

LETTERS

*To the Editor***Author Overreacted****To Arbitration Decision**

Philip M. Berkowitz's column, "Arbitration Revisited" (NYLJ, July 11, page 5), is an overreaction to a plaintiff's rare large victory in management's home court — arbitration forum. I represent the plaintiff in *Sawtelle v. Waddell & Reed*, which Mr. Berkowitz cites for why management should abandon its hard-fought right to compel employees to arbitrate their employment claims.

The author should have checked his facts. For example, the case was not about an "improper termination" as Mr. Berkowitz claims, but instead about Waddell & Reed's post-termination violation of the Connecticut Unfair Trade Practices Act (CUTPA). The NASDR arbitration panel made specific findings in its award after an extensive hearing, including that Waddell & Reed had engaged in "reprehensible conduct that warrants an award of punitive damages." The panel found that Waddell & Reed had "orchestrated a campaign of deception" by among other things, "giving the impression to clients that Mr. Sawtelle" had "mishandled their investments," was "untrustworthy," was "no longer in business" and "not authorized to do business" and "was some way involved with the embezzling of client funds." The panel also found that Waddell & Reed re-routed Mr. Sawtelle's mail and telephone calls and redirected them to itself.

Despite these specific findings of fact, the article ignored what actually happened at the arbitration so as not to undermine the author's implied thesis that arbitration panels are at least as likely as a Mississippi jury to produce a runaway verdict. Notably, however, Justice Stallman of the New York Supreme Court, in his order confirming the \$25 million punitive damages arbitration award in *Sawtelle*, did not believe that the punitive damages award was excessive or unreasonable. Indeed, he wrote, "Suffice it to say, the Panel's findings find support in the record. For example, there was evidence before the Panel that Waddell representative implied to certain customers that Sawtelle had been fired because, like Stevenson [a different Waddell broker], he had embezzled client funds. In light of the Panel findings, it was not unreasonable for the Panel to impose punitive damages in an amount that would, in fact, be punitive." The punitive damages award was also consistent with punitive damages of \$16 million and \$1 million (where actual damages were \$1) in other cases arising under CUTPA. Waddell & Reed's parent company had a \$2.7 billion market cap in 2001, and third quarter 2001 profits of \$28 million (the award was issued in August 2001), further demonstrating that the award was not excessive.

The arbitration panel in *Sawtelle* was sophisticated and not swayed by emotion. It included an attorney as its chairperson, a securities industry member, and a respected economist. Together, these arbitrators had presided over more than 100 reported cases and did not have a history of awarding punitive damages. Their reported

cases included only two punitive damage awards, in the amounts of \$62,500 and \$100,000.

Significantly, Waddell & Reed is also subject to a \$50 million jury verdict entered this month as a judgment by a federal district court in Alabama.

Mr. Berkowitz's attack on the arbitration process is akin to "[a kind of man bites dog case in that a brokerage firm attacks an arbitration award]." Having enthusiastically welcomed the enforcement of agreements to arbitrate, the securities industry might be expected not to encourage retrial of a case in federal court. *Rostad & Rostad v. Investment Mgmt. & Res.*, 923 F.2d 694, 697 (9th Cir. 1991). *Glennon v. Dean Witter Reynolds Inc.* 83 F.3d 132, 139n. 1 (6th Cir. 1996) (Welford, concurring). With only one big loss, Mr. Berkowitz has quickly lost faith in the system that he and his clients have spent so much time and effort crafting and defending for so many years. Indeed, since 1990 there have been over 71,000 arbitrations filed at the NASD alone, and thousands more filed at the NYSE. I do not believe that there has been even one securities firm that has gone out of business as a consequence of an arbitration panel awarding punitive damages. As significant as Mr. Berkowitz thinks that punitive damages award was in the *Sawtelle* case, warranting in his view the dismantling of the arbitration system, even the New York Law Journal did not think it significant enough to report Justice Stallman's decision, which confirmed an arbitration award that, had it been a jury verdict, would have only been the 71st largest verdict in 2001 alone according to the National Law Journal.

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