Between a Rock and a Hard Place: Defending Against Legally Meritless Claims in FINRA Arbitration

By JEFFREY PLOTKIN and ELI YAMPEL

I. FINRA Arbitration's Dual Challenges for Respondents' Counsel

In both federal and state courts, defendants can move to dismiss a complaint that fails to state a viable legal claim at the outset of litigation.[1] Such dispositive motions, which courts routinely grant, increase judicial economy and shield defendants from the pressure to settle frivolous claims to avoid high litigation costs.

Respondents in arbitration proceedings before the Financial Industry Regulatory Authority ("FINRA") Office of Dispute Resolution—the main forum for broker-dealer/customer and intra-industry claims—do not have a similar escape hatch. FINRA rules effectively prohibit arbitrators from dismissing claims for legal insufficiency until after the conclusion of the claimant's presentation of its case-in-chief at a full evidentiary hearing.[2] This procedural restriction arguably undermines the purported virtues of arbitration: speed, efficiency, and cost-effectiveness.[3]

FINRA's approach, designed to protect claimants' right to be heard, carries substantial consequences for respondents. Any claim, no matter how legally tenuous, can force respondents to incur significant litigation expenses over an extended period—even if dismissal as a matter of law would be all but guaranteed in court. As a result, settlements in FINRA arbitration are often motivated by pragmatic business pressures rather than the legal merit of claims.

Compounding this dilemma, FINRA arbitrators generally are not bound by the law and are empowered to dispense justice as they see fit. Further, respondents who receive an adverse FINRA arbitration award based on a legally meritless claim cannot successfully move a court to vacate the award on the ground of mere legal error. Instead, respondents must satisfy stringent statutory or judicially-created grounds to vacate the award that are all extremely difficult to satisfy.[4]

Respondents in FINRA arbitrations therefore face a "rock and a hard place" dilemma: they must bear the burdens, costs, and distractions of defending against legally meritless claims all the way through the evidentiary hearings, and then may be faced with adverse awards lacking a legal basis that courts are unlikely to set aside. This article provides guidance to counsel on how best to navigate these twin dilemmas.

A. The "Rock": Restrictions on Prehearing Dismissal

FINRA's rules enshrine the principle that claimants have the right to a full evidentiary hearing on their claims. FINRA Rules 12504 (for customer cases) and 13504 (for intra-industry cases) make clear that motions to dismiss on any grounds prior to the conclusion of the claimant's case-in-chief are strongly discouraged.[5]

Beyond generally discouraging the prehearing dismissal of claims, FINRA's rules preclude arbitrators from granting motions to dismiss unless they successfully establish one of three narrow grounds for dismissal: (i) the claimant released the claim in writing; (ii) the respondent was not associated with the relevant account, security, or conduct; or (iii) the claimant previously brought a claim regarding the same dispute against the same respondent and that claim was fully and finally adjudicated on the merits.[6] None of these exceptions include a failure to state a claim. Arbitrators typically defer any ruling on a motion to dismiss for failure to state a claim until after the claimant's case-in-chief at hearing.[7]

FINRA's rules also contain procedural quirks that reflect its reluctance to dispose of cases prior to a hearing. Unlike in court, a respondent must file its answer prior to moving to dismiss.[8] The motion to dismiss must be filed as a standalone document.[9] Each member of the arbitration panel must decide the motion together,[10] and the panel may not grant the motion prior to a prehearing conference, unless the conference is waived by the parties.[11] In order to grant the motion, even in part, the panel must issue a unanimous written decision containing its reasoning—a higher burden on the panel than the requirements of a post-hearing award, for which no explanation is required.[12] And the rules shift fees for losing parties: if the panel denies a motion to dismiss, it must assess the costs of the hearings on the motion against the moving party, and if the panel deems a motion to dismiss frivolous, it must award the opposing party its costs and attorneys' fees.[13]

Image credit: Irina_Strelnikova | Getty Images

For respondents, this means that even a plainly meritless claim almost always triggers an extensive adversarial process, including wide-ranging discovery and hearing preparation. The combination of business disruptions and mounting costs often compels respondents to settle meritless claims because there is no efficient way to quickly resolve such claims as a matter of law.

B. The "Hard Place": High Standard for Vacatur

Unlike the decisions of trial courts, arbitration awards are not subject to standard appellate review. The only recourse is a motion to "vacate" the award, either under the Federal Arbitration Act[14] (the "FAA") or state arbitration statute.[15] Because courts give extreme deference to the arbitration process, they will not vacate an arbitration award based on mere errors of law or fact.[16] The FAA and most state statutes allow vacatur only if the award was procured by corruption, fraud, or undue means; there was evident partiality or corruption; the arbitrators committed serious misconduct; or the arbitrators exceeded their powers.[17]

However, courts interpret the FAA as implicitly providing an additional, non-statutory ground for vacatur—where arbitrators act in "manifest disregard of the law."[18] Under this judge-made doctrine, a court may vacate an arbitration award only if it finds that the arbitrators (i) were aware of a well-defined and clearly applicable legal principle; (ii) appreciated its controlling nature; and (iii) nevertheless willfully refused to apply it.[19] State courts, too, may apply the FAA—including the manifest disregard standard—in deciding motions to vacate FINRA arbitration awards, because the matters contemplated in contracts containing FINRA arbitration clauses (securities transactions or employment in the securities industry) involve interstate commerce.[20]

The manifest disregard of the law doctrine remains a narrow but vital avenue for challenging FINRA arbitration awards that flout explicit legal standards. FINRA's Arbitrator's Guide emphasizes that "[a]rbitrators are not strictly bound by legal precedent or statutory law. However, it is important that arbitrators not manifestly disregard the law. By doing so, your award may be vacated. In other words, if the parties have provided the panel with the law, the law is clear, and it applies to the facts of the case, the arbitrators should not disregard it."[21] Nevertheless, it is exceedingly difficult to show manifest disregard of the law, especially because FINRA awards are usually perfunctory—merely stating the types of claims asserted, which party prevailed, and the amount of any damages awarded—without any explanation or reasoning for the panel's decision.[22]

II. Strategic Considerations for Respondents' Counsel

Defending against legally meritless claims in FINRA arbitration requires counsel to, among other things, create a clear and compelling record for a potential motion to vacate. On a motion to vacate for manifest disregard of the law, courts will presume that the arbitrators did not know the law and will impute to arbitrators only knowledge of governing law identified by the parties during arbitration.[23] Thus, respondents' counsel must treat every phase of the arbitration as an opportunity to educate the panel on the controlling, applicable law and the risk of vacatur for manifest disregard of it.

A. At the Pleading Stage

Counsel must carefully assess whether the law truly renders the claim meritless, and ensure the law is current, controlling, and from the correct state jurisdiction or federal circuit. Determining the correct governing law is essential but sometimes overlooked, despite the potentially ruinous consequences for citing and arguing the wrong law to the arbitrators.

While arbitrators generally honor a contractual choice-of-law clause, such clauses are commonly limited in scope, providing only that the contract will be governed or construed pursuant to the laws of a particular state. Such narrow provisions apply to the contract's interpretation and breach, but may not control non-contractual claims, including those sounding in tort or statute.[24] In the absence of an applicable choice-of-law provision, the panel should look to the choice-of-law principles of the arbitration's forum.[25] Generally, when there is no substantive conflict across jurisdictions, the law of the forum state will be applied.[26] By contrast, a genuine conflict of law requires the panel to analyze which jurisdiction has the "greater interest" in the matter, guided by the forum's own interest analysis or comparable framework.[27]

For federal claims, yet another layer of analysis may arise. In the absence of binding Supreme Court precedent, arbitrators should look to the law of the circuit where the arbitration is sited. Counsel's ability to clarify circuit splits or unsettled questions of law can therefore prove decisive. Counsel bears the burden of educating the panel on any potential choice-of-law issue, offering a well-reasoned rationale for the choice of law to be applied, and demonstrating clearly that the selected legal rule is both explicit and controlling.

Beyond the choice-of-law considerations, effective pleadings frequently present the respondent's position in terms of fundamental fairness. Courts defer to arbitrators' resolution of disputes even when the resolution is fashioned out of the arbitrators' own sense of fairness as opposed to a strict application of the law.[28] In that regard, it is typically effective to emphasize to the panel that businesses and individuals who act in conformity with the law should not incur liability simply because arbitrators may feel free to impose rough justice. The panel will likely be receptive to the argument that clear and universal legal norms must guide their decision-making because (i) businesses and individuals need to be able to operate under established legal norms that declare permissible conduct in order to properly function in the economy and society; and (ii) alternative dispute resolution offers a different path to justice, not a substitute for the rule of law.

Respondents' counsel must also be in tune with the procedural nuances of FINRA arbitration. If a respondent decides strategically to file a motion to dismiss for failure to state a viable legal claim (notwithstanding the FINRA rules that prohibit the pan-

el from granting such motions), the respondent must first file an answer stating all legal defenses with supporting authority, and only then may the motion follow in a separate document.[29] Though not required by rule, good practice is to attach copies of all controlling authority that precludes a claim, as this will bolster the argument that the panel was fully apprised of that authority. A carefully constructed motion to dismiss will educate the panel on the law and their obligation to apply it, and will preserve vital legal issues for subsequent review, whether by the panel after the conclusion of the claimant's case-in-chief at the evidentiary hearing or by a court reviewing a motion to vacate an adverse award.

If the panel actually grants a prehearing motion to dismiss for failure to state a legal claim, the courts will not necessarily vacate the award on the ground that the panel exceeded its powers under FINRA Rule 12504. For instance, in *Yarmak v. Penson Fin. Servs. Inc.*,[30] petitioner moved the New York Supreme Court to vacate a FINRA arbitration award that granted respondent's pre-hearing motion to dismiss the claim. Petitioner argued that the panel's dismissal of her claims prior to the completion of her case-in-chief violated FINRA Rule 12504's admonition that prehearing dismissal of claims is "discouraged." The court denied the motion to vacate and confirmed the award. On appeal, the Appellate Division affirmed the ruling, holding that the arbitrators had plenary authority to interpret Rule 12504 as they saw fit (based on FINRA Rule 12409)[31] and that any error in the panel's interpretation constituted "a mere error of law that does not provide a basis for vacatur."[32]

Image credit: Irina_Strelnikova | Getty Images

B. At the Prehearing Stage

The prehearing stage in FINRA arbitration provides respondents' counsel essential opportunities to reinforce legal arguments and methodically build the record. Taking full advantage of prehearing conferences and the prehearing briefing process allows counsel to focus the panel's attention on pivotal legal defects in the claims. Targeted interventions—such as insisting that the Panel's scheduling order provide for prehearing briefing addressing the viability of the legal claims—help frame the dispute with clarity and precision.

Respondents' counsel may also consider filing motions *in limine* aimed at excluding evidence proffered in support of legally unsupported theories. However, such motions are not without significant procedural considerations, because under FINRA's regime, such a motion may be treated as a prehearing motion to dismiss. Arbitrators are expressly cautioned in the Arbitrator's Guide to be vigilant for the misuse of *in limine* motions as mere delay tactics.[33]

Respondents' counsel should also consider whether to try and persuade claimants' counsel to file a joint request to the panel for an "explained decision," a fact-based award that states the general reasons for the arbitrators' decision (although it may not necessarily contain detailed legal analysis or precise calculations).[34] Requests for explained decisions must be supported by all parties and filed no later than the prehearing exchange of documents and witness lists.[35] While explained decisions are limited in scope, they can provide insight for potential post-award review and help clarify the panel's application—or disregard—of governing law.

C. At the Hearing and Beyond

The hearing phase provides a critical forum to reinforce and clarify legal arguments for the arbitrators. Counsel should use opening statements to highlight key legal standards, supporting each point with clear citations to the controlling law. During witness examinations, returning to these standards as issues arise underscores their centrality. Most importantly, at the close of the claimant's case-in-chief, respondents' counsel should make a verbal motion to dismiss the claims on legal grounds, incorporating by reference prior briefing on the issue, reciting the well-defined and explicit legal principles at issue, arguing that the panel's hands are effectively tied by the precedent, and noting for the record that the panel has been given a full opportunity to apply the correct standard. Thorough record-building is essential both for the panel's own deliberation and to preserve issues for appellate review under the manifest disregard doctrine in the event the award needs to be challenged.

Though rare, arbitration awards can be overturned when counsel meticulously crafts a record. *Barclays Cap. Inc. v. Shen*[36] illustrates how calculated legal advocacy can set the stage for successful vacatur. There, Barclays sought to vacate an award issued by a National Association of Securities Dealers ("NASD") (the predecessor to FINRA) arbitration panel on the grounds of manifest disregard of the law under the FAA.[37] Barclays argued that, despite the fact that New York law affords brokerage firms absolute immunity from monetary damages for defaming terminated employees in Form U5 filings, the arbitration panel awarded punitive damages to claimant Shen on her Form U5 defamation claim. The New York Supreme Court observed that the applicable law had been "vigorously argued before the panel in both oral and written motions," and concluded that the arbitrators, fully aware of this authority, deliberately chose to ignore it.[38] This constituted manifest disregard of law.[39]

While most motions to vacate FINRA awards rely on federal law—particularly the doctrine of manifest disregard of the law—state law may offer additional, albeit narrow, grounds to challenge an award. Connecticut's statutory bases for vacatur generally mirror the FAA's.[40] In addition to the typical statutory grounds for vacatur, Connecticut caselaw provides two more: (i) the award erroneously rules on the constitutionality of a statute; or (ii) the award violates clear public policy.[41] Although success on these alternative bases is rare, counsel should be aware of their existence and carefully prepare the record to preserve arguments in the event any state law ground for vacatur becomes relevant. This comprehensive, detail-oriented approach not only fulfills counsel's duty to the client but also serves to promote integrity and predictability within the arbitral process.

III. Conclusion

Effective advocacy in FINRA arbitration requires diligent and repeated education of the panel throughout every phase of the proceeding concerning the governing legal standards and their applicability. Because motions to vacate for manifest disregard of the law are rarely granted, the record supporting such an application must be methodically developed from the outset of the arbitration. Key legal arguments should be presented both in writing and orally, and the rationale for applying the law of the correct jurisdiction must be clearly articulated and supported with appropriate authority. In the end, professional and focused advocacy—addressing the substantive law while adhering to the appropriate procedural processes—remains the most reliable defense against legally meritless claims. ■

Jeffrey Plotkin *is a partner in the litigation group at Finn Dixon & Herling LLP in Stamford, Connecticut. Jeff's practice includes representing broker-dealers, investment advisers, financial services professionals, and others in a variety of regulatory, criminal, and civil litigation and arbitration matters nationwide.*

Eli Yampel *is an associate in the litigation group at Finn Dixon & Herling LLP in Stamford, Connecticut. Eli's practice includes representing private equity and corporate clients in high-stakes commercial litigation, sensitive internal investigations, and actions brought by the government or regulators.*

NOTES

[1] *See* Fed. R. Civ. P. 12(b)(6); Conn. Practice Book § 10-39(a).

[2] *See infra* Section I.A. Similarly, FINRA rules do not allow for the equivalent of a summary judgment motion after the close of discovery. *See* Fed. R. Civ. P. 56(a); Conn. Practice Book § 17-44.

[3] *Comprehensive Orthopaedics & Musculoskeletal Care, LLC v. Axtmayer*, 293 Conn. 748, 761 (2009) (contrasting arbitration with judicial proceedings and noting "the very purpose of arbitration" to be "efficient, economical and expeditious resolution").

[4] *See infra* Section I.B.

[5] FINRA Rules 12504(a)(1), 13504(a)(1) ("Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration."). FINRA's official guide for arbitrators underscores this principle, noting that "motions to dismiss filed prior to the conclusion of a party's case-in-chief are discouraged and granted only under limited circumstances." FINRA Dispute Resolution Services Arbitrator's Guide, March 2025 Edition ("Arbitrator's Guide") at 49.

[6] FINRA Rules 12504(a)(6)(A)–(C), 13504(a)(6)(A)–(C).

[7] FINRA Rules 12504(b), 13504(b).

[8] *Compare* Fed. R. Civ. P. 12(b) *and* Conn. Practice Book §§ 10-6, 10-7 *with* FINRA Rules 12504(a)(2), 13504(a)(2).

[9] FINRA Rules 12504(a)(2), 13504(a)(2).

[10] FINRA Rules 12504(a)(4), 13504(a)(4).

[11] FINRA Rules 12504(a)(5), 13504(a)(5).

[12] *Compare* FINRA Rules 12504(a)(7), 13504(a)(7) (an order granting a prehearing motion to dismiss "***must*** be accompanied by a written explanation.") (emphasis added) *with* FINRA Rules 12904(f), 13904(f) (a post-hearing "award ***may*** contain a rationale underlying the award.") (emphasis added), 12904(g), 13904(g) (an explained decision is only required when all parties request one).

[13] FINRA Rules 12504(a)(9), (10); 13504(a)(9), (10).

[14] 9 U.S.C. § 1 et *seq.*

[15] *See, e.g.*, Conn. Gen. Stat. § 52-407aa *et seq.*

[16] "A federal court cannot vacate an arbitral award merely because it is convinced that the arbitrat[or] ... made the wrong call on the law." *Shenzhen Lanteng Cyber Tech. Co. v. Amazon.com Servs., LLC*, 2024 WL 4356307, at *2 (2d Cir. Oct. 1, 2024) (citation omitted and alteration in original); *see also Ahmed v. Oak Mgmt. Corp.*, 348 Conn. 152, 187–88 (2023), *cert. denied*, 144 S. Ct. 2520 (2024) (noting a court reviewing an arbitration award must "put aside its judicial sensibilities" due to the deferential standard of review).

[17] 9 U.S.C. § 10(a); *accord* Conn. Gen. Stat. § 52-407ww(a) (generally governs agreements to arbitrate dated on or after October 1, 2018); Conn. Gen. Stat. § 52-418(a) (generally governs agreements to arbitrate dated before October 1, 2018). See Conn. Gen. Stat. §§ 52-407cc, 52-407eee.

[18] "[A] court may set aside an arbitration award if it was rendered in manifest disregard of the law." *Key Inv. Servs. LLC v. Oliver*, 2025 WL 1523350, at *2 (2d Cir. May 29, 2025); *see also Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

[19] *Key Inv. Servs. LLC*, 2025 WL 1523350, at *2 ("An arbitration award 'manifestly disregards the law,' however, 'only in those exceedingly rare instances where' '(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case.'") (quoting *Smarter Tools Inc. v. Chongqing SENCI Imp. & Exp. Trade Co.*, 57 F.4th 372, 383 (2d Cir. 2023)).

[20] *Hottle v. BDO Seidman LLP*, 268 Conn. 694, 702 (2004) ("The arbitration act; 9 U.S.C. §§ 1 through 16; governs written arbitration agreements that pertain to contracts involving interstate commerce."); *Ungerland v. Morgan Stanley & Co.*, 52 Conn. Supp. 164, 170–71 (Super. Ct. 2010) ("[I]f the original contract involved interstate commerce, then the substantive law of the Federal Arbitration Act applies, no matter that this case is in state court"), *aff'd*, 132 Conn. App. 772 (2012); *Pendergast v. Wells Fargo Clearing Servs., LLC*, 2024 WL 136912, at *2 (D. Conn. Jan. 12, 2024) ("Contracts that involve interstate commerce are governed by the FAA, not the analogous Connecticut statute").

[21] Arbitrator's Guide at 64.

[22] FINRA Rules 12904(f), 13904(f) (a post-hearing "award ***may*** contain a rationale underlying the award.") (emphasis added); 12904(g), 13904(g) (noting an explained decision is only required when all parties jointly request one).

[23] *Success Sys., Inc. v. Maddy Petroleum Equip., Inc.*, 316 F. Supp. 2d 93, 100 (D. Conn. 2004) ("[C]ourts should assume that the arbitrator is 'a blank slate unless educated in the law by the parties.'") (quoting *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002).

[24] Connecticut courts examine the wording of the choice-of-law provision to determine whether it governs extra-contractual claims or is limited to the construction of the contract. *Norwich Com. Grp., Inc. v. Quintalino*, 2024 WL 811851, at *3 n.3 (D. Conn. Feb. 26, 2024) ("A narrow choice of law provision . . . may not apply to related tort claims.") (alteration in original); *Grey Mountain Partners, LLC v. Insurity, Inc.*, 2017 WL 5641378, at *5 (Conn. Super. Ct. Oct. 18, 2017) (discussing the varying scope of choice-of-law provisions depending on their breadth).

[25] *Bos. Prop. Exch. Transfer Co. v. Pierce*, 2013 WL 6916696, at *6 (Conn. Super. Ct. Dec. 2, 2013) (""In determining the governing law, a forum applies its own conflict-of-law rules. . . .") (quoting *Gibson v. Fullin*, 172 Conn. 407, 411–12 (1977)).

[26] *See, e.g., Ultimate Nutrition, Inc. v. Leprino Foods Co.*, 747 F. Supp. 3d 371, 379 (D. Conn. 2024).

[27] Connecticut applies a "'most significant relationship' test found in §§ 6 and 145 of the Restatement (Second) of Conflict of Laws." *Bos. Prop. Exch. Transfer Co.*, 2013 WL 6916696, at *11.

[28] *See generally* Ahmed, 348 Conn. at 192 ("[A]rbitrators are generally afforded greater flexibility in fashioning remedies than are courts.") (quoting *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 902 (2d Cir. 2015)); *Norwich Roman Cath. Diocesan Corp. v. S. New England Contracting Co.*, 164 Conn. 472, 475 (1973) (noting that the arbitrators were empowered to "grant any remedy or relief which they deem just and equitable."); *id.* at 478 (observing that a referee reviewing the award "was not required to review the evidence on which the award was based or to ensure that the judgment of the arbitrators was either factually or legally correct.").

[29] FINRA Rules 12504(a)(2), 13504(a)(2).

[30] 146 A.D.3d 642 (1st Dep't 2017).

[31] "The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties." FINRA Rule 12409; *see also* FINRA Rule 13413.

[32] *Yarmak*, 146 A.D.3d 642.

[33] "Parties may try to include other issues for ruling when filing motions in limine, including requests to dismiss one or more of the alleged claims. Arbitrators should treat any requests for dismissal of claims as motions to dismiss and respond to them in accordance with FINRA's motion to dismiss rules. As with all motion practice, arbitrators should be alert to the possible misuse of motions as tactics to delay the hearing." Arbitrator's Guide at 51.

[34] FINRA Rules 12904(g), 13904(g).

[35] *Id.* In cases involving legally dubious claims, claimants' counsel likely will determine that an explained decision is not in the best interests of their clients and decline to join the request.

[36] 20 Misc. 3d 319 (Sup. Ct., New York County 2008).

[37] *Id.* at 320.

[38] *Id.* at 326.

[39] *Id.*

[40] Conn. Gen. Stat. § 52-407ww(a); Conn. Gen. Stat. § 52-418(a). § 52-407ww(a) also includes additional defenses based on the lack of an agreement to arbitrate or a lack of notice, but neither is likely to apply to a FINRA arbitration.

[41] *Garrity v. McCaskey*, 223 Conn. 1, 6 (1992).