

SECURITIES ARBITRATION COMMENTATOR

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CLOSING THE GAP

To make room for the extended article on "Award Results" and the many case decisions that are included in this edition, we had to drop our usual "In Brief" and "Bulletin Board" features and postpone some other articles. At the same time, the excluded material was too much to include by extending to 20 pages, as we have done now for the last two issues. This means that the May edition will follow very closely on the heels of this issue, in order to stay timely in our reporting of events and developments in arbitration. Such plans have been de-railed before, but, with a bit of good fortune, you will have no sooner digested, dog-eared, and underscored all the interesting things in this issue than the next issue will be in your "in" box.

Surveying Public Award Results

In the September 1989 issue of SAC (2 SAC 9(5)), we analyzed the results of the first 273 Awards made public by the three SRO's (ASE, NASD, and NYSE) that adopted and implemented the public Award program, starting May 10, 1989. Since that time, the SAC Award Reporter has been collecting and tabulating the results of securities/commodities arbitrations around the country and building an inventory of Awards that now exceeds 1,400.

The Reporter has been since January 1990 a separate publication and database service, reporting monthly some 200-250 Awards to Reporter subscribers. More and more of the Awards we catalogue on the database issue from arbitration forums other than the original three, but the large majority continue to be NASD and NYSE Awards. We have made arrangements with other SRO's, including now the National Futures Association, to obtain the Award information they are making public and will, with SRO cooperation and subscriber assistance, be able to build a stronger, more complete database in the coming year.

A year has passed since the first Awards were made publicly available. We not only have a far larger number of Awards to survey; we also have more complete Award information than we did last September. Arbitration staff have become acclimated to the new Award format, so many of the omissions that regularly occurred in the first Awards are occurring less regularly.

Moreover, NASD's Rockville, Maryland facility, which maintains the Awards for that forum, provided data that enabled us to return to the early Awards and fill some of the information gaps.

We recently conducted a database survey that utilized 1,289 Awards of all varieties. This article summarizes some of the results of that survey. Some of the areas covered in the September 1989 article are revisited to see if there are serious changes. We also explore some new areas, such as break-outs by major forum and by major brokerage firm, since we now have a large enough sample to make some comparisons.

Some of the caveats prefacing our survey in September 1989 still apply. For instance, the labels used to categorize disputes as Customer/Member, Member/Customer, etc., disregard Awards on counterclaims or third-party claims that can change the outcome complexion of a particular case significantly. A good example of this is the Member/Employee (NASD) Award of Prescott Ball & Turben v. Kanuth, the subject of an "Award Profile" in the latest issue of the Reporter. As a Member/Employee case, the claim by Prescott for \$6.3 million failed, a \$0 Award; but, Mr. Kanuth won a huge counterclaim Award. Had the case been styled as an Employee/Member matter, it would reflect a \$67.4 million claim (plus \$50 million in punitive damages) by Mr. Kanuth, which

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AWARD RESULTS *cont'd from page 1*

yielded an Award of more than \$38 million!

The Kanuth Award also serves to remind one that total claim amounts, which include punitive and other extraordinary damage claims, can skew the results unfavorably and, we think, unfairly, when the "real" losses or compensatory claims become a small part of the total. Such large numbers as appear in these "mega-cases" also have a disproportionate impact on the total percentages, since our quest generally is to determine the norm.

Finally, some of the required information is still being omitted in the Awards; this is vexing and unwarranted at this stage, but, as we said, the occur-

rence is lessening and its impact is dwindling as the Award base grows. We ignore it for the most part in this analysis; understand, though, that some of our numbers will not completely cross-relate, because of this factor's continued presence.

The 1289 Awards can be generally categorized as customer-related and industry-related. Twenty-six Awards could not be categorized from the information in the Awards. In the customer-related category, there were 1,100 Awards representing four different types of disputes: Customer/Member (519); Member/Customer (130); Small Claims (Customer/Member cases not exceeding \$10,000 in claims, exclusive of costs and expenses) (445); and Cus-

tomers/Employee (where no broker-dealer was named) (6). All Awards rendered by ASE, NASD, and NYSE panels in this category are made publicly available.

In the industry-related category, there were 163 Awards: Member/Employee (77); Employee/Member (65); Member/Member (16); Non-Member (Dealer)/Member (4); and Member/Non-Member (Dealer) (1). NASD does not generally release Awards dealing with industry-related disputes, so any tabulation of the results in this category is best limited to the forums that are revealing all Awards. We do not focus on the industry-related cases in this survey.

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Damage Category Analysis

CustomerMember SmallClaims MemberCustomer

Damage Category (Amount Claimed)	NASD	* %	NYSE	%	**AAA	%	All SRO Forums	%
\$1 - \$10,000	351	50.9	85	25.7	83	18.9	443	42.2
\$10,001 - \$50,000	151	21.9	114	34.4	120	27.3	275	26.2
\$50,001 - \$100,000	58	8.4	39	11.8	77	12.5	100	9.5
\$100,001 - \$500,000	85	12.3	51	15.4	104	23.6	140	13.3
\$500,001 - \$1,000,000	10	1.4	14	4.2	18	4.1	24	2.3
\$1,000,001 & Over	22	3.2	18	5.4	26	5.9	41	3.9
No Amount Indicated	13	1.8	10	3.0	12	2.7	25	2.4
Totals	690		331		440		1,048	

*This column reflects the percentage of cases in the damage category versus the forum's total caseload.
 **Unlike the SRO columns, which present figures based on Awards issued, the AAA column is based on cases filed throughout 1989.

AWARD RESULTS *cont'd from page 2*

Claims vs. Awards

All Awards

Claimants of all varieties were victorious to some degree in 777 of the 1289 cases that went to Award, or 60.3% of the time. This compares closely with the 61.3% indicated in our September 1989 survey. There were total claims amounting to \$300.4 million (remember, this does not include the \$117.4 million claimed by Mr. Kanuth). Of this \$300.4 million, \$180.6 million was classified as compensatory claims. The total amount awarded in all cases was \$49.6 million — a substantial transfer of wealth for the eight- or nine-month period covered in the survey! As a percentage of compensatory claims, this \$49.6 million equals 27.5% (28% in the September survey).

Of the almost \$50 million in amounts awarded, \$44.2 million constituted compensatory awards. The 777 winning claimants asserted \$218.0 million in total claims and \$116.7 million in compensatory claims. Thus, a comparison of the total amounts awarded to the \$116.7 million in related compensatory claims indicates that claimants of all types win 60.3% of the time and recover (assuming payment of the award) approximately 42.5% of their actual damages (37.8%, if compensatory awards only are considered). In the September survey, the corresponding figure was 43.1%.

All Customer Awards

For our "universe" of customer-claimant Awards, we combined Customer/Member disputes and Small Claims (we disregarded the 6 Customer/Employee cases), which yielded 964 Awards. Winning claims in this category numbered 532, or 55.2% of the total, --- the most significant deviation from the September 1989 results (51%).

Total amounts claimed in the 964 cases aggregated \$186.8 million, \$103.9 million of which constituted compensatory claims. Total amounts awarded aggregated \$32.2 million, \$27.7 million of which constituted compensatory awards. Thus, 31% of the total compensatory claims of both winners and losers was recovered in awards granted to customers.

This percentage rises to 50.5%, when only the related compensatory

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Award Analysis Of The Five Most Active States

CustomerMember Only

State Situs	No. Awds.	No.		Total Comp. Claims (\$000's)	Total Awards (\$000's)	"Related" Comp. Claims (\$000's)	Percentages		
		NYSE/ NASD Wins	NYSE/ NASD				Cust. "Wins" (%)	TCC TA (%)	RCC TA (%)
NY	147	80/ 58	42/ 30	37,000.2	9,963.5	21,644.9	52	27	46
CA	74	9/ 62	6/ 38	20,309.5	6,949.2	9,307	63.5	34.2	75
FL	54	17/ 34	22/ 9	10,826.1	2,381.1	9,257.7	61	22	26
TX	27	17/ 9	7/ 6	2,440.1	962	1,695.9	52	39.4	56.7
PA	27	15/ 12	6/ 7	3,922.5	344.1	2,048.3	48	8.7	17
All States	519	206/ 297	108/ 172	102,197	31,632	63,011	56	31	50

AWARD RESULTS *cont'd from page 3*

claims (\$63.8 million) of the 532 winning customers are considered. Thus, those customers who win something on their claims recover, on average, 50.5% of their actual damages (43.4%, if only compensatory awards are considered). This is right on point with the 50.3% calculated in our September survey.

Small Claims

The 445 Small Claims matters account for only \$1.68 million, or less than 1%, of the total claims in the customer-claimant category. Yet, these cases as a whole bear separate scrutiny, if only to eliminate suspicion that a high-win ratio in this category may skew the total statistics on customer wins. In fact, the number of customer wins (242) in the Small Claims group yields a percentage amazingly close, though slightly lower (54.4%), than the 55.2% for customers as a whole. The "win" percentage for customers claiming in excess of \$10,000 is 55.9%.

Customers in this group won a total of \$610,150, which, on a percentage basis, amounts to 36.3% of the total claims for both winners and losers and a relatively high 73% of their related (i.e., only those amounts that relate to winning Awards) compensatory claims of \$836,900. For this type of dispute, there is a negligible difference (about 1%) between the total claims and total compensatory claims or between total awards and compensatory awards. Accordingly, the "recovery" percentage changes little no matter how the figures are compared.

One wonders whether the considerably higher "recovery" percentage of 73% in the Small Claims group discloses anything material about the recovery percentage in larger cases. One might guess that the \$10,000 ceiling inhibits claimants from overstating their actual damages, whereas one can more easily inflate his compensatory claim in larger cases without affecting the fee schedule breakpoints. Another might attribute the difference to arbitrator psychology or to the greater absolute importance, in dollar terms, of mitigation arguments by the defense in

larger cases. There are certainly other reasonable explanations. We leave the reasons to the reader's surmise.

NASD & NYSE

Together, the NYSE and NASD accounted for 1,254 of the 1,289 Awards in our growing collection. Even though the NASD decisions do not include some of its industry-related Awards, NASD panels still account for 785, or 62.6% of the Awards. As to customer-claimant Awards, NASD issued 656 Customer/Member and Small Claims Awards; NYSE issued 285 Awards, or 30.3%, of the combined total of 941.

Despite the disparity in number of Awards handled, total claims, in dollar terms, were fairly close between these two major forums. The 656 NASD matters reflected aggregate claims of \$93.4 million and NYSE matters (285) showed total claims of \$90.0 million. Compensatory claims were \$52.1 million at NASD and \$48.4 million at NYSE. Explaining this phenomenon in part is the fact that NASD issued 359 Small Claims Awards during our survey period and NYSE issued only 79. It remains true, though, that NYSE Awards reflected amounts claimed that were skewed more to the higher dollar brackets. The Chart on page 2, which compares amounts claimed at the major SRO's to AAA securities cases, also illustrates this point.

Customers arbitrating at NASD were victorious to some degree in 370 of the 656 cases, or 56.4% of the time. At NYSE, winning claims were seen in 149 of the 285 cases, or 52.3% of the total. Total amounts awarded at NASD aggregated \$18.2 million versus \$12.5 million at NYSE. Compensatory amounts awarded were closer in absolute terms, \$14.1 million versus \$12.3 million, respectively. NYSE actually issued punitive damage Awards in more cases than NASD during the survey period, but the amounts were generally smaller. Several large Awards, including Peterson v. Shearson (SAC #8912061 - \$1 million in punitives) and Cox v. Shearson (SAC #8911172 -

almost \$900,000 in punitives, RICO, and attorney fees), account for the bulk of the difference in the NASD figures between total amounts awarded and compensatory awards.

In any case, a comparison of the total amount awarded (\$18.2 million) in the NASD customer-claimant cases to the related compensatory claims of \$30.3 million, reveals a surprisingly high 60.1%. The figure falls to 46.5%, when only the \$14.1 million in compensatory awards is compared. Related compensatory claims in the winning Awards at the NYSE totalled \$30.9 million. Thus, the comparable "recovery" percentages are 40.4% and 39.8%, respectively.

Statistical Charts

From the information we developed in reviewing the customer Awards, some additional breakdowns occurred to us that are set forth in chart form. For instance, the database is now large enough to test how well or poorly some individual brokerage houses are doing on an overall basis. The "Broker-Dealer" Chart on pages 8 and 9 offers comparative figures on customer-claimant cases for the five broker-dealers most active in arbitration (measured by Awards issued). This Chart provides similar statistics for two other brokerage houses whose results appear to be among the best and the worst during the period covered.

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SAC Award Reporter: The Securities Arbitration Commentator also publishes the Reporter, the only periodical providing monthly information on SRO public Awards in securities/commodities arbitration. The Reporter's consolidated database of Award information also permits research reports and specific inquiries, as well as hard copies of SRO Awards. Ask us about it. Subscription Price: \$168 per year.

AWARD RESULTS *cont'd from page 4*

If one is going to compare results among the large brokerage houses, it seems fair to compare results among the arbitration forums. This we do in a couple of ways. Our "State" Chart provides Award results for the five states from which the most Awards issued. There is a subcategory for each state that identifies the number of NASD and NYSE Awards included in the whole. For this chart, we omitted statistics on Small Claims Awards, since many of these are decided without a hearing ("on the papers").

The "Damage" Chart uses various dollar brackets for damage claims and compares the distribution of claims

among the NYSE and NASD. The dollar brackets employed are those used by the American Arbitration Association in reporting the dollar distribution of claims in securities cases filed. Note that the comparison offered for AAA includes all securities cases filed during 1989, whereas the NASD and NYSE figures cover only Awards issued during the survey period. In this Chart, we used Member Customer statistics, as well as Customer Member and Small Claims Awards, in order to equate the SRO figures more closely with the AAA caseload.

Conclusion

Our attempt has been to provide all

relevant statistics and allow the reader to determine the most important ones; but, such a blur of figures can also be confusing. Here's our summary: Claimants of all types won 60.3% of the time. They recovered 42.5% of their stated actual damages and won almost \$50 million. Customer-claimants won most of that -- \$32.2 million. They won 55% of their cases and recovered 50.5% of their actual damages. Small-claim customers won about the same percentage of their cases (54.4%), but did recover, on average, a greater percentage of their actual losses (73%).

Recent Articles & Cases

As a regular feature, SAC summarizes articles and case decisions of interest in the field of arbitration law. If you find one we missed or are involved in a case that produces an interesting decision, please write and tell us about it. We thank those readers who have contributed case opinions and who, by doing so, help us all to keep informed. Credit is given to contributors at the end of the relevant case summaries.

A new feature in our case summaries is the use of subject headings. We began the practice with the first 1990 issue, in order to facilitate scanning and, ultimately, to assist in arbitration research. Many of our readers have told us that the "Articles & Cases" section allows them easily to review case law in this area for briefs, legal articles and seminar presentations. Many have said, too, that such tasks would be considerably lightened if we offered a case index to past issues. The new subject headings will allow us to create a 1990 case index quickly at year-end.

Articles

The Level Playing Field, by Constantine N. Katsoris, 17 *FORD. L. JNL.* 419 (No. 4, 1990).

Never a "shrinking violet" in his regular law review articles on securities arbitration, Professor Katsoris literally peppers this article on recent developments in SRO Arbitration with his thoughts and insights on most of the major issues confronting arbitration practice and its future development. As an original member of the Securities Industry Conference on Arbitration and one of its four public representatives, these views are not only well-informed and educational, but important to SRO arbitration's future shape and well-being. Driving this candid expression is evidently a sense of urgency about the future. He makes the case quite easily that the securities markets, from 1987 to the present, have been in the "Dickens Years," and commences the piece with a quotation from a "Tale of Two Cities" ("It was the best of times, it was the worst of times...").

Securities arbitration, too, he explains, is in the throes of revolutionary change and the volatile reverberations of market movement and legal precedent that have cast arbitration into the limelight can either shake it to pieces or stimulate its healthy growth as an alternative to litigation. "In this regard," he writes, "the public *perception* of fairness must be zealously guarded, for it extends far beyond the issue of arbitration. Indeed, it goes to the very heart of

the public investors' trust in the securities markets themselves, and it is this trust which must be preserved for those very markets to remain healthy."

This is a collective effort, he emphasizes, which must involve the Congress, the SEC, the SRO's and SICA, of course, but the arbitrators, users and their counsel as well, and he suggests ways in which all should help. Don't misunderstand — the article is not preachy; it is informative and thought-provoking. We recommend it highly to new arbitrators and attorneys just embarking on arbitration practice. The section-by-section summary in Part III of the content of and changes in the Uniform Code of Arbitration from 1979 to the present enlivens the cold text of the arbitration procedures with evolutionary meaning and continuity — perfect for someone new to it all and an excellent refresher for those more experienced!

We liked best the expanded treatment the article gives to arbitrators as the keystone to the vitality and worth of the arbitration system. It is important to keep in mind, Professor Katsoris tells us, the necessary tension between assuring fairness through the absence of conflicts and biases in our arbitrators and the equally critical task of providing knowledgeable arbitrators, who are capable and honest: "[w]e must under-

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