

How Do Arbitrators Allocate Forum Fees?

SAC Survey of Customer-Initiated Awards

In SAC's last edition, we examined and reported upon forum fee allocations in broker-dealer initiated arbitrations filed during 1994 at the three largest securities arbitration forums: NASD, NYSE, and AAA. In this edition, we report upon the results of our survey of customer-initiated arbitrations at the same three forums during 1994. The statistics used are derived from SAC's Award Database, which now contains information about more than 14,000 Awards.

What is it we are looking for? Forum fees are no longer inconsiderable. While practitioners should not be encouraged to base tactical decisions and negotiating stances primarily upon which side is most likely to pay the fees, it is one consideration in the mix. Moreover, most practitioners base generalizations about arbitration upon their own experiences trying arbitrations, yet very few practitioners try more than a dozen cases to Award in the course of a year. Therefore, we think certain generalizations made, even by experienced practitioners, are likely to be based upon inadequate samples and deserve to be tested against samples where some statistical validity can be assumed. In fact, reference to some norm may help practitioners whose individual experience varies from that norm to understand why.

We break out our Survey results by forum in this article, but we would readily concede that statistical differences among the forums could be explained by any number of variables, some of which might not be quantifiable (such as the conduct of the parties and their representatives at hearing). In theory, the forum itself should not be influencing Arbitrators' decisions about who should be charged. It is also true that many Arbitrators serve with more than one arbitration forum; presumably, each will apply similar stan-

dards in making forum fee allocations, regardless of which forum is currently sponsoring him or her.

Methodology

We refer readers to the first part of this Survey, 7 SAC 4&5(7), for a more detailed explanation of our approach and the universe of Awards we surveyed. For purposes of understanding what follows here, we should repeat the classifications we used in lumping forum fee allocations into four different groups: (1) Awards in which the broker-dealer is ordered to pay the bulk of the forum fees; (2) those in which the customer is ordered to pay the bulk of the forum fees; (3) those in which the fees are split between the Claimants and the Respondents; and, (4) those in which the Arbitrators order a refund of the fees and charge neither party.

The statistics offered in this article on customer "win" rates, that is, the frequency with which investors win some monetary award on their claims, are presented strictly to compare the impact of winning or losing on the fee allocations. We periodically do an exhaustive survey in SAC of a large number of Awards to arrive at "win" rates for investors and recovery rates (see, e.g., our last survey at 5 SAC 12). That was not the focus in this survey.

Broker-Dealers as Claimants

In our survey of Member/Customer cases, we did find some differences among the general forum fee allocations, from one forum to another. The results, taken as a whole, disclosed considerable similarity in the allocation practices of SRO Arbitrators, whether serving at the NASD or the NYSE, but our small sample of 1994 Awards at AAA disclosed a greater tendency to split fees among the parties (38% of the time at AAA versus 16% of

the time at the SROs). Customers were charged the bulk of the fees in a majority of these collection-type cases at the SROs, but only a quarter of the time at AAA.

Among our primary observations from this statistical exercise were the following: (1) the common assumption that broker-dealers will pay the fees, when they file as Claimants in arbitration (even though they win) was not validated here. Either the customer pays or the fees are split in the substantial majority of the cases. (2) the small number of Member/Customer Awards strongly indicate that brokerage firms are pursuing collection matters in court, not in arbitration. Although 18 of the 52 AAA Awards surveyed were brokerage firm-initiated, one firm accounted for all 18. At the SROs, there was a total of 44 such Awards among almost a thousand customer-related Awards closed during 1994.

Customers as Claimants

Generally speaking, there was a far greater tendency to split forum fees between the two sides in customer-initiated actions than in the collection-type actions. This meant, correspondingly, that one side was burdened with the bulk of the bill less frequently, but, when this occurred, it was generally the brokerage firm which was given the tab. The nearly parallel SRO statistical findings in the Member/Customer cases dissolved into considerable disparity when NASD and NYSE were compared on customer-initiated matters.

AAA Awards

Thirty-four of the 52 AAA Awards were customer-initiated. In none of the 34 Awards was the Claimant allocated most of the fees. Fee-splitting was the norm (65%), but in the remaining 12

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instances (35%), the brokerage firm was slated to pay most of the fees. In all but one of the cases, this occurred when the broker-dealer lost the case.

The frequency with which customers won some monetary award on their claims was unusually high among the AAA Awards. There were 25 "wins" for investors among the 34 Awards (74%). Fees were split 89% of the time when the customer lost and 56% of the time when the customer won. In 44% of the cases where the customer emerged victorious, the broker-dealer received the bulk of the fee allocation.

NASD & NYSE Awards

The sample surveyed for the SRO forums was far bigger than for AAA, so we accord a bit more reliability to the customer "win" rates. The survey disclosed that investors received monetary awards in 46% of the NYSE Awards during 1994 and in 52% of the NASD Awards.

Only one of the AAA Awards concerned a claim of \$10,000 or under, whereas approximately one-third of the NASD and NYSE Awards qualified as Small Claims. The "win" rates and fee allocation patterns for these smaller cases did vary somewhat from the rates and patterns observed for customer claims over \$10,000. Excluding Small Claims decreased the customer "win" rate to 44% at NYSE, while at NASD the "win" rate increased to 56% for claims over \$10,000.

For purposes of determining fee allocation patterns, we surveyed all customer-initiated Awards together. In our view, the impact of including Small Claims Awards was not so great as the confusion we would create by accounting for them separately. The overall fee allocations by NASD Panels revealed assessments primarily against the brokerage firm Respondent in 28% of the Awards, primarily against Claimant-investors in 15% of the Awards, and, in 57% of the Awards, fees were split between the two sides. There were four Awards in which the parties were excused from paying forum fees.

At NYSE, the corresponding statistics disclosed that forum fees were assessed against the broker-dealer 44% of the time, against the customer 22% of the time, and split among the parties 32% of the time. Again, there were four instances, all in Small Claims Awards, where we found no indication that fees were assessed.

Where customers won monetary awards, there tended to be a shift toward placing primary fee responsibility on the broker-dealer. Among a total of 425 such Awards at NASD, there were 184 instances (43%) where the broker-dealer was assessed. At NYSE, the corresponding figure, among 75 customer "wins," was 43 (57%). There were 20 NASD Awards in which the customer was primarily assessed (5%) and 6 NYSE Awards (8%). Except for six "refund" situations, the remaining Awards were classified as fee-splitting (219 at NASD or 52%; 22 at NYSE or 29%).

Among 394 NASD Awards where all primary claims were dismissed, Arbitrators tended to relieve the Respondent broker-dealer of the primary burden for fees as well. There were only 43 instances (11%) among these Awards, in which the winning broker-dealer was primarily assessed. At NYSE, the same tendency was present, but less distinct. The corresponding figure, among a total of 89 Awards, was 29 (32%). There were 99 NASD Awards in which the losing Claimant was primarily assessed (25%) and 30 NYSE Awards (34%). Except for two "refund" situations, the remaining Awards were classified as fee-splitting (250 at NASD or 63%; 30 at NYSE or 34%).

In this part of our survey, NASD and AAA seemed more alike, with NYSE displaying some differences in pattern. For instance, emerging victorious had a favorable impact at all forums upon the broker-dealer's relative responsibility for fees, but the impact was less pronounced in NYSE Awards. NYSE Arbitrators also tended more to place the primary fee burden on broker-dealers when the customer won,

whereas NASD and AAA Arbitrators tended to split fees in the majority of cases, more so when the broker-dealer won, but even when the customer won. Charging the winning customer with primary fee responsibility, though, was a rarity at all three forums.

SECURITIES ARBITRATION COMMENTATOR - Editor and Publisher: Richard P. Ryder, P.O. Box 112, Maplewood, N.J. 07040. Business Office: 6 1/2 Highland Place, Maplewood, N.J. 07040 (201) 761-5880. FAX No. (201) 761-1504. Copyright © 1995 Securities Arbitration Commentator. No part of this publication may be reproduced in any manner without the written permission of the publisher.

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