

Forum Fee Survey

Who Pays in Employee-Member Disputes?

Introduction

More than one court has cited the D.C. Circuit’s decision in *Cole v. Burns Intl. Security Services*, 105 F.3d 1465 (C.A.D.C. 1997), for the proposition that the employer pays all the fees in securities arbitration. That list now includes the U.S. Supreme Court. The exact quotation from that Court’s decision states that:

“[I]n *Gilmer*[v. *Interstate/Johnson Lane*, 500 U.S. 20 (1991)], the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims. There is no reason to think that the Court

would have approved arbitration in the absence of this arrangement....”

We searched the *Gilmer* decision by the terms “fees” and “costs” and they appear neither in the majority, nor the dissenting Opinions. We found no indication that the *Gilmer* Court considered the NYSE fee structure at all. The *Cole* Court is technically correct that employees do not “pay for the arbitrator,” but in the same sense employers do not either. The NYSE pays its arbitrators and, indeed, the NYSE continues to subsidize its programs over and above the fee revenues collected from parties.

It is also true, though, that employees and employers pay filing and forum

fees to the NYSE and the arbitrators can allocate those fee charges among the parties at their discretion. At the NASD, the same is true, except that it can no longer be fairly said that the parties do not “pay for the arbitrator.” During the late 90’s, the NASD has raised its fees considerably with the stated objective of having the users pay for the forum. Indeed, the Association has established a separate subsidiary, NASD Dispute Resolution, Inc., to provide dispute resolution services. That subsidiary is charged with the goal of becoming self-sustaining.

Survey Methodology

When the *Cole* Court’s statement about securities arbitration recently saw *cont’d on page 6*

| FORUM FEE SURVEY: Employee-Member Awards, 6/97-6/00 | | | | |
|---|---------------------------------|--|---|--|
| OUTCOME | No. Awards (Total #) | Costs Assessed BD Primary Payer (#/%) | Costs Assessed Empl. Primary Payer (#/%) | Costs Assessed Parties Co-Pay (#/%) |
| All Awards ¹ Employee-Member | 562 ⁴ | 233/41% | 70/12% | 251/45% |
| Employee Wins ² | 331 | 188/57% | 13/4% | 125/38% |
| Respondent Wins ³ | 224 | 42/19% | 57/25% | 124/55% |
| SUMMARY OF RESULTS | | | No. of Pays /No. Awards | % Frequency of Assessments |
| Awards in which Employee Wins, but is Co-Payer or Primary Payer | | | 138/331 | 42% |
| Awards in which Respondent Wins, but is Co-Payer or Primary Payer | | | 166/224 | 74% |
| Overall Frequency of Employee as Co-Payer or Primary Payer | | | 321/562 | 57% |
| Editor Notes: | | | | |
| 1. Eight Awards among the 562 were stipulated or interim Awards or for other reasons were omitted from the cost assessment columns. Two were “0” classifications (i.e., fee refunds/forgiveness). | | | | |
| 2. Five Awards among the 331 were omitted. Two were “0” classifications. | | | | |
| 3. One Award among the 224 was omitted from the cost assessment columns in this category. | | | | |
| 4. Seven Awards among the 562 were stipulated or interim Awards or for other reasons were not classified as “employee wins” or “respondent wins.” | | | | |

FORUM COSTS SURVEY *cont'd from page 5*

further endorsement in the dissenting Opinion in *Green Tree Finl. Corp. v. Randolph* (Ginsburg, J., U.S. Sup. Ct., 12/11/00), we decided it was time to compile some statistics on how frequently the complaining employee does get assessed. To do this, we surveyed SAC's Award Database for a three-year period from 1997, when *Cole* was decided, to 2000. During our Survey Period, 562 Awards issued from the SRO forums wherein employees and former employees were the initiating Claimants against member Respondents ("Employee-Member Awards"). We classify Awards, upon entry into the Database, using four classifications for "who pays": (1) the Respondent is assessed the bulk of the forum fees; (2) the Claimant is assessed the bulk of the forum fees; (3) Both sides, Claimant and Respondent, are assessed a relatively equal share of the fees; and (4) Fees are forgiven or refunded by the Arbitrators.

Using these classifications, we developed statistics on "who pays" in Employee-Member cases, when the Arbitrator allocate the fees. The results are reflected on the Forum Fee Survey Chart that appears on the preceding page.

The Awards were neither surveyed for the kind of claim asserted by the employee, nor for a breakdown by forum, situs or amount of claim. We did examine whether arbitrators factor in "who wins" in deciding "who pays." Thus, the Chart indicates that employee-Claimants won monetary relief in 331 Awards (331/562, or 59% of the time) and that brokerage firm Respondents were assessed no monetary amount in 224 of the Awards. For ease of reference, we refer to the two categories as "employee wins" and "Respondent wins," respectively. Within each classification, the Chart reflects whether the forum costs were assessed primarily against one or the other side or whether the costs were split by the arbitrators.

While we did not perform a forum breakdown, we can confirm that the

great majority of these Awards are NASD-DR Awards and that almost all of the rest are NYSE Awards. NASD-DR has a different fee structure than the NYSE. First of all, it charges higher fees generally. Secondly, it charges the member-users special fees, over and above the usual forum and filing fees, that are not allocable by the arbitrators. Thus, one can accurately say that the member firm almost always pays more than the employee user. We do not consider those special fees in determining our fee classifications. We do consider filing fees, which are usually paid by the Claimant as the filing party, because they are available for Panel allocation. Forum fees for hearing sessions are generally the largest element in the arbitration costs allocated by the Arbitrators.

Survey Analysis

When the employee won, the Arbitrators clearly placed the forum fee burden on the losing brokerage house. Only 4% of the time was the winning employee designated the primary payer and only 42% of the time was the winning employee ordered to pay half or more of the fees. When the employee lost, arbitrators were more likely to split the fees, as they did in 55% of the cases and, despite winning, brokerage houses were the primary payers in 19% of the cases. Still, overall, without regard to outcome, employee-users did not have a "free ride" in the majority of cases. They probably paid a minor portion of the fees in many more cases -- a factor for which we do not account here -- but, in 57% of all Employee-Member Awards, the employee-Claimant was a co-payer or primary payer, i.e., s/he was ordered to split the fees with Respondent or to pay the bulk of the fees.

It may have been true once, probably more so the further back in time one goes, that the brokerage industry "pays for the arbitrators" in investor disputes and employment controversies. When forums were heavily subsidized, when most of the revenues of SROs came from member dues, and

when arbitrators were routinely encouraged by the forums to charge the member party, one might have fairly said so. These propositions are no longer true today. The staff stays out of it and arbitrators are far more likely to allocate the costs based upon the outcomes, party conduct during the proceeding, or other equitable grounds related to the case before them.

As the courts take up the issue of whether employees or consumers are unfairly charged to arbitrate their disputes or whether, through excessive fee schedules, those seeking to vindicate federal statutory rights are blocked by "financial inaccessibility," parties opposing arbitration will need to present the courts with quantitative data and cost estimates that will tell the courts what the costs are likely to be and whether the employee or consumer is likely to be the one to bear the costs. Courts will likely want to look at the relative costs of comparable forums and should, while they are at it, scrutinize the true costs of pursuing the same claims through litigation.

In those cases, it will be important for parties to present the courts with an accurate picture of the costs of proceeding in arbitration. The *Cole* Court was misinformed, perhaps, about cost allocations in the securities arbitration arena; whether misinformed or misdirected, it has fostered a misimpression that, with the *Green Tree* dissent's imprimatur, has gained factual currency. Brokerage firms, particularly under the NASD fee structure, clearly pay more of the fees and they pay more frequently. However, employees pay often and well, too. In making their assessments of what is fair or unconscionably one-sided, it will be important for the courts to discard misty myths about a "Camelot" in which the parties arbitrate for free.

Postscript: Since we have this additional bit of space -- here's a question: why is it a good thing that employers pay all the arbitrator fees, anyway? That will just lead to suspicion that the arbitrators (and the forum) are "hired guns" beholden to management.