See* Cerisse Anderson, *Arbitrator Authorized to Choose Time Limit; Reversal Addresses Much-Litigated Issue*, N.Y. L.J., Apr. 18, 1995, at 1.

In Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477 (1989), the Court held that where an agreement had a choice of law provision, state law would prevail even though the Federal Arbitration Act ("FAA") would otherwise apply. *But see*

unique application and interpretation of NASD section 15.[11] The Comment also addresses how Florida state courts and the Eleventh Circuit (in which Florida resides) recently have diverged in their application of section 15.

I. THE EVOLUTION OF THE SIX-YEAR ELIGIBILITY RULE

A. Arbitration as the Means of Resolving Securities

Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) (holding that a choice-of-law provision does not require limiting the arbitrator's authority).

Often, a New York court has personal jurisdiction over a party not residing in New York on the basis of the "choice of forum" clause in the customer agreement. Lawrence E. Fenster, *S.R.O. Eligibility Requirements in Securities Arbitration*, *in* REVIEW OF SEC. & COMMODITIES REG. § 26:18, at 183 (1993). See, e.g., *infra* note 13 which contains language illustrative of standard broker account agreements. In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Barnum, 616 N.Y.S.2d 857, 859 (Sup. Ct. 1994), the court considered whether a New York court had personal jurisdiction over a party solely based on the choice-of-law clause. Though recognizing that the majority of New York courts found jurisdiction premised on "the forum selection clause and the mailing of the initiating documents [which] implies a consent to jurisdiction," the *Barnum* court joined the minority finding that personal jurisdiction was not proper. *Id*. (noting that there was no appellate guidance on the matter). The court concluded that Merrill Lynch could provide as a condition in its customer agreement that the client consent to personal jurisdiction in New York. *Id*. at 863. To date, Merrill Lynch has not chosen to so modify its account agreement. *See infra* note 13. The author of the *Barnum* case was Justice Jane S. Solomon to whom the Chief Judge of New York County, Stanley Ostrau, assigned all the brokerage cases raising an issue of eligibility. Seth E. Lipner, *The Week That Was: February 21 – February 28, 1995 — What Will We Argue About Now?*, *in* SECURITIES ARBITRATION, at 118 n.20 (Corporate Law & Practice Course Handbook Series No. B4-7107, 1995).

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McLeod, 622 N.Y.S.2d 954 (App. Div. 1995), the only New York appellate decision to consider the issue, followed the reasoning of Justice Solomon in *Barnum*. *Id*. The current New York law is that New York courts have personal jurisdiction in the following situations:

(1) When the plaintiff utilizes the Amex window;

(2) when a part-time New York resident availed himself of his brokerage account while in New York; or

(3) when a customer established an account through a New York branch.

Lipner, *supra*, at 124. For a discussion of the Amex window, see *infra* notes 26–31 and accompanying text.

11. The New York Court of Appeals concluded that in areas not directly in conflict with the FAA, the New York Arbitration Act is applicable. *See* Smith Barney, Harris Upham & Co. v. Luckie, 647 N.E.2d 1308 (N.Y. 1995); *see also* N.Y. CIV. PRAC. L. & R. §§ 7500–7514 (McKinney 1992).

Industry Claims

Securities firms have uniformly incorporated arbitration clauses in their brokerage account agreements.[12] The language has been refined over the years in response to judicial interpretation.[13] Two Supreme Court cases were key to the expansion of the applicability of arbitration clauses. *Shearson/American Express, Inc. v. McMahon*[14] and *Rodriguez de Quijas v. Shearson/American Express,*

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12. The securities industry was one of the earliest utilizers of arbitration as a method of dispute resolution. The New York Stock Exchange ("NYSE") established arbitration facilities for investors and members by 1872, while the NASD developed similar facilities in 1968. J. KIRKLAND GRANT, SECURITIES ARBITRATION FOR BROKERS, ATTORNEYS, AND INVESTORS 94 (1994). In 1920, New York passed the first statute which provided for judicial enforcement of pre-dispute arbitration agreements. PIONEERS IN DISPUTE RESOLUTION 5 (1991) [hereinafter AAA PIONEERS]. At common law, courts would not enforce pre-dispute agreements. *Id*. at 4. Prior to enactment of the New York statute, the NYSE made agreement to arbitrate to resolve disputes among member firms a requirement of membership. GRANT, *supra*, at 94. While courts did not enforce the arbitration agreement, non-compliance was reason for dismissal from NYSE membership. *Id*.

Businessmen founded the AAA in 1926 to resolve contractual commercial disputes, rather than those arising solely from securities transactions. *See generally* AAA PIONEERS, *supra*.

13. For example, compare the following

> The customer agrees and, by carrying any account for the customer, Baird agrees that all controversies between the customer and Baird or any of Baird's present or former officers, directors, agents or employees which may arise for any cause whatsoever, shall be determined by arbitration. Any arbitration under this agreement shall be before the [NASD], or the [NYSE], or an arbitration facility provided by any other securities exchange of which Baird is a member, or the [AAA], or the Municipal Securities Rulemaking Board ("MSRB"), and in accordance with the rules obtaining of such organization. . . .
>
> This arbitration provision shall apply to any controversy or claim or issue in any controversy arising from events which occurred prior, on or subsequent to the execution of this arbitration agreement. This arbitration provision shall be interpreted according to the laws of the state of New York.

which is the current language from a Robert W. Baird & Co., Inc. (a subsidiary of Northwestern Mut. Ins. Co.) account agreement with

> I agree that all controversies which may arise between us, including but not limited to those involving any transaction or the construction, performance, or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this Agreement shall be conducted by the [NYSE], the [AMEX], or an arbitration facility provided by any other exchange, the [NASD], or the [MSRB], and in accordance with its arbitration rules then in force. . . .
>
> This Agreement . . . will be governed by and interpreted under the laws of the State of New York.

which is the current language from a Merrill Lynch, Pierce, Fenner & Smith, Inc. account agreement.

14. 482 U.S. 220 (1987).

Inc.[15] held that federal securities claims were subject to predispute arbitration agreements.[16] Prior to that time, firms included arbitration clauses in their account documents without informing customers that courts would enforce the provision only with respect to state, rather than federal, claims.[17]

Arbitration clauses had traditionally "legal boilerplate" language imbedded in lengthy and unrelated paragraphs.[18] Concerned that legislatures might prohibit arbitration clauses within the securities industry, the industry responded with disclosure rules.[19] The

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15. 490 U.S. 477 (1989).

16. *See* CANE & SHUB, *supra* note 5, at 294.

17. *Id*. In Wilko v. Swan, 346 U.S. 427, 429 (1953), *overruled by* Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989), the Court held that federal claims arising under the Securities Exchange Act of 1934 were not subject to a pre-dispute arbitration agreement. *See* CANE & SHUB, *supra* note 5, at 256. However, arbitration clauses could be enforced for blue-sky and common law claims. *Id*. at 294 n.4. States have adopted various disclosure and reporting requirements for the offering of securities, and these state laws are commonly known as "blue-sky laws." *See generally* LOUIS LOSS & EDWARD M. COWETT, BLUE SKY LAW 6 n.22 (1958) (stating that by 1911 the term was common); ROBERT R. REED & LESTER H. WASHBURN, BLUE SKY LAWS ANALYSIS AND TEXT ix–xxvi (1921).

Common law claims often associated with brokerage accounts are fraud, breach of contract, breach of fiduciary duty, or negligent conduct. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 382 (11th Cir. 1995); Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 751 (5th Cir. 1995). Between 1983 and 1987, many firms included the following language: "[i]t is understood that such arbitration does not operate as a waiver of my right to bring a judicial action for claims under the securities law." GRANT, *supra* note 12, at 78. The SEC required such language pursuant to Release No. 34-20, 397 (Nov. 28, 1983). *Id*. The rule was repealed following *McMahon*, 482 U.S. at 220, in which the Court concluded that federal securities law claims were subject to pre-dispute arbitration agreements. GRANT, *supra* note 12, at 78.

18. CANE & SHUB, *supra* note 5, at 299. Account holders have challenged pre-dispute arbitration agreements, *inter alia*, as contracts of adhesion arguing that they, as customers, did not expect the consequences of the provision. *See generally* GRANT, *supra* note 12, at 27–36 (discussing common law defenses to pre-dispute arbitration agreements and the judiciary's reluctance to void such agreements). Interestingly, it is now more often the account holder who is seeking arbitration of a dispute while the firm argues the dispute is not eligible for arbitration due to the passage of time.

19. CANE & SHUB, *supra* note 5, at 300. In 1987, the House Subcommittee on Telecommunications and Finance held hearings on arbitration in the securities industry. *Id*. The following year, a bill was introduced to ensure services to customers who would not agree to an arbitration clause in their account agreement. *Id*. (citing *Boucher Introduces Bill to Bar Mandatory Arbitration Agreements*, 20 Sec. Reg. & L. Rep. (BNA) 1054 (July 8, 1988)). While the bill failed when the SEC did not endorse the legislation, the SROs recognized they had to respond to Congressional and media scrutiny of securities industry arbitration. *Id*. Accordingly, notice rules were adopted. *See* NASD RULES OF FAIR PRACTICE 21(f)(3) (1994).

The assault on pre-dispute arbitration agreements within the securities industry

new disclosure rules require that agreements contain language adjacent to the arbitration clause which explains that (1) customers are waiving their right to seek remedies in court, (2) arbitration is final, (3) discovery is generally more limited in arbitration than in court proceedings, (4) the award is not required to contain factual findings and legal reasoning, and (5) the arbitration panel usually includes a minority of members associated with the industry.[20] The disclosures do not mention that an SRO arbitration forum may decline to consider a claim because of the passage of time.[21]

Following *Roney & Co. v. Goren*,[22] brokerage firms were free to limit the arbitration forum rather than being obligated to arbitrate at a customer-selected forum.[23] In *Goren*, the Securities and Ex-

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was in conflict with congressional affirmation of arbitration as a means of dispute resolution. By adoption of the Federal Arbitration Act, 9 U.S.C. §§ 1–14 (1947) (re-codifying the 1925 Arbitration Act, ch. 213, §§ 1–15, 43 Stat. 883–86 (1925)), Congress intended that an agreement to arbitrate be liberally construed, apply to disputes reasonably contemplated by the language of the agreement, and resolve doubts in favor of arbitration. Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961).

20. CANE & SHUB, *supra* note 5, at 300 (citing Self-Regulatory Organizations Order Approving Proposed Rule Changes of the [NYSE], [NASD], and the [AMEX] Relating to Arbitration Process and the Use of Predispute Arbitration Clauses, SEC Release No. 34-26,805, 54 Fed. Reg. 28,544 (1989)). In addition to the content of the disclosure, the rules must be visually highlighted in four ways: (1) the disclosure language must be in a distinguishable type; (2) the language must be set out in outline form; (3) the agreement must contain a notice of the arbitration clause immediately preceding the signature line; and (4) the notice must identify where in the agreement the arbitration clause may be found. CANE & SHUB, *supra* note 5, at 300–01.

21. See *supra* note 4 for a discussion of a procedures pamphlet available to the public which describes the requirement that claims be submitted less than six years "from the date of the event giving rise to the dispute." ARBITRATION PROCEDURES, *supra* note 4, at 4.

22. 875 F.2d 1218 (6th Cir. 1989).

23. In response to *Goren*, 875 F.2d at 1218, the SEC issued SEC Litigation Release No. 12,198, Fed. Sec. L. Rep. (CCH) ¶ 80,377, at 84,437 (Aug. 7, 1989), to forbid pre-dispute agreements from limiting a customer to a single arbitration forum; the agreement must provide that the customer may utilize any SRO forum which would otherwise be available. PaineWebber, Inc. v. Pitchford, 721 F. Supp. 542, 550 (S.D.N.Y. 1989).

In the late 1980s, there was some discussion of forming a single independent forum. CANE & SHUB, *supra* note 5, at 365–80. The concept was prompted in part by the SEC's consideration of promulgating a rule to require at least one non-SRO forum be included in customer agreements. *Id*. at 379. AAA suggested that it could serve as the single forum. *Id*. at 378. For a discussion of the differences between the AAA and the SROs, see *infra* notes 31–34 and accompanying text.

SICA, which opposed the SEC rule requiring one non-SRO forum, recommended an independent forum. CANE & SHUB, *supra* note 5, at 365 n.3 (citing *SIA Opposes Possible Rule to Mandate Choice of Non-SRO Arbitration Forums*, 22 SEC. REG. & L. REP

change Commission ("SEC"), as *amicus*, supported Goren's argument that the pre-dispute agreement could not preclude the NASD as an arbitration forum.[24] Goren and the SEC argued that as a member of the NASD, Roney & Co. could be compelled to arbitrate at the NASD, if selected by the customer, notwithstanding the fact that the pre-dispute agreement named the NYSE as the sole arbitration forum.[25] Disregarding the position urged by the SEC, the Sixth Circuit held that the forum selection provision in a pre-dispute agreement bound the customer.[26] The SEC, shortly before the *Goren* decision, approved NYSE, NASD and AMEX rules which provided that "[n]o agreement shall include any condition which limits or contradicts the rules of any self-regulatory organizations or limits the ability of a party to file any claim in arbitration or limits the ability of arbitrators to make any award."[27] Once the *Goren* court

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(BNA) 945 (June 22, 1990)). Subsequently, the SICA commissioned the accounting firm of Coopers & Lybrand to determine the feasibility of one SRO-sponsored forum. Deborah Masucci & Robert S. Clemente, *Securities Arbitration at the New York Stock Exchange, Inc. and National Association of Securities Dealers, Inc. — Administration and Procedures*, *in* SECURITIES ARBITRATION, at 301 (Corporate Law & Practice Course Handbook Series No. B4-7107, 1995). SICA determined that there were no economic benefits from a single forum. *Id*.

24. *Goren*, 875 F.2d at 1222 (rejecting the SEC's interpretation of NASD ARB. CODE § 12(a) as giving the customer unilateral authority to select the NASD as the arbitration forum).

25. *Id*.

26. *Goren*, 875 F.2d at 1221. The court held that limiting the arbitration forum did not trigger the anti-waiver provision of the Exchange Act. *Id*. Prior to Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), the use of pre-dispute arbitration agreements was construed to be in conflict with the anti-waiver provision of the Exchange Act which mandated that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Exchange Act] or of any rule or regulation thereunder, or any rule of an exchange required thereby" was void. *Goren*, 875 F.2d at 1220 (quoting 15 U.S.C. § 78cc(a) (1982) (§ 29(a) of the Exchange Act)) (alterations in original).

The *Goren* court also noted that the SEC had the power to change the arbitration rules of the NYSE if the SEC was concerned about differences in the arbitration proceedings of the NASD and the NYSE. *Id*. at 1221. In what arguably may be circular thinking, the court reasoned that because the NASD and NYSE had substantial similarities, it was reasonable to allow the parties freedom of contract to limit the forum. *Id*. In effect, the court said the parties were free to choose their forum, but the SEC could render that choice moot by requiring all SROs to have identical arbitration rules. For a discussion of the differences in interpretation of NASD § 15 and NYSE Rule 603, which have identical wording, see *infra* note 67 and accompanying text.

27. CANE & SHUB, *supra* note 5, at 45 (citing *Goren*, 875 F.2d at 1218, and SEC Litigation Release No. 88-1874, 1989 SEC LEXIS 1529 (Aug. 7, 1989)). The SEC rule ensures that customers could always bring a firm to arbitration at an appropriate SRO;

concluded that the parties could contractually limit the arbitration forum, brokerage firms were able to specify the arbitration forum and, thereby, attempt to preclude the American Arbitration Association (AAA) as an arbitration forum. Only a few brokerage firm agreements provide the AAA as a forum choice.[28] Despite an agreement specifying an arbitration forum other than the AAA, some courts have found that customers may, nonetheless, select AAA arbitration. The courts reason that because the relevant agreement allows the AMEX as an arbitration forum, it also provides that AMEX rules are applicable.[29] The AMEX constitution "provides that a customer may arbitrate with a member firm `before the [AAA], unless the customer has expressly agreed, in writing, to submit only to the arbitration procedures of the Exchange.'"[30] A customer may prefer to bring a claim to the AAA because (1) the AAA does not have an eligibility requirement comparable to NASD section 15,[31] (2) the AAA allows the parties to select the arbitrators while the Director of Arbitration at the relevant SRO appoints the arbitration panel,[32] (3) the AAA gives the arbitrator broad powers to control discovery compared to the SROs' detailed rules on discovery,[33] and (4) the AAA is a forum independent of the industry.[34]

Using the AMEX constitution as a means to gain access to the AAA, even though the AAA is not a delineated forum, is commonly

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firms could not provide a "no arbitration" provision in their agreement as to a customer's right to force the firm to arbitration at an appropriate SRO. *Id*.

28. CANE & SHUB, *supra* note 5, at 48. The NASD proposed prohibiting its members from seeking arbitration with the AAA after the NASD determined that an NASD-submitted claim was ineligible for arbitration due to the expiration of six years "from the occurrence or event giving rise to the dispute, claim or controversy." SEC Release No. 34-33108, 58 Fed. Reg. 58573 (1993). Because of the industry's historical use of arbitration for dispute resolution, member firms may have preferred arbitration at the AAA to the proposed alternative of judicial resolution. Following receipt of substantial negative comments, the NASD withdrew the proposed change. For a discussion of why a customer may prefer the AAA, see text accompanying notes 31–34, *infra*.

29. CANE & SHUB, *supra* note 5, at 51.

30. *Id*. at 48 (quoting AMEX CONST. art. VIII, § 2).

31. Friedman, *supra* note 2, at 562.

32. *Id*. at 564. The parties may strike a proposed panelist on a limited basis. *Id*.

33. *Id*. at 566–67.

34. *Id*. at 571; *see generally* AAA PIONEERS, *supra* note 12. For a comparison of procedures among SROs, the AAA, and court, see GRANT, *supra* note 12, at 161. In May 1993, the AAA revised its rules resulting in fewer distinctions between the fora. Friedman, *supra* note 2, at 560. One negative aspect of using the AAA is that costs are generally higher, in part because industry members subsidize the SROs. *Id*. at 563.

referred to as the "AMEX window."[35] Courts have supported industry efforts to preclude arbitration at the AAA through the "AMEX window."[36] For instance, in *PaineWebber, Inc. v. Webb*,[37] although the customer was allowed to select AAA arbitration through the AMEX mechanism, the court noted that using "only" when describing the SRO fora would result in eliminating the AAA as an arbitration forum.[38] To counter this judicial response, the SEC recommended the "position that the SROs must include a non-SRO forum in their forum choices."[39] Such a provision would result in an automatic avenue to elect the AAA as a forum for customers regardless of the language of the account agreement.[40] However, to date this provision is not mandatory.[41]

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35. CANE & SHUB, *supra* note 5, at 48.

36. *See, e.g.*, Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109 (2d Cir. 1990); *Goren*, 875 F.2d at 1218. Most account agreements have a New York choice-of-law provision thereby imposing the New York interpretation of the access to the AAA through the AMEX window. GRANT, *supra* note 12, at 147. For a discussion of the significance of New York decisions on securities arbitration matters, see *supra* notes 10–11 and *infra* notes 99–103 and accompanying text.

37. 548 N.Y.S.2d 120 (App. Div. 1989).

38. CANE & SHUB, *supra* note 5, at 51 (discussing the PaineWebber, Inc. v. Webb, 548 N.Y.S.2d 120 (App. Div. 1989), court's differentiation from Piltch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 714 F. Supp. 537 (D.D.C. 1989)). *See also* Formica v. Malone & Assocs. Inc., 907 F.2d 397 (2d Cir. 1990); Cowen & Co. v. Anderson, 558 N.E.2d 27 (N.Y. 1990). In *Piltch*, the court denied selection of the AAA because the operative language included "only" when describing the alternative fora. CANE & SHUB, *supra* note 5, at 51. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109, 112 (2d Cir. 1990) (holding that the agreement provides for arbitration *only* before [NASD, NYSE, AMEX], and therefore, the AAA was not available for customer selection).

39. CANE & SHUB, *supra* note 5, at 54 (citing *SEC Staff Asks Markets to Mandate Use of Non-SRO Arbitration Forums*, 22 SEC. REG. & L. REP. (BNA) 817 (June 1, 1990)). Following industry criticism, the proposed rule was withdrawn. The complexity of the amendment and the departure from the UCA language were significant issues. Telephone Interview with Professor Constantine N. Katsoris, Wilkinson Professor of Law at Fordham University School of Law and member of SICA (Sept. 28, 1995).

40. CANE & SHUB, *supra* note 5, at 54. In PaineWebber, Inc. v. Pitchford, 721 F. Supp. 542, 551 (S.D.N.Y. 1989), the court concluded that the AMEX window was available for customers electing arbitration who either did not have a pre-dispute agreement or whose pre-dispute agreement did not set out which arbitration fora were available. For an explanation of the AMEX window, see *supra* note 35 and accompanying text. For a discussion of why a customer might prefer the AAA forum, see *supra* notes 31–34 and accompanying text.

41. AMEX rules now support an application of the "AMEX window." CANE & SHUB, *supra* note 5, at 54.

Professor Katsoris opines that the reason most broker agreements do not list the AAA as a forum choice is because the AAA does not have an eligibility provision similar to NASD's § 15. Katsoris Telephone Interview, *supra* note 39.

B. History of the Current Eligibility Rule Language

In the early 1970s, the *NASD*'s *Code of Arbitration* had a two-year period during which claims were eligible for arbitration.[42] By 1978, the eligibility period had been extended to five years.[43]

The SICA was established in 1977 to coordinate the industry's approach to arbitration issues.[44] The Conference promulgated the *Uniform Code of Arbitration* ("UCA").[45] Each member of the Securities Industry Association has adopted the UCA with minor differences in wording.[46] In drafting the UCA provision on which section 15 is modeled, SICA was concerned that no stale claims be eligible for arbitration.[47] To that end, "SICA chose the six-year eligibility

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42. "No dispute, claim or controversy shall be eligible for submission to arbitration under this Code in any instance where two years shall have elapsed from the date of the securities transaction(s) giving rise to the dispute, claim or controversy in issue." NASD CODE OF ARBITRATION PROCEDURE ¶ 3702, § 2 (adopted Nov. 1, 1968).

43. "No dispute, claim or controversy shall be eligible for submission to arbitration under this Code in any instance where five years shall have elapsed from the date the dispute, claim or controversy arose." NASD CODE OF ARBITRATION PROCEDURE § 6 (1978) (CCH).

44. Martin L. Budd, *Securities Industry Arbitration — Recent Issues, in* ALI-ABA COURSE OF STUDY MATERIALS — BROKER DEALER REGULATION, at 37 (American Law Institute 1994); SEC Release No. 34-26,805, 54 Fed. Reg. 21,144 (1989). The SICA has a representative from the NASD, NYSE, AMEX, Boston Stock Exchange (BSE), Chicago Board Options Exchange (CBOE), Cincinnati Stock Exchange (CSE), Midwest Stock Exchange (MSE), Municipal Securities Rulemaking Board (MSRB), Pacific Stock Exchange (PSE), and Philadelphia Stock Exchange (PHLX). CANE & SHUB, *supra* note 5, at 20; GRANT, *supra* note 12, at 135. In addition, SICA includes four members of the public and one industry representative. CANE & SHUB, *supra* note 5, at 20.

SICA's first task was to develop a small claims procedure for the securities industry. Affidavit of William J. Fitzpatrick ¶ 4, Allen v. Prudential Sec., Inc., No. 93-582-CIV-ORL-18 (M.D. Fla. 1993). This was completed in 1979, and SICA then turned to drafting a uniform arbitration code. *Id*. Fitzpatrick was the securities industry representative on SICA from 1977 to 1994; Kaye Williams succeeded Fitzpatrick. Telephone Interview with office of William J. Fitzpatrick, Esq. (Sept. 8, 1995).

45. *See* UNIF. CODE OF ARBITRATION (Sec. Indus. Comm'n on Arbitration 1995) [hereinafter UCA 1995].

46. For a list of association members, see *supra* note 44.

47. Fitzpatrick Affidavit, *supra* note 44, ¶ 6; *Symposium: New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry: Eligibility (Six-Year) Rule*, 63 FORDHAM L. REV. 1533, 1536 (1995) [hereinafter Symposium].

In contradiction to Fitzpatrick's testimony and the obvious relationship to the records retention rule, Professor Katsoris asserts that the eligibility rule was arbitrary, in part motivated by the limited discovery provisions originally available in arbitration. Katsoris Telephone Interview, *supra* note 39. Professor Katsoris further asserts that the eligibility rule was never intended to bar an ineligible claim from a judicial forum. *Id*.

period to conform with SEC regulation, now section 240.17a-4(a), which requires exchange members to retain customer records for six years."[48] SICA concluded that any arbitration claim filed after the documentation period should be barred as stale.[49]

C. Exceptions to the Six-year Eligibility Rule

Section 15 provides that the six-year eligibility requirement is not applicable to "any case which is directed to arbitration by a court of competent jurisdiction."[50] The accepted exception to the six-year rule is where a dispute is brought to a court *prior* to the expiration of the six-year period, and thereafter, the court concludes what issue or issues should have been submitted to arbitration.[51] In that event,

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The discovery limitations may explain why, in 1980, arbitrators were faced with greater difficulty obtaining credible witnesses and relevant documents than courts of competent jurisdiction. *Id*. *See also Symposium: New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry: Introduction*, 63 FORDHAM L. REV. 1501, 1507 (1995).

48. Symposium, *supra* note 47, at 1544; Fitzpatrick Affidavit, *supra* note 44, ¶ 10. The relevant regulation reads: "(a) Every member, broker and dealer subject to § 240.17a-3 shall preserve for a period of not less than 6 years, the first 2 years in an easily accessible place, all records required to be made pursuant to § 240.17a-3(a) (1), (2), (3), and (5) [e.g., confirmation statements, periodic account statements, customer agreements]." 17 C.F.R. § 240.17a-4 (1995).

SICA recognized that the "securities transaction" language was too narrow to cover all situations intended to be covered by arbitration. Fitzpatrick Affidavit, *supra* note 44, ¶ 7. Accordingly, the triggering event was defined as the "occurrence or event giving rise to the act or dispute, claim, or controversy." *Id*. ¶ 8.

According to Fitzpatrick, the broader language of the rule was not intended "to change the dispute triggering event from the date of a securities transaction to the date" of discovery. *Id*. Interestingly, Fitzpatrick is quoted as now supporting the elimination of the eligibility rule all together. Symposium, *supra* note 47, at 1539.

Director of Arbitration, Masucci, also suggested that the eligibility rule be eliminated with arbitrators being able to consider affirmative defenses of applicable statutes of limitations. *Id*. at 1544. Ms. Masucci joined the NASD in 1981 as a staff attorney and was made Director of Arbitration in 1983. Deposition of Deborah Masucci at 10, FSC Securities Corp. v. Scully, No. 3087-92 (N.Y. Sup. Ct. Feb. 12, 1993).

49. Fitzpatrick Affidavit, *supra* note 44, ¶ 10. As a practical matter, in addition to available records, there is the issue of witness memory. *See* Symposium, *supra* note 47, at 1536. For this and a variety of reasons, legislatures have adopted statutes of repose which bar a claim regardless of equitable considerations which may justify tolling a statute of limitation. *See generally* Gail L. Heriot, *A Study in the Choice of Form: Statute of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L. REV. 917, 923–27. For examples of state statutes, see *infra* note 53. Many argue that the eligibility rule is a method to allocate scarce resources. *See* Symposium, *supra* note 47, at 1536.

50. NASD ARB. CODE, *supra* note 2, § 15.

51. Fitzpatrick Affidavit, *supra* note 44, ¶ 11. But see *infra* note 166 and accompa-

the SRO would not bar the claim despite the passage of the six-year period.[52] Once accepting a claim pursuant to section 15, the arbitrators may still conclude upon hearing the case that state or federal statutes of limitation or statutes of repose bar a claim.[53] However,

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nying text for a case interpreting another exception to the six-year eligibility rule. Through court proceedings, a party may contest the validity of an arbitration agreement or whether the issue is covered by the arbitration agreement. *See* GRANT, *supra* note 12, at 27–28. In that instance, a court may determine that the issue is subject to a valid arbitration agreement and direct it to arbitration more than six years after the occurrence giving rise to the claim. *See, e.g.*, Macchiavelli v. Shearson, Hammill & Co., 384 F. Supp. 21 (E.D. Cal. 1974). In *Macchiavelli*, the court disagreed with plaintiff's assertion that the dispute was not subject to the arbitration clause signed by the parties and compelled arbitration of the non federal claims after the [then two-year] period of eligibility. For a comparison of pre-Uniform Arbitration Code eligibility sections, see *supra* notes 42–43 and accompanying text. For discussions regarding federal claims and state claims, which prior to Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), required the court to determine the extent of the interrelationship of the claims, see *supra* note 17.

52. The relevant provision provides:

> The six (6) year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim, or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such periods as the court shall retain jurisdiction upon the matter submitted.

NASD ARB. CODE, *supra* note 2, § 18(b).

In PaineWebber, Inc. v. Deegan, 896 F. Supp. 410 (E.D. Pa. 1995), the court considered an application of § 18(b). Deegan, as executor of the estate of Zelda Westlake, brought suit in federal court against PaineWebber, Inc. and Shearson, Lehman Brothers, Inc. within the six-year eligibility period. *Id.* at 410. The court dismissed all claims against PaineWebber and stayed the claims against Shearson, Lehman. *Id.* at 411. Subsequently, Deegan filed a claim for arbitration against PaineWebber almost seven years after Mrs. Westlake ceased doing business with that firm. *Id.* The court ruled that "pursuant to Rule 54(b) of the Federal Rules of Civil Procedure" the earlier dismissal was not final, and therefore, the court retained jurisdiction over the matter. *Id.* While the companion claims against Shearson, Lehman remained pending, the six-year eligibility time was tolled pursuant to § 18.

53. Fitzpatrick Affidavit, *supra* note 44, ¶ 13; NASD ARB. CODE, *supra* note 2, § 18(a). The six-year period is far longer than most statutes of limitation which address wrongs of non-medical professionals. Symposium, *supra* note 47, at 1541. *See, e.g.*, CAL. CIV. PROC. CODE § 340.6 (West 1991) (one year limitation, six years repose); FLA. STAT. § 95.11(3) (1995) (two years); N.Y. CIV. PRAC. L. & R. § 214(6) (McKinney 1992) (three years). Similarly, some states have statutes of repose for securities fraud claims. *See, e.g.*, CAL. CORP. CODE § 25506 (West 1977 & Supp. 1995) (one year limitation, three years repose); FLA. STAT. § 95.11 (1995) (two years limitation, five years repose); N.Y. CIV. PRAC. L. & R. § 213(8) (McKinney 1992) (six years repose), 70 PA. CONS. STAT. ANN. § 1-504(a) (1994) (four years repose). Federal securities claims are subject to a one year statute of limitations and a three year statute of repose. 15 U.S.C. § 77m (period of limitation for § 12 claim); 15 U.S.C. § 78i(e) (period of limitation for § 10(b) claim); *see* Aizuss v. Commonwealth Equity Trust, 847 F. Supp. 1482, 1486 (E.D. Cal. 1993). The period of limitation under § 10(b) and Rule 10b-5 is one year after the plaintiff obtains

many claimants are seeking court ordered arbitration as a method of avoiding the eligibility issue.[54]

In 1993, after numerous courts debated whether the court or the arbitrators should determine the issue of a claim's eligibility for arbitration, the NASD proposed an amendment to its *Code of Arbitration Procedure*.[55] The proposed change vested in the Director of Arbitration the sole authority to determine if a claim was eligible for arbitration.[56] Further, the rule provided that a claim ineligible because of section 15 would result in the parties having available a judicial remedy notwithstanding the existence of a predispute arbitration agreement.[57] The rule was withdrawn upon receipt of signif

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notice and an absolute bar of three years "after the sale of securities at issue." 15 U.S.C. § 78i(e); *Aizuss*, 847 F. Supp. at 1486. The three year statute of repose is not subject to equitable tolling. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).

54. Symposium, *supra* note 47, at 1537. For a discussion of judicial interpretation of the last sentence of § 15, see *infra* notes 165–79 and accompanying text.

55. SEC Release No. 34-33,108, 58 Fed. Reg. 58,573 (1993). "[T]here have been conflicting decisions over who possesses such authority; the Director, the courts or arbitrators." *Id*. While the NASD hears the vast majority of arbitration disputes and is therefore highly influential, each SRO would independently consider the adoption of any change to their respective eligibility section.

56. SICA made a change to the UCA to provide that the Director of Arbitration make the decision on eligibility. Symposium, *supra* note 47, at 1538. SICA considered the choice of the Director making the determination as a compromise. *Id*. SICA did not want the courts to make the determination, but many members of SICA thought it should be the sole prerogative of the arbitrators. *Id*. at 1538, 1540 (discussing why the Director of Arbitration is preferable over the arbitrators). Section 35 of the NASD Arbitration Code [§ 22 of the Uniform Arbitration Code] provides that: "[t]he arbitrator shall be empowered to interpret and determine the applicability of all provisions under this Code . . . . Such interpretations . . . shall be final and binding upon the parties." *See* Symposium, *supra* note 47, at 1540 (citing NASD ARB. CODE, *supra* note 2, § 35).

57. The proposed amended text of § 15 is as follows:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the [act or] dispute, claim, or controversy. This section shall not extend or limit applicable statutes of limitations[, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction].
>
> (b) Where eligibility is disputed by a responding party after service of the Statement of Claim, the Director of Arbitration shall promptly make a final determination as to whether a claim is eligible for arbitration. Any such determination regarding eligibility shall set forth the occurrence or event which was the basis for the determination of eligibility of the dispute, claim or controversy. The identification of the occurrence or event which formed the basis for a determination that a claim is eligible shall not limit any parties right to offer evidence to the arbitrators which relates to their substantive claims or defenses.

icant industry criticism.[58] As discussed in Parts IV and V of this Comment, the proposed rule change would be a complete departure from most court interpretations of the section.

D. How the NASD Calculates the Six Years

The NASD arbitration staff makes its determination of eligibility by measuring the period from "the date of the occurrence or event giving rise to the act or dispute, claim, or controversy"[59] to the date

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> (c) A determination by the Director of Arbitration pursuant to subparagraph (b) that a claim is ineligible shall not constitute a bar to asserting the underlying claim in a judicial forum. With respect to any such ineligible claims, the parties will have available to them the rights and remedies provided by applicable law, notwithstanding, any (i) existing predispute arbitration agreement or (ii) decision on eligibility. No party shall seek to enforce any agreement to arbitrate where the claim has been determined to be ineligible under this section.

SEC Release No. 34-33,108, 58 Fed. Reg. 58,573 (1993) (Bracketed sections indicate proposed deletions from existing §, while underlined text indicates proposed additions to the existing §.). The proposed language tracked SICA's recommendation. Symposium, *supra* note 47, at 1539. Professor Katsoris argues that the NASD modifications so embellished SICA's version that the industry rejected the amended rule. Katsoris Telephone Interview, *supra* note 39. Section 4 of the UCA, on which the proposed § 15 was supposedly modeled, reads as follows:

> (a) No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code if six (6) years have elapsed from the occurrence or event giving rise to the act or the dispute, claim, or controversy. This section shall not extend applicable statutes of limitation.
>
> (b) Where eligibility is disputed by a responding party after service of the Statement of Claim, the Director of Arbitration shall promptly make a final determination as to whether a claim is eligible for arbitration. Any such determination regarding eligibility shall set forth the occurrence or event which was the basis for the determination of eligibility of the dispute, claim or controversy. The identification of the occurrence or event which formed the basis for a determination that a claim is eligible, shall not limit any parties right to offer evidence to the arbitrators which relates to their substantive claims or defenses.
>
> (c) A determination by the Director of Arbitration pursuant to subparagraph (b) that a claim is ineligible shall not constitute a bar to asserting the underlying claim in a judicial forum. The parties will have available to them the rights and remedies provided by applicable law, not withstanding, any (i) existing predispute arbitration agreement or (ii) decision on eligibility. No party shall seek to enforce any agreement to arbitrate where the claim has been determined to be ineligible under this section.

UCA § 4. Because the NASD proposal was withdrawn at the request of the SEC, SICA is considering a modification of the UCA. Symposium, *supra* note 47, at 1539 n.15.

58. Masucci, *supra* note 23, at 45–46.

59. NASD ARB. CODE, *supra* note 2, § 15.

of filing a claim with the NASD.[60] The date of filing is defined by section 25(c)(1).[61] The great dispute revolves around what is "the date of the occurrence or event giving rise to the act or dispute, claim, or controversy."[62] The members of the NASD National Arbitration Committee ("NAC")[63] concluded that the six-year eligibility rule should be strictly applied and should be measured from the date of the transaction without regard to the party's contention of when he did or could have reasonably discovered the claim.[64] At the urging of the NASD Director of Arbitration, Deborah Masucci, the NAC reconsidered its position of a narrow application and authorized the Director to apply a more liberal interpretation which includes the date of discovery.[65]

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60. Internal memo from Conrad Shih, NASD Manager, to arbitration staff (Sept. 16, 1993) (on file with author).

61. The text of this section states:

> Service may be effected by mail or other means of delivery. Service and filings are accomplished on the date of mailing either by first-class postage pre-paid or by means of overnight mail service or, in the case of the means of service, on the date of delivery. Filing with the Director of Arbitration shall be made on the same date as service on a party.

NASD ARB. CODE, *supra* note 2, § 25(c)(1).

62. *Id*. § 15.

63. The NASD Board of Governors appoints the members of NAC. *See id*. § 2.

64. Internal memo from Thomas F. Wynn, NASD Assistant Director of Arbitration, to arbitration staff (May 8, 1991) (reflecting the unanimous decision of NAC on Oct. 9, 1990) (on file with author). NAC's decision was consistent with the purported intent of SICA when it drafted the language. *See supra* notes 47–49 and accompanying text.

NAC believed that a bright-line rule would be easiest to administer. NAC meeting minutes (May 14, 1991) (discussing rationale of Oct. 8, 1990, decision to strictly construe six-year eligibility). *See* Symposium, *supra* note 47, at 1537.

65. Wynn, *supra* note 64. NAC reconsidered its position on the triggering event for the six-year eligibility. NAC Meeting Minutes (May 14, 1991). NAC voted nine to four to give the staff discretion to determine that an event other than the transaction was the "event giving rise to the act or dispute, claim or controversy." *Id*. The minutes suggested that the staff should be lenient in its application of the six-year rule with the arbitrators being able to make a final determination of a claim's eligibility. *Id*.

Ms. Masucci suggests that the NASD application of the rule leaves for the arbitrators the resolution of any dispute about what event or occurrence gave rise to the claim; the eligibility rule would be used to resolve only "bright-line" cases where on its face, and the statement of claim emanates from a specific factual event older than six years. Symposium, *supra* note 47, at 1544–45. Interestingly, Director Masucci asserts that the eligibility rule "cause[s] an extreme administrative burden on the SROs." *Id*. at 1545 (stating that the eligibility disputes were close to 500 in 1994 where as prior to 1990, 20 such disputes was a busy year). NAC must have recognized the burden when it concluded that a bright-line rule was appropriate. *See supra* note 64.

In comparison, NYSE Rule 603 measures eligibility from the purchase date of the relevant security. Quinton F. Seamons, *Does Securities Arbitration Go On Forever?*, 8

While the NASD may now internally be in agreement on how to measure and apply the six-year eligibility requirement, the courts continue to assert their authority to determine if the parties are bound by the NASD's determination of a claim's eligibility for arbitration.[66] Further, the SROs are not in agreement among themselves on how to interpret substantially the same provision.[67]

In addition to parties filing motions with the arbitration forum asserting the eligibility issue, parties often bring a simultaneous court action.[68] In some cases, the SRO is brought in as a party to defend its actions, *inter alia*, with respect to determining eligibility.[69] Where the court disagrees with the NASD's application of section 15, the court may (1) order arbitration as provided in the latter sentence of section 15,[70] (2) permanently enjoin arbitration,[71] or (3) hold that the parties may proceed in a judicial forum irrespective of the arbitration agreement.[72]

INSIGHTS 17, 17 n.3 (1994) (citing Castellano v. Prudential-Bache Sec., Inc., [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,321, at 96,535 (S.D.N.Y. 1990)).

66. The NASD Board of Governors established an eight person task force [hereinafter NASD Task Force] in September 1994 to make recommendations, *inter alia*, about the eligibility rule. SECURITIES ARBITRATION REFORM, REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS [NASD] 1 (1996) [hereinafter ARBITRATION REFORM]. The task force recommended suspending the eligibility rule for a three-year period during which time the NASD would implement a procedure to consider early in the claim's process a statute of limitation defense to a claim. *Id*. at 28.

67. NYSE Rule 603 measures the six-year period from the date of a relevant transaction regardless of discovery issues. Telephone Interview with David Carey, staff attorney for NYSE Arbitration Department (Nov. 8, 1995). The NYSE interpretation is consistent with the initial interpretation of NAC which was subsequently revised at the urging of Director Masucci.

68. Symposium, *supra* note 47, at 1546.

69. *Id*. *See* Silver v. New York Stock Exch., Inc., 373 U.S. 341 (1963); Baird v. Franklin, 141 F.2d 238 (2d Cir.) (holding that the Securities Exchange Act of 1934 imposes a duty upon exchanges and SROs to enforce their own rules which are promulgated and filed with the SEC), *cert. denied*, 323 U.S. 737 (1944). *See also* Collins v. P.B.W. Stock Exch. Inc., 408 F. Supp. 1344, 1348 (E.D. Pa. 1976); New York Stock Exch., Inc. v. Sloan, 394 F. Supp. 1303, 1316 n.6 (S.D.N.Y. 1975) (finding that a private right of action ensures that exchanges and SROs enforce their own rules thereby promoting the remedial purpose of the Securities Exchange Act).

70. A party whose claim the NASD determined ineligible for arbitration would petition a court to order arbitration.

71. A party who believed a claim was "stale," even though the NASD accepted the claim for arbitration, would seek to enjoin the arbitration proceeding.

72. Should the NASD decline to hear a claim, a court may conclude that the dispute should be resolved in a judicial forum notwithstanding the written agreement to submit all disputes to arbitration. For a discussion of decisions finding a judicial remedy is available where a claim is ineligible for arbitration because of the passage of time, see

II. TWO VIEWS: THE SIX-YEAR ELIGIBILITY RULE CONSTRUED AS RULE OF JURISDICTION

A. Some Federal Courts Consider Jurisdiction

In *Edward D. Jones & Co. v. Sorrells*, the court vacated an arbitration award finding that the disputed claims were ineligible for arbitration.[73] In *Sorrells*, the brokerage firm (Jones) had unsuccessfully argued to the arbitrators that ten of the twelve claims were ineligible for arbitration because the Statement of Claim had been filed more than six years after the making of the investments.[74] Because the arbitrators did not accept Jones' argument regarding eligibility, Jones presented its entire substantive defense to the claims.[75] After two unsuccessful efforts to have the arbitrators explain their award in light of the eligibility issue, Jones moved in the United States District Court of the Northern District of Illinois to have the award vacated as to the ten ineligible claims.[76] The circuit court approvingly quoted the rationale of the district court in finding "that Section 15 `is an eligibility requirement . . . (i.e., [a question of] subject matter jurisdiction) . . . . It is not a statute of limitations.'"[77]

The *Sorrells* court held that determining whether a claim was eligible for arbitration was the responsibility of the courts, not the arbitrators.[78] In reaching its decision, the district court relied on an

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infra notes 154–61 and accompanying text.

73. Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 514 (7th Cir. 1992).

74. *Id*. at 510–11.

75. *Id*. at 511. Because of the development of case law regarding the eligibility issue, a defendant now would seek a stay of arbitration to preclude the presentation of the case on its merits to the arbitrators rather than proceeding to arbitration and thereafter seeking to vacate the award. To do otherwise would likely result in a finding that the defendant waived its right to challenge the arbitration. *Cf*. District Lodge No. 71 of Int'l Ass'n of Machinists v. Bendix Corp., 218 F. Supp. 742 (W.D. Mo. 1963) (failure to raise eligibility issue prior to arbitration creates waiver resulting in no basis to set-aside arbitration award); Oinoussian S.S. Corp. v. Sabre Shipping Corp., 224 F. Supp. 807 (S.D.N.Y. 1963) (participation in arbitration proceeding creates waiver of objection to arbitrator's jurisdiction over claim).

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

77. *Id*. at 512. But see *infra* notes 165–66 for the *Sorrells* court's discussion of an extension of the six-year rule. For a discussion of arbitrators' application of a statute of limitation defense, see *infra* note 158.

78. *Sorrells*, 957 F.2d at 514 (citing AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986), holding that determination of whether the parties agreed to arbitrate a claim is the prerogative of the court unless the parties

earlier Seventh Circuit opinion, *PaineWebber, Inc. v. Farnam*.[79] The Sorrells tried to distinguish the earlier case by arguing that equitable tolling suspends the six-year period if there is fraudulent concealment.[80] The *Sorrells* court rejected the distinction, finding that the earlier *Farnam* decision explicitly stated that tolling was not relevant to the eligibility requirement.[81]

The Third Circuit considered the same issue in *PaineWebber, Inc. v. Hartmann*.[82] Unlike *Sorrells*, where the brokerage firm sought to vacate an award because the arbitrators did not consider the eligibility rule, in *Hartmann*, the brokerage firm sought an injunction to prevent the arbitration from proceeding.[83] The United States District Court for the Western District of Pennsylvania granted a request for an injunction to prevent the scheduled arbitration.[84] The trial court determined that the disputes were ineligible for arbitration; the Hartmanns argued that it was for the arbitrators, and not the court, to determine if the claims should be considered.[85]

The Third Circuit found the Federal Arbitration Act and related substantive laws of arbitration to be relevant.[86] The court concluded that, while the FAA did not clearly address the extent of the district court's jurisdiction to compel arbitration, federal case law required

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clearly provide otherwise).

79. 870 F.2d 1286 (7th Cir. 1989) (holding that § 15 determined the eligibility of a claim, and not whether the claim could be met with a statute of limitation defense).

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

81. *Id*. at 513 (citing *Farnam*, 870 F.2d at 1292). The *Farnam* court reached its decision, in part, based on an August 5, 1988, letter from John R. Wylie, an NASD staff attorney. The letter clearly described § 15 "as an absolute bar to claims submitted for arbitration more than six years after the event which gave rise to the dispute." *Id*. at 512.

Interestingly, the current Director of Arbitration, Masucci, testified that § 15 is an eligibility provision, not a statute of limitation. Masucci Deposition, *supra* note 48, at 58–59. However, Masucci interprets "the event which gave rise to the dispute" as the discovery of an alleged wrong rather than the transaction date. *Id*. See *supra* note 65 for a discussion of the event that triggers the eligibility provision.

82. 921 F.2d 507 (3d Cir. 1990).

83. *Id*. at 508. In *Hartmann*, the court was construed NYSE Rule 603 which is virtually identical in wording to NASD § 15. But see *supra* note 65 and accompanying text for a discussion of how the wording is being interpreted differently by the two SROs.

84. *Hartmann*, 921 F.2d at 508.

85. *Id*. at 508–09.

86. *Id*. at 510. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–14 (1994) [hereinafter FAA].

the court to first determine whether the dispute was arbitrable.[87] The court held that the issue is one of jurisdiction for the court to determine.[88] If the court concluded that the claim was outside the scope of the arbitration agreement, the court should enjoin the arbitration proceeding.[89] The court considered "two plausible interpretations of Rule 603 [i.e., the NYSE analogue to NASD section 15] . . . ."[90] The court found three factors persuasive in adopting its interpretation of the eligibility rule.[91] First, the literal interpretation of "eligible" and "submission" as used in Rule 603 supported an interpretation that six years was a *bar* from arbitration.[92] Second, the court found persuasive the reasoning in *Farnam*, premised on the "plain and literal" interpretation of section 15's language, which concluded that section 15 determined the eligibility of a claim.[93] The

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87. *Hartmann*, 921 F.2d at 510, 511.

88. *Id*.

89. *Id*. There is a presumption of arbitration. *Id*. (citing *AT&T Technologies*, 475 U.S. at 650). The dispute may be outside of the scope, for example, because of the nature of the dispute, the signing of an agreement in a different capacity than in which they are a named party, or the agreement does not cover the specific account at issue. CANE & SHUB, *supra* note 5, at 277.

90. *Hartmann*, 921 F.2d at 512 (asserting that there are two lines of cases, each supporting the respective interpretations). The court framed one argument as "the parties were already through the gate and within the jurisdiction of the arbitrator." *Id*. (citing County of Durham v. Richards & Assocs., Inc., 742 F.2d 811 (4th Cir. 1984); Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023 (11th Cir. 1982); O'Neel v. National Ass'n of Sec. Dealers, Inc., 667 F.2d 804 (9th Cir. 1982); Conticommodity Serv., Inc. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980)). The court defined the other argument as requiring the court to "protect [a party] from being forced to arbitrate a dispute that arose after the agreement to arbitrate had expired." *Id*. (citing National R.R. Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756 (D.C. Cir. 1988); Hussey Metal Div. v. Lectromelt Furnace Div., 471 F.2d 556 (3d Cir. 1972); Westmoreland Hosp. Ass'n v. Westmoreland Constr. Co., 223 A.2d 681 (Pa. 1966); Emmaus Mun. Auth. v. Eltz, 204 A.2d 926 (Pa. 1964)).

91. *Hartmann*, 921 F.2d at 513.

92. *Id*.

93. *Id*. (citing *Farnam*, 870 F.2d at 1292, which held that "eligible" must mean an absolute bar of stale claims).

In *Farnam*, 870 F.2d at 1286, appellant asked the court to grant summary judgment on the issue of whether the parties dispute must be resolved by arbitration. PaineWebber argued that (1) "there was not a presently enforceable [arbitration] agreement," and (2) § 15 of the NASD arbitration code barred the claim because of the passage of more than six-years. *Id*. at 1288. The district court had ordered PaineWebber to arbitration predicated on a state court's decision that the question of eligibility was for the arbitrators. *Id*. (referring to PaineWebber, Inc. v. Farnam, No. 87 C 3595 (N.D. Ill. Dec. 31, 1987)). The lower court felt compelled to recognize the state court's holding based on the principles of collateral estoppel. *Id*. at 1289. *Farnam* concluded that the

Hartmann court found the *Farnam* court's reliance on a letter from an NASD staff attorney additionally persuasive.[94] Third, the court distinguished the procedural issues presented in *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[95]

The Sixth Circuit adopted the growing view that the six-year eligibility rule is one of jurisdiction. In *Roney & Co. v. Kassab*, the court considered a district court's ruling that the arbitrators should determine the applicability of NYSE Rule 603.[96] Finding the rationale in *Hartmann* persuasive, the court elected to hold that an issue of eligibility is one for the court, not the arbitrators.[97] The court also found that the circuit ruled previously, in a non-securities context, that a matter may not proceed to arbitration unless certain conditions precedent were met.[98]

B. New York State Court Interpretation of the Six-year Rule

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state court's reasoning was unclear and, therefore, held that the state court's decision was not the law of the case. *Id*. at 1291. Having concluded that the state court's order was not dispositive, *Farnam* considered whether § 15 barred the claims from arbitration. *Farnam*, 870 F.2d at 1291. Using the literal meaning of the words in § 15, the court concluded that the rule "serves as an absolute bar to [stale] claims submitted for arbitration . . . ." *Id*.

94. *Id*.

95. *Id*. (citing Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982), in order to interpret provisions of when and how an arbitration must commence). For further discussion of *Belke*, see *infra* note 118 and accompanying text.

96. Roney & Co. v. Kassab, 981 F.2d 894, 895 (6th Cir. 1992). The *Kassab* agreement provided only for arbitration before the NYSE and not the NASD. *Id*. at 896. Kassab brought a claim before the NASD more than six years after the departure of the account representative from Roney. *Id*. The lower court entered an order directing the NYSE to hear the claim. *Id*. at 897.

97. *Id*. at 897–98 (citing extensively from *Hartmann*, 921 F.2d at 509–11).

98. *Kassab*, 981 F.2d at 899 (citing General Drivers, Local Union 89 v. Moog Louisville Warehouse, 852 F.2d 871 (6th Cir. 1988)).

Having concluded that the court would determine the eligibility of the claim, the opinion considered whether Kassab's claim of fraudulent concealment tolled the six-year eligibility period. *Id*. at 900. The court concluded that Kassab did not state a claim for fraudulent concealment. *Id*. As discussed, *supra* note 96, the Sixth Circuit implied that the court, not the arbitrators, determines whether a claim is eligible, but that the six-year rule is effective as a statute of limitation subject to equitable tolling, rather than an absolute bar as a statute of repose. For a discussion of equitable tolling and its effect on eligibility, see *infra* Part IV.

Under New York law, as under the FAA, the court determines whether a claim is eligible for arbitration.[99] New York state decisions have overwhelmingly concluded that the six-year rule is a jurisdictional requirement to be decided by the court which cannot be tolled by allegations of fraudulent concealment.[100] There are three threshold inquiries for a New York court: (1) is there a valid arbitration agreement between parties; (2) have the parties complied with the agreement; and (3) would the asserted arbitration claim be otherwise barred by a statute of limitations if brought in a judicial forum.[101] In New York, the state court can issue a stay of arbitration

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99. Fenster, *supra* note 10, at 185–86 (citing N.Y. CIV. PRAC. L. & R. §§ 7502–7503 (McKinney 1992), as authority to stay arbitrations determined to be ineligible).

100. *Id*. (citing *e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeChaine, 600 N.Y.S.2d 459 (N.Y. App. Div.), *appeal denied*, 624 N.E.2d 694 (1993)). Further, the decisions hold that the FAA does not preempt New York law on the issue of subject matter jurisdiction. Fenster, *supra* note 10, at 186. (citing *DeChaine*, 600 N.Y.S.2d at 460).

On the other hand, in Smith Barney Harris Upham & Co. v. Luckie, 640 N.E.2d 150 (N.Y. 1994), the New York court concluded that the FAA required the arbitrators to consider a statute of limitation defense, notwithstanding *New York Civil Practice Law & Rules* § 7502 and the language of the customer agreement which explicitly read "[t]he foregoing agreement to arbitrate does not entitle me to obtain arbitration of claims that would be barred by the relevant statutes of limitations if such claims were brought in a court of competent jurisdiction." Budd 1995, *supra* note 3, at 209.

For a discussion of the choice of law provision and the FAA, see *supra* note 10 and accompanying text. For a discussion of Florida's interpretation that the issue is one of federal law construction, rather than state law, see *infra* note 130 and accompanying text.

101. Fenster, *supra* note 10, at 188 (citing Rockland v. Primiano Constr. Co., 409 N.E.2d 951 (N.Y. 1980)). New York law expressly states that courts are to determine statute of limitation issues. *Id*. (citing N.Y. CIV. PRAC. L. & R. § 7502 (McKinney 1992)).

But see Smith Barney, Inc. v. Sacharow, N.Y. L.J., Apr. 19, 1995, at 26 (N.Y. Sup. Ct. 1995). The *Sacharow* court held that the arbitrator may determine the issue of a statute of limitation. *Id*. (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995)). The court concluded that *Mastrobuono* superseded the rationale of Smith Barney Harris Upham & Co. v. Luckie, 640 N.E.2d 150 (1994), which found that New York law governed the enforcement of the provision to arbitrate. The court distinguished the facts in *Sacharow* from those in *Luckie* based upon the language of the account agreements. In *Luckie*, the agreement "provided that New York law governed the agreement and its enforcement . . ." while in *Sacharow*, the parties agreed that only the agreement would be governed by New York law. Anderson, *supra* note 10, at 1. A decision rendered two days later in federal court concluded that a distinction like that considered in *Sacharow* was immaterial. PaineWebber, Inc. v. Richardson, No. 94 Civ. 3104, 1995 WL 236722, at *4 n.9 (S.D.N.Y. April 21, 1995).

In Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1219 (1995), the Supreme Court held "that a New York choice-of-law provision . . . did not necessarily require application of the state's rules limiting the authority of arbitrators." However, *Mastrobuono* addressed the question of punitive damages and not eligibility. *Id*. at 1215.

based on a statute of limitations.[102] However, some courts have concluded that the factual issues for determining whether a tolling of the statute was appropriate were so complex that it warranted a full hearing on the merits by the arbitrator thereby delegating the court's determination of jurisdictional eligibility.[103]

III. TWO VIEWS: THE SIX-YEAR ELIGIBILITY RULE CONSTRUED AS RULE OF PROCEDURE

A. Rules of Procedure Are for Arbitrators

In comparison, Florida courts have consistently held that statutes of limitation must be raised as affirmative defenses which are then decided by the arbitrator. *See infra* note 131. In Victor v. Dean Witter Reynolds, Inc., 606 So. 2d 681, 685 (Fla. 5th Dist. Ct. App. 1992), the court, when asked to apply New York law, concluded that Dean Witter waived its right to judicial consideration of the statute of limitation defense by virtue of participating in the arbitration several months prior to raising the issue before the court. Regardless, the court determined that New York law was not applicable because it impermissibly preempted the FAA. *Id*. at 684–85.

102. Symposium, *supra* note 47, at 1545.

> If, at the time that a demand for arbitration was made . . . the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court . . . . The failure to assert such bar . . . shall not preclude its assertion before the arbitrators, *who may, in their sole discretion, apply or not apply* the bar.

N.Y. CIV. PRAC. L.& R. § 7502(b) (McKinney 1980 & Supp. 1995), *cited in* Symposium, *supra* note 47, at 1545 (emphasis added). New York appears to be the only state which leaves to the court the determination of the affirmative defense of a statute of limitation. C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 KY. L.J. 347, 361 (1990–91). For a discussion of the importance of New York law in determining issues of securities arbitration, see *supra* notes 10–11 and accompanying text.

It is SRO policy to abide by a court order to stay an arbitration, even if the SRO is not a named party. Fenster, *supra* note 10, at 186. Florida, unlike New York, adopted the Uniform Arbitration Act. *See* FLA. STAT. § 682 (1995). An arbitration agreement is unenforceable in Florida where the agreement stipulates that the laws of New York apply. Knight v. H.S. Equities, Inc., 280 So. 2d 456 (Fla. 4th Dist. Ct. App. 1973). Florida courts will not enforce the arbitration clause in an agreement which specifically stipulates the law of another state is to govern. *Id*. at 459 (citing FLA. STAT. § 680.02 which states in part that the Florida Arbitration Act "shall not apply to [an] agreement or provision to arbitrate in which it is stipulated that [Florida] law shall not apply").

103. Fenster, *supra* note 10, at 189 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coffler, No. 7495/92 (N.Y. Sup. Ct. July 21, 1992)); *see also* Goldberg v. Parker, No. 94-02670, 1995 WL 396568, at *1 (N.Y. Sup. Ct. 1995) (allegations of fraudulent concealment are cause for the arbitrator, not the court, to consider issue of eligibility).

The Second, Fourth, Fifth, Eighth, Ninth, and District of Columbia Circuits have concluded that the arbitrator should determine whether a claim is eligible for arbitration. Considering the issue in a non-securities context, the Eighth Circuit concluded that failure to bring a claim within a stated period of time was a question of procedural arbitration.[104] Similarly, the District of Columbia Circuit held that a court should determine if a valid arbitration agreement exists and leave to the arbitrators the determination of whether the dispute was raised in a timely manner.[105]

In *Miller v. Prudential-Bache Securities, Inc.*,[106] the court upheld the arbitrators' application of a three-year statute of limitations barring recovery rather than applying the six-year eligibility period. The Fourth Circuit held that the arbitrators had authority to determine what claims would be heard based on an applied statute of limitations and were not constrained to apply the forum's eligibility rule to extend an otherwise applicable statute of limitations.[107]

The Second Circuit considered the issue in *Conticommodity*

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104. Automotive, Petroleum & Allied Indus. Employees Union, Local No. 618 v. Town & Country Ford, Inc., 709 F.2d 509, 514 (1983). The court considered a notice requirement in the pre-dispute arbitration agreement. *Id*. at 510. The agreement provided that complaints about discharge or layoff required five-days written notice to the employer, and, failing such notice, the claims were barred from further action. *Id*. Relying on John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), the court held the notice requirement was an issue of procedural arbitrability and, therefore, one to be decided by the arbitrators. *Id*. at 514. The court further held that it was proper for the court to determine if the "subject matter" of the claim was contemplated by the arbitration agreement, not the method in which the complaint should be presented. *Id*.

In FSC Securities Corp. v. Freel, 14 F.3d 1310, 1312 (8th Cir. 1994), the court concluded that it need not determine if § 15 was one of procedure or substance. Relying on *NASD Arbitration Code* § 35, the court found the parties intended for the arbitrators to determine if the claim was subject to arbitration. *Cf. AT&T Technologies, Inc.*, 475 U.S. at 643 (holding that in absence of an express agreement by the parties, arbitration is for the courts).

105. Hanes Corp. v. Millard, 531 F.2d 585 (1976) (relying on Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd., 204 F.2d 366 (2d Cir.), *cert. denied*, 346 U.S. 854 (1953), which held that timeliness of claims is for the arbitrators).

106. 884 F.2d 128, 129 (4th Cir. 1989) (arbitrators applied a three-year statute of limitations by authority of N.Y. Civ. Prac. L. & R. § 202 which imposed the statute of limitations in the original state for a cause of action commenced outside of New York), *cert. denied*, 497 U.S. 1004 (1990).

107. *Id*. Interestingly, Miller brought her arbitration claim to the NASD as a matter of geographical convenience even though the agreement specifically provided the AAA or the NYSE as the arbitration forum; Bache did not challenge the choice of forum. *Id*. at 129. For a discussion of why a customer may want to select the AAA as the arbitration forum, see *supra* notes 31–34 and accompanying text.

Services, Inc. v. Philipp & Lion.[108] The appellant appealed from an order granting a stay of arbitration.[109] The trial judge concluded that the claim was time barred for failure to bring the claim within one year of the event as provided by the agreement.[110] The circuit court disagreed and held that the decision was for the arbitrators, and not the courts.[111]

In a case challenging the validity of an arbitration award in the face of a five-year time limit for submission of a claim, the Ninth Circuit held that the arbitrators should determine *any* time-bar defense.[112] Relying on *Conticommodity Services*, the court expressly held that a defense of a time bar is for the arbitrators regardless of whether the time bar is one of judicial making or of the forum's making.[113]

The Fifth Circuit specifically considered section 15 in *Smith Barney Shearson, Inc. v. Boone* and concluded that the arbitrators should determine if the claim was timely.[114] The Fifth Circuit declined Smith Barney's invitation to follow the reasoning of the Third, Sixth, and Seventh Circuits.[115] The court looked to a Fifth

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108. 613 F.2d 1222 (2d Cir. 1980).

109. *Id*. at 1223.

110. *Id*. "Any controversy . . . arising out of or relating to this contract shall be settled by arbitration . . . . Arbitration must be commenced within one year after the cause of action has accrued . . . ." *Id*. at 1223 n.1 (quoting the relevant section of the parties' agreement). Interestingly, the agreement provided the AAA as one of the permissible fora. *Id*.

The trial judge relied on Reconstruction Finance Corp. v. Harrisons & Crosfield, 204 F.2d 366 (2d Cir. 1953), for the proposition that the trial court could consider the "time-bar defense to arbitration." *Id*. at 1225. The Second Circuit discussed *Reconstruction Finance* and found that it supported the proposition that timeliness was an issue for the arbitrators, not the court. *Id*. *See supra* note 105 (discussing the District of Columbia's reliance on *Reconstruction Finance* the following year).

111. Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222, 1225 (2d Cir. 1980).

112. O'Neel v. National Ass'n of Sec. Dealers, Inc., 667 F.2d 804 (9th Cir. 1982). For language of the applicable eligibility section, see *supra* note 43.

113. *Id*. at 807 (citing *Conticommodity Servs.*, 613 F.2d at 1222). O'Neel had been a registered representative of the firm Birr, Wilson & Co. until 1974. *Id*. at 805–06. O'Neel resigned from the NASD in late 1975. *Id*. at 806. The firm received a notice of claim from an unsatisfied customer in 1979. *Id*. O'Neel was the account executive during the time covered by the claim. *Id*. In arbitration, the firm filed a third-party claim for indemnification in the event an award was made to the customer. *Id*.

114. Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 754 (5th Cir. 1995) (holding that § 15 is a procedural matter to be considered by the arbitrators).

115. *Id*. at 753.

Circuit case in a non-securities context as its precedent.[116] Finding that there was a dispute as to the date of the last occurrence, the court concluded that the dispute was for the arbitrators to resolve.[117]

B. And the Answer in Florida Is . . . It Depends

In Florida, the resolution of the eligibility dispute will depend on whether the parties bring their dispute to state court or to federal court. Also relying on *O'Neel* and *Conticommodity Services*, the Eleventh Circuit in *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* held that the timeliness of an arbitrable claim is an issue for the arbitrators, and not the court.[118] However, specifically construing *NASD Code of Arbitration Procedure*, section 15, the Eleventh Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, recently distinguished the eligibility rule[119] set out in section 15 from

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116. *Id*. (citing Local 4-447 v. Chevron Chem. Co., 815 F.2d 338 (5th Cir. 1987)). In *Chevron*, the collective bargaining agreement specifically provided that unless claims were made within express time limits, such claims were not eligible for arbitration. *Id*. (citing *Chevron*, 815 F.2d at 339).

117. *Id*. at 754 (analogizing to *Chevron* where there was a dispute as to the date the requisite filing was made). For a discussion of SROs' disagreement on how to determine the last occurrence, transaction or discovery, see *supra* notes 65–67 and accompanying text.

118. *Belke*, 693 F.2d at 1027–28 (citing O'Neel v. National Ass'n of Sec. Dealers, Inc., 667 F.2d 804, 807 (9th Cir. 1982); Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980)). In *Belke*, the court considered whether Merrill Lynch had been timely in its demand for arbitration of arbitrable issues. *Id*. At the outset, the *Belke* court concluded that the claims were so intertwined that Merrill Lynch had not waived its right to arbitration by bringing an action first in court. *Id*. at 1026–27 (criticizing trial court for not determining the severability question prior to holding that Merrill Lynch had waived its right to arbitration). The court further held that it was the court's responsibility to determine whether the issues presented by the claims are subject to arbitration. *Id*. at 1026. For a discussion of *NASD Code of Arbitration Procedure* § 15's right to court ordered arbitration after six-years, see *infra* notes 165–77 and accompanying text.

Before considering whether Merrill Lynch had waived its right to arbitration, the *Belke* court decided the issue of whether all the claims were subject to arbitration. *Id*. Prior to the decision in Shearson/American Express v. McMahon, 482 U.S. 220, 220 (1987), a complaint involving state common law claims and federal securities claims was subject to severance of the arbitrable claims. *Belke*, 693 F.2d at 1025. The common law claims were to be resolved by arbitration while the federal securities law claims were for the court. *Id*. For a discussion of federal securities claims now being subject to arbitration, see *supra* notes 16–17 and accompanying text.

119. The court opinions refer to an "eligibility rule" when discussing a rule adopted by the arbitration forum to determine whether the forum will hear a claim.

the timeliness[120] issue presented in *Belke*.[121] In *Cohen*, the district judge granted the Cohen's petition to compel arbitration finding that whether a claim arose more than six-years prior to it being filed (making the claim ineligible) was for the arbitrators to consider.[122] Relying favorably on the reasoning of the Third, Sixth, and Seventh Circuits, the Eleventh Circuit reversed and held that NASD section 15 is not a timeliness issue but rather a substantive requirement for the courts to apply.[123] The *Cohen* court considered the language of section 15 to be clear, yet disregarded the language of section 35, which had convinced the trial court that the parties intended for an issue of eligibility to be resolved by the arbitrator.[124]

Prior to *Cohen*,[125] the Fourth District Court of Appeal of Florida considered the Eleventh Circuit to be with the majority of circuits in holding that the arbitrators should determine a question of eligibility based on timeliness.[126] *Wylie v. Investment Management & Research, Inc.* unequivocally found that the arbitrators should decide the issue of timeliness.[127] In *Wylie*, the securities broker asked the arbitrators to dismiss Wylie's claim because the transactions from

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120. The court opinions, in this context, construe "timeliness" as whether the party brought a claim, to court or to the arbitration forum, in a time period which was reasonable and consistent with the agreement between the parties.

121. *Belke*, 62 F.3d at 381.

122. *Id*. at 382 (relying on *Belke*, 693 F.2d at 1023). The lower court also found § 35 relevant: "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties." *Cohen*, 62 F.2d at 382 (citing NASD ARB. CODE, *supra* note 2, § 35).

123. *Id*. at 383.

124. *Id*. at 384. The Supreme Court recently distinguished between the presumption that a matter was subject to arbitration (*i.e.*, the underlying claim is contemplated by the arbitration agreement) and the presumption that the arbitrator should determine whether the matter was subject to arbitration (i.e., the court, not the arbitrators, determine if the claim is contemplated by the arbitration agreement). First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1924 (1995) (citing *AT&T Technologies*, 475 U.S. at 649).

125. *Cohen*, 62 F.3d at 381.

126. Wylie v. Investment Management & Research, Inc., 629 So. 2d 898 (Fla. 4th Dist. Ct. App. 1993). The state court's assumption was validated by other district courts' decisions. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Gregg, No. 93-177-Civ-Oc-16 (M.D. Fla. Dec. 8, 1993); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, No. 93-915-CIV-SM (S.D. Fla. Sept. 23, 1993). *But see* Allen v. Prudential Sec., Inc., No. 93-582-Civ-Orl-18 (M.D. Fla. Dec. 16, 1993) (magistrate recommending that the court find the six-year eligibility requirement is a jurisdictional matter to be considered by the court; no final order issued because the case was on appeal on a discovery issue).

127. *Wylie*, 629 So. 2d at 898.

which the claim arose were all made more than six years prior to filing the claim.[128] The arbitrators declined to do so.[129] Distinguishing the *Wylie* case from a previous non-securities case, the court concluded that it was bound by federal law that "all doubts be resolved in favor of arbitration rather than against it."[130] The court also found its ruling in *Wylie* to be consistent with other Florida district courts.[131]

The federal circuits are in conflict as to the interpretation of section 15 as are the state courts (e.g., Florida and New York). Assuming that the issue is one for the courts, the next question is how do the courts measure the six years.[132]

IV. WHEN THE COURT APPLIES THE SIX-YEAR RULE, DOES IT MEASURE THE TIME FROM THE DATE OF TRANSACTION OR FROM THE DATE OF DISCOVERY?

Much authority contends that the date of the occurrence is the date of the investment.[133] However, recent cases suggest that the

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128. *Id*. at 899.

129. *Id*.

130. *Id*. (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)). The Fourth District found that its opinion in Anstis Ornstein Assocs., Architects & Planners, Inc. v. Palm Beach County, 554 So. 2d 18, 19 (Fla. 4th Dist. Ct. App. 1989) (holding that the court is to determine whether a statute of limitation is applicable, not the arbitrator), was not implicated because it did not appear to consider a question of federal law. *Wylie*, 629 So. 2d at 901.

131. *Id*. at 902 n.1 (citing Dean Witter Reynolds, Inc. v. Clarke, 617 So. 2d 402 (Fla. 3d Dist. Ct. App. 1993); Marschel v. Dean Witter Reynolds, Inc., 609 So. 2d 718 (Fla. 2d Dist. Ct. App. 1992), *rev. denied*, 617 So. 2d 318 (Fla. 1993); Victor v. Dean Witter Reynolds, Inc., 606 So. 2d 681 (Fla. 5th Dist. Ct. App. 1992), *rev. denied*, 614 So. 2d 502 (Fla. 1993)).

In *Clarke*, *Marschel*, and *Victor*, the courts were considering the brokerage firm's request for declaratory and injunctive relief from proceeding to arbitration on the basis that state statutes of limitation barred the claims. *Clarke*, 617 So. 2d at 402; *Marschel*, 609 So. 2d at 719; *Victor*, 606 So. 2d at 683. The respective courts held that the arbitrators should determine any affirmative defense provided by a statute of limitations or statute of repose. *Clarke*, 617 So. 2d at 402; *Marschel*, 609 So. 2d at 721; *Victor*, 606 So. 2d at 686.

132. For a discussion of how the NASD measures the six years, see *supra* notes 10, 59–65 and accompanying text. But, as discussed in *supra* note 67, the SROs are not in agreement on the commencement date for the measuring period.

133. *See, e.g.*, Dean Witter Reynolds, Inc. v. McCoy, 853 F. Supp. 1023, 1030 (E.D. Tenn. 1994) [hereinafter *McCoy II*] (citing Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 512 (7th Cir. 1992); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jana, 835 F. Supp. 406, 411 (N.D. Ill. 1993), *aff'd*, 70 F.3d 1271 (6th Cir. 1995)); Calabria v. Merrill

occurrence may be the fraudulent concealment of information which resulted in the investor being denied his right to arbitration.[134]

In *Ohio Co. v. Nemecek*, the court considered when the period of eligibility begins to run when applying NYSE Rule 603.[135] The court described the dispute as whether the transaction was the relevant date and, therefore, similar to a statute of repose, or whether the discovery was the relevant date and, therefore, similar to a statute of limitation.[136] Recognizing the split within the district courts of the Sixth Circuit, the *Nemecek* court declined to decide if the six-year period was subject to tolling because the Nemeceks did not sufficiently plead fraudulent concealment which would have satisfied a tolling analysis.[137] While the court did not decide the issue, the opinion implies that the fraudulent concealment might be the "transaction date" from which the eligibility period is measured.[138]

While the Third Circuit in *PaineWebber, Inc. v. Hofmann* clearly stated that the transaction date is the relevant date, the opinion provides a basis for the argument that concealment may raise an independent cause of action.[139] The concept of concealment as a dis-

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Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 172 (N.D. Tex. 1994); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Barnum, 616 N.Y.S.2d 857, 859 (Sup. Ct. 1994). *Cf.* Smith Barney, Harris Upham & Co. v. St. Pierre, No. 92 C5735, 1994 WL 11600, at *4 (N.D. Ill. Jan. 4, 1994) (concluding that it is for the court to decide if the relevant occurrence is the transaction date or the discovery date).

134. *See infra* notes 139–42 and accompanying text. The NASD Director of Arbitration supports the rationale that concealment is an independent cause and, therefore, the transaction date should not be the relevant date. *Cf. supra* note 65 and accompanying text (Masucci urging liberal interpretation of occurrence date).

135. Ohio Co. v. Nemecek, 886 F. Supp. 1342, 1344–45 (E.D. Mich. 1995), *rev'd*, No. 95-2182, 1996 WL 590822, at *1 (6th Cir. 1996). Notwithstanding an argument of fraudulent concealment, the court concluded that the Third and Seventh Circuits determined that the six-year period is not subject to equitable tolling. *Nemecek*, 1996 WL 590822, at *3 (citing PaineWebber, Inc. v. Farnam, 870 F.2d 1286, 1292 (7th Cir. 1989); *Sorrells*, 957 F.2d at 512).

136. *Nemecek*, 886 F. Supp. at 1344.

137. *Id*. at 1346, 1348. *Compare e.g.*, First of Mich. Corp. v. Swick, 894 F. Supp. 298 (E.D. Mich. 1995) (holding that six-year period may be tolled if claimants sufficiently plead fraudulent concealment); Davis v. Keyes, 859 F. Supp. 290 (E.D. Mich. 1994) (holding that the six-year rule operates as a statute of limitations subject to tolling) *with McCoy II*, 853 F. Supp. at 1023 (holding that the six year rule is one of eligibility and, therefore, not subject to equitable tolling), *aff'd*, 70 F.3d 1271 (6th Cir. 1995).

138. For a discussion of fraudulent concealment as the relevant date for considering eligibility, see *infra* notes 198–202 and accompanying text.

139. PaineWebber, Inc. v. Hofmann, 984 F.2d 1372, 1381 (3d Cir. 1993). The opinion states in dicta that claims arising from alleged fraudulent concealment may "be viewed as an independent cause of action" or "as an attempt to toll the time period on . . .

tinct "act or occurrence" for purposes of measuring the six-year eligibility period is essentially the basis for the NASD's current interpretation.[140]

When the Eleventh Circuit remanded the case in *Cohen*, it held that the transaction date was not necessarily the relevant date for measuring the six-year eligibility.[141] The court recognized that using a date other than the transaction date would result in the judiciary holding "mini-trials" to establish the date from which the court would measure the six years.[142]

Most courts hold that the eligibility issue is determined by the bright-line rule that the transaction is the relevant date. An independent claim arising from the discovery date responds to equitable considerations but undermines the concept of conserving judicial resources by private dispute resolution. Applying arbitration rules to enforce a private dispute agreement may include enforcing a provision which acts as a private "statute of repose." While the result may mean no redress for a perceived wrong, not all wrongs are compensable.

V. IF NOT ELIGIBLE FOR ARBITRATION, THEN WHAT?

A determination, by the judiciary or by the arbitration forum, that the claim is ineligible for arbitration raises the issue as to what remedy remains available to resolve the parties' dispute.[143] In *Dean Witter Reynolds, Inc. v. McCoy*, the district court relied on the Sixth Circuit's determination that section 15 was a jurisdictional require-

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[the] underlying wrongdoing." *Id*. The court further stated that it would be for arbitrators to determine whether there was an independent duty owed to a customer, and whether that duty was breached. *Id*. Moreover, the court held that it would have to determine what claims should be severed. *Id*. at 1382. The court in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 385 (11th Cir. 1995), relied on the language in *Hofmann*.

140. For a discussion of the NASD's interpretation of § 15, see *supra* notes 59–65 and accompanying text.

141. *Cohen*, 62 F.3d at 385 (citing *Hofmann*, 984 F.2d at 1381).

142. *Id*. (holding that judicial economy cannot be the only consideration when resolving contract construction and citing Goldberg v. Bear, Stearns & Co., 912 F.2d 1418, 1422 (11th Cir. 1990)).

143. For a discussion of a proposed rule allowing ineligible claims to proceed to a judicial forum, not withstanding the arbitration clause, see *supra* notes 55–58 and accompanying text. For a discussion of a more recent proposal to eliminate the eligibility rule and, therefore, precluding the need for a judicial remedy, see *infra* notes 185–87 and accompanying text.

ment, rather than a rule of procedure.[144] Having won the issue of whether the six-year rule was an eligibility requirement, Dean Witter faced an argument from the McCoys that "the arbitration agreements . . . did not constitute a waiver of the right to pursue their claims in a judicial forum."[145] The McCoys relied particularly on the concept expounded in *Bonar v. Dean Witter Reynolds, Inc.* that waiver required a knowing and voluntary relinquishment of rights.[146] Turning to an interpretation of the FAA, the court held that the parties expressly provided by agreement that arbitration was the *only* forum for resolution of disputes between them.[147] The court reasoned that to hold otherwise would compel Dean Witter to be in a forum expressly precluded by the parties' agreement.[148]

The *McCoy* court cited *Piccolo v. Faragalli* several times to support its reasoning that the parties waived an opportunity to resolve differences in a judicial forum.[149] Piccolo agreed that his claims were not subject to arbitration but argued that they were still eligible for judicial resolution.[150] The court found that Piccolo's argument ignored the express language of the parties' agreement.[151] The court held that no opportunity existed to resolve the disputes in court existed.[152] The court concluded that to hold otherwise would "encourage a plaintiff seeking to avoid arbitration to wait six years and then

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144. *McCoy II*, 853 F. Supp. at 1025 (citing Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649 (6th Cir. 1993)), *aff'd*, 70 F.3d 1271 (6th Cir. 1995).

145. *Id*. at 1033.

146. *Id*. (citing Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1387–88 (11th Cir. 1988)).

147. *Id*. The court commented in dicta that had the parties wanted "to reserve a right to litigate their untimely claims" they could have done so by an express provision in the agreement. *Id*. (citing Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 478 (1989)). Just as brokerage firms have differences in their arbitration provisions, *see*, *e.g.*, *supra* note 13, customers may seek a securities broker who will modify its agreement in an effort to distinguish its account.

148. *McCoy II*, 853 F. Supp. at 1034.

149. *Id*. at 1033–34 (citing Piccolo v. Faragalli, No. 93-2758, 1993 U.S. Dist. LEXIS 13111 (E.D. Pa. Aug. 23, 1993)).

150. *Piccolo*, 1993 U.S. Dist. LEXIS 13111, at *3.

151. *Id*. at *5. Paragraph 19 of the relevant agreement provided in pertinent part: "[t]he undersigned agrees, and by carrying on account(s) for the undersigned you agree that . . . all controversies which may arise between the undersigned and you . . . shall be determined by arbitration." *Id*. at *3.

152. *Id*. at *6. *See also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shelapinsky, No. 93-1553, 1994 U.S. Dist. LEXIS 10477 (W.D. Pa. Mar. 10, 1994); Castellano v. Prudential-Bache Sec., Inc., No. 90 Civ. 1287, 1990 U.S. Dist. LEXIS 7352 (S.D.N.Y. June 19, 1990).

assert his claims in federal district court."[153]

But courts are not unanimous in the resolution of this sub-issue arising from the six-year eligibility requirement.[154] In *Smith Barney, Harris Upham & Co. v. St. Pierre*,[155] the court found St. Pierre's claims eligible for judicial disposition. Rather than holding that the ineligible claims were nonjusticiable, the court considered the plaintiff's motion for summary judgment on the matter of the claims being barred by applicable statutes of limitation.[156] The court found that all the securities claims were barred from the courts because of federal and state statutes of limitation.[157] However, other state claims required further proceedings to determine if the plaintiff could show tolling of the relevant statutes of limitation.[158]

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153. *Piccolo*, 1993 U.S. Dist. LEXIS 13111, at *6. The court found support for its reasoning from the Sixth Circuit's decision to "enjoin the Appellees from pursuing any further claims" based on the six-year eligibility provision of NYSE Rule 603. *Id*. (quoting Roney & Co. v. Kassab, 981 F.2d 894, 899 (6th Cir. 1992)). Of course, a claim brought in federal court would be subject to applicable statutes of limitation which may be less than six years. See *infra* note 158 and accompanying text for a discussion of statute of limitations defenses; *see also, e.g.*, FLA. STAT. § 95.11(4)(e) (1995) (securities fraud violations must be brought within two years of discovery and in no event more than five years from the date of the transaction).

154. *See supra* notes 55–58 and accompanying text (discussing withdrawn *NASD Arbitration Code* § 15 proposal which would have clearly stated that parties may proceed to a judicial forum if time-barred from arbitration).

In those circuits that find that the six-year eligibility rule is one of jurisdiction, the rule also works as a statute of repose if there is no judicial forum available for non-arbitrable claims. This is most significant where otherwise applicable state law provides a statute of limitations subject to tolling with no statute of repose. See, e.g., *supra* note 53 for a discussion of statutes of limitation and statutes of repose.

Similar to the eligibility rule encompassed in an arbitration provision, a contract provision coupled with a choice-of-law provision may result in a private limitation on an action, different than the applicable state's law. In Burroughs Corp. v. Suntogs of Miami, Inc., 472 So. 2d 1166, 1167 (Fla. 1985), the contract contained a Michigan choice-of-law provision and a two-year limitations period for bringing any claim for breach of contract. Notwithstanding a Florida statute which expressly voided such a clause, the *Burroughs* court held it would apply Michigan law and enforce the contractual bar to suit. *Id*. at 1169 (citing FLA. STAT. § 95.03 (1975)). In New York, which is the choice-of-law in many account agreements, *see generally supra* note 10, parties may contract for a shorter limitations period as long as the court concludes that the period is reasonable. N.Y. CIV. PRAC. L. & R. § 201 (McKinney 1990); *see* Sapinkopf v. Cunard S.S. Co., 172 N.E. 259 (N.Y.), *cert. denied*, 282 U.S. 879 (1930).

155. No. 92 C5735, 1993 U.S. Dist. LEXIS 18649, at *9 (N.D. Ill. Jan. 4, 1994).

156. *Id*. at *12. The SRO deemed the claims ineligible for arbitration due to the act or occurrence arising more than six years prior to filing of the claims. *Id*. at *11.

157. *Id*. at *14.

158. *Id*. at *16. The resolution of a claim would not necessarily be the same if a court considered a statute of limitations defense or an arbitration panel considered the

In *Prudential Securities, Inc. v. LaPlant*, the court held that claims ineligible for arbitration because of the six-year eligibility rule were eligible for litigation in court.[159] The court did not express its reasoning. LaPlant unsuccessfully urged the court to consider the last sentence of section 15 as authority, regardless of timeliness, to order all the claims to arbitration as a matter of judicial economy.[160] Prudential Securities sought a permanent injunction against the arbitration proceedings because of untimeliness.[161] Prudential Se-

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defense. Notwithstanding District Judge Edgar's assertion that "[t]he NASD arbitrators are required to follow and apply the same substantive law and the applicable statute of limitations as the courts," an arbitrator's misapplication of the affirmative defense of a statute of limitations is not reviewable by the judiciary. *McCoy II*, 853 F. Supp. at 1034.

The FAA provides five bases for vacating an arbitration award. *See* 9 U.S.C. § 10 (1994). The FAA does not statutorily require the arbitrators to apply the law of a specific jurisdiction. An award may be vacated "[w]here the arbitrators were guilty of misconduct . . . by which the rights of any party have been prejudiced." *Id*. § 10(c). Given that arbitrators are not required to disclose their reasoning, it is rare that a court would consider ignoring a statute of limitation defense as "misconduct." *See* NASD ARB. CODE, *supra* note 2, § 41(e) (arbitrators not required to disclose basis of award); Wilko v. Swan, 346 U.S. 427, 436 (1953) (misunderstanding of law or misinterpretation of law does not meet the "manifest disregard" standard to support judicial review of an arbitration award), *overruled by* Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); *cf.* Sovel v. Hertz, Warner & Co., 469 F.2d 1211, 1216 (2d Cir. 1972) (under the FAA confirmation of an award is appropriate if any grounds for the decision can be gleaned from the evidence); *cf. generally*, Stewart, *supra* note 102, at 351–55, 360–63 (discussing the difficulty in judicially challenging an arbitration award).

Included in the recommendations by the NASD task force to suspend the eligibility rule is a requirement that arbitrators, when deciding a statute of limitation defense, provide in writing the basis of their conclusion and the "law on which the arbitrators relied" to reach their conclusion. ARBITRATION REFORM, *supra* note 66, at 30. The report continues that a decision by the arbitrators to dismiss on the basis of a statute of limitation would be subject "to challenge . . . in accordance with the FAA." *Id*. A claim not dismissed on the basis of a statute of limitation would proceed to arbitration on the merits before the parties would be able to "challenge an award under the FAA." *Id*.

159. Prudential Securities, Inc. v. LePlant, 829 F. Supp. 1239, 1244 (D. Kan. 1993). The court made clear that any claims brought in the judicial forum were subject to the affirmative defense of the statute of limitations. *Id*. The court also postponed judicial resolution of the litigated claims "to avoid any duplication of remedies or inconsistent results." *Id*. It is hard to understand the court's comments about duplication and consistency in light of its finding that the claims must be brought in two fora. Just as a manufacturer may have two negligence claims brought by two injured parties in different proceedings and get vastly different results, it would seem the results and remedies provided by the arbitrators and the judiciary would not have a basis for coordination.

160. *Id*. at 1243. Defendant cited Prudential Sec., Inc. v. Seimetz, No. 5:93 CV 0647, 1993 WL 475975 (N.D. Ohio May 21, 1993), in support of his position. *Id*. For a discussion of court ordered arbitration pursuant to *NASD Code of Arbitration Procedure* § 15, see *infra* notes 165–77 and accompanying text.

161. *LaPlant*, 829 F. Supp. at 1240.

curities did not argue that claims ineligible for arbitration were likewise ineligible for judicial resolution.

In *Calabria v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[162] the court declined to follow *LaPlant*. The court interpreted *LaPlant's* reasoning to be based on the claims having been originally brought in court and having been permitted to proceed rather than allowing claims which had previously been ruled ineligible for arbitration to then look to the judicial forum.[163]

The forum for resolution of a dispute should not depend on whether a party first proceeds to arbitration or to the courts. When the parties agree to resolve their disputes by arbitration, it should be the sole remedy to redress wrongs. If a party is delayed in bringing a claim and is therefore ineligible for arbitration, then the party must suffer the consequences of their dilatoriness.

Dispute resolution by private contract should be upheld by the judiciary. Parties may contract not to raise a statute of limitations defense. Similarly, the six-year eligibility rule is a privately agreed upon statute of repose; no stale claims are susceptible to consideration.[164] Arbitration is a less costly and faster method of dispute resolution, in part, because of limitations on discovery, ineligibility of stale claims, and focused expertise of the fact-finders. Once the parties consent to arbitration as a term of their contract, the judiciary should not rewrite the contract for one party, i.e., the party bringing a stale claim, when there is no consideration for the modification by the other party.

VI. WHAT ABOUT COURT ORDERED ARBITRATION?

In *Sorrells*, the court discussed the 1984 amendment to section 15.[165] The court concluded that the amendment was intended to

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162. 855 F. Supp. 172, 176 (N.D. Tex. 1994) (finding no discussion in *LaPlant* to explain the decision).

163. *Id*. (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shelapinsky, No. 93-1553, 1994 U.S. Dist. LEXIS 10477 (W.D. Pa. Mar. 10, 1994)).

164. For a discussion of a change in the rule which would eliminate the eligibility rule altogether, see *infra* notes 185–87.

165. Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 513 (7th Cir. 1992). Section 15 read as follows prior to the amendment:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code 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. This Section shall not extend applicable statutes of limitation.

order to arbitration any claim that would not otherwise be barred by a state statute of limitations, regardless of the six-year eligibility rule.[166] The court further held that the claim in the instant case had been submitted to arbitration, rather than to the court and, therefore, was subject to the six-year jurisdictional bar.[167]

Sorrells court's reasoning would encourage claimants to bring an action in court initially when the plaintiff believed that the applicable law would result in a tolling of the statute of limitations. If a court found a tolling of the statute of limitations, it could order arbitration notwithstanding the passage of six years from the date of the act or occurrence from which the claim originated. Such a posture would undermine the effectiveness of keeping stale claims out of arbitration and circumvent the parties' tacit agreement of an absolute bar of claims more than six-years old.

In *Prudential Securities, Inc. v. LaPlant*, the court concluded that the NASD intended the modified language in section 15 to foreclose any possible "jurisdictional standoff," "if a court, for whatever reason, sen[t] something to arbitration" that arose from an event more than six years previous.[168] The court considered as misguided the reasoning of an "unreported decision from the Northern District of Ohio" which found as a matter of judicial economy it would order all claims to arbitration based on the court's authority as it interpreted section 15. The Ohio order, cited by LaPlant in support of his position, ordered to arbitration both claims that clearly were eligible for arbitration and claims which the Ohio court found arguably might be eligible.[169] The *LaPlant* court felt compelled to determine which claims were eligible for arbitration.[170] The *LaPlant* court cor-

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Id. (quoting NASD ARB. CODE, *supra* note 2, § 15 (1983)). The 1984 change deleted "in any instance" and added "nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction." *Id*. For the full language of the current text, see *supra* text accompanying note 56.

166. *Sorrells*, 957 F.2d at 513 (relying on an explanation in Securities and Exchange Commission, Form 19b-4, Proposed Rule Change by NASD, File No. SR-NASD-84-16, 8–9).

167. *Id*. at 513–14.

168. Prudential Sec., Inc. v. LaPlant, 829 F. Supp. 1239, 1244 (D. Kan. 1993).

169. *Id*. Rather than carrying out their responsibility to decide if certain claims were eligible for arbitration, the court allowed the arbitrators to consider such claims even if the merits might have shown them to be ineligible. *Id*.

170. *LaPlant*, 829 F. Supp. at 1243–44. For a discussion of the nature of claims which provide the relevant date, see *supra* notes 133–34 and accompanying text.

rectly concluded that the court must determine if a claim is within the scope of an arbitration agreement and not abdicate the responsibility to the arbitrators.

In *Manasse v. Prudential-Bache Securities*, the district court interpreted and applied the latter phrase in section 15.[171] The court concluded that section 15 meant that claims older than six years were barred from arbitration yet able to be pursued in a judicial forum.[172] The court continued, that once the parties moved their dispute to court, the court could thereafter order arbitration, not withstanding that more than six years had passed.[173] The court found support for its reasoning in *Sorrells*.[174] In holding that section 15 is a jurisdictional provision, the *Sorrells* court also concluded that the second sentence of section 15 provided an exception to the six-year bar if a court ordered the claim to arbitration.[175] Using this reasoning, the *Manasse* court held that the claims first brought to court *may* be ordered to arbitration.[176] The court concluded that it would order to arbitration all the claims first filed in court notwithstanding that more than six years had passed since the event giving rise to the claim.[177]

As held by the Supreme Court, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit."[178] Where a party first files in court a claim which would be eligible for arbitration at the time of a judicial filing, a court should order the claim to arbitration

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171. Manasse v. Prudential-Bache Sec., No. 92-13E, 1995 U.S. Dist. LEXIS 10419, at #1 (W.D. Pa. July 20, 1995).

172. *Id*. at *9. For a discussion of the result a court could reach when it finds claims ineligible, see *supra* notes 143–63 and accompanying text.

173. *Id*.

174. *Id*. at *11 (citing *Sorrells*, 957 F.2d at 513).

175. *Sorrells*, 957 F.2d at 513. The *Sorrells* court noted that the Sorrells elected to submit to arbitration rather than bring their claim to a court. *Id*. at 513–14. The language of the decision implies that the Sorrells should have sought a declaratory judgment to determine which claims were subject to a valid arbitration agreement and which claims should be brought in a judicial forum. *Cf*. AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643 (1986).

176. *Manasse*, 1995 U.S. Dist. LEXIS 10419, at *13.

177. *Id*. at *18. The initial action was filed in state court on December 18, 1991. *Id*. at *2. It was removed to the district court on January 16, 1992, which granted Prudential-Bache's motion to compel arbitration. *Id*. All the transactions giving rise to the complaint were made between May 8, 1984 and August 9, 1992. *Id*. at *7.

178. *AT&T Technologies*, 475 U.S. at 648 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

notwithstanding the fact that at the time of its order more than six years has passed since the act or occurrence.[179] If a court considers a claim that is ineligible for arbitration because of timeliness, the court should not construe the latter sentence of section 15 as authority to expand the matters the parties agreed to submit to arbitration. To do so would result in a judicial modification of the parties' agreement.

VII. CONCLUSION

> The lack of evidentiary standards and, more importantly, the lack of any specification of the standard of law to be applied in arbitrations are weaknesses in the arbitration process. The lack of a written opinion, the industry-oriented background of the arbitrators, the limited availability of appellate avenues after arbitration and the involuntary nature of the arbitration agreement are also matters of concern.[180]

Regardless of these apparent weaknesses in arbitration, it is generally less costly and brings a quicker resolution of the dispute.[181]

A. Industry Clarification

A significant step in reducing costs due to litigation collateral to the arbitration procedure could be made by the establishment of a clear interpretation of *NASD Code of Arbitration Procedure* section 15 and its counterparts at other SROs. The industry could help itself by quickly, decisively, and uniformly expanding the language of section 15 to state clearly what claims may be brought before the

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179. A proceeding brought to court within six years of the transaction may take several years for the courts to resolve. In that instance, the arbitration forum would hear a claim which was more than six years old. There is a similar result when an arbitration claim occurs within six years of the transaction, but for a variety of reasons, legitimate and not legitimate, discovery takes an extended period of time resulting in the case actually being heard by the arbitrators well over six years from the time of the transaction.

180. William C. Hermann, Note, *Arbitration of Securities Disputes:* Rodriguez *and New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697, 721 (1990).

181. GRANT, *supra* note 12, at 163.

forum.

SICA drafted the eligibility rule as a mechanism to bar stale claims from the arbitration fora. While the SROs have expanded discovery procedures for arbitration, the parties still face discovery difficulties from lost documents and failing witnesses' memories. Effectively a private statute of repose, the eligibility rule has merit as a means to limit exposure from claims arising many years prior, claims which arbitrators will decide from incomplete documentation and poor witnesses' memories.

Second, industry members need to expand the language of their account agreements to state that arbitration is the only forum for dispute resolution and that parties who sign pre-dispute arbitration agreements are precluded from seeking judicial intervention.[182] While such a provision may be attacked by some disgruntled customers as "unconscionable," such a provision is likely to be upheld if challenged in court.[183] Regulation provides customers with the right, but not the obligation, to force the dealer to arbitration as the sole dispute resolution forum.[184] Both parties should by contract agree to a bilateral method of dispute resolution.

Elimination of the eligibility rule at the SROs, consistent with the AAA, is the most recent proposal promulgated by the NASD Task Force.[185] An important component of the Task Force recommendation is the provision that the arbitrators determine in writing whether a claim is barred by the applicable statute of limitations.[186] Consistent with procedure in the judicial forum on the matter of interlocutory appeals, the recommendation is that a denial or deferral of a statute of limitations argument results in the claim being heard on the merits, regardless of whether the defeated party be-

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182. The NASD Task Force recommends enhancing customer account agreements to explicitly apply the FAA, in lieu of state arbitration laws, as well as providing notice that claims are subject to time limitations. ARBITRATION REFORM, *supra* note 65, at 19–20. As suggested by the court in Roney & Co. v. Goren, 875 F.2d 1218, 1221 (6th Cir. 1989), the SEC ultimately can determine what contract provisions are fair.

183. See *supra* note 18 for a discussion on challenges to pre-dispute arbitration agreements.

184. *See supra* note 2 (NASD member firms, as a condition of membership, agree to arbitrate disputes with customers even in the absence of an express agreement).

185. For a discussion of the NASD Task Force and the recommended implementation of an early consideration by the arbitrators of a statute of limitations defense, see *supra* note 64.

186. *Cf*. *supra* note 158 (arbitrator generally not required to disclose reasoning).

lieves the arbitrators made a substantive error in the application of the law.[187]

To effectuate a test period prior to the elimination of the eligibility rule, the NASD Task Force is urging that the eligibility rule be suspended only for claims which occurred within six years of the date from which the rule is suspended.[188] For claims accruing prior to the effective date of the new rules, the courts should conclude that the claimant cannot bring an ineligible claim to a judicial forum.[189]

B. Judicial Restraint

In the interim, consideration of the eligibility rule as a jurisdictional issue is the appropriate approach for the judiciary.[190] Noting federal securities law, many states have long recognized the need to establish statutes of repose because of the problems of evidence and witness memory.[191] Where the parties have a pre-dispute arbitration agreement, the judiciary should be involved in only two instances: (1) when a party requires judicial intervention to order a contractually bound party to submit to arbitration, or (2) when a party requires judicial intervention to order the SRO to apply its own rules. In no circumstance should a party be allowed to bring a claim, ineligible pursuant to the arbitration procedures, to court for redress. Of course, in those instances where the underlying claim was not one within the scope of the parties' contract, a complaining party would have every right to judicial resolution.

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187. ARBITRATION REFORM, *supra* note 66, at 30. The parties would be able to challenge an award after it is granted but would have to meet the difficult standards established by the FAA. *See supra* note 158 (describing the bases to vacate an arbitration award).

188. ARBITRATION REFORM, *supra* note 66, at 30. The NASD Task Force provides the following example: "If the rule is suspended effective April 1, 1996, only claims that occurred on or after April 1, 1990 could be submitted for NASD arbitration. Claims arising prior to that time would be ineligible for NASD arbitration." *Id*. at 30–31. The NASD Task Force does not address the issue of what constitutes the act or occurrence from which the six years is to be measured.

189. Contrarily, the NASD Task Force urges that ineligible claims be permitted to be heard in a judicial forum. *Id*. at 31.

190. For customers who signed account agreements prior to the effective date of the proposed rule change, one can anticipate litigation over which arbitration rules are applicable to the claim: the rules at the time of the signing of the customer agreement or the rules at the time that the claim is presented to the arbitration forum.

191. For examples of statutes of repose, see *supra* note 53.

A majority of federal circuits which have specifically construed section 15, conclude that it is a jurisdictional issue to be considered by the court.[192] This is the right conclusion. Absent the concurrence of the contracting parties, the courts, not the arbitrators, are to determine if the parties' dispute was within the scope of the agreement to arbitrate.[193] As Justice White held in a unanimous opinion, the courts must determine what disputes the parties agreed to submit to arbitration.[194]

The influential State of New York concurs with the majority of federal courts. The Fourth District Court of Appeal of Florida wrongly anticipated the Eleventh Circuit's interpretation of section 15. The Fourth District should reconsider its interpretation of section 15, consistent with the majority of federal courts and the New York courts.[195]

Once a court determines the jurisdictional issue, claims not eligible for arbitration should be brought in no other forum. To reason otherwise would be to encourage manipulation of the parties' agreement. Allowing parties to seek a judicial remedy after the arbitration forum declines consideration of a stale claim and would en-

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192. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 383–84 (11th Cir. 1995); Roney & Co. v. Kassab, 981 F.2d 894, 898 (6th Cir. 1992); PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 510–11 (3d Cir. 1990); PaineWebber, Inc. v. Farnam, 870 F.2d 1286, 1289 (7th Cir. 1989). The Fifth Circuit has found the issue is one for the arbitrators. *See* Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 752–54 (5th Cir. 1995). The Second, Fourth, Eighth, Ninth, and District of Columbia Circuits have not specifically construed § 15. *Cf. supra* notes 104–13 and accompanying text (discussing cases analogous to § 15 decisions). Lower court cases in these circuits are similar to situations outside of a § 15 context to interpret the law of the respective circuit. *See*, *e.g.*, Soares Fin. Group, Inc. v. Hansten, No. C93-4172, 1994 WL 392475, at *3 (N.D. Cal. 1994) (citing O'Neel v. National Assoc. Sec. Dealers, Inc., 667 F.2d 804 (9th Cir. 1982), and Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980)); Bakk v. Principal Fin. Sec., Inc., 892 F. Supp. 1206, 1210 (D. Minn. 1995) (citing FSC Sec. Corp. v. Freel, 14 F.3d 1310 (8th Cir. 1994)); Armstrong v. Dore, No. 7:95-CV-133-BR(2), 1995 U.S. Dist. LEXIS 19936 (E.D.N.C. Dec. 14, 1995) (citing Miller v. Prudential-Bache Sec., Inc., 884 F.2d 128 (4th Cir. 1989), *cert. denied*, 497 U.S. 1004 (1990)); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Noonan, No. 92 Civ. 3770, 1992 U.S. Dist. LEXIS 11363, *28 (S.D.N.Y. Aug. 3, 1992) (citing *Conticommodity Servs.*, 613 F.2d at 1222). None of the First, Tenth, District of Columbia Circuits, nor their trial courts, have considered the eligibility issue.

193. See *supra* note 78 and accompanying text for judicial decision supporting the rationale that arbitrators should not determine their own jurisdiction.

194. AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 648–49 (1986).

195. For a discussion of the reasoning in *Wylie*, 629 So. 2d at 899–902, which was rejected by *Cohen*, 62 F.3d at 382–84, see *supra* notes 126–31 and accompanying text.

courage parties to circumvent the intent of arbitration clauses.

In addition, to find that a stale claim is eligible for judicial resolution is inconsistent with the underlying purpose of the account pre-dispute arbitration clause. Without the clause, the customer can always force the dealer to arbitration;[196] only with the clause can the dealer force the customer to arbitration. One of the key benefits of arbitration is to minimize the cost associated with dispute resolution. If a stale claim can be brought in a second proceeding, i.e., the court, the economy of dispute resolution is lost.

C. Fraudulent Concealment

The *Cohen* court recognized the distinction between a claim arising from an initial transaction and a claim arising from a later act, e.g., the misrepresentation of an investment's value.[197] When reviewing the eligibility decisions of SROs, courts should consider whether an independent claim exists for fraudulent concealment.[198] Consideration of fraudulent concealment would require appropriate drafting of the complaint and a review by the court to determine if the complaint states a claim.[199] Similarly, the SROs need to be more sensitive to the broader definition of an act or occurrence; the event on which the arbitration claim is based may not be a securities purchase or sale. The court, by the forum's own rules, is in a position to order an arbitration panel to hear a claim which was improperly denied eligibility by the forum.[200]

For instance, if a purchase of a partnership interest was made ten years ago, but for the first eight years of the investment the securities firm fraudulently misrepresented the investment's value on the broker statement, there would be an arbitrable claim on the

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196. *See* NASD ARB. CODE, *supra* note 2, § 8.

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

198. The court in *Hofmann*, 984 F.2d at 1381, suggested that fraudulent concealment was a separate claim which may be considered by the arbitrators notwithstanding that more than six years had passed since the original transaction. For a discussion of the reasoning in *Hofmann*, see *supra* note 139 and accompanying text.

199. The court should make the determination of whether the complaint states a claim which would give the SRO jurisdiction for purposes of arbitration. *See Sorrells*, 957 F.2d at 514 (holding that determination of whether the parties agreed to arbitrate a claim is the prerogative of the court).

200. *See, e.g.*, NASD ARB. CODE, *supra* note 2, § 15; *supra* notes 68–69 and accompanying text.

issue of the misrepresentation of the statement value. This concept of fraudulent concealment mollifies the concept of equity; a wrongdoer who successfully and actively conceals his wrong should not escape punishment.

Because of the passage of time, there would not be a claim asserting misrepresentation at the time of the investment.[201] The investor should have the responsibility of ascertaining the validity of provisions in offering documents and representations made at the time of the transaction. The investor would not be able to ignore the voluminous disclosures mandated by the SEC.[202]

An investor should not bring a claim arising from the original transaction after a long-term (i.e., more than six years old) investment declines in value, even though a decline was consistent with the risks described in the offering memorandum. An investor would have a claim if the broker made a misrepresentation of an asset's periodic value or other pertinent feature. Likewise, a breach of a duty, where the breach occurred within six years of the claim, would result in the arbitrators hearing the claim.

However, without looking back to the original transaction (of which consideration is time-barred), the arbitrators are faced with the difficult issue of how to measure damages.[203] How do the claim-

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201. For example, an investor is induced to purchase a partnership interest because the registered representative states that the principal value is guaranteed. For eight years the customer receives a brokerage statement showing the value of his investment to be at least the value of his original purchase, i.e., consistent with the representation made by the broker. In the ninth year, the customer learns that the securities-dealer knowingly misrepresented the value of the investment.

The customer would bring a timely claim for fraudulent concealment but would be unable to bring a claim for misrepresentation and fraudulent inducement for the original purchase.

202. *See generally* JOSEPH C. LONG, DIFFERENCES BETWEEN STATE AND FEDERAL STATUTES IN BLUE SKY LAW § 1.03 (1995).

203. In many instances, the damage arising from the misrepresentation of an investment's value is the loss of opportunity to make a timely claim on the original transaction. Accordingly, the damage calculation can easily erode into circular logic so as to hear damage calculations from the initial investment which is ostensibly barred from arbitration.

For further information about proving damages in a securities arbitration claim, the reader is directed to three articles printed in the 1995 edition of SECURITIES ARBITRATION compiled and published by the Practicing Law Institute: Howard G. Berg, *Presentation of Damages*, *in* SECURITIES ARBITRATION, at 507 (PLI Corporate Law & Practice Course Handbook Series No. B4-7107, 1995); James L. Keating, *Damages in Securities Cases: The Importance of Timely and Accurate Assessments by Both Sides*, *in* SECURITIES ARBITRATION, at 537 (PLI Corporate Law & Practice Course Handbook Series No. B4-

ants prove what they would have done had they known their investment was declining; in many instances the investor is unable to do anything, either because of a lack of liquidity or because of a complete devaluation in the investment. The ability to bring before the arbitrators the "independent claim" may seem equitable, but it engenders myriad, new problems on damages unless the arbitrators look back to the original investment which would circumvent the purpose and finality of the eligibility rule. Further, the new "independent" act of fraud is faced with statute of limitations defenses, often shorter than the securities claim which the arbitrators should apply.[204]

D. Summation

Congress adopted the FAA to validate and encourage the resolution of civil conflicts by non-judicial means.[205] As part of that process, parties may agree to limit what disputes will have a remedy. Disputes over six-years old, with the resultant loss of documents and loss of witness memory, may by agreement go uncompensated. The offset to this individual "cost" is a systemic benefit of a less costly and swifter resolution of the vast majority of claims that are brought well within the six-year eligibility period. Likewise, parties may agree to limit the method of dispute resolution. The judiciary should not expand its jurisdiction to disputes the parties have agreed to resolve outside of the judicial process.

In January 1996, the NASD Task Force proposed eliminating the eligibility rule, consistent with the approach of the AAA.[206] The elimination of the eligibility rule would end the judicial debate but would also end the industry's ability to defeat stale claims before

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7107, 1995); Carroll E. Neeseman & Maren E. Nelson, *Securities Arbitration Damages*, *in* SECURITIES ARBITRATION, at 417 (PLI Corporate Law & Practice Course Handbook Series No. B4-7147, 1995).

204. *See, e.g.*, FLA. STAT. §§ 95.11(3)(j), 95.11(4)(e) (1995) (four-year statute of limitations for fraud versus two-year statute of limitations with five-year statute of repose for securities violations). For a discussion on arbitrators obligation to apply a statute of limitations defense, see *supra* note 158 and accompanying text.

205. *Cf.* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (discussing congressional intent to encourage resolution of civil conflicts by arbitration in lieu of judicial decree).

206. Michael Siconolfi, *Major Changes Loom for Securities Arbitration*, WALL ST. J., Jan. 15, 1996, at A3.

expending vast sums on discovery. Public and political demand may necessitate the change in the arbitration rules. If the SROs eliminate the eligibility rule, it is unlikely that it will be retroactive for claims brought prior to the adoption of the amended rules. In fact, it may be applicable only to claims arising from an occurrence after a future date.[207] For the next several years, litigants will continue to struggle with the courts' conflicting determination of whether an arbitration eligibility rule is jurisdictional or substantive.

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207. Telephone Interview with Norman Sue, General Counsel, NASD (Jan. 18, 1996). The NASD Board of Governors expects to consider the proposals in the first half of 1996. *Id*. Thereafter, it is likely the Board will seek industry comment prior to submitting to the SEC for approval. *Id*. The adoption of a new eligibility rule is unlikely to be effective for at least a year. *Id*.