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2008 Award Survey: Perspective & Resurgence

A SAC Award Survey Comparing Results in 2008 to 2002-2007

Introduction

Most recently, as we emerge, dazed by the sudden economic collapse, and peer about at the wreckage, we are being told that houses are selling again and that businesses are reporting profits beyond analysts' targets. Quite recently, the Dow hit 10,000 again and some of the big financial services companies reported renewed earnings growth. While these hopeful signs may be evidence of an economic recovery, they must also be evaluated with perspective.

Are we seeing recovery or the eye of the storm? Houses have fallen significantly in price, so those with money (or who know banks that are still lending money) are scooping up apparent bargains. Interest rates are at historic lows, but it seems they are being artificially restrained. Many worry that a new wave of foreclosures remains in the wings, particularly if rates do rise. Businesses, particularly the multinationals, were quick to lay off huge numbers of people in the wake of the crisis and that has lowered overhead significantly. By dint of that fact, any increase in sales must mean increased profits.

The market meltdown with its concomitant investor losses has similarly been reflected in the arbitration case filings that FINRA is experiencing. Filing volume in 2008 grew steadily, year over year, throughout the year, as the losses from auction-rate securities and other derivative investments became evident and, when the inevitable consequence of those failures hit the market as a whole, filings really surged. Customers filing arbitration claims doubled their business with FINRA and drove a 54% overall increase in new submissions of all types by the end of 2008.

Indeed, at the two-thirds mark — which is where we stand as we review the 2008 Award results for securities arbitration — filings in 2009 through August are 65% ahead of 2008's pace and already equal in number to the total for last year. But, let's also put this clearly strong surge in some perspective. 2007 was the low point for new case volume for, perhaps, two decades. At 3,238, it had nowhere to go but up. 2009 could end up being a record year for the FINRA forum, but 2008's final tally of 4,982, when compared to the yearly volumes of the decade before, only beat the two anemic years of 2006 and 2007.

Arbitration is certainly in a period of recovery, whether the economy is or not, but 2008 was, all said and done, an average year. In fact, on the close-out side, it was a dismal year from a production perspective. According to FINRA reports, only 897 Awards issued throughout the entire year. That is truly anemic, in comparison to a historical Award volume that has generally run around 2000 per year. Only three years before, in 2005 for instance, FINRA reported 2,122 Awards decided by its arbitrators.

Thus, 2008 was a year of shifting, sometimes countervailing, currents. What do we find, then, as we review the 2008 Award results? With new brands of cases from the meltdown, the high-yield money fund disputes, the Ponzi scheme exposures and "selling away"

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disasters entering the case flow – mixing with and replacing the ARS and subprime-related matters – arbitrators were clearly challenged by the meat of the subject matter. In sum, 2008 was a year of varied case models and of increasing magnitude – in dollars, in numbers, and in investor distrust of the markets. This is the arbitration landscape that we now survey.

Methodology & Caveats

Last October, when we conducted our annual Award survey for the period 2003-2007 (2008 SAC 1(1)), we deviated from our traditional format and focused upon individual broker-dealer results. In that article, which is posted on the "View Award Surveys" Page of SAC's WebSite, we analyzed results, in terms of "wins" and median and average recoveries, for the six most active broker-dealers in securities arbitration and a second tier of a dozen smaller brokerage firms. The analysis covered customer-initiated and employee-initiated cases with yearly breakouts and total dollars awarded.

This year's review necessarily returns to the traditional presentation followed in our 2006 Award Survey (2007 SAC 2(1)). With only 900 Awards issued during the full year, we have to be cautious about representative samples, when testing categories within the whole. We generally exclude Stipulated Awards from our Survey numbers, so that reduces the core samples even further (although Stipulated Awards are, as a result of the changes in the expungement rules, becoming less of a factor – about 17% amongst 2008's CustomerMember Awards). Stipulated Awards are not the product of arbitration decisions on the merits of a dispute, but of negotiations between the parties that are memorialized in an Award in order to secure one or another aspect of the settlement agreement (e.g., expungement relief or installment payments).

Settlements are not reflected in the figures we present as Survey results. Data about settlements are not publicly available and, yet, settlements account for the bulk of the (presumably satisfactory) outcomes for customers and employees. While the number of Awards fell in 2008, they were, as a portion of the whole, larger than in the past two Survey years. In 2008, the 897 Awards accounted for 24% of the cases closed by FINRA, whereas in 2006 and 2007, decided cases were only 21% of the whole. Settlement rates are dropping, for a variety of reasons having to do with case dynamics and economic dynamics, and that trend has continued into 2009.

In determining "win" rates, readers should understand that we count as

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a "win" any monetary award assessed by the arbitrators (other than fees and costs). Those upset with the inflationary effect that may have on the "win" results may find company with those of another camp who object to the deflationary features of our "recovery" rate analyses. Ultimately, we must base our calculations on figures disclosed in the Awards. Thus, if an employee makes an outrageous claim for "compensatory" damages stretching from the date of his/her termination through the rest of his/her working years, we honor that assessment and include it as the denominator over which we place the numerator of dollars awarded.

Dollars awarded, we should disclose, include all amounts assessed by the arbitrators, other than fees and costs. That may seem like a comparison of apples to oranges to the purist, but it is the most practical approach, given the information available in the Awards, and it "compensates" somewhat – only by a fraction – for the excesses in the claims figures. To adjust for these imperfections, to the extent we can, we present both average recovery rates and median recovery rates. The latter has a percussive effect on the impact of the outliers for the total statistical results, especially with smaller samples. In very large samples, we find the average recovery rate to be the more representative of true expectations.

The Charts that follow – along with our commentary on each – seek to compare Award results on a yearly basis from 2002-2008. The Charts number five and approach each year's Awards in the following manner:

Chart 1 — Award Volume, Distribution & Win Rates: Four categories of Awards form the Chart's columns (Customer/Member, Small Claims, Member/Employee and Employee/Member). The Chart shows the reader the "win" rates for each category, plus the changing Award volume over the years and the distribution of Awards among these major categories.

Chart 2 – Small Claims Awards, Win Rates: Customer-initiated cases involving $25,000 or less will proceed "on the papers," unless the customer opts for a merits hearing. We also look at how frequently Small Claims investors are represented by counsel. Do these variables have an impact on "win" rates? This Chart addresses such possibilities.

Chart 3 – Recovery Rates: CustomerMember (<$1M) Awards: By limiting the range of compensatory claims to cases involving more than $25,000, but not more than $1 million, this Chart seeks to define the usual (calculated by both the median and average) recovery an investor can expect in securities arbitration. This focus also permits a more reliable look at yearly comparisons over the seven-year period.

Chart 4 – Employee Member Awards, Win & Recovery Rates: Employee disputes with former employers over compensation, hiring and firing decisions, and account transfers form an array of disputes within this one category. This Chart presents data on the aggregate damage amounts involved and how often and in what manner arbitrators distributed them.

Chart 5 – Total Amounts Awarded: This Chart returns to the four categories in Chart 1 and provides data about the aggregate amounts awarded in each category and how much of the total was comprised of punitive damages awards and attorney fee assessments.

CHART 1 – TOTALS, TYPES & TALLIES

Customer-Initiated Awards

"Win" rates for customers have been sinking since the start of the new Millennium, moving from highs in the mid-50s to a low of 36% in 2007. Small Claims disputes have, in the past decade, been reflecting a gap in "win" rates, when compared to their bigger brother, "Customer/Member" Awards, where customers claim amounts are greater than $25,000. From our observations, though, both Customer/Member Awards and Small Claims Awards have been turning in steadily lower "win" results for the public investor.

That trend appears to have hit a bottom and rebounded, when one compares the difference in results between 2007 and 2008. In 2007, according to the Award results on Chart 1, the Small Claims "win" rate hit an abysmal low of 29%, the first time to our knowledge that this sector has performed so poorly for the investor. However, in 2008, the Small Claims sector recovered dramatically to 41%. Not only did the "win" rate rebound, but it also closed the gap between Small Claims and Customer/Member Awards to a modest 2% (43% to 41%). That gap is the smallest it has been during any year in the past decade.

Overall, the "win" rate on the customer side of Chart 1 rose from 36% to 42%, which still ranks lower than the average for all years combined (2002-2008). Interested in whether that upward trend continued into 2009, just as the surge in filings did? Well, we have that answer, because we surveyed the first quarter's Awards in *SAM,* our *Securities Awards Monthly* publication, and found that Customer/Member "win" rates for the Awards in that quarter reached 53%. Small Claims Awards, however, dropped back into the 30s, yielding a 37% "win" rate from that three-month sample. FINRA reported a 47% overall "win" rate for customers in the first quarter and we calculated 48%.

Industry-Initiated Awards

The number of disputes that associated persons and broker-dealer entities fight through to an Award has remained relatively stable over the years. On the Member/Employee side, the range of Awards, in terms of annual totals, stayed between 220 and 273 from 2002-2006. Similarly, the number of Employee/Member Awards fluctuated narrowly from 172 to 206 during that period. In 2007, though, the numbers dropped below that norm (200 and 166) and continued below that norm in 2008 (162 and 171).

"Win" rates for employers in Member/Employee Awards have also been quite stable, ranging from 83-89% dur-

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Chart 1

Award Volume, Distribution & Win Rates
By Type of Dispute & Year (2002-2008)

Year	CustomerMember Wins/All (#) Win Rate (%)	SmallClaims Wins/All (#) Win Rate (%)	All Cust. Wins	MemberEmployee Wins/All (#) Win Rate (%)	EmployeeMember Wins/All (#) Win Rate (%)
2002	690/1304 (53%)	108/283 (38%)	50%	192/220 (87%)	99/172 (58%)
2003	704/1422 (50%)	148/319 (46%)	49%	186/220 (85%)	106/188 (56%)
2004	793/1600 (50%)	213/622 (34%)	45%	209/238 (88%)	107/206 (52%)
2005	616/1356 (45%)	169/472 (36%)	43%	242/273 (89%)	101/193 (52%)
2006	395/942 (42%)	57/180 (32%)	40%	189/229 (83%)	103/178 (58%)
2007	217/582 (37%)	36/124 (29%)	36%	161/200 (81%)	74/166 (45%)
2008	158/370 (43%)	45/111 (41%)	42%	135/162 (83%)	72/171 (42%)
All Years Combined	3573/7576 (47%)	776/2111 (37%)	45%	1314/1542 (85%)	662/1274 (52%)

Notes to Chart:

1. Stipulated Awards are excluded from the numbers.
2. "CustomerMember" Awards describe disputes by complaining customers that involve $25,001 or more, while "SmallClaims" Awards identify disputes by complaining customers that involve $25,000 or less.
2. The term "Wins" signifies a "win" for the Claimant. Any monetary award in favor of the Claimant is counted as a "win."
3. The "win rate" is determined by dividing the number of Awards that are "wins" into the total number of Awards that issued in that category of dispute and year.
4. The four types of dispute reflected in this Chart represent the great majority, but not all, of the Awards that issued during each of the given years. Other dispute categories include CustomerEmployee, MemberMember and NonMember Member.
5. The "All Cust. Wins" column combines the results in the "CustomerMember" and "Small Claims" columns to arrive at a "win rate" for all customer Claimants. The "win rates" for all years, 2002-2008 combined, are caluclated by adding together all "wins" and dividing the sum into the sum of all Awards in that category..

ing 2002-2006. For 2007 and 2008, Member/Employee "win" rates came in at or below those norms. Member/Employee cases are characteristically collection-type cases, in which the firms seek recovery of sums loaned to brokers as part of an upfront "bonus" in the form of a forgivable loan or otherwise. The sums are fixed and the loans are generally evidenced by a signed note, so the firms are overwhelmingly successful, both in terms of "win" and recovery rates.

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Chart 2

Small Claims Awards (SCA) "Win" Rates
By Presentation & Representation (2002-2008)

Year	Merits Hearing Wins/All (#) Win Rate (%)	On the Papers Wins/All (#) Win Rate (%)	MH v. All SCA[4]	Cs Pro Se Wins/All (#) Win Rate (%)	Cs w/ Counsel Wins/All (#) Win Rate (%)	Pro Se v. All SCA[5]
2002	11/30 (37%)	97/253 (38%)	11%	64/162 (40%)	44/121 (36%)	57%
2003	38/63 (60%)	110/256 (43%)	20%	88/193 (46%)	60/126 (48%)	61%
2004	30/62 (48%)	183/560 (33%)	10%	67/182 (37%)	146/440 (33%)	29%
2005	17/44 (39%)	152/428 (36%)	9%	47/134 (35%)	122/338 (36%)	28%
2006	13/50 (26%)	44/130 (34%)	28%	28/101 (28%)	29/79 (37%)	56%
2007	9/36 (25%)	27/88 (31%)	29%	26/90 (29%)	10/34 (29%)	73%
2008	10/31 (32%)	35/80 (44%)	28%	28/87 (32%)	17/24 (71%)	78%
All Years Combined	128/316 (41%)	648/1795 36%	15%	348/949 37%	428/1162 37%	45%

Notes to Chart:

1. Stipulated Awards are excluded from the numbers.
2. The term "Wins" signifies a "win" for the Claimant. Any monetary award in favor of the Claimant is counted as a "win."
3. The "win rate" is determined by dividing the number of Awards that are "wins" into the total number of Awards that issued in that category of dispute and year.
4. The "MH v. All SCA" column presents percentages for each year that represent the ratio between those Small Claims Awards (SCA) in which an oral hearing was conducted and the total number of SCAs.
5. The "Pro Se v. All SCA" column presents percentages for each year that represent the ratio between those Small Claims Awards (SCA) that are handled by customers without counsel (pro se) and the total number of SCAs.
6. In 2008, of the 10 Claimants who opted for a merits hearing and won, five of them represented themselves and five were represented by counsel.

Employee/Member disputes are more diverse in nature and the damage figures are especially prone to subjective adjustments (as Chart 4 reflects). The disputes are oftentimes straightforward compensation disputes, but more usually they involve tortious conduct, such as defamation, discrimination, retaliatory discharge, and wrongful conduct leading to termination or constructive discharge. Money is not always an adequate salve for these personal wounds and that fact often leads to very large, perhaps even exaggerated, compensatory claims.

Compensatory damages claimed by the 72 winning Awards appearing in column 5 of the 2008 Awards in Chart 1 totaled $187 million; an additional $46 million in punitive and other damages enriched the claims further. Although those 72 Awards resulted in

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recoveries for the successful employee-claimants totaling $50.6 million – more than $700,000 in average recoveries; yet, that hefty sum does not approach what was claimed.

One change we noted with some surprise. Throughout the period of decline in the "win" rates for customers, "win" rates for employees in Employee/Member Awards had remained relatively stable and above 50%. That changed in 2007 and in 2008; the "win" rate for employees averaged out to 42% in 2008. That is the same "win" rate as customer-initiated Awards experienced, except that the result for Employee-Member Awards stands 10 points below the average for all years combined. We have no ready explanation for that dramatic change; it is a possible trend that will require watching.

CHART 2 – SMALL CLAIMS: FACING TWO CHOICES

As we determined in reviewing Chart 1, Small Claims customers fared much better in 2008 than in the trough-year of 2007, but why and how does that break out, when the additional factors of representation and hearing choice are considered? Small Claims customers have the choice of requesting a live hearing before the Arbitrator, but the default choice is no hearing, more commonly called "on the papers (OTP)." This decision certainly changes the dynamics of the proceeding and, therefore, may influence the outcome. Similarly, the choice to be represented by counsel may have a bearing on the outcome.

Chart 2 attempts to measure the impact of these factors. Historically, claimants in this category have regularly won more cases when they requested a live or "merits" hearing than when they accepted the default. Chart 2 indicates that, viewing 2002-2008 in the aggregate validates this proposition. Cases that proceeded before the Arbitrator via a merits hearing achieved a "win" rate for all years combined of 41%, whereas cases that proceeded "on the papers" without a merits hearing won only 36% of the time.

Working against the idea that the customer should opt for a merits hearing are the results for the past three years. While merits-hearing claimants win more often over the seven-year period surveyed, they have not won more frequently during the past three years. Something has changed. We tested a number of possibilities – repeat arbitrators, repeat situses, more frequent representation in OTP matters — in the 2006 Award Survey article, when this phenomenon first appeared. The evidence did not permit a firm conclusion.

It makes sense to us that settlements in the merits hearing area are far more likely to occur. The cost of preparation and attendance at hearing would seem to warrant at least a token offer from Respondents in most cases, whereas submitting a well-reasoned answer and relevant documentation in an OTP case plays to the brokerage firm's strong suit and can be accomplished at little cost. More settlements in the Merits Hearing category would characteristically produce a lower "win" rate, because the cases most likely to be contested would be those least worth settling.

More settlements does not appear to be the answer, though, since, in the years 2006-2008, the percentage of merits hearings among all Small Claims Awards has increased. If there were more merits-hearing settlements, one would expect the ratio of Awards in those cases, as compared to the whole, to grow smaller, not larger. That is not the case – in 2006-2008, while Small Claims claimants chose merits hearings an average of 15% of the time for all years combined, claimants during the years 2006-2008 chose merits hearings 28 or 29% of the time.

Small Claims claimants proceed *pro se* about 45% of the time, according to the "All Years Combined" percentage in Chart 2, but that figure is skewed, by a dip into the high 20s in 2004 and 2005, when a few claimants' firms offered representation in the "research analyst" cases; note that an unusually large number of Small Claims Awards appeared in those years. Generally speaking, the *pro se* percentages have placed in the high 50s and low 60s, but that, too, has changed in the last two years.

In 2008, a historically high percentage (78%) of Small Claims customers proceeded without representation and, ironically, counsel who did represent such customers enjoyed an unusually high "win" rate of 71%. If all of those winning counsel chose the OTP route, then that would lift the OPT "win" rate, but that is not what happened either. Four of the 17 winning counsel opted for a merits hearing, which is not much different than the 28% reflected on Chart 2 for all Small Claims Awards. We checked the list of counsel in the 2008 column. There were a couple of securities arbitration clinic cases, but no one attorney appeared in more than two of the 17 "win" Awards.

CHART 3 – RATING RECOVERY RATES

Recovery rates, i.e., the amount winning claimants are awarded, as compared to how much they claimed to have lost, are the most controversial statistics we publish. They are volatile, particularly in employment disputes (see Chart 4), and are quite dependent upon the unsteady premise that claimants will not inflate the amounts they request in compensatory damages.

While they may, indeed, be imperfect, we believe that recovery-rate determinations answer the second question new claimants will ask after "what are my chances of winning?" That question is, "If I win, how much can I expect to win?" FINRA does not attempt to calculate recovery rates, although it does publish "win" rates on customer Awards. The forum did make an attempt to publish more realistic claim figures by revising the forum's hearing script in April 2008 to ask claimants to state a final compensatory claim request before the close of hearings.

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Chart 3

Recovery Rates: CustomerMember Awards 2002-2008

Range of Compensatory Claims: $25,001 to $1 million

Year	Avg Recovery (%) Avg Award/ Avg Clmd Comp ($)	Median Recovery (%) Median Award/Median Comp Clmd ($)			
		All C/M Awards	Florida	New York	California
2002	$120.7/$244.4 **49%**	$54.2/$154.0 **35%**	$68.4/$180.0 **38%**	$47.2/$150.0 **31%**	$55.4/$117.5 **47%**
2003	$135.5/$290.7 **47%**	$69.8/$204.4 **34%**	$85.0/$200.0 **43%**	$56.5/$220.0 **26%**	$110.4/$216.0 **51%**
2004	$129.0/$307.4 **42%**	$71.3/$224.0 **32%**	$54.6/$220.0 **25%**	$58.9/$256.3 **23%**	$99.3/$288.0 **34%**
2005	$129.9/$299.6 **43%**	$72.0/$208.9 **34%**	$81.9/$191.0 **43%**	$70.0/$245.4 **29%**	$55.0/$200.0 **28%**
2006	$153.1/$279.0 **55%**	$67.1/$197.1 **34%**	$50.0/$152.1 **33%**	$67.1/$147.0 **46%**	$58.6/$124.0 **47%**
2007	$186.4/$350.8 **53%**	$88.8/$240.0 **37%**	$175.0/$296.1 **59%**	$64.0/$133.5 **48%**	$100.0/$162.2 **62%**
2008	$182.8/$306.9 **60%**	$100.0/$240.0 **42%**	$100.0/$240.0 **42%**	$67.2/$165.0 **41%**	$90.0/$331.0 **27%**

Notes to Chart:

1. Stipulated Awards are excluded from the numbers. Counterclaim awards are not considered in this Chart.
2. $000s are omitted in expressing all dollar figures.
3. Average recoveries are determined by aggregating the amounts awarded in each case and the compensatory claims in each such case and determining the average of each by dividing by the number of Awards.
4. Median recoveries are determined, first, by sorting all Awards in dollar order by total amount awarded and finding the middle value, and, then, by sorting the Awards by compensatory claim and finding the middle value. Those aggregate results are then divided by one into the other and multiplied by 100 to determine a percentage..
5. Awards reflecting more than $1 million in compensatory claims were deliberately omitted from this Survey, to minimize the skewing effect of potentially grossly inflated claim amounts and to develop suitable recovery rates for year-to-year comparisons.

We did our share by calculating both average and median recovery rates in presenting the figures on Chart 3. Because the recovery-rate calculations for the three top States – Florida, New York and California – are especially small samples, we used only median recovery rates in those yearly rate calculations. We also limited to $1 million the claim size of the Customer/Member Awards surveyed, in order to reduce any skewing effect from very large claims or awarded amounts and, also, to generate recovery rates that would be most relevant to the "average" public-investor claimant.

Not only are customers winning more often in 2008 than in the recent past, but the average recovery rate for 2008 reached 60%, the highest level it has achieved since 2000. The median recovery rate is just 42%, but it, too, is the highest median recovery rate achieved in this category of cases for all years displayed. There, the superlatives end. The State median rates are far more dicey. Generally, the recovery rates for Florida Awards have beaten the overall median; that was particularly true in 2007 (59% vs. 37%), but in 2008 the two rates were the same (42%).

The opposite has been true for New York in past years, but that

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Chart 4

EmployeeMember Awards: 2002-2008 Win & Recovery Rates

Year	E/M "Win" Ratios Wins/All (# of Awards)	Median Recovery Ratios Median Award/Median Comp Clmd ($)	Win Rate (%) (from Col. 1)	Median Recovery Rate (%) (from Col. 2)
2002	99/172	$43.5/$100.0	58%	44%
2003	106/188	$48.2/$184.2	56%	26%
2004	107/206	$87.5/$500.0	52%	18%
2005	101/193	$118.8/$725.0	52%	16%
2006	103/178	$56.7/$300.0	58%	19%
2007	74/166	$174.5/$1000.0	45%	17%
2008	72/171	$75.7/$300.0	42%	25%
All Years Combined	662/1274	$104.8/$400.0	52%	26%

Notes to Chart:
1. Stipulated Awards are excluded from the numbers.
2. $000s are omitted in expressing all dollar figures.
3. The term "Wins" signifies a "win" for the Claimant. Any monetary award in favor of the Claimant is counted as a "win."
4. The "win rate" is determined by dividing the number of Awards that are "wins" into the total number of Awards that issued in that category of dispute and year.
5. Median recoveries are determined, first, by sorting all Awards in dollar order by total amount awarded and finding the middle value, and, then, by sorting the Awards by compensatory claim and finding the middle value. Those aggregate results are then divided by one into the other and multiplied by 100 to determine a percentage..

changed in 2006 (46% v. 34% overall) and in 2007 (48% v. 37% overall). In 2008, the two rates are roughly the same. California changed the most in 2008, moving to a low of 27%, when its 2007 median recovery rate stood at 62%, well above the 37% overall rate. California did have a relatively high 57% average recovery rate, without any outliers, so we are blaming the small sample of 11 Awards and declaring the California result unreliable.

CHART 4 – EMPLOYEE WINS & RECOVERIES

Chart 4 is a simple chart, focusing exclusively on Employee/Member Awards and presenting win rates and recovery rates for these Awards. The Chart repeats the "win" information in column 5 of Chart 1, which reflects, as we noted, a 10-point gap (42% v. 52%) between the 2008 "win" rate for this category of Awards and the overall "win" rate for 2002-2008.

The recovery rate, then, is the focus of this Chart. Chart 4 displays median recovery rates that, except for 2002, reveal that Employee/Member claimants recover far less of what they request from arbitrators than do customers. With the exception of 2002's 44% median recovery rate, monetary awards for Employee/Member claimants have run in a range of 16-26%, relative to the compensatory amounts claimed.

The results for 2008 stand at the top of that range, at 25% of the $300,000 median compensatory damages claimed, reflected in column 3 of Chart 4.

We do not have a ready guess as to why claim amounts began to soar in 2004, but they did, and they crested in 2007 at $1 million. The years 2005 and 2007 had the highest median compensatory claim amounts. Expectations were not met and they also became the years of the lowest median recovery rates. In that respect, the 2008 results

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Chart 5

Total Amounts Awarded ($)
By Type of Dispute & Year (2002-2008)

Year	CustomerMember Total $ Awarded (bold) Punis ($)/Atty Fees ($)	Small Claims Total $ Awarded (bold) Punis ($)/Atty Fees ($)	MemberEmployee Total $ Awarded (bold) Punis ($)/Atty Fees ($)	EmployeeMember Total $ Awarded (bold) Punis ($)/Atty Fees ($)
2002	**$153.0M** $24.4M/$4.6M	**$532K** $5K/$15K	**$19.9M** $0/$899K	**$25.4M** $1.6M/$1.5M
2003	**$190.8M** $28.6M/$10.1M	**$1.7M** $14K/$71K	**$27.2M** $350K/$748K	**$47.0M** $25.2M/$2.2M
2004	**$169.8M** $20.4M/$9.8M	**$2.7M** $40K/$166K	**$28.2M** $25K/$1.1M	**$39.4M** $661K/$1.8M
2005	**$162.0M** $9.6M/$6.4M	**$1.9M** $115K/$127K	**$52.2M** $135K/$5.3M	**$46.0M** $350K/$2.3M
2006	**$149.7M** $15.7M/$12.7M	**$515K** $11.8K/$17.6K	**$25.3M** $0/$1.4M	**$31.4M** $62.8K/$621.9K
2007	**$75.7M** $8.3M/$4.6M	**$378.8K** $0/$17.4K	**$23.3M** $500K/$1.3M	**$32.1M** $2.0M/$813.9K
2008	**$53.1M** $5.6M/$3.5M	**$422.6K** $4K/$12.9K	**$24.7M** $0/$1.4M	**$50.6M** $7.9M/$3.0M

Notes to Chart:

1. Stipulated Awards are excluded from the numbers, even if they disclose any dollars paid in settlement.
2. M=Millions and K=Thousands when expressing all dollar figures.
3. By referring to the number of "Win" Awards reflected in each dispute category of Chart 1 and dividing that number into the aggregate award amounts reflected above, one can determine the average amount awarded to a winning Claimant. For instance, dividing 690 CustomerMember "wins" in 2002, as noted on Chart 1, into the $153M in aggregate amounts awarded, per Chart 5, yields an average award amount of $222K for CustomerMember Awards issued in 2002. Similarly, there were 158 CustomerMember Awards issued in 2008, which, when divided into the $53.1M awarded in that category in 2008, yields an average award amount of $336K.

reflect a more moderate mood, as far as claim amounts are concerned, and a relatively generous median award figure.

CHART 5 – SHOW THE MONEY

Chart 5 is also a relatively simple chart, in that it returns to the four categories of dispute listed in Chart 1 and provides aggregate award amounts for each category from 2002-2008. 2008 comes in last in the Customer/Member category, with a total of $53.1 million awarded. That result, though, is a natural consequence of the small number of Awards issued in 2008. With 158 "wins" during the year, 2008 produced an average award of $336,076. That compares to an average award of $348, 848 in 2007, when there were 217 wins and $378,987 in 2007, when there were 395 "wins."

2008 was also a "normal" year, in terms of the punitive damages awarded, which are about 10% of the total awarded amount, and in terms of the attorney fees awarded, which fell in the 6-7% range. The total amounts awarded in Member/Employee and Employee/Member Awards were $24.7 million and $50.6 million, respectively. The former is very much par for the course, in comparison with past years, while the Employee/Member total ranks as the highest among the years surveyed.

That is an interesting development, because the $50.6 million awarded is spread over the smallest number of cases (72) for any one year. That means that the average awarded amount of just over $700,000 is also the highest for the years surveyed. That lofty award amount equates to double the average

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amount awarded in Customer/Member cases and compares to the $433,784 average Employee/Member award in 2007 and the $304,854 average in 2006.

$1 Million-Plus Awards

The biggest Customer/Member award amount in 2008 was $5.3 million, assessed against Wachovia Securities in *Patton v. Wachovia Secs.,* FINRA ID #07-01729. An interesting facet of this case is that Claimants initially set their compensatory claim at $4.2 million and, at the close of the hearing when asked by the Arbitrators for a final relief request, Claimants revised their claim upward and asked for $7.6 million in compensatory damages. The Arbitrators came in somewhere between the old and the new claims.

The other top-money Awards in the Customer/Member category were: (1) *Stubbs v. AG Edwards,* FINRA ID #07-01866, which assessed $4.3 million against an individual Respondent, comprised of compensatory damages, punitive damages and attorney fees; and (2) *Sardis v. Frankel,* FINRA ID 04-03481, a case that took more than four years to try to conclusion, but which ended with a total award of $3.5 million against Goldman Sachs and Lehman. Lehman Brothers was in bankruptcy at the time of the Panel's deliberation, but the Bankruptcy Court permitted the case to proceed and the Panel tagged Lehman and another Respondent for $2.5 million. Goldman and the same individual, Sofia Frankel, were liable for $1 million of the award.

Thirty-two Awards in 2008 exceeded $1 million in total amounts awarded. Fourteen of those were Customer/Member Awards. Six Employee/Member Awards topped $1 million; one for $12 million was awarded to a single individual in *Carl v. Alliance Capital,* FINRA ID #06-04962. The rest were won by members. Three Member/Customer Awards reached $1 million, the leading one of which awarded $1.74 million in principal and interest (*Chas. Schwab v. Gabay,* FINRA ID #08-00989). Five Awards were Member/Employee matters, which collectively total approximately $8.5 million; the top Award in that category was *Opco v. Daher,* FINRA ID #04-03134, which awarded $2.2 million to Opco, more than $600,000 of which was accrued interest. Finally, three Member/Member Awwards (Nos. 04-05610, 05-04568 and 07-03337) and one Member/Non-Member matter (NYSE ID #2004-015322) completed the big-dollar cases. Members won $12.4 million in these four disputes.

Conclusion

This marks the fourth time we have issued annual Award surveys. We have customarily canvassed a span of years for two main reasons: (1) the universe of Awards in a group of years is sufficiently large to minimize the skewing effect of outlying Awards; and (2) the larger sample permits statistical breakouts that are impractical with a single year's Awards. What we have lost in that mix, though, was a sense of the present.

We have learned from publishing the latest Award information in the *Securities Awards Monthly (SAM)* that trends and patterns appear as one looks at the latest Awards to issue from FINRA. A sense of the present is one of the benefits of focusing specifically on the prior year's Awards. Each year has its own dynamics and these dynamics may be seen to have their impact on arbitration results and party reactions. By plotting the Award results year-by-year, we see the changes on a yearly plane and can compare past years to the present.

In summary, then, here are some of the statistical findings of this year's Survey:

In 2008, customer-initiated Awards in general reflected better results for customers than in prior years, especially better than in 2007:

- From a trend of steadily lower "win" results for the public investor, both Customer/Member and Small Claims Awards have rebounded from lows in 2007 and moved higher in 2008.
- Overall, the customer "win" rate for 2008 rose from 36% to 42% and for the first quarter of 2009, that rate has increased to 48%.
- In addition, the average recovery rate for Customer/Member Awards, with a range of claims from $25,000 to $1 million, has climbed to 60%, the highest level since 2000.
- The median recovery rate of 42% for those same 2008 Awards is also the highest rate for the years surveyed (2002-2008). The separate calculations for New York and Florida reveal median recovery rates of 41% and 42%, respectively.
- While the total amount granted to customers in Customer/Member Awards was the lowest for the seven years surveyed, the average amount awarded to the winning customers was on a par with past years, equaling $336,076.

Small Claims Awards have recovered from a dismal period, the results of which would have scared off virtually any Small Claims investor who was thinking about bringing a claim in arbitration (*ed: we spoke of this concern at length in the "Conclusion" section of our 2006 Award Survey)*:

- The Small Claims "win" rate in 2007 hit a low of 29%, while in 2008 the "win" rate surged to 41%. That improvement has waned a bit in the first quarter of 2009, as the "win" rate for Small Claims Awards during that three-month period dropped to 37%.
- Small Claims Awards have, in past years, developed a win-rate gap with Customer/Member Awards, wherein Small Claims results are considerably lower; in 2008, that gap narrowed to two points, the smallest in a decade.
- During the past three years, 2006-2008, Small Claims claimants who opt for a merits hearing have done worse than those taking the default OTP approach, a change in trend from the past. Ironically, more merits-hearing Awards are in the Small Claims mix during the past three years as well.

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- Historically, Small Claims claimants have proceeded *pro se* the majority of the time and, in 2007 and 2008, that tendency has moved higher, to 73% without representation in 2007 and 78% in 2008.
- Those Small Claims investors who were represented by counsel in 2008 enjoyed an unusually high "win" rate of 71% and that fact likely accounted for much of the upward shift in the overall Small Claims "win" rate.

From a number of perspectives, industry-initiated Awards have characteristically kept an even keel, although the past couple of years have been slightly different from the others in the 2002-2008 Survey range:

- In 2007 and 2008, the number of Awards issued by the FINRA forum dropped below the relatively stable norms of earlier years for both Member-Employee and Employee-Member Awards. That is consistent, though, with the relative paucity of Awards in 2008 overall.
- "Win" rates for employers in Member/Employee Awards remained within the historical norm at 83%, but the "win" rate for Employee/Member Awards in 2008 dropped to 42%, as compared to a norm of 52%.
- The average amount awarded in 2008 Employee/Member Awards was $700,000 and the total amount awarded was $50.6 million; both were the highest figures in their categories throughout the survey period. Compensatory claims totaled $187 million.
- The median recovery rate in Employee/Member Awards for 2008 was 25%, far less than the median recovery rates for customers, but on the high side of the range for 2002-2008 Awards.

2008 was a year of change – a transition from the doldrums of 2006 and 2007, when the cases in process were leftovers from the Tech Crash, the Research Analyst conflicts and the telecom frauds. In 2008, we see the beginnings of a volume surge due, first, to the ARS and derivatives debacles and, then later, to the full market meltdown. What is different this time around, though?

The "win" rates fell during the first half of the new Millennium decade, average recovery rates dropped into the 40s and median recovery rates fell into the 30s. The claims were too often pulled into arbitration, instead of finding their own way, and many were weak claims, brought by investors who wanted technology stocks and were not ruined by their ultimate collapse.

In stark contrast, the claims by investors after this market collapse come from the heart. The meltdown affected all markets, generated losses in stocks, bonds and derivatives that left no market untouched, and, by reaching into the bond markets, impacted the elderly and their savings severely. Today's Claimant is not the brash speculator of the Tech Crash, but the average investor who was relying on the strength of her investments to fund retirement or pay for investments in their children's futures.

We oversimplify, but only to make the point that 2008 signals the onset of a new arbitration market, one in which investor "win" rates returned to strength and recoveries by winning investors reached the 60% level last year. From what we have seen of Award results for the first quarter of 2009, this new arbitration market trend has been confirmed, as filings have jumped and heightened "win" rates have returned for investors.

Finally, we address the win-rate drop in Employee/Member Awards. The investor turnaround and this anomaly in employees' "win" statistics must be the two chief findings of this 2008 Survey. As we noted, this downward draft in employee "wins" has been in force for two years now; the rate dropped from 58% in 2006 to 45% in 2007 and $42% in 2008. Admittedly, we cannot project why this is occurring, but will it continue?

We certainly believe that new arbitration filings will be increasing in this sector. So many people have lost their jobs on the Street that it would be a natural outcome. While we do not yet know if the lower employee "win" rates have continued in 2009, we anticipate that the Street layoffs of the past year will adversely affect "win" rates. Linking that tough jobs environment to the 2007-2008 win-rate drop, though, seems tenuous.

Some other environmental factor may have been at work. 2007 and 2008 signaled the era of the "breakaway broker," voluntary shifts by wirehouse brokers to other platforms. For instance, the number of investment advisers has increased to 11,000-plus in recent years, a jump of 30%. Perhaps, this seismic shift in the sales model provides an explanation. We look forward to the 2009 Award Survey for the answers or, at least, more data to support such trend analyses.

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