

# SECURITIES ARBITRATION COMMENTATOR

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## IN THIS ISSUE

### AWARD SURVEY

*How fares the public investor who uses arbitration? Are the forums relatively comparable, in terms of outcomes and recovery results? What other factors affect outcomes? SAC seeks the answers to these questions and numerous others in a survey of Award results that covers six years and 10,000 Awards.....*

1

### IN BRIEF

*NASD Plans Early Neutral Evaluation in 1997; RAND Study of Jury Verdicts & Punitive Damages; Arbitrator Bias Claims Rejected by 11th Circuit.....*

13

### SAC's BULLETIN BOARD

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

15

### SCHEDULE OF EVENTS

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

16

### 1995 ADVOCATE RECORD

More than a simple directory of professionals involved in securities arbitration, the 1995 Advocate Record provides particulars about the securities Arbitration Awards in which advocates across the nation participated during 1995. If you are a regular participant in securities arbitration, this new book, a product of SAC's Award Database, offers invaluable information about adversaries, competitors, potential clients and others that will assist you in your practice and in your business.

The 1995 Advocate Record will be available to Database subscribers at a 15% discount and can be purchased in regional or national editions. Never before have advocates and their arbitration casework been matched together. The uses for this information seem endless! Call Gaynelle at SAC, for our pre-publication offer. Tel: 201/761-5880.

## Public Customer Award Survey

### The First 10,000 Awards

*ed: At this point, the major arbitration forums of the securities self-regulatory organizations (SROs) have been issuing Arbitrator Awards publicly for seven years — since May 10, 1989. While it may have seemed then a small step towards full disclosure of information about the otherwise private arbitration process, we sincerely believe that making Awards publicly available and expanding the information those Awards disclose were among SICA's (and the SEC's) most significant contributions to an open process and an informed arbitration constituency.*

*The ways in which the Awards and the information they disclose have altered and benefited the arbitration process are manifold. When SAC began gathering and cataloguing the Awards, we had no notion of the ways in which practitioners, arbitrators, and experts would utilize this new information. We did understand that we could use the Awards to conduct surveys, analyze trends, and hopefully debunk some of the myths and misconceptions that arise about arbitration in the absence of hard, quantitative information. Led mainly by our subscribers' demands and feedback, we gradually began to appreciate as well the ways in which the Public Awards could contribute to settlement negotiations, better inform tactical choices, and guide participants' strategic planning.*

*This edition represents SAC's fourth Public Award Survey, focusing primarily on investor disputes with their brokerage firms. SAC's Award Database now carries about 15,000 Awards. The current Survey deals mainly with some 10,000 Awards regarding investor-initiated claims, including securities SRO, AAA and NFA Awards. We also survey Awards issued by the two*

*major forums, NASD and NYSE, for both customer-related and industry-related disputes. In our Survey Charts, we attempt to break out the aggregate Award information in terms of the size of the claims, the time periods in which they were issued, the situs states, the forums involved, and the top twenty broker-dealer participants.*

*Two terms we will use repeatedly bear explanation: (1) "customer win" rate and, (2) customer "recovery" rate. "Customer win" rate compares the total number of Awards (i.e., all final decisions of the arbitrators) to those Awards in which the Claimant prevails. A "customer win" is one in which the customer-Claimant was granted some monetary award by the Arbitrator(s). Thus, a survey sample of 1,000 Awards that discloses 500 Awards in which the Claimant prevailed has a 50% "customer win" rate.*

*When the customer wins, it is also important to calculate how much she won, relative to the losses she claimed. That comparison, performed for the winning Awards in aggregate, establishes an average "recovery" rate. We use the total amounts awarded in "customer wins" and divide that dollar amount by the compensatory damages claimed by the winning customers. Only the compensatory claims that relate to the winning Awards (the "related compensatory claims") are used. For example, investors who won, in aggregate, \$500,000 and who had claimed losses of \$1 million would have an average "recovery" rate of 50%.*

*Besides being our most extensive Survey effort yet, this Survey is also our most current. It reviews all relevant Awards in our Database through June*

*cont'd on page 2*

**AWARD SURVEY** *cont'd from page 1*

1995, less than a year ago. The period covered is six years and the Awards covered number about twice those available for our last Survey. As we have much ground to cover, we refer readers to the previous Survey analyses, rather than summarizing their results here. Our first Survey in April 1990, which covered about 1,300 Awards, appears at 3 SAC 4&5(1). The 1991 Survey, dealing with the first 3,000 customer Awards, can be found at 4 SAC 5(1). The 1993 Survey (5 SAC 12(1)) analyzed results from the first 5,000 Awards involving customers.

The 1993 Survey also provides summaries of the earlier Surveys, as well as the findings of the General Accounting Office in its comprehensive statistical analysis of SRO arbitration: Securities Arbitration: How Investors Fare.

**The Time Distribution Chart**

The Broker-Dealer Chart in SAC's 1993 Award Survey not only supplied three-year, cumulative Award figures for each of the top broker-dealers, it also separately isolated the final six months of the May 1989 to June 1992 period. Cumulative statistics afford a wider, more reliable base for analysis; on the other hand, statistics from the most recent periods serve to identify emerging trends.

In the 1993 Survey, the figures for the latest six-month period reflected a trend towards fewer Awards and lower "customer win" rates. Since new case filings and total case close-outs at the major SRO forums had not been on the decline, the explanation for the decline in the number of Awards must lay with a trend towards more settlements. During the first half of the 90's the settlement rate in securities arbitration moved from an historic norm of less than 50% to a reported 65-70% level.

Our "Time Distribution" Chart offers six-month "snapshots" of Award statistics for the three-year period since the 1993 Survey. This approach registers the settlement trend identified in the trailing period of the 1993 Survey and follows it through the ensuing semi-annual periods. Its presence is seen in

the declining number of Awards and changes in the average "customer win" and "recovery" rates.

During the three years covered in the 1993 Survey period (5/89-6/92), customer-related Awards numbered nearly 2,000 per year. Viewing the six-month segments from the latter half of 1992 to the early half of 1995, one sees a steady decline in Awards issued from 831 to 532, semi-annually. As settlements have increased in number, fewer cases have gone to hearing and been decided by the arbitrators. Consequently, only 3,810 customer-initiated Awards issued during the latest three-year period, 33% fewer than the total of 5,694 Awards in the earlier three-year period.

A steady downward trend in the "customer win" rate is revealed by the time-distribution approach. Since this corresponds directly with the rise in the settlement rate, it is natural to assume a link. "Customer win" rates have exceeded 60% at some arbitration forums. The General Accounting Office's 1992 study of securities arbitration reported a 59% "win" rate for customers at the SRO forums (vs. 60% at AAA) and a 60% "recovery" rate (vs. 57% at AAA). Plainly, these levels can no longer be expected.

Assuming a perfect world, where both sides in a dispute are rational and receptive to settlement, the truly meritless cases and the truly meritorious cases would not reach hearing. Arbitrators would be required to decide only those matters where both sides have strong arguments and legitimate differences. This ideal would dictate a "win" rate, it seems to us, that would hover around 50-50 and recoveries by the winning parties could frequently be mitigated by equities fairly balanced between the two sides.

Whether this ideal fully explains the trends identified in our "Time Distribution" Chart, we think it plays a role. "Customer win" rates have fallen and, while the periodic "recovery" rates cut a ragged trail on our Chart, the overall

trend is downward. The average "recovery" rate moved from 44% in the early three-year period to 34% in the recent three-year period. At the same time, claim size has increased and the average amount awarded (TA/#CW) has risen to \$81,100 from \$58,200. Despite, then, a 33% drop in the number of Awards issued, the total amounts awarded declined only 16% and aggregate compensatory claims actually went up.

Will the trend toward higher and higher settlement rates cycle back? We predict that it will. Mediation may prevent that reversal, but there are few other indicators in our "crystal ball" that suggest settlement rates will stay high. Why would the trend shift towards the historic settlement rate? The short answer is — because it is the historic settlement rate! The longer answer weighs the effect of limited partnerships, the switch in disputes from speculative products to mutual funds and equities, changes in focus from churning allegations to suitability claims, belt-tightening at brokerage houses, the widening collateral consequences of settlement, a decline in case filings, the resurgence of outside counsel, and tort reform.

There are counter-trends, surely, such as the strong pull represented by mediation and ADR generally, more vigorous SRO oversight, and delays in arbitration reform and simplification. We can only report in quantitative terms that, in the last half of 1995 (not shown on our Chart), the number of Awards rose to about 700, a level not reached in similar second-half periods since 1992. This shift may be explained in other ways and could easily be a short-term adjustment. Arbitration's draw is its offer of an early "day in court." It may be that its ability to meet that promise will be most influential in affecting party willingness to settle.

In any case, the Time Distribution Chart provides a convenient overview of the Award results for the two three-year periods covered in our Survey.

*cont'd on page 3*

**AWARD SURVEY** *cont'd from page 2*

The remaining Charts attempt to isolate other factors that may also affect Award results.

**Size of Claim Chart**

The ability to survey nearly 10,000 Awards involving customer claims against brokerage firms allowed us to broaden our review of the Awards. Separating the Awards into different

compensatory claim levels was feasible, as we had enough Awards in each level to draw reliable results. The effect achieved from this particular breakdown was especially revealing in the results obtained.

In addition to parsing Award results by the compensatory damages claimed, we also included a column on

punitive damage awards. Here, we cannot say that the samples are large, because by their nature punitive damage awards are relatively rare. On the other hand, we learned something significant from this breakdown that escaped notice when we conducted our prior surveys of punitive damages in securities arbitration (see, e.g., 5 SAC 7(1) and 6 SAC 11&12(13)).

*cont'd on page 4*

| <b>Time Distribution Chart</b>         |               |                |                              |                        |                                  |              |            |            |             |
|--|---------------|----------------|------------------------------|------------------------|----------------------------------|--------------|------------|------------|-------------|
| <b>CustomerMember And Small Claims</b> |               |                |                              |                        |                                  |              |            |            |             |
| <b>5/10/89...6/30/95</b>               |               |                |                              |                        |                                  |              |            |            |             |
| Time Frame                             | (#CW)         |                | (TCC)                        | (TA)                   | (RCC)                            | Percentages  |            |            |             |
|  | No. Awds.     | No. Cust. Wins | Total Comp. Claims (\$000's) | Total Awards (\$000's) | "Related" Comp. Claims (\$000's) | Cust. Wins % | TA / TCC % | TA / RCC % | TA / #CW \$ |
| 5/1/89... 6/30/92*                     | 5,694         | 3,221          | 658,166                      | 187,489                | 422,681                          | 57           | 28         | 44         | 58.2        |
| 7/1/92... 12/31/92                     | 831           | 435            | 208,161                      | 43,763                 | 164,367                          | 52           | 21         | 27         | 100.6       |
| 1/1/93... 6/30/93                      | 733           | 379            | 115,096                      | 25,939                 | 76,472                           | 52           | 23         | 34         | 68.4        |
| 7/1/93... 12/31/93                     | 642           | 329            | 111,514                      | 28,459                 | 62,710                           | 51           | 26         | 45         | 86.5        |
| 1/1/94... 6/30/94                      | 602           | 311            | 128,373                      | 26,063                 | 83,154                           | 52           | 20         | 31         | 83.8        |
| 7/1/94... 12/31/94                     | 470           | 231            | 88,573                       | 21,486                 | 48,263                           | 49           | 24         | 46         | 93          |
| 1/1/95... 6/30/95                      | 532           | 255            | 78,357                       | 11,560                 | 29,776                           | 48           | 15         | 39         | 45.3        |
| 7/1/92... 6/30/95                      | 3,810         | 1,940          | 730,075                      | 157,269                | 464,743                          | 51           | 22         | 34         | 81.1        |
| <b>All Time Frames</b>                 | <b>9,530*</b> | <b>5,169*</b>  | <b>1,388,529</b>             | <b>344,881</b>         | <b>887,600</b>                   | <b>54</b>    | <b>25</b>  | <b>39</b>  | <b>66.7</b> |

\* SAC's 1993 Survey listed 4,962 Awards during this period, not 5,694 Awards. Since then, additional Awards not previously made public were, with the helpful cooperation of the SRO forums involved, released and added to the Award Database.

\* There is a difference of 26 Awards between "All Time Frames" and the sum of the individual timeframes. In 26 instances, we have been unable to identify the exact period in which the Award issued. These 26 Awards reflect \$288,300 in claimed compensatory damages and 8 "Customer Wins" with a total of \$123,300 in monetary awards.

**AWARD SURVEY** *cont'd from page 3*

In those surveys, we found that arbitrators awarded punitive damages in only about 2.1% of the Awards. We also found that, in terms of proportionality, arbitrators exceeded a punitive-to-compensatory award ratio of 3-to-1 in 12% of the punitive damage cases and exceeded a 5-to-1 ratio in only 7% of such Awards. That 2.1% average, though, was spread among Awards with claims of all sizes. Once we compared the incidence of punitive awards to the various claim sizes, we discovered that dispersal was not uniform. In fact, the incidence of punitive awards ranges

from .9% for low-dollar claims to 6.9% for compensatory claims over \$1 million!

More than one-third of the Awards surveyed concern compensatory claims not exceeding \$10,000. Because many of these claims are handled via the Small Claims procedures, involve only a single Arbitrator, are often decided without a hearing ("on the papers"), and less frequently request punitive damages, one cannot be too surprised that the incidence of punitive awards (.9%) is low. From that level upwards,

though, the incidence of punitive awards in each succeeding damage category heightens, peaking at 6.9% of the time in the \$1 million-and-over category.

This compares quite closely with the incidence of punitive damage awards found in the RAND Study of civil jury verdicts mentioned in this issue's "In Brief." Juries are not often asked to deliberate on claims less than five figures. Eliminate those and it seems arbitrators are doing what juries do, about as often as juries do, except that,

*cont'd on page 5*

| <p align="center"><b>Size Of Claim Breakdown</b><br/>                     (With Punitive Award Results)<br/>                     CustomerMember And Small Claims</p> |               |                      |  |                                      |                               |                                      |   |                   |                    |                |
|--|---------------|----------------------|--|--------------------------------------|-------------------------------|--------------------------------------|---|-------------------|--------------------|----------------|
| <p>5/10/89...6/30/95</p>   |               |                      |  |                                      |                               |                                      |   |                   |                    |                |
| Size Of<br>Comp.<br>Claim<br>(\$000's)   | No.<br>Awd's. | No.<br>Cust.<br>Wins | (RCC)<br>"Related"<br>Comp.<br>Claims<br>(\$000's) | (TA)<br>Total<br>Awards<br>(\$000's) | Punitive Awards*              |                                      |   |                   | Percentages        |                |
|  |               |                      |  |                                      | (#PA)<br>No.<br>Puni<br>Awd's | Total<br>Puni<br>Awards<br>(\$000's) | (PRCC)<br>"Related"<br>Comp.<br>Claims<br>(\$000's) | #PA<br>#AWDS<br>% | Cust.<br>Wins<br>% | TA<br>RCC<br>% |
| >\$0...<br>≤\$10.0   | 3,395         | 1,683                | 7,977  | 6,515                                | 29                            | 238                                  | 123   | .9                | 50                 | 82             |
| >\$10.0...<br>≤\$50.0  | 2,309         | 1,274                | 36,542   | 24,615                               | 48                            | 1,289                                | 1,527   | 2.1               | 55                 | 67             |
| >\$50.0...<br>≤\$100.0   | 1,183         | 660                  | 49,637   | 31,039                               | 33                            | 2,572                                | 2,589   | 2.8               | 56                 | 63             |
| >\$100.0...<br>≤\$500.0  | 1,653         | 991                  | 224,844  | 108,437                              | 59                            | 13,134                               | 14,309  | 3.6               | 60                 | 48             |
| >\$500.0...<br>≤\$1000.0   | 246           | 163                  | 118,991  | 41,131                               | 10                            | 2,070                                | 7,901   | 4.1               | 66                 | 35             |
| Over<br>\$1MM  | 189           | 118                  | 449,610  | 109,100                              | 13                            | 8,352                                | 24,884  | 6.9               | 62                 | 24             |
| \$s Not<br>Specified   | 555           | 280                  | ---  | 24,043                               | 18                            | 1,794                                | ---   | 3.2               | 50                 | ---            |
| All \$ Cat-<br>egories   | 9,530         | 5,169                | 887,600  | 344,881                              | 210                           | 29,450                               | 51,333  | 2.2               | 54                 | 39             |
| <p>* Excludes all Awards where an award of punitive damages was made on the counterclaim or in an industry or employment dispute.</p>                                |               |                      |  |                                      |                               |                                      |   |                   |                    |                |

**AWARD SURVEY** *cont'd from page 4*

as our previous studies indicate, their punitive damage awards are far more proportionate to the amount of compensatory awards granted.

We also verified two items of common wisdom by reference to the Size of Claim Chart: (1) the larger the losses in dispute, the more likely the Claimant will recover something; and, (2) correspondingly, Claimants with large claims recover less in relative terms than Claimants with smaller, more targeted claims. A clear pattern can be seen between "customer win" rates and the size of the claim. That rate rises steadily from 50% to 66% as the compensatory claim amount rises from \$0 to \$1 million.

There exists as well a clear relationship between the "recovery" rate and the size of the claim, but it works inversely. In other words, the smaller the compensatory claim, the greater percentage of that claim will be recovered by the winning Claimant. The "recovery" rate for winning Claimants moved from 82% for the smallest claims to 24% for the largest. At the same time, in absolute dollars, Claimants with losses in excess of \$100,000 comprised only 22% of those who tried their cases, but they won 75% of the proceeds awarded.

Arbitration is still very much about the small investor. More than one-third

of the cases tried to Award involved \$10,000 or less in losses and 60% of the Awards involved claimed losses of \$50,000 or less. On the other hand, those who maintain that arbitration should be restricted to smaller claims will find little in these statistical findings to support their arguments. The consistency and substance represented by the figures in each claim category far more readily support the proposition that arbitrators have acquitted themselves ably in deciding claims of all sizes.

**The State Chart**

With the size of our statistical base increasing from one Award Survey to

*cont'd on page 6*

| <b>Award Analysis Of The Ten Most Active States</b> |               |                      |                                       |                              |   |                    |                |                |                 |
|---|---------------|----------------------|---------------------------------------|------------------------------|---|--------------------|----------------|----------------|-----------------|
| <b>5/10/89...6/30/95 CustomerMember Only</b>        |               |                      |                                       |                              |   |                    |                |                |                 |
| State<br>Situs                                      | (#CW)         |                      | (TCC)                                 | (TA)                         | (RCC)                                     | Percentages        |                |                |                 |
|   | No.<br>Awd's. | No.<br>Cust.<br>Wins | Total<br>Comp.<br>Claims<br>(\$000's) | Total<br>Awards<br>(\$000's) | "Related"<br>Comp.<br>Claims<br>(\$000's) | Cust.<br>Wins<br>% | TA<br>TCC<br>% | TA<br>RCC<br>% | TA<br>#CW<br>\$ |
| NY  | 1,227         | 692                  | 391,587                               | 54,605                       | 267,852                                   | 56                 | 14             | 20             | 78.9            |
| CA  | 1,180         | 664                  | 222,105                               | 51,055                       | 118,045                                   | 56                 | 23             | 43             | 76.9            |
| FL  | 653           | 399                  | 133,567                               | 58,291                       | 90,484                                    | 61                 | 44             | 64             | 146.1           |
| TX  | 273           | 161                  | 100,123                               | 22,290                       | 57,084                                    | 59                 | 22             | 39             | 138.4           |
| IL  | 264           | 136                  | 47,869                                | 11,554                       | 27,476                                    | 52                 | 24             | 42             | 84.9            |
| PA  | 254           | 136                  | 43,165                                | 13,739                       | 24,497                                    | 54                 | 32             | 56             | 101             |
| MA  | 208           | 113                  | 56,212                                | 10,950                       | 44,625                                    | 54                 | 19             | 25             | 96.9            |
| MI  | 172           | 93                   | 30,618                                | 6,292                        | 21,406                                    | 54                 | 20             | 29             | 67.3            |
| MN  | 161           | 95                   | 22,669                                | 5,611                        | 12,275                                    | 59                 | 25             | 46             | 59              |
| GA  | 150           | 96                   | 54,851                                | 19,022                       | 43,036                                    | 64                 | 35             | 44             | 198.1           |
| <b>10 States<br/>Total</b>                          | <b>4,542</b>  | <b>2,585</b>         | <b>1,102,767</b>                      | <b>253,408</b>               | <b>706,781</b>                            | <b>57</b>          | <b>23</b>      | <b>36</b>      | <b>98</b>       |
| <b>All States<br/>Total</b>                         | <b>6,081</b>  | <b>3,462</b>         | <b>1,372,663</b>                      | <b>338,973</b>               | <b>879,964</b>                            | <b>57</b>          | <b>25</b>      | <b>39</b>      | <b>97.9</b>     |

**AWARD SURVEY** *cont'd from page 5*

the next, we have been able to increase the number of situs states covered in our State Chart. We surveyed five states in our 1991 Survey, eight in our 1993 Survey, and ten in this State Chart. New York, California and Florida have consistently led the list of top situs states, in terms of total number of Awards. Illinois has, in the past, been in fourth place, but Texas has moved into that spot here. Together, the top four states account for 55% of all Awards and the ten most active states comprise 75% of the whole.

Georgia made our "top eight" list in the 1993 Survey, but Michigan and Minnesota have displaced it to tenth position. As in the 1993 State Chart, though, Georgia maintains its status as the state with the highest "customer win" rate. Moreover, it has the highest average monetary award (\$198,100) and a higher-than-average "recovery rate" (44% vs. 39% for all states). Illinois marks the other end of the range with a 52% "win" rate. The lowest and the highest recovery rates are found among the top three states, with New York at 20% and Florida soaring 25 points above the average to 64%.

Despite many disparities among the various states, each state individually seems to stay in character. Readers will see little change in the results from the 1993 State Chart. This geographical diversity has always surprised and interested us. It illustrates how important the choice of situs can be. Situs determinations are made on the basis of rather time-worn guidelines, but when practitioners have the ability to influence the situs choice, it appears tactically worthwhile to make the effort.

**Major Forums - NASD & NYSE**

There have been about 6,500 cases of all types filed at the securities SRO forums in each of the past few years. When case filings at the American Arbitration Association and the National Futures Association are considered, the total number of new broker-dealer arbitrations each year approaches 7,000 on average. So far, in 1996, it appears that that number will drop somewhat, but throughout recent years, the National Association of Securities Dealers and the New York Stock Exchange have accounted together for 90% or more of the total volume.

NASD and NYSE Arbitrations deal with many types of disputes and a wide variety of fact patterns. For purposes of our "Major Forum" Chart, we separated NASD and NYSE Awards into five primary types, three of which are customer-related and two of which are industry-related. Customer-initiated arbitrations account for more than 80% of the Awards surveyed. They are classified as Customer/Member (over \$10,000) and Small Claims (\$10,000 and under) cases. The remaining customer-related Award category is Member/Customer cases, which usually concern deficits in customer accounts.

Industry-related Awards are grouped as Member/Employee and Employee/Member Awards. These types of disputes constitute about 12% of the 11,033 Awards surveyed for our Forum Chart. The NYSE has been making industry-related Awards publicly available since May 1989, whereas NASD only began making such Awards publicly available in October 1993. For that reason, NYSE Awards are greater in number in these two categories.

*cont'd on page 7*

| <b>Major Forum Chart</b>              |              |                      |  |                                      |  |                       |                |                 |                    |
|---------------------------------------|--------------|----------------------|--|--------------------------------------|--|-----------------------|----------------|-----------------|--------------------|
| <b>(Breakdown By Type Of Dispute)</b> |              |                      |  |                                      |  |                       |                |                 |                    |
| <b>5/10/89...6/30/95</b>              |              |                      |  |                                      |  |                       |                |                 |                    |
| Forum/<br>Type Of<br>Dispute          | (#CW)        |                      | (TCC)<br>Total<br>Comp.<br>Claims<br>(\$000's) | (TA)<br>Total<br>Awards<br>(\$000's) | (RCC)<br>"Related"<br>Comp.<br>Claims<br>(\$000's) | P e r c e n t a g e s |                |                 |                    |
|                                       | No.<br>Awds. | No.<br>Cust.<br>Wins |  |                                      |  | Cust.<br>Wins<br>%    | TA<br>RCC<br>% | TA<br>#CW<br>\$ | TCC<br>#AWDS<br>\$ |
| NASD/C/M                              | 4,658        | 2,718                | 900,676  | 261,151                              | 557,122  | 58                    | 47             | 96.1            | 193.3              |
| NYSE/C/M                              | 1,161        | 607                  | 436,060  | 67,767                               | 302,873  | 52                    | 22             | 111.6           | 375.6              |
| NASD/SClm                             | 2,650        | 1,338                | 12,456   | 4,648                                | 6,129  | 50                    | 76             | 3.5             | 4.7                |
| NYSE/SClm                             | 559          | 238                  | 2,406  | 629                                  | 956  | 43                    | 66             | 2.6             | 4.3                |
| NASD/M/E                              | 235          | 188                  | 26,750   | 9,559                                | 12,754   | 80                    | 75             | 50.8            | 113.8              |
| NYSE/M/E                              | 514          | 430                  | 63,443   | 24,780                               | 56,581   | 84                    | 44             | 57.6            | 123.4              |
| NASD/E/M                              | 250          | 147                  | 198,563  | 15,708                               | 115,664  | 59                    | 14             | 106.9           | 794.3              |
| NYSE/E/M                              | 305          | 181                  | 367,083  | 32,462                               | 225,643  | 59                    | 14             | 179.3           | 1,203.5            |
| NASD/M/C                              | 432          | 378                  | 21,355   | 19,648                               | 19,085   | 88                    | 103            | 51.9            | 49.4               |
| NYSE/M/C                              | 269          | 230                  | 25,510   | 21,220                               | 22,512   | 86                    | 94             | 92.2            | 94.8               |

**AWARD SURVEY** *cont'd from page 6*

Overall, there are 8,225 NASD Awards in our survey group for this Chart and 2,808 NYSE Awards.

Customer-related Awards have been publicly available from both NASD and NYSE since May 1989. Nineteen percent (1,720) of the 9,028 Awards dealing with disputes initiated by customers were decided by NYSE. Of NASD's customer-initiated Awards, 36.3% were Small Claims matters, whereas NYSE's Small Claims segment was only 32.5%. In addition, the average amount claimed (TCC/#Awd) in Customer/Member Awards and the average amount awarded (TA/#CW) are both considerably higher for NYSE Awards.

Our Chart on "Size of Claims" revealed a fairly clear ratcheting up of the average "customer win" rate, as the size of the disputed compensatory claims increased. It also indicated a fairly clear pattern of decline in the average "recovery rate," as the size of the claim increased. Given these factors, we have to credit the apparent indication in the Forum Chart that customers win more often in both NASD Customer/Member cases (58% vs. 52% at NYSE) and Small Claims cases (50% vs. 43% at NYSE).

That customers recover a smaller percentage of their compensatory claims in NYSE Customer/Member Awards (22% vs. 47% at NASD) might be par-

tially explained by the NYSE's entertaining larger compensatory claims than NASD, on average, but NYSE's Small Claims recovery rate (where the size of the claims are relatively equal) is also lower (66% vs. 76% at NASD) on average. These differences in "win" and "recovery" rates were first seen in our "Forum Chart" in the 1993 Survey and, while all of the percentages have decreased somewhat in the interim, the relative indications have remained the same.

Since the "State" Chart reflected a wide variance in both "customer win" rates and "recovery" rates, we compared the Award distributions for NYSE and NASD situs to highlight any differences. Some impact may be attributable to the geographical factor, but the impact seems slight. The four states (IL, PA, MA & MI) with the lowest "customer win" rates account for 19.1% of NYSE Awards and only 14.3% of NASD Awards. Furthermore, the four states (GA, FL, MN & TX) with the highest "win" rate for customers account for only 17.1% of NYSE Awards and 22% of NASD Awards.

NYSE's low recovery rate may be partially explained by geographical factors. New York State had the lowest recovery rate of all states surveyed (20%). New York is also the hearing situs for 35% of NYSE Customer/Member Awards, while NASD uses a New York situs in only

17% of its cases. California, which reflected a slightly higher-than-average recovery rate of 43% was the only other state in which the difference between the forums' Award distributions was as dramatic as the New York difference. California Awards account for only 8% of the NYSE Awards surveyed and 21% of the NASD Awards surveyed.

We are loath to concede that there no longer exists relative comparability between these two important SRO forums. There does seem to be some relationship between NYSE's lower recovery rate and differences in Award distributions among the states, namely New York and California. A geographical influence on the "customer win" rate differential seems possible, but not convincingly so. The size of the claims each forum entertains does not appear to be an influential factor, either.

**NFA Statistical Charts**

The two Charts on the National Futures Association's program supply Award results and case filing information about the most significant commodities SRO arbitration forum. The "Arbitration Statistics" Chart is based on information supplied by NFA and reflects, for the last five calendar years, statistics regarding all case filings and the disposition of those cases. The "NFA Awards" Chart is based upon information taken from SAC's Award

*cont'd on page 8*

| <b>Five-Year Summary of NFA Arbitration Statistics</b> |             |             |             |             |              |
|--|-------------|-------------|-------------|-------------|--------------|
| <b>Category</b>  | <b>1991</b> | <b>1992</b> | <b>1993</b> | <b>1994</b> | <b>1995*</b> |
| <b>Cases Filed</b>                                     | 232         | 200         | 191         | 189         | 214          |
| <b>Cases Closed</b>                                    | 287         | 303         | 180         | 179         | 199          |
| <b>Hearings Held</b>                                   | 125         | 85          | 62          | 52          | 55           |
| <b>Awards Issued</b>                                   | 120         | 88          | 60          | 56          | 49           |
| <b>Cases Settled</b>                                   | 96          | 169         | 97          | 90          | 117          |

\*In SAC's previous five-year summary of NFA Arbitration Statistics (5 SAC 2&3(30)), we provided similar data for NFA's fiscal years 1988-1992. This time around, NFA kindly supplied calendar year statistics to facilitate more direct comparisons with other forums' statistics.

AWARD SURVEY *cont'd from page 7*

| <b>NFA Awards Chart</b><br>(Customer-Initiated Awards) |             |                      |                                       |                              |   |                       |                |                 |                    |
|--|-------------|----------------------|---------------------------------------|------------------------------|---|-----------------------|----------------|-----------------|--------------------|
| 1/1/90...6/30/95                                       |             |                      |                                       |                              |   |                       |                |                 |                    |
| National<br>Futures<br>Association                     | (#CWs)      |                      | (TCC)                                 | (TA)                         | (RCC)                                     | P e r c e n t a g e s |                |                 |                    |
|  | No.<br>Awd. | No.<br>Cust.<br>Wins | Total<br>Comp.<br>Claims<br>(\$000's) | Total<br>Awards<br>(\$000's) | "Related"<br>Comp.<br>Claims<br>(\$000's) | Cust.<br>Wins<br>%    | TA<br>RCC<br>% | TA<br>#CW<br>\$ | TCC<br>#AWDS<br>\$ |
| <b>All<br/>Awards</b>                                  | <b>538</b>  | <b>318</b>           | <b>30,086</b>                         | <b>6,339</b>                 | <b>12,790</b>                             | <b>59</b>             | <b>50</b>      | <b>19.9</b>     | <b>55.9</b>        |

Database. The information in the "NFA Awards" Chart deals only with Awards deciding customer-initiated claims.

NFA operates under a different government regulator, the Commodity Futures Trading Commission, is not subject to SICA's Uniform Code, and, as a result, does not make the actual Awards publicly available. The Association does make public individual information on computer runs about each customer-related Award. Those runs do not supply names of arbitrators or the names of the professionals involved in each case, but they do contain information about the nature of the dispute and the claimed damages that often do not appear in the NFA Awards. SAC has compiled that information since January 1990, using the data supplied in the NFA runs.

We have written before about the NFA's excellent mediation program (See, e.g., "NFA Mediation," 7 SAC 9&10(10)). The impact of that program upon the case settlement rate is apparent in the "Arbitration Statistics" Chart. In 1995, 59% of the cases closed by NFA were settlements, whereas in 1991 only 33% of the closed cases were settled. Correspondingly, the number of hearings held and cases closed by Award have dropped dramatically.

For the period from January 1990 through June 1995, NFA has issued 538 Awards involving customers as Claimants. The overall "customer win" rate is 59% and the "recovery" rate for win-

ning Claimants averaged 50%. NFA arbitration claims have generally been smaller than claims filed with the securities SROs, but average claim size has reportedly been growing in the last year or two. For our survey period, we calculated \$55,900 as the average claim and the average amount awarded as \$19,900.

**AAA Chart**

The American Arbitration Association began making securities Awards publicly available in May 1993. Only Awards filed after that date and filed under the Securities Arbitration Rules are formally subject to the Public Award Program. SAC has relied in the past solely upon the statistics released by AAA concerning its securities arbitration program. Today, we can refer to statistics developed from our own database of publicly available AAA Awards.

The period covered by the Chart of AAA securities Awards runs from May 1, 1993 to June 30, 1995, an approximate two-year period. AAA processes a fairly high ratio of Member/Customer Awards, generally dealing with debit balances. Most of these involve one national brokerage firm, so we decided to restrict our survey to customer-initiated arbitrations only. There were 83 Awards in this category.

The customer "win rate" of 70% came as a pure surprise! Past comparisons between the AAA and the SRO forums, whether based upon statistics compiled by AAA, SAC (see 4 SAC

5(3)), or the U.S. General Accounting Office (see 5 SAC 1(1)), have all found relative comparability. The AAA "win rate" derives from a fairly small sample of Awards (58 "winners" among the 83 Awards), but beyond that we saw no visible factors that would cause us to view this result as unrepresentative. We will note that the "win" rate among the first Awards disclosed in 1993 was abnormally high (the first 18 Awards issued had 15 winners for Claimants, 83%). That dropped during 1994 to a 70% "win" rate for customer-Claimants and slipped further to 60% (15 of 25) in the first six months of 1995.

The "recovery rate" among the 83 Awards was also suspiciously high, but here the data were to blame. To determine "recovery rate," we compare the total amount awarded to the compensatory damages claimed in win-related Awards (RCC or "related compensatory claims"). We rely upon the Awards for this information. The amount awarded is always present, but sometimes the compensatory damages claimed is not. In this case, relatively frequent omissions (26 of the 58 "winners" reflected no compensatory damage figure) and the heightened effect on a small sample combined to make the total RCC figure unreliable.

In order to adjust, we considered only those Award "wins" (the remaining 32 of the 58) that displayed compensatory damage claims, when calculating the AAA "recovery rate." This

*cont'd on page 9*

**AWARD SURVEY** *cont'd from page 8*

was an unfortunate necessity, but one which is unlikely to recur. Accordingly, on the AAA Survey Chart, we display the statistical results on two lines, one for all Awards and the other for those Awards that include compensatory damage claims. As to the latter Awards only, the AAA "recovery rate" is 44.4%.

The 44.4% recovery rate is perhaps more representative of the later AAA Awards in the group. In 1993, very few of the initial Awards made public disclosed compensatory damage figures. Today, the great majority do. Moreover, there were three punitive damage Awards among those disclosed in 1993 that involved \$3.2 million in awarded amounts and \$1.2 million in punitive damages. None of those Awards discloses the compensatory claim amount. There were two punitive damage Awards in the 1994-5 period, but they totalled only \$30,000 and both Awards enumerated the compensatory damages claimed.

Thus, the AAA "win" rate of 70% appears valid for the overall period. It also appears to be settling in a region between 60-70%, still well above the "win" rates for the major SRO arbitration forums. The AAA "recovery rate" of 44% falls in line with the recovery rate (39%) shown for all SRO Awards on the Broker-Dealer Chart.

**Broker-Dealer Chart**

SAC's Award Survey "centerfold" is our two-page Broker-Dealer Chart. Focusing on results in customer-initiated matters against the major brokerage firms, the Broker-Dealer Chart seeks to compare Award results among the top users of SRO arbitration and to see what dynamics are at play.

This Chart has changed in appearance from the earlier surveys, as we have moved from a "universe" of 1,000 Awards to almost 10,000 Awards. Early on, we did not feel the number of available Awards justified generalizations about individual firm results. The 1990 and 1991 Charts also limited the results shown to the top five brokerage firms, viewed in order of the number of Awards issued. In the 1993 Survey, with 5,000 Awards to draw upon, we expanded the Broker-Dealer Chart to the top ten brokerage firms.

With double the number of Awards in this Survey, we have doubled the number of broker-dealers as to which we can view Award results. The 20 broker-dealers which appear in this issue's Chart are those firms with the most Awards relating to customer-initiated disputes. These 20 broker-dealers were involved as Respondents in the majority (58%) of all customer-initiated Awards. We have crafted a Broker-Dealer Chart which has more infor-

mation than ever before. With nearly 10,000 Awards forming the basis for our conclusions, we feel confident in making some observations about relative differences among the firms, as reflected in the Chart's figures.

Regarding the trailing 15 of the 20 ("the second tier"), we tabulated only the total number of SRO Awards issued during the Survey period and, among those, the number of customer "wins." For the top five ("the first tier") broker-dealers, we supply claim and outcome figures, as well as the usual ratios. Among the "Percentages" or comparison ratios, the most familiar is the "customer win" rate for customer claims. The calculation is provided for each of the 20 broker-dealers. PaineWebber in the first tier, and Wedbush Morgan and Thomson McKinnon in the second tier, share the highest rate (61%).

Among the majors, PaineWebber has occupied the "worst rate" slot since we began our surveys. It has stayed at 61% in the past three surveys, even though the overall rate for broker-dealers has declined from 58% to 54%. The firm's "customer win" rate in Small Claims cases was a more moderate 54%, but that still lies five points above the norm and seven points above the next highest "first tier" rate. Conversely, Merrill Lynch has consistently held the

*cont'd on page 12*

| <b>AAA Awards Chart</b>                 |                 |                       |                                     |                               |   |                     |                   |                    |                       |
|---|-----------------|-----------------------|-------------------------------------|-------------------------------|---|---------------------|-------------------|--------------------|-----------------------|
| <b>(Customer-Initiated Awards)</b>      |                 |                       |                                     |                               |   |                     |                   |                    |                       |
| <b>5/1/93...6/30/95</b>                 |                 |                       |                                     |                               |   |                     |                   |                    |                       |
| <b>American Arbitration Association</b> | <b>(#CWs)</b>   |                       | <b>(TCC)</b>                        | <b>(TA)</b>                   | <b>(RCC)</b>                            | <b>Percentages</b>  |                   |                    |                       |
|   | <b>No. Awd.</b> | <b>No. Cust. Wins</b> | <b>Total Comp. Claims (\$000's)</b> | <b>Total Awards (\$000's)</b> | <b>"Related" Comp. Claims (\$000's)</b> | <b>Cust. Wins %</b> | <b>TA / RCC %</b> | <b>TA / #CW \$</b> | <b>TCC / #AWDS \$</b> |
| <b>All Awards</b>                       | <b>83</b>       | <b>58</b>             | <b>----</b>                         | <b>10,562</b>                 | <b>----</b>                             | <b>70</b>           | <b>----</b>       | <b>182.1</b>       | <b>----</b>           |
| <b>Awards w/ \$ Clmd</b>                | <b>46</b>       | <b>32</b>             | <b>6,587</b>                        | <b>2,155</b>                  | <b>4,847</b>                            | <b>--</b>           | <b>44</b>         | <b>---</b>         | <b>143.2</b>          |

# Award Analysis By Most

## CustomerMember

(SROs Only)

5/10/89...6/30/95

| <u>Firm</u>          | <u>A w a r d</u><br><u>F i g u r e s</u> |                               | <u>D a m a g e</u>     |                                       |                                |                              |
|----------------------|--|-------------------------------|------------------------|---------------------------------------|--------------------------------|------------------------------|
| Broker - Dealer      | No. Awards                               | {# CW}<br>No. Of Cust. "Wins" | Total Claims (\$000's) | {TCC}<br>Total Comp. Claims (\$000's) | {TA}<br>Total Awards (\$000's) | Total Comp. Awards (\$000's) |
| Smith Barney*        | 1414                                     | 765                           | 403,789                | 253,862                               | 65,515                         | 56,058                       |
| PruBache             | 886                                      | 476                           | 285,726                | 222,408                               | 33,642                         | 30,091                       |
| Merrill Lynch        | 772                                      | 348                           | 223,187                | 148,615                               | 23,049                         | 19,386                       |
| Dean Witter          | 514                                      | 245                           | 77,457                 | 54,831                                | 13,404                         | 11,351                       |
| PaineWebber          | 425                                      | 258                           | 134,827                | 99,728                                | 37,449                         | 31,582                       |
| Top 5 Broker-Dealers | 4,011                                    | 2,092                         | 1,124,986              | 779,444                               | 173,059                        | 148,468                      |
| All Broker-Dealers   | 9,530                                    | 5,169                         | 2,095,431              | 1,388,529                             | 344,881                        | 291,517                      |
| Broker - Dealer      | No. Awards                               | No. Cust. "Wins"              | Cust. Wins (%)         | Broker - Dealer                       | No. Awards                     |                              |
| SBH&U                | 229                                      | 103                           | 45                     | Gruntal                               | 105                            |                              |
| Bear Stearns         | 167                                      | 73                            | 44                     | Kidder Peabody                        | 100                            |                              |
| AG Edwards           | 160                                      | 82                            | 51                     | Olde Discount                         | 93                             |                              |
| Chas Schwab          | 147                                      | 48                            | 33                     | Fidelity Brkg.                        | 77                             |                              |
| Oppenheimer & Co.    | 120                                      | 58                            | 48                     | Josephthal Lyon                       | 59                             |                              |

\* These numbers are a combination of Shearson Lehman's Awards that were rendered prior to the merger with SBH&U and Awards that have come down involving either Shearson Lehman or Smith Barney since the merger. Awards involving just SBH&U are shown separately.

# Active Broker-Dealers

## and Small Claims (SROs Only)

| <u>Figures</u>                            |  | <u>Percentages</u>     |                         |                         |                         |                     |                                |                                   |  |
|---|--|------------------------|-------------------------|-------------------------|-------------------------|---------------------|--------------------------------|-----------------------------------|--|
| "Related"<br>Total<br>Claims<br>(\$000's) | {RCC}<br>"Related"<br>Comp.<br>Claims<br>(\$000's) | Cust.<br>"Wins"<br>(%) | <u>TA</u><br>TCC<br>(%) | <u>TA</u><br>RCC<br>(%) | Small Claims Only       |                     | <u>TA</u><br># CW<br>(\$000's) | <u>TA*</u><br># RR's<br>(\$000's) |  |
|   | Cust.<br>"Wins"<br>(%)                             |                        |                         |                         | <u>TA</u><br>RCC<br>(%) |                     |                                |                                   |  |
| 276,400                                   | 161,360  | 54                     | 26                      | 41                      | 47                      | 66                  | 85.6                           | 5.9                               |  |
| 226,203                                   | 173,608  | 54                     | 15                      | 19                      | 46                      | 111                 | 70.7                           | 6.0                               |  |
| 94,896                                    | 61,070   | 45                     | 16                      | 38                      | 41                      | 66                  | 66.2                           | 1.8                               |  |
| 52,122                                    | 35,494   | 48                     | 24                      | 38                      | 42                      | 60                  | 54.7                           | 1.7                               |  |
| 104,705                                   | 78,164   | 61                     | 38                      | 48                      | 54                      | 72                  | 145.1                          | 7.0                               |  |
| 754,326                                   | 509,696  | 52                     | 22                      | 34                      | 45                      | 75                  | 82.7                           | 4.1                               |  |
| 1,374,310                                 | 887,600  | 54                     | 25                      | 39                      | 49                      | 77                  | 66.7                           | *                                 |  |
| No. Cust.<br>"Wins"                       | Cust. Wins<br>(%)                                  | Broker - Dealer        |                         |                         | No.<br>Awards           | No. Cust.<br>"Wins" | Cust. Wins<br>(%)              |                                   |  |
| 58  | 55   | Quick & Reilly         |                         |                         | 54                      | 17                  | 31                             |                                   |  |
| 54  | 54   | Advest Group           |                         |                         | 53                      | 24                  | 45                             |                                   |  |
| 47  | 51   | Wedbush Morgan         |                         |                         | 49                      | 30                  | 61                             |                                   |  |
| 34  | 44   | TMcK Secs.             |                         |                         | 46                      | 28                  | 61                             |                                   |  |
| 35  | 59   | Batemen Eichler        |                         |                         | 45                      | 22                  | 49                             |                                   |  |

\* There are more than 500,000 registered employees at about 5,400 NASD member Firms. Since only a limited number of those Firms were involved in customer arbitrations during our survey period, an "Award cost" comparison spread across registered employees seemed uninformative. The number of RR's for each firm was taken from the SIA Yearbook 1995-1996.

**AWARD SURVEY** *cont'd from page 11*

top slot for success in arbitration defense work and its customer "win rate" has moved downward from 48% in the 1991 Survey to 45% here. Merrill's "customer win" rate on Small Claims cases was also the best among the first tier firms, dropping from 46% in the 1991 Survey to 41%.

Two other ratios on the Broker-Dealer Chart provide measurements of the average "recovery rate" achieved by victorious investors. These ratios are "TA/TCC" and "TA/RCC." The first ratio compares the total amounts awarded to the total compensatory damages claimed by all Claimants (i.e., winners and losers). We prefer the second ratio, which compares the total amounts awarded to the combined compensatory claims of those who won. In other words, the compensatory claim amount (RCC) relates only to those Awards which are customer "wins."

Accordingly, "TA/RCC" measures how much the average winning investor receives of the amount he/she claims to have lost. Related compensatory claims, RCC, is a conservative figure. Like TCC, it excludes all claims for attorney fees, expenses and exemplary damages, as well as claims for interest and consequential or "lost opportunity" damages. Claim figures can easily lose all relation to the "real" or out-of-pocket losses of the aggrieved investor. Our use of a "chopped-down" loss figure provides, we think, greater reliability to the recovery rate calculation.

Some evidence of this can be seen in the narrow range within which "TA/RCC" has shifted over the Survey periods. The ratio indicates a fairly consistent "recovery" rate that has moved in the last three Surveys from 40% for all broker-dealers, to 41% in the 1993 Survey, to the current recovery rate of 39%. We also think that litigation managers can discover some comparisons of importance by viewing "related compensatory claims" for a particular firm against its "total compensatory claims."

That ratio, "RCC/TCC" is not calculated in the Broker-Dealer Chart, but

we find it useful when trying to assess the quality of a firm's litigation strategy. For instance, a firm which regularly tries cases that involve large claims and bad facts seems likely to have a relatively high RCC. Put another way, such a firm will show more of its TCC in RCC. Accurately calculating the risks entailed in trying cases should mean relatively low RCCs.

To illustrate: Merrill Lynch's RCC/TCC ratio appears to be favorable. It had only 41% of its TCC converted by Award losses into RCC, yet the firm lost a higher percentage (45%) of the arbitrations it fought to Award. It therefore won 55% of the cases involving 59% of the outcome risk. This is consistent with the firm's relatively low recovery rate and average Award cost. Together, they signify that Merrill not only lost fewer cases than the other "first tier" firms, but its losers related to smaller claims and yielded smaller-than-average award amounts.

We measure the average size of the monetary awards against each of the "first tier" firms in two ways: cost per case (TA/#CWs) and cost per broker (TA/#RRs). Dean Witter shows the best results in these comparisons, surpassing Merrill Lynch's \$66,200 with an average award amount of \$54,700. The overall average for first tier firms is \$82,700, up from about \$71,000 in the 1993 Survey. PaineWebber had the highest average award amount by far — \$145,100 (up almost 120% from \$66,800 in the 1993 Survey), and the highest average Award "cost" per broker — \$7,000.

While the top five firms appear in only 42% of the Awards, they had more than half of the claimed amounts and paid out about 50% of the \$344.9 million awarded to customers during the six-year Survey period. This is precisely the situation as it stood in the 1993 Survey, except that virtually all of the aggregate numbers doubled in the three years between.

Despite this apparent symmetry, there was considerable realignment

among the first-tier firms. Prudential Securities moved from third to second position in terms of number of Awards. PaineWebber moved from fourth to fifth place, displacing Dean Witter, but it lost more cases than Dean Witter and, in terms of total amounts awarded, it went from fourth to second place. Smith Barney, Inc. (to which we have allocated the old Shearson Awards, for purposes of this display) took Shearson's place as having the most Awards, but both the increase in the number of Awards and the increase in the dollars awarded were less than for any other first-tier firm.

Looking at the top five among the second-tier firms, we see the same five firms as appeared in the sixth through tenth slots on our 1993 Broker-Dealer Chart. Again, though, there was some realignment, with Bear Stearns and A.G. Edwards trading places. Bear Stearns experienced an increase of 123% in new Awards. A.G. Edwards' increase was 107% and the other three all doubled in number. Bear Stearns also had the biggest adverse change in "customer win" rate, going from an enviable 25% to 44%.

### Conclusion

The Public Awards programs instituted by the various arbitration forums for the securities/commodities disputes have facilitated the gathering of statistical data about Award results that provide insights about both individual types of disputes and the overall arbitration process. In this Survey, we discovered some trends, through the use of new types of analyses, that we frankly overlooked before. The disparate distribution of punitive damage awards among higher levels of compensatory claims was a new revelation.

We also observed that the size of the claim in dispute appears to have an impact on both the "customer win" rate and the "recovery" rate. The decline in issued Awards for the latest three-year period, which seems to be a direct consequence of increased settlements, also presents some interesting questions.

*cont'd on page 13*

**AWARD SURVEY** *cont'd from page 12*

Does settlement target a certain quality of claim, such that "win" and "recovery" rates on the remaining claims will be affected? Do cases that settle take as much staff time as those which are tried? Why else, given a heavy case docket, would the number of issued Awards decline, as settlements increase in number?

The observations that can be made from this information go well beyond those we covered in our narrative. For instance, we noted that only two of the "first tier" firms experienced a 100% increase in issued Awards since the 1993 Survey. Yet, all of the top five firms in the "second tier" experienced a

doubling in the number of Awards. Is that a function of growth, of differences in litigation strategy, or some other factor? Perhaps, the answers to some of these questions will be found in SAC's next Public Award Survey.

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## In Brief

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### NASD: Mediation Program Progressing; ENE Program Planned for 1997

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NASD's *The Neutral Corner* reported that the success rate of NASD's Mediation Program has continued, with "80 out of 94 (85 percent) cases mediated result[ing] in settlements." (April 1996, p. 1). In May, the Association held a three-day "Mediator Skills Training" program in Chicago, following up on a similar program in New York in February. NASD staff is reportedly planning another New York program in late September or early October.

*The Neutral Corner* also announced that NASD will develop a pilot Early Neutral Evaluation (ENE) Program, which will be "incorporated into the existing dispute resolution services in 1997." NASD will be announcing training plans to assure sufficient "trained quality evaluators to meet the needs of our customers." ENE involves the neutral evaluator in a case's merits more than the facilitative mediator approach. As such, the evaluator's role has raised

some debate in ADR circles as to whether ENE neutrals have to be attorneys. In other words, does serving as an ENE neutral involve an individual in the practice of law? (see, e.g., Menkel-Meadow, "Is Mediation the Practice of Law?" (Yes), *NIDR NEWS*, Vol. 3, No. 2, p. 1 (M-A, '96); Purnell, "The Attorney as Mediator — Inherent Conflict of Interest?" (No), 32 *UCLA L. REV.* 986 (1985)).

Thus far, NASD does not anticipate making distinctions between lawyers and non-lawyers in selecting evaluator candidates. Non-lawyers may be important to the program, since knowledge of the markets and the industry will be sought. Securities mediators often come from the ranks of professional neutrals. In contrast, the emphasis in recruiting ENE evaluators will, NASD staff believe, rest more heavily on substantive knowledge than the evaluator's legal or process knowledge.

Protection from litigation and liability is also an element of the new programs. NASD Mediation Director Ken Andrichik told SAC that NASD mediators are now covered, as NASD arbitrators have been for some time, by an indemnification provision passed by the Association's Board of Governors. ENE neutrals will presumably receive the same protection as that program gets underway.

The notion for an ENE pilot project arose in the NASD Arbitration Policy Task Force Report (7 SAC 11(6)). A two-year pilot was proposed, which would entail some 25% of larger arbitration cases being selected for mandatory ENE referral. NASD will move towards implementation of this recommendation, although Mr. Andrichik indicates practical considerations might limit the ENE experiment to several selected cities.

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### RAND Study of Civil Jury Verdicts Concludes Punitives Seldom Awarded

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The perceived prospect of a huge punitive damage award can cause unreasonable expectations among litigants and interfere with settlement potential.

It is perhaps for that reason that we recently saw an article summarizing a study of civil jury verdicts in an ADR periodical: "Courts Rarely Grant

Punitives, Study Shows," *Alternatives*, Vol. 14, No. 5, p. 67 (CPR Institute, M '96). The Study upon which the article

*cont'd on page 14*

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