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Securities Arbitration Alert
Surveys of 2004 Public Awards
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SURVEYING 2004 RESULTS (Attorney Fees): *SAC's Award Database offers insights and information about almost 40,000 securities arbitration Awards. About 3,600 of those Awards issued in 2004, which will be our source for some upcoming mini-surveys.* In this Alert edition, the subject is attorney fees. For this survey, we canvassed 3,614 Awards that issued during 2004. Among those Awards are about 800 Stipulated Awards that, for purposes of this survey, needed to be omitted from the sample. We have not eliminated Stipulated Awards from our surveys in the past, because their presence was nominal, but the incidence of Stipulated Awards has grown each year in the past several years. The upward trend will probably peak this year, with the advent of NASD Rule 2130. In any case, that omission left 2,815 Awards that were not Stipulated Awards. Among those, attorney fees were requested by the Claimant in 2,060 Awards. This is a large portion of the whole (73%), considering the American Rule's bias against awarding attorney fees, but, here again, the tendency – to request attorney fees as part of the monetary claim – has grown in the past decade. If one looks at the first ten years of Public Awards, from 1989-1998, more than 40% of the attorney fee requests are concentrated in the last three years of that period (see "Attorney Fee Award Survey," 11 SAC 3(7)). Among those 2,060 Awards, arbitrators granted attorney fee requests to Claimants on 338 occasions or about 18% of the time. We next checked just Customer-Member Awards to eliminate those cases where broker-dealers or employees are the Claimant. Customer-Member Awards -- customer-initiated arbitration with larger-dollar (>\$25k) claims – also offer a sample where representation is more common. We found 1,628 Customer-Member Awards (excluding Stipulated Awards and 1,271 Customer-Member Awards that reflected an attorney fee request by the Claimant (78%)). Of those 1,271 Awards, attorney fees were awarded in 165 instances (13%). For comparison purposes, check our 1998 Survey of attorney fee awards, when we found an incidence of 19%. (*ed: In next week's Alert, we'll parse this sample still further, by eliminating pro se Awards and no-money Awards from the 1,271 Awards-sample and will discuss distribution by state. Readers are invited to pose questions to the Editor that you would like to see answered by surveying 2004 Award results. Just send your request to rryder@sacarbitration.com.*) (SAC Ref. No. 2005-41, 10/19/05)

SURVEYING 2004 RESULTS (Attorney Fees, Part II): *SAC's Award Database offers insights and information about almost 40,000 securities arbitration Awards. About 3,600 of those Awards issued in 2004, which will be our source for some*

upcoming mini-surveys. In this Alert edition, we begin where we left off last week. We established, through canvassing 3,614 Awards that issued during 2004, that attorney fees are requested by Claimants in SRO arbitration about 73% of the time and are awarded, where requested, about 18% of the time. When we narrowed the sample to attorney fee requests by customer Claimants only (excluding Small Claims), we determined that 78% of such Claimants asked for attorney fees in the 2004 Award sample. In a similar survey in 1998, SAC found that attorney fee awards were granted to Claimants in 19% of those Customer-Member Awards where attorney fees were requested. In this 2004 Award survey, the percentage of requesting Awards (1,271) that succeeded in obtaining a fee award (165) was only 13%. What accounts for the difference? One factor that distinguishes the two samples is the higher rate of attorney fee requests (78%) in 2004 than in the 1996-1998 Survey (68%). It stands to reason that if one lowers the denominator in an equation that compares fee awards to fee requests, that a higher incidence of fee awards will be reflected. This attorney-fee “win” rate can also be influenced by the merits “win” rate for the Awards in the sample, by the situs state, and by whether or not the customer was represented. Just to weigh the effect, we checked to see how many of the 1,271 Awards containing attorney fee requests were made by customers appearing *pro se*. We expected very few would ask; 57 did, but that was not enough to change the 13% rate more than half a percentage point. Next, we eliminated the losers from the 1,271 denominator; that left 676 Awards in which attorney fees were requested *and the Claimant prevailed*. Comparing the 165 attorney fee awards to just those 676 “winner” Awards rendered an incidence rate of 24%, as compared to the overall 13% rate. Finally, in our 1996-1998 Survey, Georgia had the highest incidence rate, a surprisingly high 41.8%. Of the 1,271 Awards where attorney fees were requested in our 2004 Award set, 57 were Georgia-based, but only 5 of the 165 attorney fee awards related to that state. That was a big change, so we checked second-place Washington, which had a 40.5% incidence rate in our 1996-1998 Survey. Washington accounted for 31 of the 1,271 “request” Awards and 11 of the 165 “fee” Awards – a 35% incidence rate. California (6.2%) and New York (8.7%) had the lowest incidence rates in the earlier Survey and in the 2004, there was little change for California (6.6% or 11/167) and New York registered an incidence rate in 2004 of 3.5% (or 7/199). It seems likely from these figures that the drop in the incidence of fee awards from 19% to 13% nationally is the result of geographic pockets of change. (*ed: In next week’s Alert, we’ll focus on “win” rates for Claimants among the various types of disputes. Readers are invited to pose questions to the Editor that you would like to see answered during our continuing survey of 2004 Award results. Just send your request to rryder@sacarbiration.com.) (SAC Ref. No. 2005-42-02, 10/26/05)*

AWARD STATS, 2004 (“Win” Rates): SAC’s Award Database now contains data regarding almost 40,000 securities arbitration Awards from a variety of forums, searchable by more than 50 different fields; for this mini-survey, we reviewed NYSE and NASD issued in 2004 for Customer Claimant “win” rates. Some 3,614 Awards were recorded on SAC’s Award Database with 2004 issue dates. NYSE and NASD Arbitrators rendered 595 Awards in Small Claims cases (both hearings and “on the papers”) and another 2,300 Awards were rendered in CustomerMember cases, where amounts claimed exceed \$25,000. A significant percentage of the NASD Customer

Member Awards (almost 700 in number) are Stipulated Awards, which simply record party stipulations in settled matters. Although Arbitrators have some discretion in ruling on these stipulated matters, we do not view them as “merits” Awards and have eliminated them from all categories in measuring arbitral rulings in favor of Customer Claimants.

Customer Claimant Awards Results: Given this, we reviewed 1,439 (vs. 2,103) CustomerMember Awards decided by NASD Arbitrators and 166 (vs. 197) such Awards decided by NYSE Arbitrators. Seventy-three CustomerMember Awards resulted in a monetary award for the customer, yielding a 44% “win” rate (73/166) at NYSE, while NASD Arbitrators issued monetary awards to customers in 718 of the 1,439 CustomerMember Awards, 49.9% of the time. In the Small Claims Awards category, the “win” rates were lower at both forums. At NYSE, the “win” rate was about five points lower, at 38.9% (51/131), than the NYSE CustomerMember “win” rate of 44%. At NASD, a “win” rate of 31% (141/455) for the Small Claims Awards left a 19-point gap between the \$25,000-and-under matters and NASD CustomerMember Awards. This surprisingly low result in the Small Claims category mitigates the overall “win” rate in Customer Claimant cases. Combining the results in the two customer-initiated categories, the total of 1,894 Awards yields a 45.4% “win” rate for Customer Claimants (859/1,894). Thus, for 2004, NYSE Awards reflected a “win” rate in CustomerMember cases that was six points lower than NASD, but in Small Claims matters the Exchange’s “win” rate was eight points higher than NASD’s. Together, the Customer Claimant cases revealed comparable “win” rates at NASD and NYSE of 45.4% and 41.8% (124/297), respectively.

CustomerMember Awards by State: As the great majority of Small Claims Awards are decided without actual hearings, we discarded the Small Claims Awards in breaking out “win” rates for customers by State. The “State” designation is, of course, the hearing location and does not necessarily reflect the customer’s residence or the branch office locale. Represented below are the top ten States, in terms of the number of NASD CustomerMember Awards issued during 2004. Where a sufficient number of NYSE Awards was lacking in the situs, we did not attempt to calculate a representative “win” rate for the Exchange (“N/R”).

New York: NASD “win” rate: 45% (104/233); NYSE “win” rate: 40% (19/48).

California: NASD “win” rate: 48% (100/209); NYSE “win” rate: 41% (7/17).

Florida: NASD “win” rate: 54% (103/192); NYSE “win” rate: 44% (7/16).

Texas: NASD “win” rate: 38% (37/98); NYSE “win” rate: 41% (7/17).

Pennsylvania: NASD “win” rate: 45% (33/74); NYSE “win” rate: 55% (6/11).

Georgia: NASD “win” rate: 49% (19/39); NYSE “win” rate: N/R% (3/4).

Arizona: NASD “win” rate: 46% (18/39); NYSE “win” rate: N/R% (1/5).

Ohio: NASD “win” rate: 61% (23/38); NYSE “win” rate: 71% (5/7).

Illinois: NASD “win” rate: 46% (17/37); NYSE “win” rate: 17% (1/6).

Washington: NASD “win” rate: 67% (25/37); NYSE “win” rate: 0% (0/0).

Recovery rates, comparisons of the compensatory amount claimed to the total amount awarded in customer “win” cases, are far more volatile and subject to skewing than the “win” rate statistics are, because we are reliant upon the estimate of compensatory losses stated in Claimant’s pleadings. When taking an average, one highly exaggerated claim amount can introduce significant unreliability into calculations regarding “how much” of the average customer’s losses one recovers. To moderate the effect of outlying

compensatory claims, we chose to use a “mean” recovery rate, i.e., one determined by designating the “mean” (or middle) amount of compensatory losses claimed as the denominator and the “mean” amount granted among the winning Awards. In the case of the State with the most Awards, New York, that meant a mean recovery rate of 21% (69.2/328.1) among NASD Awards. In the case of the State with the highest “win” rate, Washington, we calculated a mean recovery rate of 45% (79.0/173.8). Overall, for CustomerMember Awards rendered by NASD Arbitrators during 2004, we found a mean recovery rate of 29% (82.4/288.0). The comparable recovery rate for NYSE “winners” in CustomerMember Awards was 18% (50.0/285.0). *(ed: Note the closeness of the figures for mean compensatory claims for NASD and NYSE arbitrations. That closeness suggests, we think, greater reliability in using this mean rate, as opposed to an average recovery rate. Readers should feel free to e-mail us with suggestions for further searches relating to 2004 Awards. We intend to continue analyzing these Awards from varying angles, as a prelude to doing a year-by-year comparison of Award results in a major survey in 2006.)* (SAC Ref. No. 2005-45, 11/25/05)

2004 AWARD STATS (Large NYSE Firms): “Win” rates for customers play a role in the decision making of Claimant’s lawyers when selecting which SRO forum to use - NYSE or NASD; we decided to compare the “win” rates for the two forums when customers sue large NYSE members. Historically, NYSE Arbitration has reported a lower “win” rate for customers than NASD has reported. For instance, in the latest SICA Report, the statistical chart for NYSE reflects 116 Awards in favor of the customer among 335 Awards rendered in 2004 (34.6%), while NASD, for the same year, reports 1,113 Awards in favor of customers among 2,019 issued (55.1%). That stark difference could easily influence Claimants who are considering at which forum to file their claims. Is this gap real? Do Claimants really do worse at NYSE or are there factors that could bring these two “win” rates closer together? SAC’s statistical reviews for 2004 have found NYSE lagging, but by far fewer points than the SICA statistics. We decided to review NYSE and NASD Awards in customer-initiated cases (exclusive of Small Claims), where the Respondent was one of five large broker-dealers: Merrill Lynch, MSDW, UBS (PWI cases), Prudential and Wachovia. Our working assumption was that a forum comparison restricted to just these Respondents should produce forum “win” rates that are similar. Although they number only five, this group of Respondents represents a significant percentage of the Awards issued by each forum in the CustomerMember category for 2004. At NASD, 41% of CustomerMember (claim exceeds \$25,000) Awards included one or more of these five Respondents and, at NYSE, a majority of the CustomerMember Awards issued in 2004 (58%) related to one or more of the five firms. Among 1,605 Awards in this category, 166 were issued by NYSE arbitrators and 1,439 were issued by NASD arbitrators. 96 of the NYSE Awards named one of the five selected firms and 37 of these Awards were “wins” for the customer (38.5%). NASD Awards in this category numbered 604 and 282 of those Awards (46.7%) were customer “wins.” Surprised by this gap between the two “win” rates, we looked further and found that Merrill Lynch’s results at the two forums accounts for a large part of the difference. Merrill was involved as a Respondent in 48 of the 96 NYSE Awards and only 15 of those 48 were customer “wins” (31.2%). At NASD, Merrill did better than the 46.7% average, but the customer “win” rate there was a much higher

43.7% (110/252). Merrill also accounted for a somewhat smaller part of the whole (252/604), about 42% instead of 50%. The “win” rate at NYSE, without including Merrill Lynch, and only including the four other firms, was 45.8% (22/48), while at NASD, a recalculated rate, excluding Merrill, revealed customer “wins” in 172 of the 352 Awards (48.8%). Thus, there remains a difference between the two forums’ “win” rates, even when the sample is restricted to specific NYSE Respondent firms. The real difference is probably only 3 points and not 20 points, but it remains a factor for consideration. *(Caveats: The NYSE samples, especially without Merrill, are small, perhaps too small, so proceed with caution. Readers should also understand that some Awards involve more than one of the Respondent firms and a “win” for the customer does not necessarily mean liability for the Respondent firm, when multiple Respondents defend in a case.)* (SAC Ref. No. 2005-48-01, 12/14/05)