

## Award Survey: Case Length and Hearing Time

### *Do Punitive Damage Disputes Take Longer to Arbitrate?*

Asked the question whether punitive damage cases are inherently more complex and, for that reason, incompatible with the notion of a speedy, efficient arbitration process, we looked to the Award Database Service for an answer. This article summarizes the findings from our survey of Arbitration Awards and seeks to provide some statistical figures that may reflect on this question.

Why is the question important? Putting aside the legal issues, significant as they are, regarding the authority of arbitrators to award punitive damages and the potential need for more thorough judicial review when punitive damages are awarded, one of the practical arguments raised against the presence of punitive damages claims in arbitration posits that it results in a disproportionate amount of time, effort and expense for parties, arbitrators and staff to deal with the issue, thereby curtailing much of the benefits of speed and cost efficiency that arbitration offers.

It would require access to legal costs to make cost efficiency comparisons. We are able to quantify case lengths — the time from filing to Award issuance — and hearing time — the number of hearing sessions required for a decision. These measurements of speed could, we think, could be affected adversely by complexity. From that standpoint, it made sense that case length and hearing time might indeed be greater for punitive damage Awards than for the usual case — if so, though, would the difference be material?

#### **Simple Measurements**

We recognized from the start that many factors affect case length and hearing time and that determining why a particular case took a long time to hear or to process would require a case-by-case analysis. Even if we could account for these other factors, we do not claim

expertise in the multivariate statistical analyses necessary to filter out other influences. For that reason, we stick here to presenting the simple measurements and claim no conclusive findings from our statistical results.

Whatever else, the exercise provides some interesting data and lends quantitative context to our understanding of both the punitive damage case and the processing of cases to a decision in general. For instance, this is the first time, to our knowledge, that average turnaround times have been published, solely as to cases which have proceeded to Award.

#### **Methodology**

Since May 10, 1989, the NASD and NYSE have formulated Awards that indicate the date the case was filed and the date the Award issued. The number of hearing sessions (and the dates of those hearing sessions) are also provided in the Awards. The other SRO forums followed suit through 1990 and 1991 and on May 1, 1993, the AAA adopted rules making similar disclosures for Awards relating to cases filed after that date. We quickly determined to limit our survey to just NASD and NYSE Awards, because including the others would require staggering the results over time.

Thus, our universe of Awards tested were NASD and NYSE Awards issued between May 10, 1989 through December 31, 1994. If the Award did not reflect both a filing date or an issue date, it was eliminated and if it did not indicate the number of hearing sessions, it was also eliminated. Most Awards eliminated were Small Claims cases, where the decision was made “on the papers,” but there were also Awards where the needed data was simply not reflected in the Public Award.

We chose for comparison to the total “universe” of Awards those

Awards in which punitive damages were actually granted. One might argue that we should have tested against Awards in which punitive damage claims were asserted, successfully or not, but to us, it seemed that the only sample which assured adequate development of the punitive damage issue — and, thus, some indication of any disproportionate effect upon case length or hearing time — was a sample in which punitive damages were actually awarded.

One final note regarding methodology — the case lengths calculated in this survey describe the average time from start to finish of Awards that went through the entire hearing and decision process. Turnaround times calculated by the arbitration forums generally include, in addition, cases filed and later settled or withdrawn. For instance, in 7 SAC 1(2), we cited NASD as reporting an average turnaround time of 10.46 months for 1994. This is clearly the average time it takes a case filed with NASD to be concluded, in any fashion.

When one focuses only upon those cases which resulted in an Award, NASD average turnaround time is logically longer. We calculated an average time to Award of 14.6 months for the survey period. Somewhat surprisingly, this average has declined in more recent years. In the first half (approximately) of our survey period, the average was 16.6 months, whereas in the later three years, we calculated an average time to Award of 12.6 months. At NYSE, in contrast, the results were a bit different. Average time to Award has remained relatively steady throughout the survey period — just under a year.

#### **Statistical Results - First Cut**

We identified 208 Awards involving punitive assessments that met all of our limiting criteria, 175 from NASD and 33 from NYSE. The average case

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

length for NASD Awards in this group was 15.5 months. The average number of hearing sessions was 6.5, or just over 3 days of hearings. NYSE Awards with punitive damages indicated similar averages: 15.2 months, average time to Award, and 7.0 hearing sessions on average. Thus, the readings for NASD versus NYSE Awards were quite close among the punitive damage Awards.

The disparity between the averages grew more pronounced, when we compared averages between NASD and NYSE for all Awards in the survey period, yet each average reading remained lower than its counterpart for the punitive Awards. NASD cases, as noted earlier, averaged 14.6 months from start to finish. Average number of hearing sessions were 4.0. NYSE Awards as a whole averaged 11.9 months in duration, i.e., from filing date to issue date, and the average number of hearing sessions was 4.3, just over 2 days.

The averages do indicate, on a gross comparison, both a higher average duration and a higher average hearing time for punitive damage Awards at both forums — more pronounced at NYSE than NASD. We call it a gross comparison, because we made no effort in the “first cut” to see if the punitive Award group was considerably different than the “universe” groups of NASD and NYSE Awards.

**Second Cut - No Small Claims**

We checked the median claims, both total and compensatory, for the punitive Award group and found that the median amount claimed (MAC) was \$105,600 and the median compensatory amount claimed was \$62,700. These medians were significantly higher than in the NASD and NYSE “universe” groups. After eliminating small claim matters, those in which the total amount claimed was \$10,000 or less, from the “universe” groups, the median claims became somewhat more comparable to those for the punitive damage Award group (e.g., NYSE MAC = \$80,000; NASD MAC = \$93,700).

Running the numbers for this new group of Awards, we found that the higher claim amounts among the NASD Awards produced somewhat higher case duration and hearing time results: 15.2 months, average time to Award, and an average of 4.3 hearing sessions per Award. For NYSE Awards, the results were also somewhat higher: 13.4 months, average time to Award, and an average of 4.6 hearing sessions per Award.

Worried about messing further with our test groups, we decided not to seek any greater “equalization” of the “universe” groups with the punitive Award group. The “second cut” had, though, made us curious about the effect on case duration and hearing time represented by the amount claimed. There appeared to be a correlation, but, again, how much impact on average would larger claims have upon our simple measurements of complexity?

**Third Cut - \$100,000 Plus**

We had in mind the apparent discussion within the NASD Arbitration Policy Task Force about eliminating claims over \$100,000 (see Fitzpatrick letter, “Mapping Arbitration’s Future”). Following Mr. Fitzpatrick’s lead, we selected only those Awards in which compensatory claims of \$100,000 and over were involved. These Awards, of course, include both winners and losers. As a group, they account for 18.8% of the NASD Awards and 25.6% of NYSE Awards.

We tested more than 11,000 Awards covering the survey period, May 1989 through December 1994. Those which involved \$100,000+ compensatory claims disclosed, not surprisingly, higher average results both as to case duration and hearing time: 17.1 months and 6.8 hearing sessions at NASD; 14.7 months and 7.7 hearing sessions at NYSE. On a combined basis, all such Awards took an average of 16.4 months to complete and required 7.1 hearing sessions per Award.

For comparison, we eliminated

from the punitive damage Award group those Awards in which the compensatory amount claimed was less than \$100,000. We then measured the remaining 88 of 208 Awards for case duration and hearing time. These 88 Awards required an average of 9.7 hearing sessions per Award and 16.5 months to complete. That indicates a somewhat longer average hearing time — the addition of an entire day — where the large case involves a punitive damage Award, but the average case duration does not change appreciably.

Both the actual amount at risk, as well as the risk of punitive damages appear to be factors to some degree in making hearings more protracted and cases longer in length. These are, no doubt, not the only such “complexity” factors. Just the differing results between the two forums suggest the influence of other factors. Are there sufficient time and cost savings to justify removing punitive damage or larger claims from the SRO arbitration process? Our survey does not answer that question, but it does, we hope, provide a measure of perspective about the potential savings available.

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