

# SECURITIES ARBITRATION COMMENTATOR

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### 2005 AWARD SURVEY

*In this two-part article, we turn the illuminating eye of SAC's Award Database towards the year just past to see what the 2005 Awards reflect about the ever-changing securities arbitration process. For example, we learned from this exercise in Part I the importance of claim size to the expected recovery rate.*

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## The Year In Review (Part I)

### A SAC Survey of 2005 SRO Arbitration Awards

#### Introduction to Survey

#### Moving to New Ground

In the past, we have chosen to conduct surveys of SAC's Award Database by topic – sort of a vertical inspection of the Database. Thus, we have selected topics such as punitive damages, forum-fee assessments, arbitrator service, or attorney fee awards and have examined relevant Awards over a period of years. This approach has the virtue of providing a representative sample that is large enough to avoid skewing by statistical outliers, even when the item under examination is narrow by definition, i.e., attorney fee awards by state.

Past surveys have concentrated on a span of years for analysis, because we have been reluctant to assume that virtually all Awards made publicly available by the various SRO arbitration forums had been gathered and entered into our system. Over the years, though, the job has become easier as the forums have dwindled in number. Also, the remaining active forums have become more consistent and timely in administering their Public Awards Programs and making the Awards available for distribution by private vendors. Finally, quite frankly, we are doing a better job here at SAC at staying current and entering the many fields of information for each new Award at an earlier point.

So, the notion of looking at the past year's Awards in a timely way – sort of a horizontal inspection of the Database – has become more practicable in recent years. The volume of Awards and the many interesting cases working their way through the SRO arbitration

“pipeline” have quickened our interest in the project as well. Of course, we are more limited in how “deep” we can go on a particular point, because our analyses are restricted to several thousand Awards in 2005, not the 40,000 Awards that today comprise SAC's Awards Library. Outliers can more easily skew averages and the number of relevant Awards regarding a specific issue or topic may be inadequate to offer a representative sample.

#### Caveats & Methodology

Nevertheless, the exercise of analyzing the 2005 Awards has given us a far more three-dimensional view of the year's collection and we trust that, in the explanations and Charts that follow in this article, we can pass on that “landscape” perception to subscribers. As always, there are caveats, disclaimers and disclosures to make, to wit:

(1) This Study of 2005 Awards took place over a period of time, so it was necessary to maintain a static “universe” of Awards throughout the Survey. There are always stragglers, so, during this Study period, we have received and recorded additional 2005 Awards in the Database and Awards Library; this score of stragglers, though, was not included in our Survey collection.

(2) As always, we count as “wins” for claimants those matters in which any monetary award is granted to the claimant without making a judgment whether the recovery is a satisfactory one.

(3) In determining the “recovery rate” for a certain class of Award, we

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**2005 AWARD SURVEY** *cont'd from page 1*

measure compensatory damages claimed against all damages awarded. We consider compensatory claim amounts as inflated at times, although they remain the most realistic assessment available in the Awards of the Claimant's true losses. We count all monies awarded in the numerator of the rate calculation, in part, to compensate for the inflated denominator and, in part, because all monies, whether classified as punitive, compensatory or attorney fees, are after all contributors to loss recoveries.

(4) Our information is only as good as the Award. Sometimes, required data mandated by the rules of the SRO forum are simply not supplied in the Awards and, when that is the case, the information in the Award Database will be lacking. This can cause distortions. For instance, the SRO Award Rules require inclusion of a claim amount — if not to inform the opposition and the Arbitrators, then to permit a precise forum fee assessment — but when no compensatory claim figure is posted to the Award, its absence causes a skewing of recovery rate calculations.

One limitation we quickly encountered in taking the horizontal or "landscape" route is space. We could not cover adequately all of the topics that we have analyzed in past Award surveys in connection with the 2005 Study. We had to limit the number of topics and, even then, the need arose to split the Survey article into two Parts. In this Part I of the Study article, we present the information gathered from

the 2005 Awards, without comparative findings from past years. Making comparisons to Award results in earlier years will be the subject of Part II of the Study article and will appear in an upcoming edition of SAC.

**The 2005 Awards**

There were 3,296 Awards issued by the SRO arbitration forums during 2005 and included in this Survey. That number, as we indicated, has continued to keep climbing, as stragglers come in, but it is not likely to reach the level reached in 2004, which exceeded 3,600 in number. These two most recent years have surpassed by far the Award volume of past years. One new phenomenon that has added to this spurt in Award volume has been the Stipulated Award or Consent Award.

**Stipulated Awards**

Stipulated Awards have been used by parties in the past, usually in account deficit or promissory note cases, where enforcement of an installment settlement could be expedited with the Arbitrators' issuance of an Award that reflected the agreement of the parties. Their use has blossomed in the past few years, as CRD expungement has become a familiar element of party settlements. Expungement relief is predicated upon judicial confirmation of an Award, so the issuance of an Award has become necessary to that relief process, even when the parties have settled their dispute over the money.

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MANAGING EDITOR

Richard P. Ryder

2005 AWARD SURVEY *cont'd from page 2*

## CHART 1 - 2005 Award Survey

### Breakdown by Type of Dispute

Type Dispute	Total # of Awards (incl. Stips.)	Total # of Awards (w/o. Stips.)	#/% Stipulated	
			# Awards	%
<b>Customer-Related:</b>				
Customer-Member	2,163	1,356	807	37%
Small Claims	481	472	9	2%
Customer-Employee	37	26	11	30%
Member-Customer	50	44	6	12%
<b>Industry-Related:</b>				
Member-Employee	294	273	21	7%
Employee-Member	205	193	13	6%
Member-Member	40	39	1	3%
<b>All 2005 Survey Awards</b>	<b>3,296</b>	<b>2,403</b>	<b>867</b>	<b>26%</b>

Generally, those parties are customers and brokerage firms, as the break-out of Stipulated Awards in Chart I indicates. The allegations of dishonesty and bad sales practices that arise in customer-initiated cases constitute the “black marks” on a broker’s CRD record that are likely to cause him or her trouble in dealing with customers, defending against subsequent claims, and transferring firms. The visibility of the Central Registration Depository and the regulatory campaigns against rogue brokers and regulatory “bad guys” have heightened brokers’ interest in obtaining expungement relief whenever the opportunity arises. Chart I demonstrates the strong presence of Stipulated Awards among all Public Awards in 2005: 26% of the whole and 37% of all Customer-Member Awards.

Of interest to us in this break-out was the relative absence of Stipulated Awards among the Small Claims Awards. This group is comprised of customer-initiated cases that involve monetary claims that do not exceed \$25,000. Only 9 of the 481 Small Claims Awards, fewer than 2%, are designated as Stipulated Awards. At first, we explained this dearth by the

lack of attorney representation among Claimants in Small Claims matters, but attorneys did represent Small Claimants, far more frequently in 2005 than in the past. Our next best guess is that Small Claims do not settle as frequently as the larger cases – or they did not in 2005 – and that conclusion is buttressed by the presence of a special factor we will discuss later in the article.

#### Type of Dispute

While there were 3,296 Awards in our Survey, not all of the Awards are counted in the Chart I breakdown by Type of Dispute. The seven categories of dispute account for 3,270 of the 3,296 Awards, but there are some small categories that are not identified in the Chart, such as NonMember-Member disputes. Customer-initiated disputes (Customer-Member, Small Claims and Customer-Employee) dominate the field, accounting for 81% of the cases decided by SRO arbitrators. Intra-industry disputes, especially those by brokerage firms (Members) against associated persons (Employees), account for much of the remainder. Brokerage claims against former customers, typically relating to account deficits, make up fewer than 2% of the Awards, indicating that

brokerage firms are not bringing customer collection actions to arbitration anymore. The expensive process and surcharge fees may be the reason.

#### Customer-Related Awards Member-Customer Awards

Member-Customer Awards are quite different from the customer-initiated Awards, so we will cover them first. There were only 50 such cases in our 2005 Study and six of those were Stipulated Awards. These “debit balance” or “account deficit” cases are almost always won by broker-dealers when they go to decision; of course, the risk in bringing these cases against former customers is that initiating arbitration can shake loose a valid counterclaim that dwarfs the debit. BD-Claimants won monetary awards in 41 of the 44 Awards in this group, a 93% “win” rate. In 12 instances, counterclaims met these claims and in three (25% of the time) instances, the counterclaim was successful.

In two of the three counterclaim “wins,” the customer achieved a monetary award, but was also ordered to pay the broker-dealer on its claim. In

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the third counterclaim case, the customer was named as a Respondent because it had a claim against the broker-dealer, not because the broker-dealer had a monetary claim against it. In *MLPFS v. Wheeler*, NASD ID #05-02244 (Los Angeles, 12/19/05), the Respondent had settled a claim in litigation with Merrill, but then refused to accept payment. The arbitration sought (and won) declaratory relief that claimant was bound by the settlement agreement.

**Customer-Member Awards**

The remaining customer-related Awards were all initiated by customer-Claimants. The 37 Customer-Employee cases, which involve more than \$25,000 in claims and name no

brokerage firm as Respondents are generally special cases. We focused on the Small Claims Awards and the Customer-Member Awards and, as to one or the other Type of Dispute, developed statistics concerning “win” rates, “recovery” rates, incidence of attorney fee or punitive-damages awards, incidence of representation and other measurements.

**Win Rates**

Customer-initiated Awards against broker-dealers that involve claims exceeding \$25,000 differ in many other ways from Small Claims Awards than simply the number of arbitrators assigned to the case. First, these Awards are regularly decided after a “merits” hearing and the cases are typically tried by lawyers

representing both sides. The claims are more likely to have multiple sources or involve more than one security and, so, in the past, we have generally found a higher “win” rate for Customer-Member Awards than for Small Claims Awards. Our explanation for that difference lies in the greater likelihood that with more claimed wrongs identified in the average Customer-Member case, more cases will end with some victory for the Claimant. That there are more partial “wins” among the larger-claim Awards also suggests that more Claimants will receive a lower percentage of what they sought in total – having only won on part of the claim — and a lower average “recovery” rate should be expected. That is what we have found in the past.

**CHART 2 - 2005 Award Survey**

**Customer “Wins” - by Forum and State**

C/M = Customer-Member (> \$25,000)

Top Ten States (# Awards incl. Stips.)	NASD C/M (w/o Stips.)		NYSE C/M (w/o Stips)		NASD Wins (%)	NYSE Wins (%)
	# Awds	# Wins	# Awds	# Wins		
Florida (371)	178	88	11	4	49%	36%
New York (296)	153	55	32	14	36%	44%
California(267)	159	69	7	4	43%	N/R
Texas (145)	82	35	10	6	43%	60%
Pennsylvania (130)	67	34	8	2	51%	N/R
Michigan (78)	38	16	3	2	42%	N/R
Illinois (76)	43	20	4	1	47%	N/R
North Carolina (67)	40	18	5	2	45%	N/R
Ohio (66)	42	22	3	1	52%	N/R
Missouri (63)	36	15	3	1	42%	N/R
<b>Top Ten State Total</b>	<b>838</b>	<b>372</b>	<b>86</b>	<b>37</b>	<b>44%</b>	<b>43%</b>
<b>All States Total</b>	<b>1,211</b>	<b>551</b>	<b>129</b>	<b>56</b>	<b>45%</b>	<b>43%</b>

Breaking out Stipulated Awards is an important step in our analytical process, because Stipulated Awards are not really arbitrator decisions. It makes sense, then, to include the Awards when examining arbitrator service or incidence of representation or hearing locations, but we exclude Stipulated Awards when measuring “win” or “recovery” rates. In Chart II,

we tested “win” rates broken out by SRO forum and by the hearing situs state. To do so, we eliminated the Stipulated Awards from those Customer-Member Awards issued by either NASD or NYSE during 2005 and began with a “universe” of 1,340 Awards. The all-state “win” rate for the 1,211 Customer-Member Awards (551/1211) issued by NASD during

2005 was 45%, while for NYSE, the parallel “win” rate (56/129) was 43%.

The ten leading states, from the standpoint of Award volume, were determined while including Stipulated Awards and then, after excluding the Stipulated Awards, we calculated “win” rates by forum. The ten states

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accounted for 69% of the NASD Awards and 67% of the NYSE Awards, very close as a percentage of the whole (although New York State was the top NYSE situs state, representing 25% of the whole, and Florida was the top NASD situs state, representing 21% of the whole). As a group, the ten states reflected "win" rates for each forum that were very close to the all-state "win" rates, but individual states varied widely from one another. They showed "win" rates at NASD that ranged from 36% (NY) to 52% (OH). Unfortunately, the case volumes for many of the NYSE situs states were not adequate to permit a rating for each state, but for the three

top situs, the range varied from 36% to 60%.

Given the wide-ranging state ratings, we might conclude that situs weighs as an important factor in the "win" equation and we think that is probably right. Confusing the conclusion somewhat, though, is the nettlesome fact that, with reference to Chart 2, NYSE "win" rates tended to be lower than average in those top states where NASD "win" rates were higher than average and vice versa.

It can be said that the all-state "win" rates for both NASD and NYSE are lower for 2005 than has been the

case in Award Surveys of past years. The amount awarded to customers, taking into account all customer "wins" in 2005, totaled \$161.8 million (\$159.82M for Customer-Member (614) and \$1.94M for Small Claims (176)). From that gross amount, we calculated an average award among Customer-Member winners of \$260,293 and among Small Claims winners of \$11,023.

**Recovery Rates**

Average amounts awarded are skewed by a very few mega-dollar awards, so we turned to the median or middle figures when calculating

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**CHART 3 - 2005 Award Survey****Customer-Initiated Claims - Recovery Rates by Claim Ranges**

TAA = Median Total Amount Awarded

RCC = Median Relevant Compens Clm

<b>Claim Ranges (Compensatory Claims)</b>	<b>NASD Median Recovery Ratio</b> TAA/RCC (# Awds in Claim Range)	<b>NYSE Median Recovery Ratio</b> TAA/RCC (# Awds in Claim Range)	<b>NASD Recovery Rate (%)</b>	<b>NYSE Recovery Rate (%)</b>
<b>Small Claims:</b> \$1.00-\$25,000	\$10.9/\$9.8 (144)	\$12.8/\$14.1 (24)	111% <sup>2</sup>	91%
<b>Customer-Member:</b> \$25,001-\$100,000	\$40.3/\$68.9 (110)	\$40.0/\$70.0 (19)	58%	57%
\$100,001-\$500,000	\$92.0/\$233.1 (253)	\$51.5/\$260.0 (26)	39%	20%
\$500,001-\$1 Million	\$161.6/\$732.2 (80)	\$65.0/\$730.0 (6)	22%	9% <sup>4</sup>
Over \$1 Million	\$448.0/\$2581.0 (83)	\$329.5/\$4000.0 (5)	17%	8% <sup>4</sup>
<b>Top Three States (All Cust. Claims)</b>	<b>All Forum Median Recovery Ratio (\$) <sup>3</sup></b>		<b>All Forum Median Recovery Rate (%) <sup>3</sup></b>	
Florida	\$44.1/\$79.0 (138)		56%	
New York	\$64.8/\$250.0 (80)		26%	
California	\$85.0/\$274.8 (80)		31%	

1. \$000's are omitted in recovery ratio figures, e.g., \$10.9= \$10,900.

2. Total amount awarded includes all amounts, whether designated as compensatory damages or as interest, attorney fees or punitive damages. It is feasible, therefore, to recover more than 100% of the mean compensatory claim, when compensatory claim amounts are conservatively stated.

3. The State Awards were not numerous enough to provide a separate mean ratio or rate for NASD and NYSE.

4. These values, based on such a limited set of Awards, must be considered more illustrative than reliable.

**2005 AWARD SURVEY** *cont'd from page 5*

recovery rates in this Survey. By way of illustration, removing the three biggest monetary awards from the 614 Customer-Member winners reduces the total amount awarded by \$29 million and lowers the average award from \$260,293 to \$213,977. By locating the median amount awarded, skewing effects are avoided and a figure can be calculated for the 614 Customer-Member Awards, which turns out to be considerably lower than the average award amount, at \$80,500.

Chart 3 displays median recovery rates for various claim ranges, which we determined by (1) isolating the Customer "wins" for a range of compensatory claim amounts and (2) then locating the median compensatory claim and the median award amount for that range and, finally, (3) dividing the median award into the median claim. The median recovery rate for each claim group supplies an approximation of what one might expect to recover in NASD and NYSE arbitration, when victorious on the merits.

Immediately apparent in looking at Chart 3 is the inverse relationship between recovery rates and compensatory claim amounts. Award amounts rise as claim amounts increase, but at a far slower rate. Why is this so? Well, we had one guess above (partial "wins"), but it also seems far from nonsensical that, as the amount of one's real losses increases, so does the tendency to inflate the claim. This predilection is somewhat curbed by the schedule of fees, which graduate with the claim amount, but, when one reaches the millions, there is little additional cost attached to asking for more. Note the closeness of the median claim amounts between NYSE and NASD in each range. That seems to validate the observation that claim sizes at each forum are quite similar; yet the median recovery rates at NYSE clearly trail those at the NASD.

**Individual Notable Awards**

The three largest awards granted to Customer-Claimants in 2005 were

all NASD Awards, but were otherwise quite different in kind and dispersed in both time and place. An options trading dispute was the focus of the claims in the largest customer "win"—*Benistar Empl v. UBS PWI* (NASD ID #03-08742 (NYC, 12/15/05); \$12.66 MM). Broker dishonesty — of a criminal nature — was the cause of losses in *Visconsi v. Cowen & Co.*, a Gruttadauria Award (NASD ID #03-07606 (Cleveland, 9/21/05); \$10.42 MM). Finally, *Regency Outdoor v. Bear Stearns* featured a genre of dispute that arose from the boom-and-bust of technology stocks, the broker mismanagement claims of holders of valuable company stock options (NASD ID #99-01985 (Los Angeles, 5/27/05); 6.0 MM).

The three largest compensatory claims by customers in 2005 were all NASD Awards and all three were defended successfully to a zero award. The biggest claim, filed by a *pro se* investor, was for \$1 billion and lasted a single hearing session (*Garth v. Trading Mart*, NASD ID #04-06706, 9/15/05). We are less certain of the true size of Mr. Garth's claimed losses, but the other two huge compensatory claims, one for \$180 million by a Brooklyn couple with suitability and fiduciary claims relating to Con Edison and other securities and another for \$90-\$120 million by a couple of well-heeled investors with large Tyco stock holdings, were, from all reports, both claiming real losses. *Raitport v. Salomon Smith Barney*, NASD ID #03-03625 (NYC, 11/25/05), took two and one-half years to try and lasted 45 hearing sessions. *Davenport v. Merrill Lynch*, NASD ID #03-08929 (Atlanta, 10/10/05) lasted 44 hearing sessions and wound up in less than two years. These three cases accounted for more than a third of the approximately \$3.3 billion in compensatory claims by customers.

**Attorney Fees & Punitives**

Of the 1,356 Customer-Member Awards in Chart 1, 614 reflect a monetary award for the customer. Of those 614 Awards, punitive damages

were requested in 475 of the Awards and granted in 28 Awards. That equates to an incidence of 2.1% of all Customer-Member Awards, 4.5% among all winners or about 6% of the times it was requested in winning cases. The largest punitive sanction of \$1.714 million against Private Financial Group, Somerset Financial, and Roan/Meyer Associates (*Yuhas v. Demers*, NASD ID #03-07797 (Boca Raton, 7/25/05)) was accompanied by extended remarks from the arbitrators explaining the reasons for assessing punitive damages.

A review of the same 614 Customer-Member "merit" (i.e., non-stipulated) Awards disclosed that attorney fees were requested in 539 of the Awards and granted in 131 Awards, about 24% of the times it was requested. The largest attorney fee award in a customer-initiated matter was assessed in a case that only gave the Claimant \$2 in compensatory damages on a \$3.8 million claim — \$1 each against the two Respondents. In *Cartel Pacific Ltd v. MLPFS*, NASD ID #98-00991 (NYC, 12/15/05), the Panel granted \$1.173 million in attorney fees

**Party Representation**

Interestingly, Claimant's counsel in each of the three largest awards had little or no history of representing clients in securities arbitration. From this observation, we began to wonder what other facts might be disclosed about "who" represented the parties in these decided cases. In Chart 4 we included all of the Customer-Member Awards, whether Stipulated Awards or not, for purposes of checking representation. Among these 2,163 larger-dollar Awards, only 133 reflected *pro se* representation of the Claimant. Moreover, in 23 of those 133 instances, the Claimant sought and found representation during the case's pendency. Thus, we were able to identify only 110 *pro se* Awards, signifying that customers are represented 95% of the time in these larger, decided cases.

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### CHART 4 - 2005 Award Survey Customer-Member Awards -- Representation of Parties

Party Representation	Total # of Awards (incl. Stips.)	Total # of Awards (w/o. Stips.)	# Relevant Party Wins	% Relevant Party Wins
<b><u>Customer-Member Awards (2,163)</u></b>				
<b>Customer Claimants:</b>				
Pro Se	110	108	26	24%
W/ Counsel	2,053	1,246	588	47%
<b>BD Respondents:</b>				
Outside Counsel	1,751	972	534	55%
Inside Counsel	516	257	138	54%
Both ISC & OSC	144	94	57	61%

Does representation make a difference to the outcome? When the GAO did its 1992 study of customer claims in securities arbitration, it found that representation enhanced recoveries when the client won, but represented customers won no more frequently. This statistical conclusion is no longer supported by the findings in this 2005 Study. Of the 110 *pro se* cases, only 26 resulted in a monetary

award for the Claimant – a dismal 24% “win” rate. On the other hand, when we isolated the cases where Claimant representation was apparent in the Award, we calculated 588 “wins” for Claimants among 1,246 Awards – a 47% “win” rate.

On the broker-dealer side of the Chart, we found that representation by counsel was almost universal. Outside counsel is more prevalent today than

ever. Many factors have contributed to the shift from when arbitration was an in-house endeavor. Besides budget exigencies and national contracts, there have been changes in arbitration that have fed the trend. Among those factors are the larger-dollar claims entering securities arbitration and the pattern cases that sometimes require national coordination and management. Conflicts between

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### CHART 5 - 2005 Award Survey Small Claims Awards -- Representation of Parties

Party Representation	Total # of Awards (incl. Stips.)	Total # of “Paper” Awards	Total # of Hearing Awards
<b><u>Small Claims Awards (481)</u></b>			
<b>Customer Claimants:</b>			
Pro Se	136	120	16
W/ Counsel	345	315	30
<b>% Represented by Counsel</b>	<b>72%</b>	<b>72%</b>	<b>65%</b>
<b>BD Respondents:</b>			
Outside Counsel	304	276	28
Inside Counsel	159	143	16
Both ISC & OSC	6	4	2
<b>% Represented by OSC Only</b>	<b>63%</b>	<b>63%</b>	<b>61%</b>

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broker and firm and the need to coordinate litigation with regulatory inquiries may be factors as well.

**Small Claims Awards**

As Chart 4 reflects, outside counsel and inside counsel often appear together in larger arbitrations today and, when they do, they have a higher success rate in defending claims than when one or the other appears for the defense. Somewhat surprisingly, outside counsel are more prevalent than inside counsel in Small Claims matters. Inside counsel appearing with outside counsel is uncommon in these claims of \$25,000 and under, but the brokerage firm again is almost always represented by counsel. We found only a dozen Awards among the 481 Small Claims Awards surveyed in which no counsel appears to have been representing the brokerage firm Respondent.

As Chart 5 indicates, customers were represented in Small Claims cases most of the time, but *pro se* representation was far more likely than in the Customer-Member Awards. Overall, in both the live hearing and “on the papers” Awards, Claimants represented themselves about 28% of the time. About 90% of the decided cases (435/481) were decided “on the papers,” so *pro se* representation was more feasible and less daunting. Going *pro se* was not necessarily more prudent, though. Claimants chose representation 65% of the time, when live hearings were scheduled and held and they tended to do better. Those

Claimants who won after live hearings were represented in 82% of the “wins.”

That does not mean Claimant’s counsel can claim an 82% “win” rate. Claimants won only 14 of the 30 Awards in which live hearings and Claimant representation were evident. Still, that 47% compares well with the overall Small Claims “win” rate of 36% and by comparison to *pro se* Claimants who chose a live hearing; they won a monetary award in only 3 of 16 cases (19%). In fact, Claimants who choose a live hearing in Small Claims cases have in the past done much better than those who choose the documents-only “on the papers” route. In this Study, though, the gap in “win” rates was less impressive (39% v. 36%).

**Research Analyst Awards**

Research analyst cases formed a large subset of the Small Claims Awards. We thought at first that this large group of cases might explain the low “win” rate for all Small Claims, but, as Chart 7 shows, the 146 Research Analyst/Small Claims Awards reflected the same 36% “win” rate as all other Small Claims Awards. The Research Analyst Awards did, though, influence the high-percentage findings regarding Claimant representation. The analyst cases, as a group, attract representation on both sides and they do not frequently settle. Only seven of the 146 Research Analyst Awards involved investors appearing *pro se*. This 95% representation rate in about 30% of the Small Claims Awards

moved the Claimant representation percentage from 61% to 72% overall.

All but 11 of the Research Analyst Awards were decided “on the papers” and six of those 11 were Claimant “wins.” That is far superior to the 39% “win rate” for live hearings overall and it also accounts for the difference between the 39% live hearing “win” rate and the 36% “on the papers” rate. Interestingly, none of the 146 Research Analyst decisions ended with a Stipulated Award. Stipulated Awards are not especially common among Small Claims decisions generally, but the lack of any Stipulated Awards in this large group gives credence to the common wisdom that these cases are being hard-fought by large BD Respondents, such as Merrill Lynch and Salomon Smith Barney (CGMI).

***Industry-Related Awards***

On the industry side, there are the Member-Member Awards, which are primarily raiding and recruiting disputes between brokerage firms. This is an interesting category, with large awards and lengthy, complex cases, but it warrants its own article.

Member-Employee cases, the most numerous of the industry-related category (see Chart 1), are typically contract disputes over the recovery of advance compensation or other debt claims by a former employer. Because the disputes reduce to the terms of a written instrument, the brokerage firms win the great majority of the

*cont'd on page 9*

**CHART 6 - 2005 Award Survey**  
**Small Claims Awards -- Representation & Analyst Awards**

Nature of Dispute	Total # of Awards (incl. Stips.)	# Awards w/ Pro Se Claimants	# Awards w/ Claimant Representation	% Awards w/ Claimant Representation
<b><u>Small Claims Awards:</u></b>	481	136	345	72%
Research Analyst Awards	146	7	139	95%
Other Small Claims Awards	335	129	206	61%



**2005 AWARD SURVEY** *cont'd from page 7*

cases. In 2005, BD-Claimants won money in 240 of the 273 Member-Employee "merits" Awards.

The largest awarded amount in 2005 was a Member-Employee case (*Securities America v. Wolas*, NASD ID # 04-03105 (Omaha, 5/27/05), a default Award against a broker who agreed to indemnify his firm against all judgments and settlements, including attorney fees. That liability turned out to be \$13 million in compensatory damages and \$2.7 million in attorney fees. The second largest award total

during 2005 occurred in an industry matter as well, but this was an Employee-Member Award. Three brokers shared the \$14.67 million prize in *Savino v. Merrill Lynch*, a case which concluded right at the end of 2005 (NYSE ID #2003-014887 (NYC, 12/2/05).

**Employee-Member Awards**

Employee-Member disputes arise in greater varieties, often involve personal and emotional issues, and frequently concern career-ending claims and large amounts of money.

Ten of the 193 "merits" Awards in this category involved awards of more than \$1 million. In *Savino*, defamation was the crux of the matter and the New York Arbitrators aimed the largest dollars toward compensating the *Savino* trio for lost income and pain and suffering. The Award was opaque as to which claims were successful in three of the other ten Awards, but wrongful termination, defamation, deferred compensation, and discrimination were cited in support of damage awards in the remaining cases.

**CHART 7 - 2005 Award Survey**  
**Small Claims Awards -- Breaking Down "Win" Rates**

Nature of Dispute	Total # of Awards (incl. Stips.)	Total # of Awards (w/o Stips.)	# Awards w/ Customer "Wins"	% Awards w/ Customer "Wins"
<b><u>Small Claims Awards:</u></b>	481	472	169	36%
NYSE Small Claims		75	24	32%
NASD Small Claims		394	144	37%
Merit Hearings	46	44	17	39%
Non-Hearing "Paper"	435	428	152	36%
Research Analyst Sm/Clms	146	146	52	36%

Chart 8 displays the overall results for Employee-Member Awards, in terms of "win" rates and "recovery" rates. There were 193 "merits" Awards and 101 instances in which Claimants were awarded some recovery. The resulting 51% "win" rate for Employee-Member Awards surpasses the low-to-mid 40's "win" rates for Customer-Member Awards. At \$725,000, the median compensatory claim for these Awards stands about three times bigger than the median compensatory claim for customer-initiated Awards.

On the other hand, the median recovery rate for Employee-Member Awards is only about half the median recovery rate for customers (16.4%). While this may be seen as a paltry recovery rate, recovery rates do decline as claim amounts escalate.

Compare this recovery rate to the results in Chart 3 for this range of claim (i.e., \$725,000) and the 16.4% rate stands out less. Moreover, if one views the top three recoveries in this category (*Savino, supra; McElwreath v. Refco; and Van Pelt v. UBS Finl. Svcs.*), the aggregate dollars awarded, \$18.6 million, when compared to the approximately \$130 million claimed in those cases, produces a quite comparable 14% recovery rate.

Punitive-damage claims were lodged by Employee-Claimants in about half the "winning" cases (56/101), less frequently than on the customer side, and the incidence of punitive-damage awards was also lower (2/56). In *Lorraine v. Sterling Finl.*, NASD ID #04-00376 (Boca Raton, 8/2/05), the \$100,000 punitive award was based upon a finding of

defamation. Defamation charges were dismissed in *Mehall v. Wachovia Secs.*, NASD ID #03-00345 (Los Angeles, 9/1/05), but the Arbitrators awarded on the wrongful termination claim, stating "Respondent is found to have violated public policy by instructing Claimant to [violate public policy] and terminating him for disobeying such instruction."

Finally, attorney fees were frequently requested (78/101) in the Employee-Member cases, just as they were on the customer side (539/614), and arbitrators granted attorney fee awards in 15 of the 78 cases in which they were requested. That 19% incidence rate compares to a 24% incidence rate on the customer side. The largest attorney fee award of \$576,000 was assessed in the *Savino*

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2005 AWARD SURVEY *cont'd from page 9*

<b>CHART 8 - 2005 Award Survey</b>					
<b>Employee-Member Awards -- "Win" Rate &amp; Recovery Rate</b>					
TAA = Mean Total Amount Awarded			RCC= Mean Relevant Compens Clm		
Total # of Awards (incl. Stips.)	Total # of Awards (w/o Stips.)	# Awards w/ Claimant "Wins"	% Awards w/ Claimant "Wins"	Median TAA/ Median RCC (000's omitted)	Median Recovery Rate (%)
205	193	101	51%	\$118.8/\$725.0	16.4%
1. \$000's are omitted in recovery ratio figures, e.g., \$118.8= \$118,800. 2. Total amount awarded includes all amounts, whether designated as compensatory damages or as interest, attorney fees or punitive damages.					

case. The Award in that case discloses no statutory claims, but there was apparently an agreement between the parties that permitted the Panel's award on that claim. That "agreement" could have been the employment contract or, perhaps, under New York case law, it was the "agreement" formed when both parties asked for attorney fees in their claims.

**Preliminary Conclusions**

In Part II of this Survey, we will compare the results reached in our review of 2005's SRO Awards with results of earlier years. There are many similarities with past Award results, such as the clear pattern of recovery-rate declines as claim amounts rise, but

there are also some evident changes. Claimants appear to be represented by counsel more frequently, even in the Small Claims arena. Some of that is explained by the 95% representation rate in the Small Claims Research Analyst Awards, but, as we saw, Small Claimants were still represented more than 60% of the time in other disputes. They are almost always represented in the larger cases. This may be an outgrowth of the variety of representation available to Customer-Claimants today – not only experienced lawyers, but the Arbitration Clinics and non-attorney representatives as well – but might it also be an indicator of arbitration's growing legalistic framework?

Here lies the true value of statistical analyses. They confirm or dispel hypotheses, ignite debate and inspire thinking about the likely trends that are altering this dynamic process. Part I of this Survey has attempted to identify current movements and patterns of change from these most recent Awards issuing from the major SRO forums. The 2005 collection represents much that is different and new about arbitration. What is causing the shifts? Are the causes healthy for or inimical to the securities arbitration process? In Part II, we will utilize the data from past years for comparative purposes to identify the trends and to gain perspective on their magnitude and importance.

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