

Re: Has NASD Dispute Resolution, which is **NOT** a sponsor of this email, informed you that....? (Part XXIII)

"Nobody makes a greater mistake than he who did nothing because he could only do a little."

--- Edmund Burke (1727 – 1797)

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### **I. Securities Arbitration Fairness Survey - 2006**

In Part XX, we discussed whether a "survey" proposed by the Securities Industry Conference on Arbitration ("SICA") could be "independent." In Part XXI, we presented excerpts of SICA Meeting Minutes, which revealed how SICA defines the word "independent." A news media article followed our story. See, e.g., [http://www.LGEsquire.com/LG\\_InvestmentNews\\_061113.pdf](http://www.LGEsquire.com/LG_InvestmentNews_061113.pdf).

In response to a Freedom of Information Act (FOIA) request, the SEC has recently produced more than 250 documents, including a copy of the "Securities Arbitration Fairness Survey - 2006." See, e.g., [http://www.LGEsquire.com/SAFS\\_2006.pdf](http://www.LGEsquire.com/SAFS_2006.pdf). Our annotated copy references some interesting issues, e.g., whether the NYSE and/or NASD invaded the privacy rights of former claimants and/or their attorneys by providing their contact information to SICA.

### **II. SICA Non-SRO Arbitration Pilot Program "Survey"**

From January 2000 until January 2002, pursuant to SICA's recommendation and guidance, the NASD and NYSE arbitration forums provided claimants with alternative forums before which their claims could be heard. Of 277 eligible cases, eight claimants elected to participate (to some degree).

In response to the FOIA request, the SEC produced a copy of the various documents, relating to that pilot program and describing the relationship between SICA and the SEC. See, e.g., [http://www.LGEsquire.com/SICA\\_Pilot\\_Project\\_A.pdf](http://www.LGEsquire.com/SICA_Pilot_Project_A.pdf). After reviewing the documents, you might wonder whether the SEC operates to protect the securities industry from public investors.

SICA informed the SEC:

At the time of implementation of the program, we were aware of the possibility that the program might not see a lot of cases.

SICA conducted a "survey" to confirm the obvious. At a time when SICA had received four responses to the "survey," a senior SEC official stated:

After tedious debate on how to characterize the replies (with the SROs wanting them to be a proxy for widespread joy with the process, and public member ... asserting that he was privy to secret information indicating great woe with the process), I suggested that someone draft a short, flat report that doesn't say too much, and give others an opportunity to edit.

One should wonder whether there will be a "tedious debate on how to characterize the replies" to the Securities Arbitration Fairness Survey - 2006 and whether the SEC will advise another "short, flat report that doesn't say too much." On the other hand, the SROs will push for a proclamation of "widespread joy with the process," and they are footing the bill for the "survey."

There was further evidence of how the SEC asserts itself into questionable areas when the SEC official advised exchanges to "protect themselves" against investors by stating:

NASD gave only the briefest of presentations of its rule that would allow investors access to court in cases against a defunct broker-dealer. I expanded in order to advise (sic) the exchanges of the need to protect themselves. After the meeting, I asked ... the secretary, to please make certain she looked at and understood the rule and possible implications for the exchanges so that the minutes reflect this, and help them protect themselves with similar filings if they feel exposed.

One might ask why the SEC advised SICA and stock exchanges on how to protect themselves from the investing public.

### **III. Lawsuit Against SEC**

Part XX invited your attention to *Greenberg v. United States Securities and Exchange Commission* (USDC Case No. CV 06-7878-GHK[CTx]).

The Complaint alleges that the SEC violated the Federal Advisory Committee Act (FACA) as it receives, in private, recommendations and advice from SICA, an advisory committee formed by the NASD and NYSE. See, <http://www.LGEsquire.com/Complaint.pdf>. Further, the Complaint alleges that the SEC has "unreasonably delayed" acting upon Petition for Rulemaking (SEC File No. 4-502),

which seeks changes to the securities arbitration process, and has violated FACA by soliciting SICA's recommendations and advice on the Petition.

The SEC has filed a Motion to Dismiss. See, <http://www.LGEsquire.com/MotionToDismiss.pdf>. In substance, the SEC claims that neither the NASD nor the NYSE is a "quasi-public" entity. A Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss and a Request for Judicial Notice in Opposition to Defendant's Motion to Dismiss have been filed. See, [http://www.LGEsquire.com/OMD\\_MemoP&A.pdf](http://www.LGEsquire.com/OMD_MemoP&A.pdf) and [http://www.LGEsquire.com/OMD\\_ReqJudNot.pdf](http://www.LGEsquire.com/OMD_ReqJudNot.pdf), respectively.

You be the judge.

#### **IV. Chair Roster**

NASD Code of Arbitration Procedure for Customer Disputes ("Code") states:

##### **12400. Neutral List Selection System and Arbitrator Rosters**

###### **(a) Neutral List Selection System**

The Neutral List Selection System is a computer system that generates, on a random basis, lists of arbitrators from NASD's rosters of arbitrators for the selected hearing location for each proceeding. ...

###### **(b) Arbitrator Rosters**

NASD maintains the following roster of arbitrators:

...

- A roster of arbitrators who are eligible to serve as chairperson of a panel as described in paragraph (c). ...

###### **(c) Eligibility for Chairperson Roster**

In customer disputes, chairpersons must be public arbitrators. Arbitrators are eligible for the chairperson roster if they have completed chairperson training provided by NASD or have substantially equivalent training or experience and:

- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization in which hearings were held; or
- Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.

The NASD takes the position, "In addition to completing Chairperson training and serving on the requisite number of cases to award, you must also be approved to serve on the Roster by the Director of Arbitration."

Arbitrators who assume that their names appear on the Chair Roster may wish to verify the accuracy of their assumptions. If your name does not appear on the Chair Roster, will you be informed as to whether your name has been submitted for approval and rejected? How much time will need to pass, without any action after your name has been submitted, to constitute rejection? If your name has been submitted and rejected, will

you be advised as to the reasons for the rejection and afforded an opportunity to controvert the finding?

## V. California "Inactive" Attorneys Serving As Arbitrators

In Part II, we dealt with the impropriety, if not illegality, of "inactive" and/or out-of-state attorneys using "Esquire" or "Esq." in California.

Only attorneys that are on "active" status may hold themselves out as being entitled to practice law in California. Business & Professions Code, Section 6125, states, "No person shall practice law in California unless the person is an active member of the State Bar." Section 6126 states, "Any person ... holding himself or herself out as ... entitled to practice law ... who is not an active member of the State Bar, is guilty of a misdemeanor...."

The "Transfer To Inactive Status" notice on the website of the State Bar of California states:

For example, transferring to inactive status:

...

- precludes a member from engaging in certain activities in California, including but not limited to working as a private arbitrator, mediator, referee or other dispute resolution provider, a law clerk, paralegal, real estate broker or CPA.

This is based on the presumption that these activities call upon a member to give legal advice or counsel or examine the law or pass upon the legal effect on any act, document or law.

The State Bar Membership Rules state:

### Rule 2.30 Inactive membership

(A) Any member not under suspension, who does not engage in any of the activities listed in (B) in California, may, upon written request, be enrolled as an inactive member. ...

(B) No member practicing law, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member.

(C) Notwithstanding (A) and (B) a member serving for a court or any other governmental agency as a referee, hearing officer, court commissioner, temporary judge, arbitrator, mediator or in another similar capacity is eligible for enrollment as an inactive member if he or she does not otherwise engage in any of the activities listed in (B) or hold himself or herself out as being entitled to practice law.

(Emphasis added.)

Assuming that a SRO is not an "other governmental agency," some interesting issues might arise if "inactive" attorneys serve as arbitrators. Is an arbitration award voidable where it is rendered by a panel consisting of one or more "inactive" attorneys? Does enabling an "inactive" attorney to serve on an arbitration panel constitute aiding and abetting the unauthorized practice of law?

An interesting SRO defense might be that service as a securities arbitrator is not supposed to involve "pass(ing) upon the legal effect of any act, document or law." Do you remember the words of one arbitrator who said, "We do not need case law. Simply, does one plus one equal two. That's what we try to determine"? (See, Parts VII-X.)

As additional proof, the SROs could demonstrate that they fail and, thus, refuse to train arbitrators in the applicable law and that few attorneys serve on the hearing panels. A recent "survey" of awards rendered with respect to hearings in Los Angeles, cross-referenced to State of California Bar records, shows that of 47 arbitrators signing the awards, 5 were "active" attorneys, 2 were "inactive" attorneys and one uses an "Esq." designation where State of California Bar records list no such person was ever licensed to practice law in California. This raises another question: Where did all the attorneys go? And, why?

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NASD Dispute Resolution has requested that I inform you that my Email Newsletters "are not authorized to speak on behalf of NASD or NASD Dispute Resolution."

A summary of prior publications, other materials, e.g., annotated "studies" or "reports," and associated links are located at: [http://www.LGEsquire.com/LG\\_Links.html](http://www.LGEsquire.com/LG_Links.html).

My continuing thanks to those who have contributed to Parts I through XXII and/or shared their ideas/information. Please continue to forward these emails to your colleagues and associates and share your arbitration ideas and experiences with your fellow readers.

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