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NFA Stats: During the second quarter of FY 1991 (Oct-Dec '90), 51 Demands for arbitration were filed at the National Futures Association. Of these Demands, 40 were filed by public customers against NFA Members or Associates, 2 were filed by customers who are also NFA Members or Associates, 8 were industry matters, and 1 concerned a dispute between non-Members. The Association held 49 hearings (including summary proceedings) and closed 95 cases. Of the cases closed, 11 were matters rejected for want of jurisdiction, 1 was withdrawn, another was terminated due to bankruptcy, 26 were settled, and 56 cases closed via award.

NFA Proposals: One reason the number of matters rejected for jurisdiction runs high at NFA relates to the voluntary nature of its jurisdiction over industry disputes. Business disputes (including employment disputes) between and among NFA Members and Associates are not currently subject to mandatory arbitration at NFA. NFA has received Member support, we are told, for a mandatory rule and has received approval for the concept from its Advisory Committees. Draft rules are currently being prepared for consideration by NFA's Board.

NFA Arbitrators will be happy to hear that the Association may well begin paying an honorarium to arbitrators. If it happens, filing fee increases

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may accompany the change. NFA's fee schedule has historically been much lower than the securities SRO levies. Look for this sometime in the latter half of 1991.

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Surveying Employment Arbitration Award Results

Arbitration Awards from the major self-regulatory organizations have been made publicly available since May 1989. The New York Stock Exchange includes all of the Awards it issues in the "publicly available" category. The National Association of Securities Dealers releases only those Awards that involve public customers. Industry-related disputes arbitrated before the NASD remain, for the most part, unavailable for review or analysis.

Thomas F. Wynn, Assistant Director of Arbitration for NASD, indicated at a recent seminar that industry-related arbitrations currently make up about 20% of NASD's caseload, which compares generally with historical levels. Given NASD's tally of total filings for 1990 (see "In Brief," this issue), some 600 to 700 such disputes were submitted to NASD last year. Edward W. Morris, then-Director of Arbitration for NYSE, stated at the same seminar that industry-related filings at NYSE have risen lately from a historical 25% of the total to approximately 40%. In other words, almost as many, and perhaps more, industry-related matters are be-

ing filed with NYSE now as with NASD.

How many of these cases are settled before hearing and how many are decided by arbitration panels? According to a study performed by the NASD and NYSE arbitration staffs of cases closed in 1986, 341 disputes between registered representatives and brokerage firms were concluded by NYSE (Total closed figure was 1,004). 183 settled (54%) and 158 were decided by arbitration panels. NASD processed 280 disputes (Total closed figure was 1,199) between associated persons and member firms. 177 were settled or withdrawn before hearing (63%) and 103 went to hearing.

For a more current and detailed look at Award results in "employment cases," that is, those matters which involve disputes between broker-dealers and former employees, we surveyed the SAC Award Reporter database and isolated 235 Awards. These Awards are concentrated in the first year of public Award availability, i.e., between May 1989 and April 1990. Employee/

Member (E/M) cases account for 109 of the Awards and those in which member firms were the claimant (Member/Employee, M/E) account for the remaining 126.

We have had to wait, despite some reader interest in a survey of this nature, a year longer than we did with customer cases (See 3 SAC 3&4(1)). The wait was necessary in order to perform a survey of industry Awards that offers a sample of adequate size; in some ways, it still is not sufficiently large. It should be remembered that the NASD Awards in this group constitute no more than a part of the whole. For discussion purposes, though, we assume our NASD sample is representative.

In the accompanying charts, we have shied away from comparisons between the amounts claimed and amounts awarded. Alleged damages in this area, especially in the Employee/Member disputes, are subject to wide interpretation. Also, given the size of the available sample, larger claims have a disproportionate effect on the results of such comparisons. For the

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most part, then, we stick with win/loss ratios and amounts awarded to gain perspective on the Award results.

Forum Breakdown

The first thing one notes in scanning Chart I below is that NASD and NYSE account for almost all of the

arbitrations involving employment disputes. All of the M/E (Member/Employee) cases in the survey were either NASD or NYSE matters. Of the Awards surveyed, only four were arbitrated at SRO's other than the two major forums and all four were matters initiated by the employee. As it happens, those four cases were

all "wins" for the employee and involved significant amounts. They accounted for almost \$900,000 in awards, bringing the total amount awarded employees in the 109 E/M (Employee/Member) Awards to \$9.1 million.

(Story continues below Chart I)

CHART I

***Industry Award Results**

Forum	Type Of Dispute	No. Awards	(ooo's)			(ooo's)		
			Clmts. Win	Clmts. Loss	Amt. Awd.	C/C Win	CC Loss	Amt. Awd.
NASD	M/E	26	18	8	539	3	7	38,235**
NASD	E/M	29	20	9	1,176	2	4	97
NYSE	M/E	100	83	17	2517	16	14	1,671
NYSE	E/M	76	49	27	7,086***	3	12	41
ALL SRO's		235	174	61	12,186	24	37	40,044

*Member to Member Cases are not covered by this survey.

**Prescott Ball & Turben v. Kanuth, SAC ID# 8912058, accounts for all but \$2,300 of this figure.

***Selden v. SLH, SAC ID# 9002071, accounts for \$2,914,000 of this amount.

There was a whopping \$39.9 million awarded to employees on counterclaims in "M/E" cases, but \$38.2 million of that amount is attributable to a single case (Prescott Ball & Turben v. Kanuth, 1 SAR 3(12)). Also noteworthy about counterclaim results is the surprisingly high success rate at NYSE for employees who counterclaim against the initiating firm. While member firms won 83% of the "M/E" cases at NYSE, they gave up in counterclaims more than half of what they were awarded.

Still, an 83% success rate compares favorably with the "win" rate

of 69% for NASD "M/E" Awards (assuming, again, that our sample is representative). The "win" rate for initiating employee-disputants in "E/M" cases was about the same at NASD as at NYSE (68% vs. 65%, respectively).

Counterclaim Breakdown

The rather high incidence of counterclaims by respondents in both "E/M" and "M/E" types of disputes caused us to review results solely for those Awards where counterclaims were asserted. That review is not reflected in a separate chart, but merely described here.

The purpose of a separate review was to see if the results for the initiating Claimant (i.e., the member firm in "M/E" disputes) on the original claim changed dramatically when a counterclaim was asserted. Here is what we found (we combined the results of the two SRO forums to make the sample bigger, but the results for each SRO taken individually were not materially different):

— Where a counterclaim was asserted by the employee in a M/E case (40 instances), firms won a

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monetary award on the primary claim 25 times, i.e., in 63% of the disputes.

— Where a counterclaim was successfully asserted (19 instances), the firm still won on its primary claim 9 times, i.e., in 48% of the disputes.

— Where a counterclaim was unsuccessfully asserted (21 times), the firm also won on its primary claim 16 times, i.e., in 76% of the disputes.

Is the best defense a good offense? It seems to us that the assertion of a counterclaim was somewhat helpful to respondent just by its existence, but that, for the most part, its effectiveness as a defensive tactic is a direct function of its validity. Where the counterclaiming employee won, the firm did not fare nearly as well on its primary claim. Looking to the downside, we saw little disadvantage to the respondent who is unsuccessful on the counterclaim, in terms of his or her potential to defeat the primary claim.

Broker-Dealer Breakdown

An interesting point that arose from our breakdown of M/E and E/M

cases by broker-dealer is that the major houses seem to have strong, but different, preferences when they initiate cases (Chart IV - M/E Cases on page 11). Shearson's preference for the NYSE in industry cases that it initiates is unmistakable, but Merrill Lynch and Prudential Securities also share a bias for the Big Board. PaineWebber and DeanWitter, on the other hand, took most of their disputes to NASD. All appear to be correct in their choices — indeed, one sees here that the difference disclosed in Chart I between the SRO's on M/E Award results (83% "wins" at NYSE; 69% at NASD) may be a reflection of relatively low "win" rates for broker-dealers other than the major five firms. We need a larger NASD sample to test this possibility more adequately.

Looking at Chart III (E/M Awards, p. 10), where the employee is the initiating party, one sees a discernible preference among associated persons suing the top five to use the NYSE forum. We leave judgments about the "win" rate figures in Chart III to the individual reader. The anomalies present in the NASD results for the top five broker-dealers are too great for us to assume an adequate sample.

Frequent Claims

Employee grievances against former employers appear from the figures in Chart II below to focus on basic concerns — adequate compensation and professional treatment. The categories of claims shown represent the primary allegations in almost all of the E/M Awards (106 of 109). The number of defamation and discrimination Awards does not permit ready conclusions about those cases, but claims for compensation due (and wrongful termination charges, to a lesser extent) enjoy a high percentage "win" rate and resulted in a substantial average amount awarded for those who prevailed.

Indeed, it is the size of the average amount awarded in each category of claim that is the most noteworthy aspect of this Chart. These claim categories are composed of discrete groups of Awards, so any skewing effect from a very large award should be limited to a single category. Yet, four of the five categories show six-figure averages, a good deal higher than the average for

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CHART II

Frequent Employee Claims

(Employee Member Awards Only)

Type Of Claim	No. Of Awards			Avg. Amount* Awarded In Winning Cases	Avg. Amount* Of Related Claims
		Win	Loss		
Breach of Contract	21	15	6	52	223
Compensation	56	39	17	149	653
Defamation	3	3	0	197	367
Discrimination**	4	1	3	181	500
WrongTerm	22	13	9	105	969

* 000's omitted.

** There were two add'l. E/M Awards where discrimination appeared as a secondary claim in the database - 1 win.

CHART III

Employee/Member Awards

Analyzed by Major Broker-Dealer

Broker Dealer	No. Of Awards		Claimant Wins***				No. Of Registered Representatives**
	NASD	NYSE	NASD		NYSE		
			Wins	Loss	Wins	Loss	
Merrill Lynch	0	10	0	0	7	3	12,300
Shearson Lehman	4	11	3*	1	6	5	10,933
DeanWitter	1	7	0	1	4	3	7,530
Prudential Securities	3	4	0	3	1	3	7,263
PaineWebber	1	4	0	1	3	1	4,770
Top 5 Broker-Dealers	9	36	3	6	22	14	
All Broker - Dealers	29	76	20	9	49	27	

* 3 Claimants' wins were cases in which EFH was also named as Respondent.

** Source: Securities Industry Yearbook 1990-91. Why stop at five? A. G. Edwards was the sixth largest broker-dealer, in terms of RR's employed. None of the 235 Awards comprising the M/E or E/M type involved that firm.

*** Reference to Win/Loss is a reference to the outcome for Claimants, in this case, the Employee.

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customer cases.

Conclusion

The Award Reporter database supplied the Award information from which the Securities Industry Association derived statistics for use in its *amicus* Brief in the Gilmer case, as the Brief graciously notes. Not surprisingly, the results of this more extended survey are quite comparable to those disclosed in the Brief. In evaluating those statistics, the SIA Brief observes, "[W]hile the available data is recent, it reflects that employees have received substantial awards in arbitration proceedings, and have won a significant percentage of their cases." These conclusions continue to be supported by the data disclosed in this survey as well.

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CHART IV

Member/Employee Awards
Analysis by Major Broker-Dealer

Broker Dealer	No. Of Awards		Claimant Wins***			
	NASD	NYSE	NASD		NYSE	
			Wins	Loss	Wins	Loss
Merrill Lynch	0	5	0	0	4	1
Shearson Lehman	1	49	1	0	41	8
DeanWitter	6	1	5	1	0	1
Prudential Securities	0	8	0	0	7	1
PaineWebber	6	1	5	1	1	0
Top 5 Broker-Dealers	13	64	11	2	53	11
All Broker - Dealers	26	100	18	8	83	17

*** Reference to Win/Loss is a reference to the outcome for Claimants, in this case, the Employee.

Employees choosing an arbitration forum should remember one primary difference that continues to exist between the NASD and the NYSE. Composition of the NYSE arbitration panels is similar to that used in customer cases. Thus, the claim of an employee, who is viewed as a "non-member" under NYSE's arbitration rules, will be decided generally by a panel of two public and one industry arbitrator. NASD arbitration rules view the employee as an "associated person," i.e., an industry individual, and provides an all-industry panel to hear the claims. There are theoretical advantages to one or the other kind of panel, depending upon the nature of one's case, etc. If employees believe their claims will be better-received by a mixed panel, it could explain the evident bias Claimants in E/M cases seem to have for NYSE arbitration.