SECURITIES ARBITRATION
COMMENTATOR

Published 5/93 ISSN: 1041-3057

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Punitive Award Survey

In this issue, SAC focuses on the controversial subject of punitive damages. Our approach is basically statistical. We draw the information for our analyses from the SAC Award Database Service, concentrating our attention on the punitive damage Awards that have issued over a three-year period, from May 1989 to June 1992. Our objective is to shed quantitative light upon some of the assumptions, fears and generalizations that tend to underlie debates about arbitrators' use of the punitive damage sanction. First, though, let us review some of the events that have contributed to the current state of affairs.

Background to Punitives

SAC has been reporting on the controversy over punitive damages in arbitration since we began publication. Our first issue, back in April 1988, reported on Bonar v. Dean Witter, 1 SAC 1(3), an Eleventh Circuit opinion in which arbitral authority to assess punitive sanctions was upheld. Before the self-regulatory organizations ("SROs") began making Awards publicly available, SAC would do news stories on individual punitive awards (See, e.g., Diaz-Barriga v. MLPFS, 1 SAC 3(2); Winship v. SLH, 1 SAC 6(3); Forrester v. PruBache, 1 SAC 7(4)) as we learned about them.

That's the province of the news dailies, now that Awards are available to all and less of a rarity. The issues behind the awarding of punitive damages, both in arbitration and generally, have been our major focus. Congressmen Boucher, Dingell, and Markey supported legislation in 1988 that would have expressly assured customers of the right to punitive damages in securities arbitration, but that provision was dropped from the bill (1 SAC 4(4)) — and the bill itself ultimately failed in Committee.

Arbitral Authority

Federal Circuit Court decisions over the last five years have generally established that a sufficiently broad arbitration agreement among disputants will empower arbitrators to assess punitive sanctions, even if "the P-Word" is not expressly mentioned in the agreement. Some have tried to extrapolate from the Supreme Court's favorable ruling on RICO's arbitrability in Shearson v. McMahon, 482 U.S. 220 (1987), and argue that the Court has evinced a willingness to supply punitive arrows to the Arbitrator's quiver.

In fact, the Court has not yet squarely ruled on the question and does not appear anxious to address it. When the Second Circuit struck punitive damages from a securities employee's counterclaim award in Fahnestock v. Waltman, 3 SAC 6&7(13), and set up an apparent conflict among the federal circuits on punitives in arbitration, the employee sought review. The Supreme Court refused Mr. Waltman's bid for certiorari (See, *Punitive Damages - In Brief*, 4 SAC 10(14)).

SAC has reported upon the Fahnestock dispute in all of its incarnations. When the NYSE Award (SAC ID #8911217) was first issued by a New York-based Panel in January 1990, an article describing the dispute and the Arbitrators' Award appeared in SAC's Award Reporter, 1 SAR 2(13). We reported the district court's decision (3 SAC 6&7(7)), vacating the $100,000 punitive damage portion of the Panel's

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decision and confirming the remaining defamation and wrongful termination results (worth about $170,700).

When the Second Circuit affirmed (4 SAC 3(1)), the decision stimulated a range of issues for debate (See Beckley article, *Go Down* Moses..., 4 SAC 4(1)), from potential distinctions between AAA and SRO rules to the out-of-state impact of New York's policy against arbitral awards of punitive damages (known as the Garrity Rule). One of the issues the Second Circuit left open was later decided in the final chapter of Fahnestock, when Mr. Waltman sought unsuccessfully to return to the courts for relief on the vacated punitive damage claim (Waltman v. Fahnestock, 5 SAC 1(18)). In that case, a federal court in Pennsylvania held that the earlier arbitration precluded further requests for relief upon the same causes of action that the NYSE Panel had considered.

The controversy was heightened by the Second Circuit's subsequent opinion in Barbier v. Shearson, 4 SAC 6(7). Barbier applied a New York choice-of-law provision to vacate punitives in a NYSE arbitration. New York choice-of-law provisions are common in brokerage house agreements (they even appear in agreements of one or two houses not headquartered in New York). That such choice-of-law provisions, juxtaposed with the pre-dispute arbitration clause in such customer agreements, would have the effect of exporting the Garrity Rule to other jurisdictions was a distinct possibility after Barbier. That, in fact, was the conclusion of a state appellate court in Thomson McKinnon Securities v. Cucchiella (5 SAC 2&3(27)). In Cucchiella, the Massachusetts Court of Appeals vacated a Boston-based, NYSE Award in reliance upon a New York choice-of-law provision in the customer's agreement.

Post-Fahnestock decisions by other federal circuits (See, e.g., 9th Cir: Todd Shipyards v. Cunard Lines, 4 SAC 6(9); and, 8th Cir: Lee v. Chica, 5 SAC 6(13)) have refused to apply state law or policy restricting arbitrators' ability to grant punitives, even in the face of state choice-of-law provisions. Those decisions, however, involved American Arbitration Association proceedings and relied, at least in part, upon an AAA Rule that accords arbitrators the right to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties..." (now Section 42(c) of the AAA's Securities Arbitration Rules (SAR)).

SICA's Role

These developments suggested that the SRO Arbitration Rules, which do not currently have a provision comparable to AAA SAR 42(c), did not make sufficiently explicit an intention to accord Claimants the full panoply of relief that the courts employ in resolving investor and other disputes. Left alone, this situation could not only harm the public's perception of SRO Arbitration; it could also draw the investor with a valid punitive damage claim unwillingly into a forum where that claim could neither be heard nor retrieved.

The Securities Industry Conference on Arbitration (SICA), which since 1977 has proposed rules for the ten participating SRO arbitration forums, responded in January 1992 by adopting an amendment to the Uniform Code of Arbitration (UCA). That provision, which appears in the UCA as Section 28(h), states: "[t]he arbitrator(s) may grant any remedy or relief that the arbitrator(s) deem just and equitable and that would have been available in a court with jurisdiction over the matter."

Understand that the UCA is only a model from which the SROs can formulate rulemaking, much as Uniform Law committees formulate code provisions for state legislatures to enact into law. SICA does not make rules; it only proposes them. The understanding and practice for the past 15 years has been that the participating SRO's will adopt into their arbitration codes SICA's revisions to the UCA. While no SRO has yet adopted SICA's recommendation, the issue is under active deliberations at NASD, the primary arbitration forum (5 SAC 4, *NASD & Punitives*). Action is expected during 1993.

The efficacy of adopting SICA's AAA-type relief provision can be questioned, in light of New York's strict adherence to Garrity in Dreyfus Service Corp. v. Kent, 5 SAC 2&3(16) (AAA securities Award of punitive damages vacated in 1992 by NY App. Div., *review denied* by NY Ct. App., 5 SAC 4(9)). There are those in the industry who make the knotty argument that the presence of heavy securities regulation should exempt the industry from punitive sanctions in arbitration (See SIA Position Paper, "Articles & Cases"). These arguments for the status quo probably will not prevail. More likely, the battleground of debate will be positioned less in the arena of arbitral authority and more on constitutional terrain, i.e., safeguards instead of status quo.

Due Process Standards

At base, the concern about punitive damages, both in court and in arbitration, is its unpredictability. Fear of the unknown in business is a fact of life. Damage awards in litigation that are unlimited, disproportionate, and without controls may be constitutionally defective. In other words, the constitutional question is whether due process mandates some safeguards, by way of ascertainable standards and a process for review, against uncontrolled imposition of punitive sanctions. Members of the Supreme Court have expressed conceptual sympathy with this proposition (See, Browning-Ferris Inds. v. Kelco Disposal, 2 SAC 8(7); Pacific Mutual v. Haslip, 4 SAC 1(5)), but the nature of these standards or protections remains fuzzy.

In TXO Production Corp. v. Alliance Resource Corp., Dkt. No. 92-479, the Court will review the due process concerns of a $10 million punitive damage award that exceeded the compensatory damage award of $19,000 by

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526 times. Oral argument in the matter took place March 31, 1993. SAC will cover case law on this issue and the TXO case in greater detail in an upcoming issue. The importance of TXO, for purposes of this article, is its focus upon a separate dimension of the punitive damage issue — not whether punitive damages may be imposed, but whether they are being rationally applied.

About The Punitive Damage Survey

Measuring Rational Application

Just as an advisor's past investment performance does not guarantee future investment performance, learning that arbitrators have rationally applied the punitive sanction in the past does not mean arguments for safeguards are meritless. This is not our purpose in looking back at the "past performance" of our arbitrators. A history of rational application is important, though, to arbitration's reputation and basic integrity. It is the expertise, the competence, the rational business judgment of the arbitrator that permits arbitration to be a more streamlined process than civil litigation. Its streamlined nature is what recommends arbitration as a better alternative. If the rationality cannot be relied upon, then the streamlined procedures must go and, with it, arbitration's primary virtues.

Statistics, by themselves, do not establish rational application or fairness, a distinction the General Accounting Office (GAO) in its Study of Securities Arbitration (5 SAC 1(1)) scrupulously underscored. Still, quantitative measurements are the language of business and such measures can introduce valuable objective references into decision-making processes. SAC's Award Database, which now contains information about more than 7,000 securities/commodities arbitration Awards, has been useful previously in testing some of the generalizations and beliefs about SRO arbitration outcomes (See, e.g., *SAC Surveys Public Award Results*, 2 SAC 9(5); *After the Crash: Who Pays?* 2 SAC 11(1); *Surveying Public Award Results*, 3 SAC 3&4(1); *AAA vs. SROs: The Fairness Factor - Is There a Difference?* 3 SAC 6&7(3); *Surveying Employment Award Results*, 4 SAC 2(7); *Survey of Public Award Results*, 4 SAC 5(1); *Limited Partnership Results by State*, 4 SAC 9(3); *Employment Award Survey*, 5 SAC 4((7)).

In the Survey and Charts that follow, we use information from the Award Database concerning punitive damage awards, in order to provide statistics about arbitrators' use of the punitive sanction. SAC did a quick survey last year of punitive damage results by SRO forum (4 SAC 10(15)). We also reported upon a far more exhaustive study by the Public Investors Arbitration Bar Association in 1991 (4 SAC 1(8)), but PIABA had only gathered 44 Awards at that time. For this survey, we had available 174 Awards in which punitive damages were awarded to a prevailing party in securities arbitrations.

Methodology & Caveats

The 174 Awards do not all represent punitive assessments against brokerage firms or awards to customers. There are a few instances where brokerage houses have won punitive damages from individual customers. It is also the case that the punitive sanctions have been levied, in part or whole, against co-Respondents of the primary broker-dealer. In the case of Harper v. SLH (SAC ID #9010104N), for example, $1,040,000 in punitive sanctions were allocated among three Respondents by the Arbitrators — $1 million against the incarcerated broker and $40,000 between Shearson ($15.0) and another individual ($25.0)(dollar figures on the Survey Charts are rounded to the nearest hundred dollars).

Are we certain that we have accounted for every punitive damage Award that has been issued? No. In fact, we have read about one or two elsewhere that we know we do not have. Industry-related Awards have not previously been made publicly available by NASD, NFA and MSRB. While we have a fair number of those from subscriber contributions, it is likely we do not have all. AAA also has maintained a policy in the past of not releasing Awards, yet 28 of the 174 Awards are AAA-sponsored. In the end, we believe SAC's collection of punitive damage awards, particularly those in customer-related cases, is the most complete in public hands today.

To be conservative, we limited our survey of Awards to those in a three-year period from May 1989, when Awards at the major forums were first released, through June 1992 ("the relevant period"), a period as to which we were most confident of completeness. We used the 174 Awards in some Charts (Charts A-C), where no attempt was made to measure the incidence of punitive Awards among all Awards issued in the same period. When we chose to relate the number of punitive Awards issued to all Awards issued during the same timeframe (the incidence percentage), we limited the survey to the 147 Awards issued during the relevant period. Prior to May 1989, the Awards we have cannot be compared to any relevant whole. Subsequent to June 1992, we are less confident, because of time lags, that the Database yet reflects all of the Awards publicly available.

GAO's findings on punitive damages, although briefly stated in its Study, are worthy of reference, since that agency had access to all Awards issued during its period of study. GAO surveyed a total of 6,647 customer-related arbitration cases closed (via settlements, withdrawals, Awards, etc.) between January 1, 1989 and June 30, 1990. Its findings on punitive damages are presented on page 45 of the Study in a single paragraph: "Arbitrators at SROs awarded punitive damages in 12 percent of the decided securities cases in which such damages were requested (28% of the decided cases), and AAA arbitrators awarded punitive damages in 9 percent of the cases in which such damages were requested (48% of the decided cases).

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The median for such awards was 11 percent of the amount claimed at the industry-sponsored forums and 5 percent at AAA."

Since we assume no particular relationship between a party's requesting punitive damages and his entitlement to them, our incidence percentages compare to all cases decided (whether punitives were requested or not). Converting the GAO's findings to that format establishes a GAO incidence for the AAA of 4.3% and for the SROs of 3.4% (refer to Chart E to compare SAC's forum distribution findings). Since we see the total amount claimed (where RICO, punitive, attorney fees, interest, travel and expert expenses, etc. may or may not be claimed and may or may not be specified) as generally unhelpful in statistical comparisons, our ratio comparisons are between compensatory amounts awarded and punitive damages awarded. A comparison to compensatory relief is generally what the courts reference when testing punitives for proportionality.

The Survey Charts

Chart A

We have categorized the 174 Awards according to "type of dispute" in Chart A below. One can readily see that the great majority are, in fact, punitive assessments against the industry in favor of the customer (159 of 174). In the remaining Charts and analyses, type of dispute is not listed, because our primary interest is in seeing how often arbitrators assess punitive damages (incidence) and in what proportions, relative to the compensatory damages awarded (proportionality) in the same cases. Who receives the punitive damage award is a secondary consideration. Still, it is interesting to note that, even in small claims cases, where the amounts in dispute are relatively low, arbitrators generally maintain proportionality between compensatory damages awarded and punitive sanctions, just as they do generally in customer-initiated claims over $10,000 (i.e., Customer/Member disputes).

Chart A - Type of Dispute Breakdown

Type of Dispute	# Puni Awards	Puni $ Awd. ($000)	Comps. $ Awd. ($000) (Puni Awds Only)	$ Puni Awd/ $ Comp. Awd (Col. 2/Col. 3)
Customer/Member	139	27884.3	26236.8	1.1 to 1
Small Claims	15	33.1	35.8	.9 to 1
Customer/Employee	5	126.6	66.4	1.9 to 1
Member/Customer	4	32.0	68.7	.5 to 1
Member/Member	2	90.0	35.0	2.6 to 1
Member/Employee	5*	216.8	90.0	2.4 to 1
Employee/Member	4	1324.1	861.9	1.5 to 1
All Types/Dispute	174*	29489.9	27304.6	1.1 to 1

Note: Based upon the 174 Awards surveyed, the average punitive damage award was $169.5 and the average compensatory award in the 174 cases was $156.9. The median punitive award was $30.0 and the median compensatory award was 41.0.

* In all 5 Member/Employee cases the punitive damage award was assessed against the Claimant; that is, the employee Respondent received punitive sanctions against the member on his or her counterclaim. Total punitive damages in these 5 cases aggregated $1.215 MM, $1MM of which was awarded in Prescott Ball v. Kanuth. The Kanuth figures were not included in this Chart, in order to avoid skewing the results.

As the footnote to Chart A indicates, all 5 of the punitive awards in the Member/Employee cases were granted on the employee's counterclaim. One of these Awards, Prescott Ball v. Kanuth (SAC ID #8912058), was sufficiently extraordinary in the aggregate as to skew the (proportionality) ratios in our remaining Charts, if included. To illustrate, including Kanuth's punitive award of $1 million and compensatory award of $33.2 million in the figures for Member/Employee Awards leads to a proportionality ratio of .04 to 1. Ex-

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cluding the Kanuth figures from the equation establishes a 2 to 1 ratio, which is far more representative of the median or norm.

Chart B

We offer several comments about the proportionality ratios. Remember, first, that the ratios represent a comparison of punitive awards to compensatory awards in the same set of cases. The total amount awarded, which would be the sum of these punitives, compensatories, and any other damages awarded, is not considered in our comparisons. Secondly, compensatory amounts awarded, although generally accurate, can be simplistic. There may, for instance, be other compensation ordered or stipulated to, but not quantified in the Award. Finally, placing the line between an appropriate proportionality ratio and an unacceptable one remains a matter of judgment. Generally speaking, there is no "magic number."

In Miley v. Oppenheimer, 637 F.2d 318 (1981), the Fifth Circuit called a 3:1 ratio of punitive to compensatory damages "a proper rule of thumb" in a churning case. The Supreme Court in Haslip ratified a jury verdict that represented a 4:1 ratio. Justice Blackmun, who wrote the majority opinion in Haslip, indicated that the Haslip "monetary comparisons" were "close to the line." State and federal RICO and consumer protection statutes containing multiple damage provisions generally provide for treble damages as an acceptable punitive addition to the compensatory recovery available. TXO, with its 526:1 ratio, presents a case in which the Court may choose to express a view as to the relevance of proportionality to due process limitations. We see it as a probable indicator of rational application.

The ratios which appear for each type of dispute seem fairly moderate in this context. It is only in the industry dispute categories that the proportionality ratios exceed 2 to 1 (refer to Chart A). We thought this might be the modulating effect of averaging many Awards, which could disguise the occurrence of a number of unusually high-ratio awards offset by a number of especially low-ratio awards. Chart B aims at detecting outlying Awards, by categorizing the Awards in terms of punitive amount ranges and distributing them into ratio levels. The ratio levels, as in Chart A, are established by comparing the punitive amount awarded in a particular case to the compensatory amount awarded.

Chart B - Proportionality Ratio Distributions

Puni $ Award Ranges	# Awards in Range	Ratio ≤1 to 1	Ratio >1 ≤ 2 to 1	Ratio >2 ≤ 3 to 1	Ratio >3 ≤ 5 to 1	Ratio > 5 to 1
$1-$10,000	51	36	7	3	1	4
$10,001-$50,000	51	32	9	3	4	3
$50,001-$250,000	46	26	10	5	2	3
$250,001-$1MM	17	5	5	6	1	0
Over $1MM	7	1	2	1	1	2
All Ranges	172	100	33	18	9	12

There are 172 Awards reflected in this Chart. In 2 instances among 174 Awards, the punitive portions of the Awards were subsumed in a total award amount, making a comparison of punitive and compensatory awards impractical.

Chart B reveals several points we found interesting. First, only 12% (21 of 172) of the Awards exceed a proportionality ratio of 3 to 1. That is more than we expected, but it demonstrates that the great majority of awards fall within a fairly tight ratio grouping and do not range about the landscape. Secondly, 148 of the 172 Awards, or 86% of the total contained sanctions of $250,000 or less. One surprise for us in this Chart was the ratio distribution in the high-end range, "Over $1 million." The small sample may explain the surprising variance, but 3 of the 7, or 43%, fell into the two highest ratio categories.

One of the three Awards, Mark v. Dean Witter (SAC ID #8900047Z), is an AAA, Florida-based Award that pre-dates the three-year survey period. The remaining two are more recent Awards, Pyle v. Securities USA (SAC ID # 9008123N) and Harper v. Shearson (SAC ID #9010104N). As we

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mentioned above, the punitive damages of $1,040,000 in Harper were assessed almost entirely against one individual. The low compensatory award of $25,000 appears to be somewhat misleading, since there were side stipulations concerning an additional $255,000 in indemnification guarantees to Claimant.

Pyle v. Securities USA seems to be, on the face of it, the kind of case that excites concern among industry representatives. The punitive award of $2.2 million is about 10 times more than the compensatory award of $236,200. The broker-dealers involved were fairly small firms. A subsequent federal court decision (4 SAC 5(15) indicates that two of the individual Respondents went into bankruptcy after the Award issued. It is quite possible that the punitive award was reasonable and justified. We do not have enough information to impugn the Award or endorse it, only to highlight it as a large Award with high-ratio punitives. In fact, the only punitive award larger in aggregate than Pyle is the $3.5 million punitive award in Gage v. Cigna Securities (SAC ID #9010105N). The Gage Award, though, had a compensatory element of $1.8 million.

Chart C

The final Chart dealing with all 174 punitive Awards is Chart C. Here, we provide a breakdown by "product," i.e., the investment vehicle which was the source for or central focus of the dispute. We selected the top 8 products for display. Where more than one product was involved in the dispute, we counted the Award under a maximum of three Product Categories. Thus, even though not all products appear in Chart C and even though not all Awards involve a product, the number of Awards reflected in the Chart appears to be more than the 174 surveyed. This is a result of counting the same Award in more than one Product Category.

Chart C - Product Distribution for Punitive Awards

(May 1989 thru June 1992)

Product Categories	# Puni Awards	Puni $ Awd. ($000)	Comps. $ Awd. ($000)	$ Puni Awd/ $ Comp. Awd
Equity (Common & Preferred Stock)	63	8140.8	7462.6	1.1 to 1
Options (Equity, Index, etc.)	35	4797.1	5758.6	.8 to 1
Direct Investments (Limited Partnership	22	7076.7	5729.8	1.2 to 1
Commodities (Futures, Options, etc.)	20	911.4	801.0	1.1 to 1
Bonds (Gov't, Muni & Corp. Debt)	16	3668.8	4717.0	.7 to 1
Mutual Funds	13	4490.7	1908.6	2.4 to 1
Private Secs Transactions ("Selling Away")*	8	1394.5	309.2	4.5 to 1*

* "Private Securities Transactions" is not a true product. The category isolates those situations, known as "selling away" disputes, where a registered representative has sold a securities product to an investor "away" from the records and oversight of the employing broker-dealer. The high proportionality ratio in this Product Category is due in main part to one Award, Harper v. SLH, in which punitive damages of $1.040 million ($1 million against the individual broker) and compensatory damages of $25,000 were awarded.

It should be no surprise that "Equity" Products top the list, since they account for a major portion of retail sales. Options, limited partnership interests and commodities occupy the next three top Product spots and, together, they account for more of the punitive Awards than equity securities. In dollar terms, they account for more than 150% of the punitive amount awarded in equities disputes, a total of nearly $13 million. There seems a disparity here that may mark these products as relatively troublesome (not just in terms of losses, but in terms of whatever abuses warranted the punitive sanctions).

We wondered what a relative comparison of industry production figures

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among these products might have shown for the periods when the problems leading to the disputes arose. Timeframe is not generally supplied in Awards, however. Those who have been following the "timeliness" disputes know that the problems with limited partnerships are generally fairly old. For more recent production trends, we did refer to two industry reports: one released by the Securities Industry Association in December 1991 ("Securities Industry Trends," Vol. XVII, No. 6); the other was a Merrill Lynch internal study, recently reported in the Wall Street Letter (May 3, 1993, p. 7), which compared retail production figures by Product for 1Q '92 versus 1Q '93.

The SIA research indicated that limited partnerships, annuities, options and commodities, respectively, were the four slowest-growing product segments in retail revenues (annuities were down 16% and limited partnerships were down 32%) in a comparison study of 22 regional firms, 2Q '91 versus 2Q '90. The recent Merrill Lynch study showed the same four products accounting for a total of only 4% of production in both comparison quarters (commodities - 2%; options - 1%; annuities - 1%; and limited partnerships - 0%).

Equities, incidentally, were the highest earning product group in the Merrill study (38% in 1Q '92 and 42% in 1Q '93). Mutual funds (27% and 24%, respectively) and municipal securities (7% and 7%, respectively) were the second and third largest product groups.

Chart D

To the extent that options, limited partnerships, and commodities have accounted for a disproportionate percentage of the punitive awards in the past, it may be that their declining production role will affect the occurrence of punitive damage awards in the near future. NASD filings continued unabated in 1992, but virtually every other SRO, as well as the AAA, experienced fewer filings in the past calendar year. Chart D groups semi-annually the 147 punitive damage Awards issued between May 1989 and June 1992, in order to view the Awards from a date-of-issuance perspective.

Chart D - Distribution by Semi-Annual Periods

(May 1989 thru June 1992)

Semi-Annual Periods	# Puni Awards	Total # of Awards	Puni $ Awarded	Comps. $ Awarded (Puni Awds Only)	# Puni Awd/ # Total Awd (Col. 1/Col. 2)	Puni $/ Comp. $ (Col. 3/Col. 4)
2d Half 1989	14	1427	3361.4	3495.9	1.0%	1 to 1
1st Half 1990	31	1321	2494.7*	3122.8*	2.3%	.8 to 1
2d Half 1990	27	1060	4705.9**	2426.8	2.5%	1.9 to 1
1st Half 1991	29	1017	2710.0	3120.0	2.9%	.9 to 1
2d Half 1991	27	1013	3064.1	4339.5	2.7%	.7 to 1
1st Half 1992	19	1032	6816.4	5348.8	1.8%	1.3 to 1
3-Year Tally	147	6870	23367.5*	21943.8*	2.1%	1.1 to 1

* Not considered in the asterisked figures is the punitive damage award of $1 million to Respondent in Prescott Ball v. Kanuth, as the compensatory damages awarded, $33.2 million, would unfairly skew the total figures.
** $2.2 million of the punitives awarded in this semi-annual period are attributable to Pyle v. Securities USA, a high-ratio Award.

Incidence percentages and proportionality ratios appear relatively stable during the full years 1990 and 1991. In 1990, 58 punitive damage Awards issued and in 1991, there were 56. We have only 19 for the first half of 1992. While we are reluctant to base any projections on later periods, the number of Awards we have for the periods subsequent to June 1992, together with the results for the first half, suggest a possible trend towards a declining incidence of arbitral use of the punitive sanction. The reasons why this may be so are conjectural.

Chart E

Chart E breaks out the 147 punitive Awards by arbitration forum. Since the

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Award Database contains what we believe to be a large percentage of the punitive Awards issued by AAA Panels during the relevant period, we have included AAA. However, the Award Database has too few AAA Awards to compute, for that forum, an accurate percentage of punitive Awards to the total number of Awards issued.

Chart E - Forum Distribution of Punitive Awards

(May 1989 thru June 1992)

Arbitration Forum	# Puni Awards	Total # of Awards	Puni $ Awd. ($000)	Comps. $ Awd. ($000)	# Puni Awd/ # Total Awd
National Assn. of Securities Dealers	85	3919	14539*	12851.5*	2.2%
New York Stock Exchange	26	2053	2813.5	3117.5	1.3%
American Arbitration Assn.	18	N/A**	4641.9	4384.7	N/A**
National Futures Assn.	11	382	215.3	356.0	2.8%
Pacific Stock Exchange	4	140	505.0	811.7	2.9%
Municipal Securities Rulemaking Board	1	103	50.0	57.1	1.0%
American Stock Exchange	1	105	2.8	150.3	1.0%
All Forums	147	6870	23367.5*	21943.8*	2.1%

* Not considerded in the asterisked figures is the punitive damage award of $1 million to Respondent in Prescott Ball v. Kanuth, as the compensatory damages awarded, $33.2 million, would unfairly skew the total figures.

** AAA has not in the past made its Awards publicly available. Statistics as to the total number of Awards issued are released by AAA only on an annual basis. A reasonable estimate for a three-year period might be 600 Awards.

Philadelphia Stock Exchange Arbitrators awarded punitive damages in one case, Bork v. DWR (SAC ID #9007074X), which is not included in the Chart (except in the "All Forums" row). We did not calculate a proportionality ratio for each forum. We did not want to foster the inference that forum-shopping, based on the thin samples presented, is advisable; still, the numbers are there, for those who wish to make the calculations. For us, the point we wish to take from the analysis is that arbitrators at all forums are awarding punitive damages, presumably when justified, but in an incidence range that is modest, and at a level that overall is statistically rational.

Readers are free to draw whatever conclusions they might from the statistics presented. We have a high confidence level in the relative completeness of the sample we have used and have tried to break the sample into as many different statistical perspectives as we could conjure. The GAO's conclusions in its Study were that arbitrators "rarely" grant punitive damages. Punitive damages are an extraordinary sanction by definition, though. Infrequency may be a further sign of rational application, rather than stinginess.

The fact is, there is more statistical data available about punitive damage awards and about outcome results in arbitration than there is about securities litigation. What GAO called rare, may not be rare, in any relative comparison. The GAO could not compare arbitration to litigation, because it could not find enough reliable data on litigation to formulate comparisons. Of the 161 cases GAO did identify and survey, no punitive damage verdicts appeared (5 SAC 1(3)). Thus, our concern in this survey is not with the "rarity" of punitive awards, but with a rational incidence and proportionality. We leave each reader to determine if the results are better or worse than litigation or if one arbitration forum is preferable to another.

Chart F

Chart F reflects the breakdowns for punitive Awards by the top seven states. Some forums have more of a presence in these states than others, so we thought some of the differences among the forums might be attributable to situs considerations. The State Chart contains differences in the incidence percentages and proportionality ratios that are more distinctive than for most of the other parameters we selected for analysis.

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Chart F - State Distribution of Punitive Awards

(May 1989 thru June 1992)

Situs State	# Puni Awards	Total # of Awards	Puni $ Awarded	Comps. $ Awarded	# Punis/ # Awards	Puni $/ Comp. $
Florida	33	582	9071.4	6537.0	5.7%	1.4 to 1
California	28	990	2456.7	4440.9	2.8%	.5 to 1
New York	14	1383	981.2	1841.5	1.0%	.5 to 1
Texas	10	222	1589.1	2727.2	4.5%	.6 to 1
Georgia	8	122	1480.5	514.4	6.6%	2.9 to 1**
Illinois	7	306	360.4	410.3	2.3%	.9 to 1
All States	147	6870	23367.5*	21943.8*	2.1%	1.1 to 1

* The asterisked figures do not consider $1 million in punitive damages awarded to Respondent in Prescott Ball v. Kanuth, as the compensatory award of $33.2 million would skew the figures unfairly.

**The high proportionality ratio for Georgia is due in main part to one Award, Harper v. SLH, in which punitive damages of $1.040 million and compensatory damages of $25,000 were awarded.

Harper v. SLH, with its high-ratio punitive award, skews the proportionality ratio for Georgia, but the high incidence percentage is consistent with Georgia's reputation in litigation studies we have seen. We caution that the samples are quite small, but, with that caveat, situs and perhaps regional propensities would appear to have some influence upon the incidence of punitive awards in arbitration. Interestingly, the seven states listed account for 100 of the 147 (68%) punitive Awards and $15.9 million (68%) of the total punitive amounts awarded nationwide. The top seven states hosted 52% of all of the arbitration proceedings.

Chart G

Chart G, our final statistical presentation, reflects the experience of major broker-dealers with punitive damages over the relevant three-year period. As our reference for selecting the firms which appear in Chart E, we used SIA's 1992-1993 list of the top 50 firms ranked by number of retail brokers. We wanted to present more than the top five major wirehouses, so we selected those firms on the list which had more than $500,000 in punitive awards or more than three punitive damage awards during the three years. Kidder Peabody (#11), Bear Stearns (#20), and Raymond James (#32) were the only firms that met one or the other criterion.

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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.

SUBSCRIPTION INFORMATION: The Securities Arbitration Commentator is published 12 times per year. Subscription Rates: One year - $228 Regular Rate. Overseas subscribers, please add 10% for additional postage and handling. Back issues available to subscribers only at $15 per issue.

PUNI SURVEY *cont'd from page 9*

Chart G - Broker-Dealer Punitive Awards

(Ranked by Total Puni $ - May 1989 thru June 1992)

Selected Broker-Dealers	# Puni Awards	Total # of Awards	Puni $ Awarded	Comps. $ Awarded	Puni $/ Comp. $
Prudential Securities	14	515	3977.5	4925.4	.8 to 1
Shearson Lehman Brothers	17	1195	2653.1	1053.4	2.5 to 1*
Merrill Lynch, Pierce, Fenner & Smith	5	475	1429.9	1581.5	.9 to 1
Dean Witter Reynolds	11	344	1256.5	1410.4	.9 to 1
Bear Stearns	2	96	1125.0	1735.8	.6 to 1
Raymond James & Associates	4	20	313.1	140.3	2.2 to 1
PaineWebber, Incorporated	5	350	274.3	1094.1	.3 to 1
Kidder Peabody	3	74	217.8	896.7	.2 to 1

Note: There were 8 instances among the 147 where a brokerage firm was not the recipient of the punitive award-- in 4 Member/Customer disputes and 4 Customer/Employee disputes. Thus, the 61 Awards reflected in this Chart represent 44% of the 139 Awards assessed against a broker-dealer. The 3,069 Awards reflected in column 2, "Total # of Awards," represent about 45% of all Awards surveyed during the period.

* Shearson's high proportionality ratio is skewed somewhat by Harper v. SLH, a high-ratio case in which $1.040 million in punitives were assessed. $15M was assessed against SLH directly. The remaining amounts were assessed against Shearson representatives.

Firms are listed in order of the magnitude of total punitives awarded during the relevant period. To answer an unspoken question, only 4 of the 14 Prudential Awards relate to limited partnership disputes. Shearson had the highest number of punitive damage Awards in the group, but note that it arbitrated more than twice as many cases as any other firm. While we did not express incidence percentages in Chart G, we did note a surprisingly high percentage of punitive Awards for Raymond James. We double-checked and believe our figures are accurate and substantially complete.

(ed.: We have not meant to imply any position in this Study concerning the status of punitive damages as an accepted instrument for relief in commercial litigation. Actually, we think that moves to introduce some predictability and rationality into the assessment of punitive damages in commercial litigation are constructive and probably overdue.

The question, though, is not whether punitive damages are good or bad. They are part of our common law heritage and here to stay. The question is whether they should be permitted in arbitration as they are in litigation. Over the course of the coming months, a finer definition of punitive damage's role in litigation generally and, secondly, its future role in securities arbitration, will be in the offing.

After the Supreme Court decides TXO Productions, it may be appropriate, even necessary, to adopt some safeguards in the arbitration process to assure fundamental fairness in the application of punitive sanctions. If arbitrators have not acted irresponsibly, but have exhibited a steady tendency towards rational application of the extraordinary punitive power, then arbitration deserves the benefit of the doubt. In other words, whatever safeguards may be adopted should be the minimum necessary to meet due process concerns, with a view to preserving the basic attributes of speed, efficiency and finality that sets arbitration apart from the litigation morass.

We conclude this analysis and express our hope that this presentation will in some way enable a more "rational" discussion of how the issue of punitive relief may be appropriately resolved, with due regard for the interests of all parties and for the preservation of arbitration as a distinct, but equally viable alternative to litigation.)