
IN BRIEF

RANDOM STATS, 20 YEARS & PRESENT: *SAC has been gathering statistics about securities arbitration, since Awards first became publicly available in May 1989. In this piece, we present some new figures regarding current Awards and, strictly from a statistical perspective, we reviewed the accomplishments of the past two decades.*

20-Year Review: Since May 1989, more than 43,000 Awards have been issued by securities arbitrators serving a variety of SRO and other forums. About three-quarters of those Awards involved customers with claims against broker-dealers and those divide into two categories: Small Claims (\$25k & under) and Customer-Member (over \$25k). Small Claims customers have been awarded some \$23 million by securities arbitration panels, according to SAC's Award Database, and, most impressively, prevailing customers in Customer-Member Awards have won more than \$2.5 billion in damages from various broker-dealers. Employees with arbitration grievances have fared well in arbitration, too. Only several thousand such Awards have been tried to conclusion since 1989, but employees have won awards totaling about \$450 million in those decisions. Of course, as FINRA likes to point out, Awards are only 20% of the story, because so many disputes are settled within the arbitration framework. Those settling employees and customers must be deemed to have reached satisfactory resolutions. The money involved in concluding those claims can only be guessed at, but would surely double or triple the totals displayed in the Award records.

Recent Data: For the 2008 collection of our newest publication, *Securities Awards Monthly (SAM)*, we revamped the charts and figures to provide more statistical detail. One of *SAM*'s objectives is to review the latest Awards issuing from FINRA and other forums to highlight tactical and other useful information for arbitration practitioners, experts and arbitrators. A new quarterly chart, "BD/Broker Win-Loss Chart," focuses on the Awards issued in the latest full quarter. This is the first time we have produced this Chart and we were interested to see the figures on how often claiming customers name only the brokerage firm and how often they name both the firm and an individual (presumably the broker). While we often hear Claimants' attorneys state that they have abandoned naming the broker as a Respondent in their cases, this Chart shows that the practice is still prevalent. Of 112 Customer-Member Awards that issued in the last quarter of 2007, the broker and the brokerage firm were named in 69 matters, or 62% of the instances. Who pays when both are named? The customer-Claimant won in 46% of those cases and in the majority of the cases, both the broker and the firm paid. Somewhat surprisingly, when only one pays, which happens about 38% of the time, the broker is tagged twice as often as the firm. (SAC Ref. No. 2008-16-02)

2007 AWARDS IN REVIEW: *The 2007 S.A.M. 12 issue of SAC's Securities Awards Monthly (SAM) newsletter reviews the 1,500 securities arbitration Awards recorded during the past year and analyzes the results from a number of perspectives.* The *Awards Monthly* publication focuses on the latest securities arbitration Awards and provides summaries of selected Awards, plus statistics about the group as a whole. The following is merely a sampling of statistics for the year, which are reported more completely in this issue of *SAM*.

Explained Awards: While FINRA has not been able to move forward with its proposal that Arbitrators provide explanations with their Awards, some arbitrators are doing just that on their own. About 70 Explained Awards were rendered by arbitration panels during 2007. That is about 5% of the total on average for the whole year and, in the final six months, the average was about 7%. Summaries of these Explained Awards appear in *SAM*, as they are issued and recorded in SAC's Award Database, and throughout the year.

Monetary Award Statistics: About half of the Awards issued involved customer claims against broker-dealers that exceeded \$25,000 (Customer-Member), with customers winning a monetary award in only 38% of these cases. They fared even worse in the Small Claims arena, where the "win" rate for customers with claims not exceeding \$25,000 tallied about 34%. The median recovery rate for Customer-Member Awards was 31% and the median Award in that category was \$98,500. The success rate for winning customers requesting attorney fees was 24% in the Customer-Member category and 22% in the Small Claims category. One attorney fee award granted to a customer's counsel topped \$2.4 million, while the median attorney fee award was about \$30,000 in Customer-Member cases. The highest punitive damages sanction was \$5.2 million to a customer and winning customers received a punitive damages element in about 8% of their cases.

Big-Dollar Awards: Four Awards granting damages in excess of \$5 million issued during 2007, two of which were Customer-Member Awards (NASD ID #s 04-08870 & 05-04382). The largest Award, *Alt v. FleetBoston Financial* (NYSE ID #2002-011191) combined awards to a group of brokers totaling \$14.7 million. The single Member-Member Award (NASD ID #06-04452) involved a \$5.2 million assessment and the two Customer-Member Awards recorded amounts of \$9.3 million and \$8.0 million, respectively. In the monthly periodical, we list information about all Awards of \$500,000 and over, but for the yearly summary, we limited coverage to \$5 million and more.

BD Use of Counsel: The top six broker-dealers accounted for almost half of the Awards issued during 2007. That is a far cry from the late 90s, when our surveys indicated that the larger broker-dealers accounted for less than 20% of the Awards. Outside counsel has a much greater role today, even a dominant one at some houses, than in the late 80s, when arbitration was the domain of inside counsel. Only A.G. Edwards continues to handle virtually all arbitration matters (at least those that come to Award)

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in-house and only one other broker-dealer assigned more cases to inside counsel than to outside. Wachovia Securities assigned 28 cases to inside counsel and 50 to outside counsel of the matters that went to Award. We will be interested to watch to see whether, with Wachovia acquiring A.G. Edwards, the mix will change at the new Wachovia. (*A complimentary copy of the year-end SAM is available upon request by any SAC subscriber.*) (SAC Ref. No. 2008-13-02)

FINRA PHONE-IN CONFERENCE, 03/08: *On March 13, 2008, the Dispute Resolution staff hosted a telephone conference for its neutrals on a variety of topical matters and more than 1,700 arbitrators and mediators tuned in.* The Phone-In Conference is now available on FINRA-DR's WebSite in MP3 format for those who did not attend. In addition, a 24-page presentation outline used for part of the program may be downloaded from the WebSite; that outline was sent to attendees after the phone-in. The program, moderated by George H. Friedman, FINRA-DR Director of Arbitration, led off with a short presentation by Linda D. Fienberg, FINRA-DR's head.

Rules & Filings: Ms. Fienberg discussed the rule proposals pending with the SEC at this juncture, with particular focus on the Dispositive Motions Rule and the companion rule changes to the six-year eligibility rule. She reported that the Expungement Relief rule revisions adopted by the FINRA Board in December have been drafted and were filed with the SEC that day (3/13). The provisions do not change the affirmative findings arbitrators need to make under Rule 2130, but add further procedural requirements to assure that the findings, if made, have been properly made. At the close of her talk, Ms. Fienberg addressed the many inquiries received at FINRA-DR from arbitrators who have not been called to serve for long periods. Dramatic drops in new filings have occasioned this situation, she stated, but the past two months indicate that filings may be bouncing back. She mentioned, specifically, that some 100 claims have been received relating to sub-prime instruments. The majority of these claims relate to alleged misrepresentations and non-disclosures when investors purchased mutual funds that later invested in debt securities collateralized by sub-prime mortgages. Auction notes, or auction rate securities, have also contributed to the filing numbers.

E-Discovery: John J. Flood and Sarah Gill of FINRA's General Counsel's Office provided a very informative session on electronic discovery, how it fits into the discovery process and how it differs from paper discovery. The pair discussed the changes to the Federal Rules of Civil Procedure that have been made to incorporate electronic discovery into the federal discovery process, the nature and benefits of metadata, the meaning of embedded data, the magnified cost burdens associated with overbroad requests, and the ways in which arbitrators can apply reason and discipline when dealing with discovery requests and subpoenas in this area.

Subpoena Requests: Arbitrators are now and for the past year have been the only authority designated to issue subpoenas in FINRA arbitrations. As a consequence, the scope of discovery and the fairness of the process depend more than ever upon the arbitrators. Mr. Flood and Ms. Gill urged arbitrators to be careful when reviewing document requests from parties to assure that they are clear to the layman, that they limit document production to relevant dates, subject matter, and a volume that meets common sense and reason. Arbitrators should place themselves in the shoes of the parties involved on both sides and provide enough time for response in granting production requests. "Ask yourself how long it would take you to collect, review, and produce the documents if you received the subpoena," the lawyers advised, and "[n]ote that parties do not always serve subpoenas immediately."

Arbitrator Immunity: Mr. Flood and Ms. Gill ended their presentation with advice for arbitrators as to how best to stay out of arbitration-related litigation and what to do if they are named or called as a witness in litigation. Mr. Flood listed the "best practices" that arbitrators can observe in order to relieve any cause for suspicion that arbitrators were biased or unfair in their conduct of the proceedings. Arbitral immunity and testimonial immunity are strongly adhered to by the courts, but arbitrators must watch their own conduct to assure that these privileges will be applied. Complete disclosure first and foremost assures that potential conflicts are aired and that parties are informed about who you are and the relationships that exist between you and those associated with the case. Ms. Gill discussed the top reasons why arbitrators are wrongly sued post-Award or receive subpoenas for testimony; oftentimes, she says, parties or their counsel wrongly believe that they must name the arbitrators. FINRA defends its neutrals and has an excellent record of protecting arbitrators from liability or appearances in these lawsuits. Neutrals were advised to contact the General Counsel's Office directly, rather than going through FINRA-DR. (*ed: The presentation outline contains citations to articles and case law regarding electronic discovery issues, arbitral immunity, and testimonial immunity. Caution: the PDF file is surprisingly large, so take care in downloading and opening the file.*) (SAC Ref. No. 2008-13-01)

FINRA ARB PROPOSALS – SOME COMMENTS: *Despite the SEC staff's moving four FINRA-DR proposals into the Federal Register within a very short period of time, quite a few people managed to submit comments. A summary of comments on key proposals appears below:*

SR-FINRA-2008-021. The Commission's announcement Release (SEC Rel. 34-57497, dtd. 3/14/08) was published in the Federal Register on March 20, 2008 and the comment period formally ended on April 10, 2008. We count about 120 comment letters, mostly from Claimants' counsel, but with a good showing from Respondents' counsel. The last posted comment letter was dated April 26, 2008. SIFMA commented on behalf of the securities industry, in a letter from Edward Turan, the head of

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