

DISCOVERY ABUSE *cont'd from page 2*

will be offered to all arbitrators online in the first quarter of 2004.

Besides these affirmative steps, NASD Dispute Resolution staff has initiated a practice of bringing all alleged discovery abuses to the attention of the Director of Arbitration and the President of NASD Dispute Resolution. These cases will be carefully

reviewed and, when appropriate, NASD Dispute Resolution will refer such cases to NASD Regulatory Policy and Oversight for disciplinary review. Hopefully, these measures will lead to a significant reduction in the instances of discovery abuse in the forum and will serve to alleviate the need for future rule changes or other additional steps to deter such abuse.

The Notice to Parties and Notice to Members 2003-70, as well as the NASD Code of Arbitration Procedure and the Discovery Guide, can be found at the NASD Web site, www.nasd.com.

Footnotes

¹ The fact that a document is turned over to the other parties does not necessarily mean that it can be introduced in evidence.

SAC Sidebar: Sample Survey of Arbitral Sanctions (2003 only)

Despite the incessant grumbles from counsel that arbitrators never award sanctions in their case, Panels do grant monetary and other penalties for bad arbitration conduct when the appropriate predicates are established. The recent attention to discovery abuses may quicken the frequency with which sanctions are awarded, but arbitrators will still need to be careful not to act hastily and, by doing so, inflame suspicions of bias by reviewing courts.

Even today, though, examples of innovative and strong sanctioning are not difficult to find. We visited the "PREMIER" section of our SCAN (SAC-CCH Awards Network) WebSite recently to word-search the PDF database of online Awards. We limited our search to 2003 Arbitration Awards on the topic of sanctions and used search-limiting phrases to find these nine examples of Awards containing sanctions. Our purpose in presenting the summary below is to illustrate some of the ways in which and degrees to which NASD Arbitrators impose sanctions. We provided the Award ID Nos. so that readers can review the actual Awards online at either www.nasadr.com or scan.cch.com (see instructions on next page).

02-0037: Tenen v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Wash. DC)

Claimant: Kevin Arthur, Kramon & Graham, PA, Baltimore, MD

Respondent: William E. Mahoney, Stradley Ronon, Philadelphia, PA

Sanction: "Respondent shall pay to the Claimant the sum [of \$10,000] as a sanction for discovery violations."

00-05345: Gregory v. Wachovia Secs. & Natl. Finl. Svcs. Corp, et al. (Charlotte, NC)

Claimant: William B. Little, Little & Little, Raleigh, NC

Respondent (NFSC): Donna Lee, Attorney at Law, Raleigh, NC

Sanction: "On May 6, 2002, the Panel entered a sanction order awarding \$3,635 in attorney's fees in favor of the Claimants and against Respondent NFSC for Respondent's discovery abuse."

98-00090: Northeast Secs v. Quest Captl. Strategies, Inc., et al. (New York, NY)

Claimant: Timothy P. Kebbe, Lehman & Eilen, Uniondale, NY

Respondent (Quest): Robert N. Vohra, Thiemann Aitken & Vohra, LLC, Alexandria, VA; Richard Pali, Points & Authorities, et al, Woodland Hills, CA

Sanction: "Respondent Quest is liable for and shall pay \$700.00 to Northeast as a sanction for Quest's counsel arriving to the hearing two hours late."

02-01460: Raymond James Finl. Svcs. V. Calabrigo, Zorzi, Colombari & Colombo (Charlotte, NC)

Claimant: Rebecca C. Davis & Shepherd Tate, Tate Lazarini & Beall, Memphis, TN

Respondents (Zorzi, Colombari & Colombo): David D. Boggs, Wishart Norris, Charlotte, NC

Sanction: "Based on the determination of the Panel that the Respondents had abused the discovery process and were not present at the hearing, the Panel granted Claimant's Motion for Sanctions and imposed the sanction of precluding the Respondents from presenting any evidence or defense in the hearing including the preclusion of counsel for Respondents Zorzi, Colombari and Colombo from cross-

examination of Claimant's witnesses or presenting any further argument on behalf of those Respondents."

02-00747: Nelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Chicago, IL)

Claimant: James J. Eccleston, Shaheen Novoselsky, Chicago, IL

Respondent: John J. Kilkenny, Ungaretti & Harris, Chicago, IL

Sanction: "Respondent [MLPFS] is liable for and shall pay to Claimant Editha Nelson..., the sum of \$1,000.00 as a sanction Respondent's failure to comply with Claimant's discovery requests.... Claimant Editha Nelson..., is liable for and shall pay to Respondent the sum of \$1,000.00 as a sanction for failure to provide copies of expert witness exhibits...."

02-06391: Vento v. Quick & Reilly, Inc. (Denver, CO)

Claimant: Pro Se

Respondent: Matthew S. Diggins (ISC), New York, NY, then John H. Bernstein, Kutak Rock, LLP, Denver, CO

cont'd on page 4

SANCTION SURVEY *cont'd from page 3*

Sanction: "It should be noted that the Arbitration Rules of Procedure call for automatic disclosure of certain documents in all cases. During the course of these proceedings, Q&R failed to comply with automatic disclosure. Q&R subsequently violated two explicit orders compelling discovery, and requiring it to deliver the documents to Vento. While this Panel is compelled to find in favor of Q&R as a matter of law, the system depends upon voluntary compliance with the rules, and a smooth interchange of discovery. We would ordinarily award costs to the prevailing party. Under the facts of this particular case, the Panel might even have considered the possibility of an award of attorney's fees in favor of the prevailing party. However, regardless of the result of the overall case, some degree of sanction must be imposed upon Q&R for willful violation of two duly issued orders and of the discovery rules generally. According, each party will bear its own costs and attorney's fees."

02-03722: Friedman v. Morgan Stanley Dean Witter & Co., et al.
(Boca Raton, FL)

Claimant: Richard A. Stephens, Attorney at Law, Boca Raton, FL

Respondent: Jason M. Fedo, Greenberg & Traurig, West Palm Beach, FL

Sanction: "The sanction imposed upon the respective parties in the daily sum of \$250 under the Panel's order dated June 6, 2003 [for each day that discovery was not complete after May 1, 2003] is hereby vacated. The sanction imposed in the sum of \$1,500.00 in said order is confirmed as a sanction

and not a legal fee and is ordered to be borne by the Respondent jointly and severally and paid to the Claimant."

02-06453: Schroeder v. Lawson Financial Corporation, et al. (Phoenix, AZ)

Claimants: Jon A. Titus & Michael F. Patterson, Titus Brueckner & Berry, PC, Scottsdale, AZ.

Respondents: Stephen Murphy, Steven Murphy, PA, Phoenix, AZ

Sanction: "Claimant filed a motion for sanctions. The portion of the motion relating to a referral was denied. The portion of the motion relating to discovery sanctions was granted by a vote of two to one.... Respondents Lawson Financial Corporation and Robert W. Lawson shall be and hereby [are] jointly and severally liable for and shall pay to Claimants... the sum of \$60,000.00. One half of such award is based upon the sanction relating to discovery and the remaining half based upon Arizona statute."

02-00502: Knecht v. PaineWebber, Inc. (Phoenix, AZ)

Claimant: Kevin M. Kinne, Cain Hibbard, Pittsfield, MA and Daniel R. Solin, Pittsfield, MA

Respondent: Marvin M. Goldstein, Proskauer Rose LLP, Newark, NJ

Sanction: "The panel hereby awards the Claimant the sum of \$215,000.00 which sum includes the award of all damages, attorney's fees and a monetary award for discovery sanctions, which the panel is awarding as a unitary amount.... The record reflects a pattern of abuse and discovery unusual

in other arbitrations experienced by the members of the panel. In addition, the Respondent abused the arbitration process both by extending the hearings with redundant testimony, extended repetitive cross-examination of the Claimant and an extensive barrage of motions, all in an apparent attempt to exhaust the Claimant's ability to prosecute her claim. The combination of these actions caused the panel, consisting of three lawyers with more than eighty years of combined experience, to conclude that the defense provided on the behalf of the Respondent constituted an abuse of the arbitration process beyond the boundaries of the zealous representation required by the canons of ethics...."

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Which do you think are the most meaningful sanctions? For our part, we believe that sanctions of the "jaw-boning" variety can be incredibly effective. The censure of an arbitration panel carries forward into other cases and can be cited time and again against a party or attorney, when new discovery battles arise in subsequent cases. Because they speak to professional conduct and competent performance, verbal rebukes can also deliver a much greater sting, even in the first instance, than monetary sanctions. The Panel in the *Knecht* case discussed the limitations on monetary sanctions and observed that the "remarks" they included in the Award were intended to "result in future panels having knowledge of the problems which this panel encountered and such knowledge will assist future panels to avoid such problems."

ARBITRATION AWARDS ONLINE!!

SAC has partnered with CCH Incorporated, one of the top legal publishing outfits in the country, to place securities arbitration Awards online. There are now two WebSite locations where the public can, by virtue of this partnering effort, view Awards in PDF format for free. All you need is the forum's ID or Docket number. Visit <http://scan.cch.com/ScanPlus> and place the Award number in the small window next to the "Search" button at the top right of your screen. Hit "SEARCH" (not your "return" key) and a virtual image of the actual Award will appear for downloading or viewing. In similar fashion, the NASD Dispute Resolution WebSite (www.nasdr.com) allows the public to transfer to a Portal maintained by SAC-CCH where, again, more than 30,000 SRO, AAA and other securities arbitration Awards are available.