

Arbitrator's Notebook

Punitive Damages and the Arbitrator

Isn't it true that arbitrators who award punitive damages never serve again? This is a cynical question, one that the questioner asks with a knowing wink and a self-satisfied smirk, as if the answer is unavoidable and obvious. The assumption behind the question is also a little insulting. It seems to say that arbitrators who have not awarded punitive damages will not, because they feel in some way intimidated; the question implies, ultimately, that arbitrators are willing to compromise their integrity for the "bounty" that continued service as an arbitrator brings.

At the same time, those who would bet the answer is "no, it's not true" could probably get odds. The industry seems to many so solidly opposed to the notion of punitive damages in arbitration that it must be ready to challenge any arbitrator who has previously participated in their imposition. Both sides now have the tools available to know easily the arbitrator's past record and to see the Awards in which he or she has participated. In the current climate, many would see sense in believing the worst, because what is possible will often occur.

Maybe, though, these facile assumptions are unrealistic. Consider, for instance, that there are today some 500-700 Arbitrators who have voted to assess punitive damages. Utilizing Award information provides one way to test general assertions about arbitrator performance. Should not those who want to accept cynical propositions about arbitral leanings look for statistical evidence? To the extent that such assertions, conveyed to clients and funneled to the media, are not first investigated, it hurts confidence in the process and demeans arbitrators generally.

Punitive Awards - 1992

SAC surveyed its Award Database, seeking some quantitative an-

swers on this point. Our first sample surveyed all punitive damage awards (for which Arbitrator names were provided) in the Award Database rendered during calendar year 1992. We chose 1992, because it allowed time going forward to survey whether the arbitrators who served on the subject Awards served thereafter.

The 41 punitive damage Awards we located consisted of 35 NASD Awards, 3 AAA Awards and 3 NYSE Awards. Although there are occasionally dissenting arbitrators in punitive damage cases generally, we found none in our 1992 sample. A total of 113 Arbitrators participated in these 41 Awards. Three of the Awards were Small Claims matters where only one Arbitrator was appointed, and four of the 113 Arbitrators participated twice in Awards that resulted in punitive damage assessments. In terms of "post-PD Award" service, we searched for arbitral appointments only in calendar years 1993 and 1994, even though there might have been post-PD service in 1992.

One of the difficulties that should be noted relates to the "culling" process that NASD embarked upon in January 1993, which initially reduced the ranks of its total available arbitrator pool from about 7,000 arbitrators to about 2,500 arbitrators (6 SAC 5(11)). Despite this overall reduction in the arbitrator force, 72 of the 113 Arbitrators who participated in punitive damage Awards during 1992 served at least one time thereafter. Of the four Arbitrators who voted for punitive damages on two occasions, three served again in 1993 and/or 1994.

L.A. Survey

Here, we ignored the possible skewing effect of elapsed time between "post-PD Award" to a test for subsequent service, but we limited the testing sample to one city's pool of arbitrators.

We selected Los Angeles for a couple of reasons, the primary one being the pool's historical depth of talent and active participation. A number of forums operates actively in Los Angeles and Los Angeles' pool of arbitrators offers considerable depth, longevity of service and active participation.

We isolated punitive damage Awards for the three and one-half year period between May 1989, when Awards became public among the major SRO forums, through 1992. There were 17 Awards in which investors won punitive damages during the survey period. We tallied the names of 37 Arbitrators who participated in those Awards. Seven Arbitrators participated in at least two punitive damage Awards. One Arbitrator awarded punitive damages 5 times, once in favor of a broker-dealer against a customer, and in one case, that Arbitrator dissented, while his two colleagues awarded punitive damages to an investor.

For this sample of 37 Arbitrators, we tested for subsequent service in 1993 alone. Twenty-five of the 37 Arbitrators served again in 1993. Four of the eight most active L.A. Arbitrators during 1993 awarded punitive damages at least one time prior to 1993 and three of those four most active Arbitrators awarded punitive damages more than once. In terms of monetary incentives for continued service, the most active Los Angeles Arbitrator participated in ten Awards in 1993. Assuming six hearing sessions per case, NASD's national average, this Arbitrator might have been paid just in excess of \$8,000 in 1993.

Ten Top Awards

When we told some friends of these results, we heard back that perhaps the scope of our review should be restricted to punitive awards of a large dollar amount. Responding to this sug-

cont'd on page 14

ARBITRATOR'S NOTEBOOK *cont'd from page 13*

gestion, we selected the top ten punitive arbitral sanctions on record, prior to 1993. They range from about \$700,000 to \$3.5 million. Thirty Arbitrators participated in these 10 Awards. Twenty-one of these 30 Arbitrators served again, in a total of 108 Awards, subsequent to their awarding of punitive damages.

Many conclusions are possible from a review of these results. Directly challenged is the idea that arbitrators are systematically "blacklisted" by some industry scorekeeper if they award punitive damages (or its corollary: that such arbitrators will not be selected again, because the staff will know that a challenge is inevitable). These may be appealing thoughts to some, but such theories are not only

unsupported by this review; they are also weak in a number of premises.

The first premise is that one side is able to engineer the removal of any Arbitrator appointed. The preemptory challenge is more blunt an instrument than that. It is also simplistic to posit that defense counsel will automatically scratch an Arbitrator, upon learning that he or she has awarded punitive damages. That many such arbitrators rank among the most active suggests that their service has earned respect with the staff and practitioners on both sides. Finally, there is the crass supposition that the privilege of earning \$8,000, usually less, per year will motivate arbitrators to "shave" their monetary awards.

Criticism of individual arbitrators,

funneled to the SRO arbitration forums by practitioners through the evaluation process, focus meetings, or via private correspondence, represents responsible activity by participants. Few practitioners, on either side, actually submit the evaluation forms, we are told. Apparently, the same is true of peer evaluations among arbitrators. Arbitrators and practitioners alike should be funneling information about their Panels to the forums through the established routes. This is how constructive change and responsible screening can be effectuated. Our grievance lies with those who resort to the media and others with the intention of sensationalizing untested theories. The latter constitutes nothing less than "Arbitrator-bashing." ■

SAC's 1993 Los Angeles Arbitrator Directory

In the article above, SAC presented statistics from a study of Los Angeles Awards. We presented the results of this analysis at the Third Annual Conference of the Public Investors Arbitration Bar Association. In the course of surveying the L. A. Awards for 1993, we realized that the information, albeit available to subscribers through our services, would be a valuable desktop reference for practitioners in Los Angeles.

Having done the work for our presentation, we compiled the results into a new SAC product, the *1993 Los Angeles Arbitrator Directory*. We distributed a limited number of these directories to attendees at the PIABA Conference. We have also distributed the Directory to our Board of Advisors, to others who have requested it, and will send it out shortly to some of our broker-dealer subscribers.

The Directory lists alphabetically the names of 140 Arbitrators who participated in Public Awards, sited in Los Angeles, during 1993. Under each Arbitrator's name, we list the Awards

in which that Arbitrator participated, along with information about each Award. This Directory places in subscribers' hands the ability to test some of the assumptions he or she is developing about specific arbitrators or about trends generally in local arbitration results.

Will we provide Arbitrator Directories for other cities? Certainly, we think full disclosure dispels unwarranted myths about arbitration. Still, our response depends upon subscriber response. We need to know that there is a demand for directories around the country before we go forward. For now, we are offering the L.A. Directory for the reduced price of \$25, in order to encourage its dissemination. We seek feedback from those who use the Directory. If we receive a favorable response, we shall seek orders in 1995 for similar directories regarding various cities or regions, listing 1994 Awards.

We need your input! If you want a copy of the *1993 L.A. Arbitrator Directory*, please send a check for \$25, payable to SAC, along with your request

for a copy (Non-subscriber price: \$35). If you simply want to see a sample of what the Directory looks like, please call or write and we will send a free sample for your inspection. Please let us know whether this new idea is something you will use and want on your desk.

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