

SECURITIES ARBITRATION COMMENTATOR

Published 9/98

IN THIS ISSUE

FORUM FEE SURVEY

Given NASD's bid to raise the price of admission to arbitration, we felt a look at the fees of all three major forums seemed in order. We were able to do so with the help of the AAA, NASD, and NYSE. The results are presented in this comparison study of fee calculations for 16 selected Awards..... 1

IN BRIEF

Birbrower Update; Arb Training Guide Revised; Update on NASD Rule Proposals; NASD Case Filing Stats.; Fee Disputes; New GAO Study?..... 10

ARTICLES & CASE LAW

Issues in arbitration pondered and decided..... 12

ARBITRATOR PROGRAMS

Upcoming training & orientation programs offered by the forums.... 18

SAC's BULLETIN BOARD

Notes from & about people in arbitration..... 19

SCHEDULE OF EVENTS

Arbitration events scheduled in the coming months..... 20

NEW DATABASE OFFER!

If you have an occasional need to access past arbitration Awards, but do not require a full subscription to SAC's Award Database Service, ask about our new non-subscriber access program. You accept limited services and pay-as-you-go, but you can now use the Database as many times as you choose.

Call 973/761-5880 for details.

Forum Fee Survey

A Comparison of AAA, NASD & NYSE Fees

Introduction

Back in 1989 and earlier, the fees at the self-regulatory organization's (SROs) arbitration forums were uniform, took about a quarter of a page to list, were readily calculable, and the highest fee in the table was \$1,000 (for all claims over \$500,000). It could also be said with assurance that, because the cost of SRO arbitration was heavily subsidized by the industry through general assessments, the fees for parties would, at every level and in almost every case, be less than the administrative and arbitrator fees that would be charged for the same case at the American Arbitration Association. There have been some changes since 1989, though, that clearly have caused a closing of the gap.

The American Arbitration Association (AAA) is an independent, non-profit forum, where fee revenue supports the caseload costs. The parties are not only charged administrative fees, but also must supply the compensation charged by arbitrators. Moreover, arbitrator compensation at AAA is negotiated between the staff and the parties, before the arbitrators are appointed, whereas the SROs pay the arbitrators directly and set a flat fee per hearing session (4 hours or less). Again, that "honorarium" was almost always lower than an AAA Arbitrator would receive for the same service.

In 1993, the AAA revised the fee schedule under its Securities Arbitration Rules, so that, among other things, arbitrators would receive just \$400 for the first two hearing days. Thereafter, a negotiated fee would be paid, as in the past. Then, NASD developed a mem-

ber surcharge fee, assessable against broker-dealers that are parties (or whose associated persons are parties) to a particular dispute. The surcharge table was boosted in 1997 to a range of \$150-\$3,600, depending upon the size of the disputed claim. This made NASD somewhat more expensive for members than were the other SROs, but AAA was still the most expensive.

In 1998, NASD has developed additional surcharge fees for members, known as process fees. There are pre-hearing process fees and hearing process fees. The Association has also announced its intention to become a self-sustaining forum, one that seeks to support itself from the fees it charges and collects. To accomplish this goal, NASD has submitted a fee hike proposal to the Securities and Exchange Commission. That proposal is pending approval — or was, at the time of the survey we undertook.

In light of the impending fee hike for parties, we thought it timely to compare the fees at the major forums to see in what ways and to what degree (1) there is a "fee gap" between NASD Regulation's Office of Dispute Resolution and the other SRO arbitration forums, and (2) the NASD's new fees, when implemented, would exceed or remain below the AAA's charges to parties.

Methodology

Of course, any such comparison has its uncertainties. Procedures differ, at least between the AAA and the SROs, so that parties may have a single arbitrator in a case at AAA which might

cont'd on page 2

FORUM FEE SURVEY *cont'd from page 1*

call for three arbitrators — or, vice versa, under yet-to-be-implemented NASD rules that would allow a single arbitrator up to \$50,000. Then, too, parties' tactical decisions might differ, depending upon the forum. AAA, for instance, has a "process fee" that is periodically levied on a case as it ages. This may cause parties to move more quickly than they might in SRO arbitration, if left to themselves. On the other hand, a postponement in AAA arbitration generally exacts a smaller charge than the postponement fees in SRO arbitration.

Rather than make up hypothetical cases, we decided to select actual cases for comparison that had closed with an arbitrator decision (i.e., an Award). We chose these survey Awards entirely from NASD for two reasons: (1) NASD appears twice in our comparison survey, once as the "Actual NASD," which measures the fees as actually charged in the selected Award, and, again, as "Next NASD," which projects the fees that would be charged on the same Award, but under the future fee regime; and, (2) NASD's Award format best describes, as contrasted with the New York Stock Exchange (NYSE) and the AAA Award formats — the two other comparison forums — what fees were charged and why.

Calculating the precise fees that should be charged, under the rules of a particular forum, is no mean task, we can tell you. The schedules are com-

plicated enough, but, depending upon the types of claims, the number of pre-hearing conferences, the existence of counterclaims, and other factors, one must know not only the rules, but the operating policies of the forum in order to make a precise determination of the applicable charges. We knew our efforts would be imperfect, but we tried anyway, and then sent our calculations to the three forums — AAA, NASD, and NYSE — and solicited their assistance in checking our figures.

We selected 16 Customer/Member Awards, primarily on the basis of claim size. Since filing fees, hearing session deposits, member surcharges, and hearing process fees all operate on a graduated schedule, we felt that varying the claim amount among the selected Awards would best assure as complete a comparison as practicable. The claim amounts vary from \$23,000 to \$6,000,000. We stayed away from small claims and tried to some degree to use a sample that was representative of the average.

The selected Awards were all issued in the first half of 1998, but among them are cases filed one and two years before (in one case, 1993). Remember, length of processing time is a fee factor at AAA, in particular. Given the time period we chose, the January 1998 process fees and even the July 1997 stepped-up surcharge

cont'd on page 3

BOARD OF EDITORS

James E. Beckley
James E. Beckley & Associates

Robert S. Clemente
New York Stock Exchange

Joel E. Davidson
PaineWebber, Inc.

William F. Davis
Law Offices of William F. Davis

Roger M. Deitz
Attorney at Law

Paul J. Dubow
Morgan Stanley, Dean Witter & Co.

Robert Dyer
Allen Dyer Doppelt Milbrath & Gilchrist

William J. Fitzpatrick
Attorney at Law

Philip J. Hoblin
Parker Chapin Flatteau & Klimpl

Constantine N. Katsoris
Fordham University School of Law

Theodore A. Krebsbach
Theodore A. Krebsbach & Associates, PC

Joan L. Lavell
J. Lavell & Associates, Inc.

Deborah Masucci
Attorney at Law

Richard A. Miller
White & Case

Sam Scott Miller
Orrick Herrington & Sutcliffe

J. Boyd Page
Page & Bacek

Gerald F. Rath
Bingham Dana, LLP

David E. Robbins
Kaufmann Feiner Yamin Gildin & Robbins

Stephen G. Sneeringer
A.G. Edwards & Sons, Inc.

EDITOR-IN-CHIEF
Richard P. Ryder

SENIOR EDITOR
Samantha B. Rabin

SECURITIES ARBITRATION COMMENTATOR - Publisher: Richard P. Ryder, P.O. Box 112, Maplewood, N.J. 07040. Business Office: 6 1/2 Highland Place, Maplewood, N.J. 07040. Tel: (973) 761-5880. FAX No. (973) 761-1504. E-Mail: searco@erols.com. Copyright © 1998 Securities Arbitration Commentator. No part of this publication may be reproduced in any manner without the written permission of the publisher.

SUBSCRIPTION INFORMATION: The Securities Arbitration Commentator is published 12 times per year. Subscription Rates: One year - \$348, Regular Rate. Overseas subscribers, please add 10% for additional postage and handling. Back issues of SAC are available to subscribers only at \$20 per issue. An attractive SAC-imprinted "D-Ring" binder is also available to store back-issues. The 1.5" blue binder, with grey print on its face and backing, costs \$15.

FORUM FEE SURVEY *cont'd from page 2*

schedule are not part of the "Actual NASD" calculations. In addition, mandatory pre-hearing conferencing began at NASD in the summer of 1997, so not all cases reflect a fee charge for a pre-hearing conference. These additional fees would be reflected in NASD Awards that have been more recently decided or are still in the "pipeline."

What follows is a summary of each of the 16 Awards included in our comparison survey, along with a table that sets forth the total fee charges by fo-

rum. We use the figures calculated by the forums themselves (*vis a vis* their own forum). Our calculations meshed in nearly every respect with "Actual NASD" and NYSE, but were off in some respects on "Next NASD" and AAA differed with us in every case.

The reason, we think, for this latter disparity relates primarily to the fact that we had "plugged in" an arbitrary \$1,000-per-day negotiated fee for AAA arbitrators after the first two "days," while AAA, as we understand it, took a more scientific approach and surveyed

its Regional Offices for a normal rate on each case. Since the disparities almost always resulted in the forums' reporting a higher overall figure, we deferred to the forums on most differences.

For this cooperation, and the rapid turnaround time on a thankless task, SAC expresses its great appreciation to the staff at AAA, NASD, and NYSE who gave us the necessary assistance to make this comparison survey meaningful and accurate.

Forum Fee Comparison Survey

CASE No. 1: Kirchner v. Baraban Securities
(NASD ID #97-00461, filed 1/97)

\$23,590

Claimant asserted excessive options trading against two broker-dealers and three individuals, claiming "\$23,589.74 or selective rescission in the amount of \$30,852.11," in a case that involved two pre-hearing conferences (one with the Chair and another with the full Panel) and three hearing sessions.

CHART I

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$2,400	\$1,900	\$3,900	\$5,425	126%

We chose this Award because, at a claim amount of \$23,589.74, AAA Rules would install one Arbitrator, whereas three Arbitrators were reflected on this SRO Award. NASD stated that it would have chosen the higher amount, the rescission figure of \$30,852.11, to determine filing fees and hearing session deposits. Since our calculations comported with the \$2,400 fee amount stated in the Award, we used our calculation for the "Actual NASD" column and accepted NASD's calculations in the "Next NASD" column. We calculate that the "Next NASD" figure would be \$400 lower, were the \$23,589.74 claim amount used.

On another point, note that in this case one of the pre-hearing conferences involved the full Panel, while the other did not. Both the "Actual NASD" and the "Next NASD" schedules charge a full hearing session fee when the full Panel appears in a pre-hearing conference. The lower "conference" fee, mentioned in the fee schedules, is reserved for single arbitrator conferences. Thus, NASD's practice of requiring an "initial" pre-hearing conference with the full Panel will result in a full hearing session charge. As we understand it, NYSE makes the distinction based upon telephonic versus personal appearances. Pre-hearing conferences are generally conducted by telephone and, in such case, the fees are set by NYSE Rule 629(h). If a full Panel is convened and the parties appear, however, it is usually considered a hearing session, subject to NYSE Rule 629(b).

CASE No. 2: Giljum v. Smith Barney
(NASD ID #96-03096, filed 7/96).

\$30,767

Claimant asserted unsuitability and fraud against one broker-dealer and one individual, claiming \$30,767, plus unspecified opportunity losses, commissions and margin interest, and attorney fees, in a case that involved one pre-hearing conference, two postponement fees and two hearing sessions.

CHART II

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$2,220	\$2,020	\$5,100	\$6,425	189%

cont'd on page 4

FORUM FEE SURVEY *cont'd from page 3*

AAA counts a pre-hearing conference, or, in AAA terminology, a preliminary hearing, as the first “day” of hearing. We count two hearing sessions as equaling one day, so we think the three Arbitrators in this matter would only have charged \$2,400 (\$400 per day X 3 arbitrators X 2 “days”). Part of the remainder of the AAA fees are attributable to the “process fees” for the one and one-half years the case stayed open and the two postponement charges of \$300. The additional unspecified claims were not cited as affecting the filing fee calculations at any of the forums.

CASE No. 3: Hayes v. Stuart James Inv. Brokers **\$30,967
(NASD ID #93-02270, filed 6/93)**

Claimants asserted unsuitability, misrepresentations and failure to supervise against four broker-dealers and three individuals (and their spouses), claiming \$30,966.65, plus unspecified punitives, opportunity losses, and attorney fees, in a case that involved one hearing session. Respondents asked for attorney fees, but no counterclaim was interposed.

CHART III

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$1,320	\$520	\$21,800	\$10,975	731%

Note the fee differences between this case and Case No. 2, the *Giljum* Award, even though both claims are about the same amount. The key to the surprising charges in this case lies in the fact that four broker-dealers are named and it took four-and-a-half years to be decided. We calculate only \$1,200 for the Arbitrators’ compensation at the AAA, but the AAA process fees for the long duration of this \$31,000 case were, in relative terms, mammoth. In the “Next NASD” column, duration was not a factor; rather, the member surcharges and the process fees accounted for \$9,600 of the charges, mainly because NASD assessed each of the four Respondent broker-dealers with process fees — a total of \$6,400.

CASE No. 4: Morris v. Cressida Capital **\$32,000
(NASD ID #96-05744, filed 12/96)**

Claimants asserted unsuitability and misrepresentations of inside information in penny stock transactions against one broker-dealer and one individual, claiming \$32,000 in a case that involved one hearing session.

CHART IV

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$720	\$520	\$3,200	\$3,775	424%

It may be fair to note that we assessed a member surcharge in every case for “Actual NASD” and “Next NASD.” We did so, even in those instances where the NASD did not bother, or if it did, could not collect, as in this case where Cressida Capital filed bankruptcy. To make the comparison conceptually correct, we felt we had to determine the assessments as permitted under the rules, without regard to the probability of collection.

Case No. 5: Mros v. Sterling Foster **\$42,300
(NASD ID #96-05138, filed 11/96)**

Claimant asserted unsuitable and improper investments in stocks, churning and unauthorized trading, against one broker-dealer and five individuals, claiming \$17,300 in compensatory damages and \$25,000 in punitive damages, in a case that involved three pre-hearing conferences, one postponement fee, and three hearing sessions.

CHART V

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$2,820	\$2,500	\$14,450	\$6,925	146%

Note that, when a Claimant requests a specified amount in punitive damages, that amount is generally aggregated with the compensatory claim to determine the appropriate filing fee. Some forums are stricter in requiring specification than *cont'd on page 5*

FORUM FEE SURVEY *cont'd from page 4*

others. As to the AAA's disproportionate charges, versus the others, it relates to arbitrator compensation. Once the parties use up their two "days" at the limited fee of \$400 at the AAA, the costs begin to rise quickly. Here, the two "days" were allocated to pre-hearing conferences, so the third pre-hearing conference and the two days of hearing were charged at a negotiated rate.

CASE No. 6: Baldwin v. Cowen & Co. **\$51,286
(NASD ID #97-01357, filed 3/97)**

Claimant asserted claim for attorney fees and expenses in confirming a prior Award won by investor against the broker-dealer, both in trial court and on appeal, claiming \$51,286 in a case that involved one hearing session.

CHART VI

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$950	\$650	\$3,700	\$4,825	408%

This is an unusual claim, so we will report the result. Claimant won — \$51,286! Respondent claimed *res judicata*, but Claimant countered that the courts had denied his claim for fees for lack of jurisdiction. "Next NASD" stands as the most expensive forum, but, again, \$3,100 of the assessed charges relate to non-assessable surcharges and process fees.

CASE No. 7: Larsen v. Baraban Securities **\$75,000
(NASD ID #96-00121, filed 1/96)**

Claimant asserted breach of contract for canceling an agreement to sell his 20,000 shares of Haskell Intl. and to pay Claimant \$195,000. He claimed \$75,000 in net losses in a case that involved five hearing sessions. Respondent requested attorney fees, but no counterclaim was asserted.

CHART VII

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$2,950	\$2,650	\$8,800	\$7,825	165%

In this case, the two years that the matter was pending would mean \$1,400 in process fees at AAA; the three hearing "days" means one day would be conducted at negotiated rates. "Next NASD" charges include a mandatory pre-hearing conference of \$750, where none was required in the "real" case. Based upon the calculations received from NASD, we understand that the practice of holding a mandatory pre-hearing conference will continue and that, since all three arbitrators participate, the charge will be similar to that assessed for a regular hearing session. As a tactical tip, party representatives should attempt, when feasible, to establish mutually acceptable hearing dates and a discovery schedule in advance of the scheduled conference. These are the primary agenda items at the mandatory conference; agreement between the parties may allow a joint request for adjournment of the mandatory conference that could be honored.

CASE No. 8: Hiatt v. First Colonial Securities **\$121,285
(NASD ID #97-00600, filed 1/97)**

Claimants asserted unauthorized trading, misrepresentations, failure to obey instructions and unsuitability against a broker-dealer and one individual, claiming \$121,285, plus unspecified opportunity losses, punitives, and attorney fees in a case that involved one pre-hearing conference and two hearing sessions. Respondents counterclaimed for \$3,822 on an alleged account deficit.

CHART VIII

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$2,850	\$2,500	\$4,800	\$9,125	220%

cont'd on page 6

FORUM FEE SURVEY *cont'd from page 5*

About half of the “Next NASD” charges are non-assessable member surcharges and process fees. Respondents must also pay \$400 for their counterclaim. NASD adds a mandatory pre-hearing conference for \$1,125 to the one with the single arbitrator (\$400) and calculates \$2,250 in hearing session fees. Because time to hearing is speedy and hearing “days” are limited, the projected AAA costs are far more moderate.

CASE No. 9: Katz v. Delta Equity Securities **\$213,341
(NASD ID #97-02517, filed 5/97)**

Claimant asserted romantic relationship with broker induced her, along with misrepresentations about risk and the nature of investments, to allow discretion and to permit purchase of speculative and unsuitable securities. She claimed \$71,341, plus interest, \$142,000 in punitive damages, and unspecified costs and attorney fees, against a broker-dealer and one individual in a case that involved four hearing sessions. Respondents requested attorney fees and costs, but no counterclaim was asserted.

CHART IX

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$3,550	\$3,200	\$4,900	\$10,525	196%

Customarily, the punitive damages claim, at least if specified, is included in NASD’s determination of the claim amount, for fee purposes. Also, customarily, requests for attorney fees by either side are not deemed assessable items, although such claims are presumably considered by the Panel. In this case, as an aside, \$100,000 in punitive damages were awarded, in addition to \$71,151 in compensatory damages, plus 10% interest. Among the “Next NASD” charges, which are about three times the “Actual NASD” charges, are about \$2,700 in increased assessable charges; further adding to the total are the new process fees and member surcharge.

CASE No. 10: Bennett v. Schroder Wertheim **\$271,818
(NASD ID #97-01205, filed 3/97)**

Claimant asserted account overcharges and unauthorized trades against two broker-dealers and two individuals, claiming \$90,606 in compensatory damages and \$181,212 in treble damages, in a case that involved one pre-hearing conference and one hearing session.

CHART X

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$1,950	\$1,250	\$7,150	\$8,650	344%

The claimed amount for fee purposes includes the claim for treble damages (denied, in this case). “Next NASD” fees are more than four times the “Actual NASD” fees in this case, in part due to \$6,100 in member surcharges and process fees. NASD’s calculations indicated in Case No. 3, the *Hayes Award*, that each of the four broker-dealers named would be responsible for process fees. Here, Respondent Schroder was voluntarily dismissed from the case; had two broker-dealers remained in the case, we would have added an additional \$3,100 in process fees to the \$8,650.

CASE No. 11: Lamm v. Jameson Dewitt & Assocs. **\$313,000
(NASD ID #96-05274, filed 12/96)**

Claimant asserted unsuitability and misrepresentations in the purchase of Bennett Group securities, against the broker-dealer, claiming \$313,000 in compensatory damages and unspecified punitive damages and attorney fees, in a case that involved six hearing sessions.

CHART XI

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$5,050	\$4,700	\$9,500	\$12,850	154%

cont'd on page 7

FORUM FEE SURVEY *cont'd from page 6*

The mandatory pre-hearing conference adds \$1,200 to the "Next NASD" fees. The six hearing sessions also account for about a \$2,250 increase over the "Actual NASD" session fees. In this case, the AAA Arbitrator compensation charges are slightly less than the "Next NASD" hearing session charges. The process fees and member surcharges account for most of the remainder.

CASE No. 12: Mitzel v. Kensington Wells
(NASD ID #97-01266, filed 3/97)

\$504,000

Claimant asserted unauthorized trading and sales of unregistered stock, as well as a refusal to obey instructions to sell, against one broker-dealer and one individual, claiming \$504,000 in compensatory damages and unspecified punitive damages, in a case that involved one hearing session.

CHART XII

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$1,750	\$1,250	\$5,850	\$8,875	407%

The "Next NASD" fees impute, as we have said, a mandatory pre-hearing conference of the three arbitrators, despite the absence of a pre-hearing conference in the actual situation, for a charge of \$1,200. There are also \$6,100 in member surcharges and process fees. The NASD hearing session fees and the AAA arbitrator compensation for the single "day" are the same in this case, but, given the large claim amount, the AAA filing fee of \$3,000 becomes a large factor in the total AAA fee assessments.

CASE No. 13: Hackaylo v. Smith Barney
(NASD ID #96-02503, filed 6/96)

\$661,284

Claimant asserted churning and unsuitability, along with alleged misrepresentations, in connection with an options program, against one broker-dealer and three individuals, claiming \$661,284 in compensatory damages, plus unspecified attorney fees and interest, in a case that involved five hearing sessions.

CHART XIII

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$5,750	\$5,250	\$10,100	\$13,675	138%

NASD reported that a postponement fee of \$1,000 was not mentioned in the Award and included that, initially, in their calculations. We backed it out, because it would have required re-calculating the AAA and NYSE computations. At AAA, clearly the key to controlling cost is to limit the number of hearing sessions. In the larger cases, though, the hearing session costs in "Next NASD" arbitration approach in size the AAA hearing costs (see, e.g., *Nodvin*, Case No. 16, which ran 21 hearing sessions).

Case No. 14: Spensieri v. Southwest Securities
(NASD ID #96-01684, filed 4/96)

\$900,000

Claimants asserted unsuitability, excessive trading, and lack of supervision, especially in their options trading, against two broker-dealers and one individual, claiming \$100,000 in compensatory damages, \$500,000 in punitive damages, and \$300,000 in RICO damages, in a case that involved one pre-hearing conference, two postponement fees, and five hearing sessions.

CHART XIV

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$8,550	\$7,550	\$12,100	\$17,675	107%

cont'd on page 8

FORUM FEE SURVEY *cont'd from page 7*

Generally speaking, the scheduled fees are pretty much the same whether the claimed amount is determined to be \$600,000 or \$900,000. Thus, we cannot say whether the specified amounts of \$500,000 for punitives and \$300,000 for RICO were both taken into account for fee purposes, or just the \$500,000 in punitives. We treated the case as a \$900,000 claim in the survey listings, but the claims for both punitives and RICO damages might more fairly be construed as alternative claims. As to the “Next NASD” fee calculation, only one set of process fees was included in the \$17,675. NASD’s calculations indicated in Case No. 3, the *Hayes Award*, that each of the four broker-dealers named would be responsible for process fees. If that were applied in this case, where two broker-dealers were named, then there would be an additional \$3,100 in charges to add to the \$17,675.

CASE No. 15: Labrecque v. Josephthal **\$1,210,000
(NASD ID #96-04130, filed 9/96)**

Claimants asserted unsuitability, churning, misrepresentations, unauthorized trading, and lack of supervision, against one broker-dealer and three individuals, claiming \$210,000 in compensatory damages, \$1,000,000 in punitive damages, and unspecified attorney fees, in a case that involved two pre-hearing conferences and four hearing sessions.

CHART XV

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$5,350	\$4,850	\$16,900	\$15,000	180%

A hefty filing fee of \$3,000 for this large claim explains some of the AAA charge. Larger cases often require more hearing sessions, too, and that means a negotiated rate for the arbitrators at the AAA. The “Next NASD” calculation includes \$7,600 in surcharges and process fees for the member and \$6,900 in fees to cover the conferences and hearing sessions. One can get some idea of what the punitive damage claim of \$1,000,000 cost the parties in fees here by looking at the fees calculated in Case No. 9, the *Katz Award*, where the total claim was about \$210,000. It was evidently warranted, however, as the Arbitrators in *Labrecque* awarded \$123,000 in punitive damages and \$30,000 in attorney fees, allocated between two of the Respondents.

CASE No. 16: Nodvin v. National Financial Svcs. **\$6,000,000
(NASD ID #95-01782, filed 4/95)**

Claimants asserted breach of fiduciary duty for failing to monitor the account and improper margin liquidation, against the broker-dealer, claiming \$6,000,000 in compensatory damages and an equal amount in punitive damages, plus attorney fees. Respondents counterclaimed for a \$2 million account deficit. Trying the case involved one postponement fee, and twenty-one hearing sessions. In the final Award, the Arbitrators dismissed the primary claim and awarded \$1.59 million on NFSC’s counterclaim.

CHART XVI

Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$33,876	\$32,800	\$35,426	\$38,676	14%

What strikes you about the various forum calculations in this case? Most remarkable to us was the closeness in grouping of all four fee calculations — less than a 20% variance. This is a model “large & complex” case, in terms of the size of the claims by both sides and the length of time it took to be heard. Even the current fee structures of the SROs and AAA anticipate this kind of claim, with its disproportionate demands on the system, and provide for adequate fee coverage. As a result, the “Next NASD” fees do not change that much for a case of this nature.

Here is some additional fee minutiae. We mentioned the outcome in this case, because it had some impact on the fee calculations. Interesting to us was the fact that, in a claim-counterclaim situation, the fees charged can vary, depending upon the outcome. In this singular instance, where the customer loses and the broker-dealer wins on its counterclaim, NASD determines the hearing session fee in relation to the amount *awarded* to the broker-dealer. NYSE takes the same approach (see NYSE Rule 629(c)), but only when the broker-dealer is the primary Claimant — i.e., not in this configura-

cont'd on page 9

FORUM FEE SURVEY *cont'd from page 8*

tion. As to deposits, each side puts up the deposit that relates to its claim. How do you determine postponement fees? Both SROs agree that in a claim-counterclaim situation, the adjournment charge is based on the hearing deposit of the requesting party.

assume here that the arbitrators would split the fees in these 16 Awards among claimants and respondents on a 50-50 basis (for an analysis of how arbitrators at the AAA, NASD and NYSE actually allocate forum fees, see our study in 9 SAC 9). Given the assumed fee-splitting allocations, industry parties

tomers will have to choose between the "Next NASD" fee regime or litigation. Adding AAA to their customer agreements is complicated by the fact that many such firms introduce business through larger clearing broker-dealers, who control the agreement. Separate side agreements are possible or, perhaps

SUMMARY CHART				
Actual NASD Fees (AN)	NYSE Fees	AAA Fees	Next NASD Fees (NN)	% Increase AN to NN
\$82,056	\$74,110	\$167,676	\$181,226	121%

Analysis & Conclusion

Extrapolating from these fee comparisons from the sixteen survey Awards, we would project that, in the majority of cases, "Next NASD" charges to the parties collectively will be greater than AAA charges in the majority of the cases. In 12 of the 16 instances surveyed, that was the case. Moreover, the "Next NASD" charges, relative to the "Actual NASD" charges calculated, ranged from 14% greater to 731% greater, for an overall average increase of 121%. The overall comparisons are reflected in the Summary Chart above.

Relative to the AAA charges, the "Next NASD" charges are 8% greater on average, but the AAA charges are more than 100% greater than the NYSE charges on average.

What does this all mean? Well, start with the proposition that what a party must deposit is not necessarily what a party will be ordered in the Award to pay. The AAA and the NYSE charges are almost entirely allocable by the arbitrators, while many of the charges assessable under the "Next NASD" charges are specifically designed to land on the broker-dealer member. We totalled \$81,800 in non-assessable member surcharges and process fees among the \$181,226 in "Next NASD" charges.

That leaves almost \$100,000 in potentially assessable "Next NASD" charges. For ease of comparison, we

would assume a fee burden of \$131,513 (81,800 + 99,426/2) and customer parties would be charged the remaining \$49,713. Thus, industry parties would pay about 73% of the fees.

This finding of a 73% industry cost burden in our sample has relevance; it comports with NASD's stated design in developing the "Next NASD" fee scheme of placing about three-quarters of the cost burden on its arbitrating members. At the AAA, assuming fee-splitting, industry parties would be assessed only \$83,838 (\$167,676/2), about 36% less, because the fees are generally assessable and, in aggregate, they are less.

We understand that the Securities Industry Conference on Arbitration is considering a pilot project designed to encourage brokerage houses to permit customers the choice of a non-SRO forum. The potential fee savings reflected in this comparison should add persuasive impetus to firms that might consider offering such an alternative. Amplify their \$48,000 fee savings in these 16 Awards by an appropriate multiple and the potential savings for broker-dealers become impressive.

The larger houses, with more significant case volume, would realize the greatest cost savings via the "alternative" route, but they also have the availability of the less expensive NYSE. Smaller houses, specifically sole-NASD members, and aggrieved cus-

tomers, we shall see more post-dispute agreements to arbitrate before AAA.

For customers, the AAA would still, on average, be more expensive than "Next NASD," again, assuming full fee-splitting; that, though, is part of the choice equation. Customers already have the choice, where the party broker-dealer is a NYSE member, to arbitrate before the Exchange. As to this alternative, we have a couple of observations from the comparison. First, the "Next NASD" fee hikes appear to fall disproportionately on parties arbitrating claims under \$100,000 (excluding small claims, of course). For Cases Nos. 1-7, the projected "Next NASD" charges amounted to an average 19% of the claim amount (23%, 21%, 35%, 12%, 16%, 9%, and 10%, respectively). When we compared the NYSE fees to the claims in Case Nos. 1-7, the average percentage of fee-to-claimed amount was only 4% (8%, 6%, 2%, 2%, 6%, 1%, and 4%, respectively).

That is a big difference — 19% vs. 4%! Of course, parties with claims under \$50,000 can save on costs under "Next NASD," by opting for a single Arbitrator, whereas our sample assumed three arbitrators for these cases. Still, from a fee standpoint, NYSE arbitration looks like a relative bargain for the customer and, even more so, for the industry. Looking strictly from the customer side, the aggregate fees at NYSE,

cont'd on page 10

FORUM FEE SURVEY *cont'd from page 9*

assuming fee-splitting, were \$37,550 for each side. That compares to \$83,838 for each side at AAA and \$49,713 for the customer at NASD — making AAA and “Next NASD” 123% and 32% more expensive than NYSE, respectively. From the industry side, as we have said, the difference between NASD and NYSE is much greater (\$131,153 vs. \$37,550).

We concede these projections are based on assumptions that may be in-

applicable in some specific cases. Nevertheless, the proposed fee hikes, together with the recently implemented member surcharges and process fees at NASD, surely broaden the “fee gap” between the Association’s forum and those of the other SROs. This survey also brought home to us the significance of the existing “fee gap” between AAA in securities arbitration disputes and the currently applicable fees at the SRO forums. With NASD’s current drive for a self-sustaining forum, though, it seems there will be a new fee “leader.”

NASD’s openness to constructive criticism, its desire to serve, and its willingness to change have made it by far the predominant forum in securities arbitration. Given the escalating price of admission, however, we think parties will begin to find the premium over potential alternatives tough to rationalize. This will mean changes in the case flow and, perhaps, even in the dynamics that have maintained the SRO forums as an exclusive choice in customer pre-dispute agreements.

In Brief

***Birbrower* Update: California Passes Sunset Bill Allowing Out-of-State Attorneys to Appear in Arbitrations**

On August 31, 1998, the so-called “Birbrower bill” passed the California Senate and Assembly by unanimous vote in each chamber. The bill was enacted, according to a statement of legislative intent which accompanies it, “to respond to the holding in *Birbrower v. Superior Court* (1998), 17 Cal.4th 117, as modified at 17 Cal.4th 563 (hereafter *Birbrower*), to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings.” The bill also protects those attorneys when performing legal services within the state in connection with arbitrations in other states.

The legislation prescribes a procedure for attorneys admitted to other states, who are engaged in a California arbitration, to serve a “certificate on the arbitrator or arbitrators, the State Bar of California, and all other parties and counsel...,” setting forth 10 items of information. These items relate to the

individual’s residence outside the state, the attorney’s good standing, previous *pro hac vice* requests, accession to jurisdiction, a statement as to “the name, address, and telephone number of the active member of the State Bar of California who is the attorney of record,” and other requirements. The certificate must be served prior to the first scheduled hearing; failure to timely file may lead to disqualification in the proceeding.

The legislation is an emergency measure, hastily introduced (*see* 9 SAC 10&11(7) for the bill’s earlier history) and shepherded through the legislature by proponents. Securities industry representatives, such as Paul J. Dubow, Morgan Stanley Dean Witter & Co., were prominent in these efforts, due to the serious impact *Birbrower* portended to inside counsel’s participation in California securities arbitrations. As a stop-gap measure, though, the bill will eclipse after a time. January 1, 2001 is the scheduled date of expiration.

In the interim, just what constitutes the “unauthorized practice of law,” relative to arbitration practitioners, will presumably be the focus of continued debate in California. At one point, the Senate bill contained a measure that would have included non-attorneys in the legislative override, but the final legislation limits any express exemption for non-attorney participation to labor arbitrations and those “arising under collective bargaining agreements....”

Those who seek a negative implication in these express exemptions, relative to non-attorney representatives in securities arbitrations, will need to deal with the statement of legislative intent, which states, “... nothing in this section is intended to expand or restrict the ability of a party prior to the decision in *Birbrower* to elect to be represented by any person in a nonjudicial arbitration proceeding, to the extent those rights or abilities existed prior to that decision....”

NASDR Distributes Clarifications to Arbitrator Training Guide

The “Chairperson Course Preparation Guide” is a 200 plus-page training guide for arbitrators qualified to serve as Chair on NASD arbitration panels. The other Guide used in arbitrator train-

ing seminars is the “Panel Member Course Preparation Guide,” both developed in November 1996. We wrote about these Guides and explored the training plans and programs with

NASD’s then-Director of Neutral Training and Development (*ed: Neal Blacker, who was the Director at the time, recently left the NASD — see “In*

cont'd on page 11