WINNING, DEFINED? TEXT-MINING ARBITRATION DECISIONS

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Who wins in consumer arbitration? Historically, this question has been nearly impossible to answer, as most arbitration proceedings are a private black box, and arbitral forums release only limited summary statistics. One exception is the Financial Industry Regulatory Authority (FINRA), which arbitrates virtually all disputes between investors and stockbroker-dealers, and makes all of its nearly 60,000 written arbitration decisions publicly available in an online database. This Article is the first to use computational text analysis tools to study these decisions, and to construct a measure of the claimants' win, loss, and settlement rates. It is the first installment in an original data analytics project that aggregates dispersed public data and document sets to assess the efficacy of arbitration outcome transparency as an investment protection measure. This Article makes three main contributions. First, the results of our novel study provide a more granular picture of customer experiences in the FINRA forum. We identify settlement as the most

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frequent outcome, followed by claimant losses, and then wins. In twenty percent of cases, we identify the presence of multiple outcomes per arbitration decision, where a claimant lost some claims but won or settled others, for example. This suggests a greater complexity and nuance in the notion of investor success than FINRA's monetary recovery versus no monetary recovery outcome measure—and previous scholarship—have recognized. Second, we discovered that the structure of FINRA's written arbitration decisions prevents further exploration of the amounts of compensatory damages that claimants recover, if any, compared to the amounts requested. Our final contribution is, therefore, a set of recommendations to FINRA—applicable to other private dispute resolution forums as well—to increase data access, usability, and transparency.

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INTRODUCTION

Neil Harrison worked as a stockbroker-dealer in the early 2000s at a string of investment firms and brokerage houses.[1] He invested money

[1] Shepherd Smith Edwards & Kantas, LLP, *Former Stifel Nicolaus and AG Edwards Stockbroker Sentenced to 21-Months in Prison for Investment Fraud Scam*, INVESTOR LAWS. (Sept. 21, 2009), https://www.investorlawyers.com/blog/former_stifel_nicolaus_and_ag_3 [https://perma.cc/H7EH-3HFZ].

and traded securities on his clients' behalf and advised them about their financial future.[2] He also diverted his clients' money to "support his drinking and gambling habits;"[3] sold stock without investors' permission;[4] induced clients, some of whom were over eighty years old, to lend him money;[5] and committed various other violations of securities law. One client, a sixty-seven-year-old, self-employed truck driver, lost his entire retirement savings due to Harrison's fraud.[6]

Eventually, Harrison was caught, indicted for securities and mail fraud, and served twenty-one months in prison.[7] Illinois securities regulators also fined him for taking illicit loans and improperly selling unregistered securities.[8] In 2010, Harrison was finally expelled from the securities industry.[9]

What about his clients? Like virtually all stockbroker clients, they would have been barred from taking Harrison to court under the terms of pre-dispute arbitration agreements (PDAAs), signed as a condition of investing with Harrison and his investment firm employers.[10] Under PDAAs, the overwhelming majority of wronged investors' claims must be resolved via binding private arbitration administered by the Financial Industry Regulatory Authority, or FINRA.[11]

Two Harrison clients did, in fact, pursue FINRA arbitration. The first claimed about $66,000 in losses due to Harrison's bad acts.[12] After

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2 *Id.*

3 *Id.*

4 DiMercurio v. Stifel, Nicolaus & Co., Inc., No. 12-03292, 2013 WL 5503259 (FINRA Sept. 24, 2013) (Merriman, Arb.).

5 FINRA, LETTER OF ACCEPTANCE, WAIVER AND CONSENT 2, No. 2008015617301 (FINRA Jan. 27, 2010) [hereinafter FINRA LETTER OF ACCEPTANCE].

6 Shepherd Smith Edwards & Kantas, LLP, *supra* note 1.

7 FINRA LETTER OF ACCEPTANCE, *supra* note 5; Shepherd Smith Edwards & Kantas, LLP, *supra* note 1.

8 BROKERCHECK REPORT, NEIL ROLLA HARRISON CRD #2254526, FINRA 10 (Feb. 20, 2020), https://files.brokercheck.finra.org/individual/individual_2254526.pdf [https://perma.cc/2ZEN-44DR].

9 *Id*. at 7–9; FINRA LETTER OF ACCEPTANCE, *supra* note 5.

10 *See* Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1179 (2010) (describing securities industry arbitration forum and near universal arbitration of customer disputes against brokerage firms and brokers before FINRA Dispute Resolution).

11 *Id.*

12 DiMercurio v. Stifel, Nicolaus & Co., Inc., No. 12-03292, 2013 WL 5503259 (FINRA Sept. 24, 2013) (Merriman, Arb.) (alleging that Harrison liquidated her investments without permission, over-traded or "churned" stock in her brokerage account solely to generate commissions, and induced her to make him a personal loan). Though the client's name is publicly

arbitration, she won $45,000 in compensatory damages, plus interest and costs.[13] The second investor made claims against Harrison, his direct supervisor, and his investment firm employer.[14] Originally seeking $400,000 in damages, the investor ultimately won only two dollars, one dollar in compensatory damages from Harrison and one from the firm, plus attorneys' fees and costs.[15]

In statistics published by FINRA, both outcomes appear within the same outcome measure—monetary recovery, which lay persons often equate with a successful outcome or "win"—as both investors recovered some amount of compensatory damages above zero.[16] Yet, while the first investor recovered 68% of the compensatory damages she requested, the second recovered only 0.0005% of his original claimed losses.[17]

Whether these recoveries should count as "wins"—whether they truly compensated the claimants for their losses at Harrison's hands and, more generally, whether the process met its investor protection goals—are complex questions that require more than a simple tally of non-zero recoveries, the metric FINRA uses to record results in its

available in the award document referenced, the authors opted not to include it to focus on the regulated firms and individuals.

13 *Id*.

14 McCrary v. Stifel, Nicolaus & Co., Inc., No. 14-00017, 2016 WL 7473710 (FINRA Dec. 22, 2016) (Soraghan, Gryzmala & Haller, Arbs.) (alleging fraud and unauthorized trading, breach of fiduciary duty, failure to supervise, and other unlawful acts and omissions). Though the client's name is publicly available in this document, the authors are not referring to it, as the focus is on the regulated individuals.

15 *Id*. at 2–3 ("Respondent Stifel, Nicolaus & Company, Inc. is liable for and shall pay to Claimant the sum of $1.00 in compensatory damages."); *id.* ("Respondent Neil Rolla Harrison is liable for and shall pay to Claimant the sum of $1.00 in compensatory damages."). The investor reduced the amount requested to $165,000 from the original $400,000 at the hearing. *Id.*

16 The only metric FINRA uses to classify the results of an award as a success or a failure is whether the claimant was awarded any monetary damages. *See Dispute Resolution Statistics*, FINRA, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics [https://perma.cc/DV77-LCXL] (Results of Customer Claimant Arbitration Awards Cases). FINRA does not claim in its statistics that monetary recovery equates to a "win" or a nonmonetary recovery equates to a "loss," though it is common for those interpreting the binary monetary recovery metric employed by FINRA as a proxy for winning and losing. In this Article, we adopt that common usage and explain why statistics evaluating a claim in a binary monetary recovery versus non-monetary recovery frame both over and understates experiences in the forum.

17 *Compare* DiMercurio v. Stifel, Nicolaus & Co., Inc., No. 12-03292, 2013 WL 5503259 (FINRA Sept. 24, 2013) (Merriman, Arb.), *with* McCrary v. Stifel, Nicolaus & Co., Inc., No. 14-00017, 2016 WL 7473710 (FINRA Dec. 22, 2016) (Soraghan, Gryzmala & Haller, Arbs.).

arbitral forum.[18] Indeed, scholars have rightly pointed out that work to classify the outcome of an arbitration as a binary win or loss based solely on whether any monetary sum has been recovered tells us little about what happened or whether the forum is fair to consumers.[19]

This Article employs a set of computational text analysis tools to study over 3,000 publicly available FINRA arbitration decisions, issued between 2013 and 2018, in disputes between investors and broker-dealers to build out a more nuanced and granular taxonomy of FINRA arbitration outcomes.[20] As an example, we find that about one-fifth of the awards[21] in our data set contained multiple outcomes (win/loss/settlement), suggesting that the presence of a positive dollar amount may both over- and under-state consumer[22] success, and an

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18 *See, e.g.*, SEC. INDUS. CONF. ON ARB., THIRD REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION 4 (1980) [hereinafter SICA, THIRD REPORT] ("The public customer probably receives satisfaction if an award is made in his favor, if he accepts a settlement, or if he otherwise chooses to withdraw his case. Of the 207 cases concluded [under the then-new SICA uniform code in 1978], 120 resulted in such satisfaction to the claimant. There were 63 awards to claimants and 57 settlements and withdrawals."); *Arbitration Reform: A Bill to Amend the Securities Exchange Act of 1934 to Provide for the Fair, Equitable, and Voluntary Arbitration of Customer-Broker Disputes, and for Other Purposes: Hearings on H.R. 4960 Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Com.*, 100th Cong. 72 (1988) [hereinafter *Hearings*] (statement of Theodore A. Krebsbach, Vice President, Shearson Lehman Brothers) ("To the investor, justice is a swift fair hearing and money in his pocket when the system is finished and that is what he gets in arbitration, not necessarily in court.").

19 *See, e.g.*, Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 556–57 (2008) (describing need to critically analyze research assessing the fairness of arbitration when reliant entirely on win/loss rates to "consider how the researchers define a 'win.'"); *id.* ("An arbitration might award a claimant $100 (thereby qualifying as a 'win' according to some reports), yet, if the claimant were seeking $100,000, such a paltry sum could hardly be considered a good outcome if the claimant had a meritorious claim."); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 87–88 (2012) ("[T]oo often commentators have asked whether consumers win or lose when they bring claims in arbitration, rather than whether consumers' claims are suppressed or eliminated altogether as a result of companies' use of mandatory arbitration clauses.").

20 This Article does not attempt to explain *why* some claimants might win (however defined) and why some might lose. Future work will take on this challenge. Instead, this Article situates itself at the necessary predecessor step: what is a FINRA arbitration win, anyway, and how can we identify it from the text?

21 In FINRA parlance, an arbitration decision is called an "award," regardless of whether the claimant was awarded any money. FINRA, RULE 12100(c) (2020) ("An award is a document stating the disposition of a case."). This Article uses the terms "award," "decision," and "written decision" interchangeably.

22 Investors are also referred to as "clients" in the FINRA context. In arbitration, they are "claimants," and they make claims against "respondents." FINRA, RULE 12100(g) (2020) (titled "Claimant"); FINRA, RULE 12100(bb) (2020) (titled "Respondent").

analysis of any one award is not complete without also looking for characteristics of multiple outcome types.

This Article is the first installment in an original and ambitious data analytics project that aggregates dispersed public data and document sets to assess the efficacy of FINRA's investor protection measures for investors like the Harrison clients. This work takes advantage of FINRA's unusual transparency as an arbitration forum. Arbitration has a reputation as a black box, from which scant information escapes about parties' experiences and proceedings' outcomes.[23] FINRA, however, makes all written arbitration decisions publicly available on its website, along with limited summary statistics.[24] It is, therefore, no surprise that scholars look to FINRA's awards database, the resource from which the Harrison clients' respective awards were drawn, in efforts to assess consumer outcomes in the forum and the factors that might lead to them.[25] Our work builds on

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23 Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1658 (2005) ("Unfortunately, researchers have found it very difficult to evaluate mandatory arbitration, for a number of reasons. First, to a large extent, researchers cannot obtain access to the data they need to perform good studies. As we have seen, one of the fundamental traits of arbitration is that it is typically private."); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2861–65 (2015); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 10–19 (2019) (describing "The Forced Arbitration Controversy"); Benjamin P. Edwards, *Arbitration's Dark Shadow*, 18 NEV. L.J. 427, 432–34 (2018); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/6MCD-5VLK].

24 As of February 20, 2021, a manual search of the FINRA awards database resulted in 59,659 awards and other documents with award dates as early as 1988. *See Arbitration Awards Online*, FINRA, https://www.finra.org/arbitration-mediation/arbitration-awards [https://perma.cc/J6EJ-4YEP].

25 *See, e.g.*, Stephen J. Choi, Jill E. Fisch & Adam C. Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43, 63 (2014); Stephen J. Choi, Jill E. Fisch & Adam C. Pritchard, *Attorneys as Arbitrators*, 39 J. LEGAL STUD. 109, 113–14 (2010); Mark L. Egan, Gregor Matvos & Amit Seru, *Arbitration with Uninformed Consumers* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25150, 2018), http://www.nber.org/papers/w25150 [https://perma.cc/6MRY-W9E5]; 5 THOMAS LEE HAZEN, A TREATISE ON THE LAW OF SECURITIES REGULATION § 15:15 (Dec. 2020 Update) (analyzing 3,526 NASD customer arbitration awards from the period of August 1998 through December 2001 to determine how investors fared in proceedings against broker-dealers and their associated persons in cases involving a stockbroker's alleged misconduct, finding that investors prevailed more often than not, winning 55.47% of the cases against stockbrokers, with an average award of $100,000); Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349 (2008).

this previous scholarship, but deploys a new set of tools and a unique focus. Using modern data analytics techniques, we can pry open the arbitral black box, at least part way, and develop a more textured understanding of customer investor experiences in FINRA proceedings.[26]

In this Article, we also document the computational difficulties we encountered in extracting information from the text of arbitration decisions. On this basis, we offer a set of data access recommendations, for regulators and decisionmakers within and outside the FINRA forum, for improving awards' structure to make them more conducive to measurement and analysis. These findings have application beyond FINRA to all types of dispute resolution and can help shape data collection and reporting standards to better facilitate independent research and public understanding.

The Article proceeds in five Parts. Part I begins with an overview of arbitration, including common support and criticism of the now-ubiquitous dispute resolution mechanism. FINRA's arbitral forum is next presented as a case study due to its unique features. We start by describing the history of arbitration in the resolution of securities disputes, moving from an initially voluntary mechanism to a functionally mandatory process for the resolution of all disputes involving stockbrokers. We next describe FINRA's broad jurisdiction over such claims before focusing on one claim type: investor claims against their stockbrokers and the varying procedures and options available to investor-claimants, dependent on claim size. Part I then moves to a detailed discussion of one characteristic that sets FINRA dispute resolution apart from other arbitration forums: the plethora of public information, dispersed across sources, concerning consumer experiences in FINRA arbitration.

In Part II, we introduce the proposition that text analytics tools can provide multiple frames through which a final arbitration decision can be defined as a win, loss, settlement, or some combination of the three. We then describe the methodology for assembling our approximately

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26 As discussed further in Part II, we acknowledge the selection bias introduced by studying only written awards. *See infra* Part II. In fact, very few customer disputes result in a written award. For example, only 313 consumer arbitration cases closed in 2019, or 13%, were decided by an arbitrator resulting in an award document. *Dispute Resolution Statistics*, *supra* note 16 (Results of Customer Claimant Arbitration Award Cases); FINRA, *supra* note 21 (describing arbitrator decisions, or "awards"). Future work will study these "missing" cases. In that work, we aggregate regulatory information from the FINRA BrokerCheck database that includes documentation of investor complaints and arbitration filings (including their resolutions) that are not reduced to an award contained in the FINRA awards database. *See infra* Part IV.

3,000-award set and analyzing each decision's text to classify its outcome. Specifically, we wrote code to extract all dollar amounts from the text, assembled keyword counts, identified the terms that best distinguished one outcome from another, and used a technique called sentiment analysis that scores text by its positivity or negativity. Throughout, we validated our results by hand-checking samples of results for accuracy and compared our own outcome tallies to those published by FINRA. We also experimented—unsuccessfully, for now—with building a machine learning classifier to algorithmically predict a dispute's outcome based on decision text, and with clustering methods to uncover latent groupings within the set of arbitration decisions.[27] Work on those projects remains ongoing.

We then turn, in Part III, to the results of our analysis. By using targeted term frequencies, we were able to classify eighty percent of awards as having a single outcome of win, loss, or settlement. The remaining twenty percent reflected multiple outcomes within a single award, including a win, loss, and/or settlement. This exercise elucidated greater nuance of consumer experiences than reflected in FINRA's binary classification of awards by virtue of whether any damages were recovered or not. Sentiment analysis, however, was not capable of measuring an award as a win, loss, settlement, or variety thereof. Finally, using targeted dollar amount extraction to measure the ratio of the amount an investor was awarded to the amount they sought was not feasible due to complexities within the data.

Thus, in Part IV, we offer a set of data access recommendations for increasing the utility and transparency of FINRA's awards database and summary statistics. We end by exploring the conclusions that can be drawn from our analysis. We also mark a path forward, describing our future research that will continue to probe the extent to which the FINRA arbitration forum is serving its stated investor protection and transparency aims.

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[27] For an explanation of classification models for prediction purposes, see HADLEY WICKHAM & GARRETT GROLEMUND, R FOR DATA SCIENCE chs. 23–24 (2017). For an explanation of hierarchal and k-means clustering, see ROGER D. PENG, EXPLORATORY DATA ANALYSIS WITH R chs. 13–14 (2020).

I. ARBITRATION AND SECURITIES CLAIMS

A. *Arbitration: Ubiquitous and Criticized*

Though it took congressional action to start,[28] the arbitration revolution has been fully embraced by courts formerly reticent to enforce PDAAs,[29] with recent Supreme Court decisions supporting scholars' assessments that arbitration will continue to reign supreme in the resolution of future consumer disputes.[30] Arbitration clauses prevail in consumer contracts,[31] from credit cards,[32] to auto loans,[33] to mobile providers.[34] Employment agreements regularly contain arbitration

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28 9 U.S.C. § 1.

29 Resnik, *supra* note 23, at 2861–65; Robert S. Clemente, *Trends in Securities Industry Arbitration: A View of the Past, the Present, and the Future: "The Dream, the Nightmare, and the Reality,"* 68 N.Y. STATE BAR J. 18, 18 (1996) ("The judicial attitude toward arbitration was traditionally one of hostility. In spite of this hostility, securities industry arbitration continued throughout its nearly 200-year history to be recognized as a viable *alternative* method of resolving securities industry disputes.").

30 The vast majority of cases heard by the Supreme Court in the past ten years involving arbitration have been resolved in favor of arbitration. *See, e.g.*, Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013); Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); KPMG LLP v. Cocchi, 565 U.S. 18 (2011); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63 (2010). *But see* New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

31 Myriam Gilles, *Killing Them with Kindness: Examining Consumer-Friendly Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 850–61 (2012) (cataloguing consumer arbitration clauses in thirty-seven consumer contracts); Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793, 795 (2015) ("[A]rbitration clauses are now also nearly ubiquitous in American consumer contracts."); *see also id.* at 800–01 (quantifying prevalence of arbitration clauses in consumer financial contracts).

32 Sternlight, *supra* note 23, at 1638 (detailing arbitration in financial institution agreements with consumers); *id.* at 1639 ("I have seen arbitration mandated by my bank, my broker, my cell phone provider, various credit cards, and my mortgage lender.").

33 JOSHUA M. FRANK, CTR. FOR RESPONSIBLE LENDING, STACKED DECK: A STATISTICAL ANALYSIS OF FORCED ARBITRATION 1 (2009) ("Other loan contracts, such as auto loans, often require forced arbitration as well.").

34 Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce Jr., *The CFPB's Consumer Arbitration Study Takes Center Stage*, 71 BUS. LAW. 731, 733 (2016) (describing arbitration clauses in "87.5 percent of mobile wireless providers covering 99.9 percent of subscribers").

clauses such that an employee may not publicly resolve a dispute with an employer in court.[35] Though arbitration clauses predominate in consumer contracts, the same companies that require consumers to arbitrate quite ironically themselves prefer litigation to resolve disputes with their peers.[36]

Arbitration purports to fill a necessary gap, providing consumers with a more economical and efficient process for resolving their claims, particularly when the claim amount is relatively small.[37] Despite these purported benefits, mandatory arbitration has received much criticism.[38] Criticism of arbitration arises both from its impact on dispute resolution writ large, as well as its effect on individual claimants.

At the systemic level, critics bemoan the loss of the civil jury trial caused by the concurrent uptick in claims that must be arbitrated.[39] This critique is particularly acute, as researchers have found that most consumers are unaware of arbitration clauses or, if they are aware, how they operate.[40] If a consumer does understand that they are bound by a PDAA, they rarely understand the limitations such a clause places on their ability to pursue claims that might arise after agreeing to the

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35 Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs that Use Arbitration: Transparency, the Universal Sanitizer*, 6 ARB. L. REV. 32, 32 (2014).

36 Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 UNIV. MICH. J.L. REFORM 871, 871 (2008) ("Using a sample of 26 consumer contracts and 164 nonconsumer contracts from large public corporations, we compared the use of arbitration clauses in firms' consumer and nonconsumer contracts. Over three-quarters of the consumer agreements provided for mandatory arbitration but less than 10% of the firms' material nonconsumer, nonemployment contracts included arbitration clauses.").

37 *See, e.g.*, Constantine N. Katsoris, *The Level Playing Field*, 17 FORDHAM URB. L.J. 419, 430–31 (1989) ("What is attractive about arbitration is that it is expeditious and economical. While speed and economy are important, they cannot be achieved at the expense of fairness."); Constantine N. Katsoris, *Securities Arbitrators Do Not Grow on Trees*, 14 FORDHAM J. CORP. & FIN. L. 49, 51 (2008) ("In general, arbitration and mediation provide the advantage of a speedy resolution of securities disputes by persons knowledgeable in the area, without excessive costs."); Chandrasekher & Horton, *supra* note 23, at 9 (discussing unrealized promise of arbitration to "facilitate access to justice.").

38 *See* Chandrasekher & Horton, *supra* note 23, at 10–19 (describing "The Forced Arbitration Controversy").

39 Craig Smith & Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 282 (2011) (describing loss of jury trial with rise of arbitration clauses).

40 *See, e.g.*, Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis &Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 62 (2015) ("Our research suggests that typical consumers do not realize when they have agreed to arbitrate and do not understand the consequences of agreeing to arbitrate.").

arbitration provision.[41] Moreover, as arbitrators' decisions do not have precedential value, those industries in which arbitration predominates have been said to stagnate, as there is no movement or change within the law.[42] Finally, certain rights, including those that Congress intended to be enforced by the public, may go unenforced due to arbitration's intervention in the area.[43]

Arbitration also has individual impacts, the aggregation of which may raise larger systemic concerns. For example, scholars argue that the rise in the ubiquity of arbitration, coupled with its lack of transparency, has led to consumers not pursuing valid claims at all.[44] Moreover, scholarship suggests that while PDAAs now regularly bar class actions, complex claims are not well suited for individual arbitration, and those claims may, likewise, not be pursued.[45] Others argue that the arbitration costs are too high and operate to deny consumers the ability to obtain redress.[46] Moreover, the confidentiality and lack of transparency into most arbitral forums make it difficult for patterns to emerge, thus discouraging individual litigants from enforcing their own rights or obscuring industry-wide concerns that regulators or law enforcement might wish to pursue.[47] On the procedural front, arbitration is also

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41 *Id.*

42 *See, e.g.*, Edwards, *supra* note 23, at 432–34 (describing how law remains static as related to securities claims subject to FINRA arbitration).

43 David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1054 (2017) ("[A]rbitration can disrupt or completely undermine incentive structures Congress created to encourage private enforcement.").

44 Estlund, *supra* note 23, at 682 ("It now appears that the great bulk of disputes that are subject to mandatory arbitration agreements ('MAAs')—that is, a large share of all legal disputes between individuals (consumers and employees) and corporations—simply evaporate before they are even filed.").

45 Sternlight, *supra* note 19, at 93 ("[P]rocedurally difficult consumer claims cannot realistically be presented by individual consumers in arbitration, or in other settings. . . . to the extent we care about procedurally difficult consumer claims we should either resurrect consumer class actions or increase the funding for government agencies that might realistically present such claims.").

46 Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 161 (2004) ("The costs of arbitration can be so high that they deny consumers access to a forum in which to air their disputes."); Clemente, *supra* note 29, at 20 ("[T]he securities industry arbitration procedures in which the Supreme Court in *McMahon* expressed confidence has changed dramatically. In its place is a burdensome, and often more cumbersome, procedural system that is alien to its origins.").

47 Silver-Greenberg & Gebeloff, *supra* note 23 (Arbitration clauses and class action bans within them can make it more difficult for law enforcement to "uncover[] patterns of corporate abuse."). In particular, arbitration clauses in employment agreements have been criticized

criticized, particularly for the repeat player effect, which posits that members of an industry in which PDAAs predominate have a better chance of success in the forum than individual consumers who have substantially less frequent engagement with the forum.[48] Recent scholarship bears out this impact, indicating, however, that the repeat player phenomenon can benefit individual consumers to the extent they employ an attorney with significant experience within the forum.[49]

Beneath these critiques of arbitration runs an undercurrent suggesting that the confidentiality at the core of arbitration creates such a high wall shielding the industries it covers that arbitration is fair neither to the public at large nor to unsophisticated individuals.[50] Empirical studies of arbitration are limited in their reach as a result of the lack of information on what is happening within the forum, producing many studies simply of whether or not consumers prevail, and others raising questions as to whether measuring winning and losing actually tells us anything about consumers' experiences.[51]

It is against this backdrop that arbitration within one industry arises as distinct from most of its peers. FINRA now hosts a single arbitral forum that resolves more securities arbitration claims than any other forum.[52] FINRA's arbitration process, born out of necessity to facilitate trust in the securities markets,[53] makes public an

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because their operation has obscured systemic problems impacting populations with already weakened voices. *See, e.g.*, Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 155, 209–10 (2019) (describing arbitration's harms in light of the #MeToo movement); *id.* at 209 ("While employment arbitration hurts all employees, it particularly harms the most vulnerable members of our workforce.").

48 Chandrasekher & Horton, *supra* note 23, at 9 ("[C]oncern that arbitration favors repeat-playing corporations is well founded. Indeed, businesses that arbitrate often in an institution perform particularly well within that institution. Nevertheless, this is just one-half of the repeat-player story. Arbitration favors repeat players on *both sides*. In a variety of different settings, serially arbitrating *plaintiffs' law firms* also fare particularly well.").

49 *Id.*

50 Edwards, *supra* note 23.

51 *See, e.g.*, Sternlight, *supra* note 19, at 87–88 ("[T]oo often commentators have asked whether consumers win or lose when they bring claims in arbitration, rather than whether consumers' claims are suppressed or eliminated altogether as a result of companies' use of mandatory arbitration clauses.").

52 Barbara Black, *Can Behavioral Economics Inform Our Understanding of Securities Arbitration?*, 12 TRANSACTIONS: TENN. J. BUS. L. 107, 107 (2011) ("[V]irtually all disputes involving customers, brokerage firms, and their registered representatives are arbitrated before the Financial Industry Regulatory Authority ('FINRA') forum.").

53 Jill I. Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 175–77 (2016).

uncharacteristically high level of information involving the claims made within the forum or otherwise levied against a stockbroker, potentially providing a level of insight into consumer arbitration not typically available.[54]

B. *Arbitration of Securities Disputes: From Voluntary to Mandatory*

Arbitration has existed in the securities realm nearly as long as securities have been traded in this country, with its roots being traced back to the late 1700s.[55] Examining the history of securities arbitration in the United States, Jill Gross argues that securities exchanges accepted consumer-investor complaints against stockbrokers in their arbitral forums as a consumer protection mechanism deriving from the exchanges' need to ensure trust and confidence in their industry.[56] Without a means to quickly and fairly resolve disputes with stockbrokers in rapidly moving financial markets, investors would not trust the markets or the individuals serving them within them.[57] While acknowledging the consumer-friendly and consumer-trust building aspects of securities arbitration, others suggest that the securities exchanges also provided for arbitration as a mechanism for their members to enforce those contracts that were not otherwise enforceable at law.[58] Thus, certain contracts disfavored by courts or at law could be

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54 *See infra* Section II.A.

55 Gross, *supra* note 53, at 175–76 (tracing history of arbitration of industry securities disputes in the United States beginning in the late 1790s and describing the New York Stock Exchange (NYSE) requirement for "members to submit to arbitration for all disputes regarding securities trading without restriction on who brought the complaint to the NYSE Board," thus permitting customers to bring claims in arbitration beginning in the early 1800s); *id.* at 178 (describing 1869 NYSE constitutional amendment "to officially require members of the Exchange to submit to arbitration whenever requested by a non-member."); *see also* Clemente, *supra* note 29, at 18 ("The use of arbitration as a quick and economical means of resolving securities industry disputes can be traced back to 1817."); Constantine N. Katsoris, *Securities Arbitration: A Clinical Experiment*, 25 FORDHAM URB. L.J. 193, 193 (1998) ("[A]rbitrations between brokers and customers have been held at the New York Stock Exchange since 1872.").

56 Gross, *supra* note 53, at 175–77.

57 *Id.*

58 *See, e.g.*, STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860, 250 (1998) ("By the 1820s, the New York Stock and Exchange Board encompassed a miniature private legal system, which formulated rules governing the market and resolved disputes involving members. Because most time bargains were unenforceable in the New York courts until 1858, this dispute resolution mechanism was the only one available for the enforcement of such transactions. . . .").

enforced by a purchaser against a stockbroker in an exchange-sponsored arbitration.[59]

Despite arbitration's role as a mechanism to induce investors to trust the securities markets and enforce investment contracts,[60] PDAAs purporting to require consumer-investors to arbitrate claims against their stockbrokers were held unenforceable by the Supreme Court for decades after the enactment of the 1925 Federal Arbitration Act.[61] It was not until the mid-to-late 1980s that a series of decisions changed course and ultimately found PDAAs in the securities industry enforceable.[62] As a result, the previously voluntary securities arbitration processes housed by the various stock exchanges, or self-regulatory organizations (SROs), would become essentially mandatory, with each of the SROs witnessing a significant increase in the number of claims heard and decided in their respective arbitral forums soon thereafter.[63] Since then, through

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59 Gross, *supra* note 53, at 175–76. Consumers outside the securities industry have, therefore, held, from nearly the beginning of the securities industry, the right to unilaterally force a stockbroker into arbitration absent a PDAA, though stockbrokers do not have the reciprocal right to force a customer into arbitration. *Id.* Consumers' right to unilaterally pull a lever and force brokers into arbitration continues today in the FINRA forum. *See infra* Section I.D.

60 Gross, *supra* note 53, at 174 ("While offering a speedy, efficient, and fair forum was important to the industry when choosing to offer and encourage arbitration, far more important was the use of arbitration as a mechanism to protect investors from unscrupulous brokers and brokerage firms, thus building trust and credibility in the securities exchanges, and, in turn, facilitating investors' use of the exchanges for their securities trading."); BANNER, *supra* note 58, at 250 (describing use of arbitration to enforce otherwise unenforceable investment contracts).

61 *See, e.g.*, Wilko v. Swan, 346 U.S. 427 (1953); *see also* Broker-Dealers Concerning Clauses in Customer Agreements Which Provide for Arbitration of Future Disputes, Exchange Act Release No. 34-15984, 44 Fed. Reg. 40,462 (July 2, 1979); Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 293–94 (1984) (describing *Wilko* decision and Supreme Court reluctance to accept securities arbitration); Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483, 487 (1996) (describing *Wilko* decision and subsequent expansion of doctrine to claims arising under 1934 Act).

62 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); *see also* Joel Seligman, *The Quiet Revolution: Securities Arbitration Confronts the Hard Questions*, 33 HOU. L. REV. 327, 328 (1996) (describing three decisions from 1985 through 1989 from which mandatory PDAAs in securities industry became the norm).

63 *See* Seligman, *supra* note 62, at 328–29 (from 1980 to 1993, claims "grew eight-fold to a total of 6561 cases"); Stephen H. Kupperman & George C. Freeman III, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs*, 65 TUL. L. REV. 1547, 1552 (1991) (quantifying significant increase in securities arbitration proceedings in late 1980s, including 151% increase in NASD filings from 1986 to 1988 and 67% increase in NYSE filings from 1987 to 1988); Katsoris, *supra* note 55, at 194 ("In 1988, the first full year after *McMahon*,

industry consolidation, FINRA has become the sole SRO-sponsored arbitral forum.[64]

The claims heard within the FINRA forum encompass nearly all interactions between broker-dealers[65] and the investors who hired them,[66] known in FINRA parlance as customers.[67] FINRA also administers intra-industry disputes, i.e., between industry members[68] and their associated persons—employment disputes between stockbrokers and investment firms, for example.[69] Industry disputes and customer disputes are resolved under separate, yet substantially

SRO arbitrations more than doubled from the year preceding *McMahon*."); Barbara Black, *Establishing a Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35, 35 (2000) ("In 1998, about 5,500 new cases were filed with the National Association of Securities Dealers, which in that year processed almost 90 percent of all securities arbitration claims . . . ."); Katsoris, *SICA: The First Twenty Years*, *supra* note 61, at 487; Katsoris, *The Level Playing Field*, *supra* note 37, at 421 ("[T]he forum for the resolution of these disputes has shifted from the courtroom to arbitration.").

64 Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes to Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc., Exchange Act Release No. 34-56145, 72 Fed. Reg. 42169 (Aug. 1, 2007) [hereinafter Exchange Act Release No. 34-56145]; *Arbitration & Mediation*, FINRA, https://www.finra.org/arbitration-and-mediation [https://perma.cc/Y5JP-S9GG] ("FINRA operates the largest securities dispute resolution forum in the United States . . . .").

65 Securities Exchange Act of 1934 § 3(a)(4)(A), 15 U.S.C. § 78c (defining broker as "any person engaged in the business of effecting transactions in securities for the account of others"); § 3(a)(5)(A) (a dealer is "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise"); *see also Registered Financial Professionals*, FINRA, https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/registered-financial-professionals [https://perma.cc/PJ7G-YGV4] ("A broker-dealer firm is in the business of buying and selling securities—stocks, bonds, mutual funds, and certain other investment products—on behalf of its customers (as broker), for its own account (as dealer), or both. The registered financial professionals who work for broker-dealers—the sales personnel whom some people refer to as stockbrokers—are technically known as registered representatives.").

66 *Arbitration & Mediation*, *supra* note 64 ("FINRA operates the largest securities dispute resolution forum in the United States . . . .").

67 FINRA's definition of customer is extremely broad. A customer is simply any person who is neither a broker nor a dealer. FINRA RULE 0160(b)(4) (2020); *see also* FINRA, RULE 12100(k) (2020) ("A customer shall not include a broker or a dealer.").

68 A member is "any individual, partnership, corporation or other legal entity admitted to membership in FINRA . . . ." FINRA, RULE 0160(b)(10) (2020).

69 An associated person is "a person associated with a member." FINRA, RULE 12100(b) (2020); *see also* FINRA, RULE 12100(W) (2020) (defining person associated as a member).

similar, codes of arbitration procedure.[70] FINRA also offers a mediation program for disputes if the parties voluntarily submit to it.[71]

Most customer disputes arbitrated by FINRA come to the forum as a result of a PDAA contained in a brokerage agreement between the consumer-investor and the broker-dealer firm, leading many to describe FINRA customer arbitration as mandatory.[72] Even if a customer's dispute with a broker-dealer or associated person is not required to be submitted to FINRA arbitration as a result of a PDAA, the claim can nevertheless be arbitrated.[73] A customer has a unilateral right to request arbitration on their own accord, and the member/associated person is required to arbitrate by virtue of their association with FINRA.[74] Alternatively, if the parties enter into a post-dispute arbitration agreement, FINRA will administer the dispute.[75]

Parties may submit an extremely wide range of conduct and disputes to FINRA arbitration. The customer code permits parties to submit claims that "arise[] in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance

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70 FINRA, RULES 12000–12905 comprise the code of arbitration procedure applicable to investor-customer claims against broker-dealers and their associated persons filed on or after April 16, 2007. FINRA, RULES 13000–13905 comprise the code of arbitration procedure applicable to intra-industry claims filed on or after April 16, 2007.

71 *See* FINRA, RULES 14000–14110. The FINRA Code of Mediation Procedure "applies to any matter submitted to mediation at FINRA." FINRA, RULE 14101 (2008). Intra-industry disputes, with the exception of statutory employment and whistleblower claims, must be arbitrated in the FINRA forum. FINRA, RULE 13200 (2008).

72 Christine Lazaro, *Has Expungement Broken BrokerCheck?*, 14 J. BUS. & SEC. L. 125, 127 (2014) ("Notably, nearly every account opening agreement contains a pre-dispute arbitration clause requiring customers to submit disputes that may arise between them and their broker or brokerage firm to FINRA."); Black, *supra* note 52, at 110 ("[M]ost retail investors sign standard form, take-it-or-leave-it contracts that are virtually identical across the brokerage industry.").

73 FINRA, RULE 12200 (2008) (titled "Arbitration Under an Arbitration Agreement or the Rules of FINRA"); FINRA, RULE 12201 (2008) (titled "Elective Arbitration").

74 FINRA, RULE 12200 (2008) (titled "Arbitration Under an Arbitration Agreement or the Rules of FINRA"). Industry members who fail to arbitrate subject themselves to discipline for engaging in actions "inconsistent with just and equitable principles of trade" and a violation of FINRA's standards of commercial honor. FINRA, IM-12000 (2008) (titled "Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes"); FINRA, IM-13000 (2008) (titled "Failure to Act Under Provisions of Code of Arbitration Procedure for Industry Disputes"); FINRA, RULE 2010 (2008) (titled "Standards of Commercial Honor and Principles of Trade"). Thus, members and associated persons must submit disputes for arbitration if they are arbitrable, comply with orders, fairly engage in the discovery process, and honor awards and settlement agreements lest they be disciplined or have their ability to work in the industry curtailed. FINRA, IM-12000 (2008).

75 FINRA, RULE 12200 (2008).

company."[76] There are, however, two major exceptions to the broad range of cases eligible for arbitration before FINRA.[77] First, FINRA will not accept class or collective action claims in arbitration, whether raised in the industry or customer context.[78] Second, shareholder derivative claims are excluded from FINRA customer and industry arbitration.[79] FINRA's Customer and Industry Codes largely mirror each other, and for the remainder of this piece, we limit our analysis to customer arbitration proceedings and the relevant provisions of the Customer Code of Arbitration Procedure.

C. *Customer Arbitration Proceedings in the FINRA Forum*

Depending upon the size of their claim, customer-claimants[80] can elect from among three different FINRA arbitration paths.[81] Claimants

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76 *Id.* The industry code similarly requires members and associated persons to arbitrate disputes they have against other members or associated persons arising "out of the business activities of a member or an associated person." FINRA RULE 13200 (2008) (titled "Required Arbitration").

77 FINRA, RULE 12204 (2008) (titled "Class Action Claims") ("Class action claims may not be arbitrated under the [Customer] Code."); FINRA, RULE 12205 (2008) (titled "Shareholder Derivative Actions") ("Shareholder derivative actions may not be arbitrated under the [Customer] Code."). FINRA, RULE 13204(a)(1) (2012) (titled "Class Action and Collective Action Claims") ("Class action claims may not be arbitrated under the [Industry] Code."); FINRA, RULE 13204(b)(1) (2012) ("Collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 may not be arbitrated under the [Industry] Code."); FINRA, RULE 13205 (2008) ("Shareholder derivative actions may not be arbitrated under the [Industry] Code.").

78 FINRA, RULE 12204 (2008) (titled "Class Action Claims") ("Class action claims may not be arbitrated under the [Customer] Code."); FINRA, RULE 13204(a)(1) (2012) (titled "Class Action and Collective Action Claims") ("Class action claims may not be arbitrated under the [Industry] Code."); FINRA, RULE 13204(b)(1) (2012) ("Collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 may not be arbitrated under the [Industry] Code.").

79 FINRA, RULE 12205 (2008) (titled "Shareholder Derivative Actions") ("Shareholder derivative actions may not be arbitrated under the [Customer] Code."); FINRA RULE 13205 (2008) ("Shareholder derivative actions may not be arbitrated under the [Industry] Code.").

80 The party who initiates the arbitration is known as the claimant, and the party (or parties) against whom an arbitration is filed is known as the respondent(s). FINRA, RULE 13100(g) (2020); FINRA, RULE 13100(e) (2020) ("The term 'claim' means an allegation or request for relief."); FINRA, RULE 13100(z) (2020) ("The term 'respondent' means a party against whom a statement of claim or third party claim has been filed. A claimant against whom a counterclaim has been filed is not a respondent for purposes of the Code.").

81 *See* FINRA, RULE 12401 (2012) (number of arbitrators and rules under which arbitration proceeds driven by dollar amount at issue).

with the smallest claims, $50,000 or less, have the greatest range of options under the so-called simplified arbitration provisions.[82] By default, claimants seeking $50,000 in damages or less will have what is known as a paper proceeding, a process by which the claim is determined entirely on the pleadings and written evidentiary briefs submitted by the parties.[83] Paper proceedings under the simplified arbitration rules were developed to be simpler and less costly for investor-claimants to navigate[84] and typically lead to a final decision

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82 FINRA, RULE 12800 (2018) (describing simplified arbitration procedures and options, including paper proceedings, special telephonic proceedings, and option for a traditional hearing for claims under $50,000).

83 FINRA, RULE 12800(a) (2018); FIN. INDUS. REGUL. AUTH., REGUL. NOTICE 18-21, SEC APPROVES AMENDMENTS TO ARBITRATION CODES TO PROVIDE AN ADDITIONAL HEARING OPTION IN SIMPLIFIED ARBITRATION (2018) [hereinafter REGUL. NOTICE 18-21] ("The default option is a decision by a single arbitrator based on the parties' pleadings and other materials submitted by the parties."); *see also Simplified Arbitrations*, FINRA, https://www.finra.org/arbitration-mediation/simplified-arbitrations [https://perma.cc/M7QZ-J2KH] (describing simplified arbitration proceedings).

84 FINRA, NOTICE TO MEMBERS 12-30 (2012) (describing cost effectiveness, speed, and consumer-friendly aspects of paper proceedings); Katsoris, *SICA: The First Twenty Years*, *supra* note 61, at 492 (describing intent of small claims arbitration process). Simplified paper proceedings are derived from an SEC-led inquiry into the fairness of securities arbitration and the need for a cost-effective, efficient, and fair process for consumers to seek redress before *McMahon* made securities arbitration functionally mandatory; *see* Settling Disputes Between Customers and Registered Brokers and Dealers, Exchange Act Release No. 34-12528, 1976 SEC LEXIS 1469 (June 9, 1976) (seeking comment on "the development of a model and uniform system of dispute grievance procedures for the adjudication of small claims."). The process was initially conceived by an industry-led conference whose exchange members sought and received SEC approval. SEC. INDUS. CONF. ON ARB., FIRST REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION: PROPOSALS TO ESTABLISH A UNIFORM SYSTEM FOR THE RESOLUTION OF CUSTOMER DISPUTES INVOLVING SMALL CLAIMS, 1-2 (1977) (on file with authors); *see, e.g.*, Notice of Filing of Proposed Rule Change by the American Stock Exchange, Inc., Exchange Act Release No. 34-14547, 14 SEC Docket 391 (Mar. 9, 1978) (American Stock Exchange, Inc. (AMEX) proposal to implement SICA-developed small claims arbitration procedure); Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc., Exchange Act Release No. 34-14546, 14 SEC Docket 390 (Mar. 9, 1978) (NYSE proposal to implement SICA-developed small claims arbitration procedure); Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc., Exchange Act Release No. 34-14671, 14 SEC Docket 816 (Apr. 17, 1978) (NASD proposal to implement SICA-developed small claims arbitration procedure); Notice of Order Approving Proposed Rule Changes by the American Stock Exchange, Inc. and New York Stock Exchange, Inc., Exchange Act Release No. 34-14737, 1978 WL 196611 (May 4, 1978) (approving NYSE and AMEX proposal to provide arbitration of investor claims under $2,500 before one arbitrator); Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc., Exchange Act Release No. 34-14757, 1978 WL 196628 (May 15, 1978) (CBOE proposal to implement SICA-developed small claims arbitration procedure); Notice of Filing of Proposed Rule Change by the Philadelphia

much more quickly than a traditional FINRA proceeding decided after a full hearing.[85] Theoretically, at least, an investor could navigate such a proceeding on their own without legal counsel, an unfortunate reality given the difficulty claimants have in securing counsel for smaller claims.[86] Paper proceedings are decided by one arbitrator, who is selected from the public[87] chairperson[88] roster.[89] Though parties in a

Stock Exchange, Inc., Exchange Act Release No. 34-14770, 1978 WL 196642 (May 16, 1978) (PHLX proposal to implement SICA-developed small claims arbitration procedure); Notice of Filing of Proposed Rule Change by the Pacific Stock Exchange, Inc., Exchange Act Release No. 34-14754, 1978 WL 196630 (May 12, 1978) (PSE proposal to implement SICA-developed small claims arbitration procedure); Notice of Order Approving Proposed Rule Changes by the Pacific Stock Exchange, Inc. and Chicago Board Options Exchange, Inc., Exchange Act Release No. 34-14881, 1978 WL 196225 (June 22, 1978) (approving PSE and CBOE proposal to provide arbitration of investor claims under $2,500 before one arbitrator); Notice of Order Approving Proposed Rule Changes by the National Association of Securities Dealers, Inc., Exchange Act Release No. 34-14892, 1978 WL 196232 (June 23, 1978) (approving NASD proposal to provide arbitration of investor claims under $2,500 before one arbitrator); Notice of Order Approving Proposed Rule Changes by the Philadelphia Stock Exchange, Inc., Exchange Act Release No. 34-14896, 1978 WL 196243 (June 26, 1978) (approving PHLX proposal to provide arbitration of investor claims under $2,500 before one arbitrator); Notice of Filing of Proposed Rule Change by the Midwest Stock Exchange, Inc., Exchange Act Release No. 34-15201, 1978 WL 195992 (Sept. 29, 1978) (MSE proposal to implement SICA-developed arbitration of investor claims under $2,500 before one arbitrator); Notice of Order Approving Proposed Rule Changes by the Midwest Stock Exchange, Inc., Exchange Act Release No. 34-15390, 16 SEC Docket 425 (Dec. 8, 1978) (approving MSE proposal to provide arbitration of investor claims under $2,500 before one arbitrator).

85 For example, from 2017 through 2019, paper proceedings produced a decision in 5.8–6.5 months, as opposed to 16.9–17.0 months for a traditional arbitration decided after a full hearing. *2019 Dispute Resolution Statistics*, FINRA, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2019 [https://perma.cc/TQ38-9LA4].

86 *See, e.g.*, HAZEN, *supra* note 25 ("[I]t may be difficult to find a lawyer to take a complex securities case on contingency, if the damages being sought are less than $100,000."); Katsoris, *supra* note 55, at 202–03 (describing then-SEC Chair Arthur Levitt's recommendation for law school clinics to fill void and provide representation to parties who have difficulty obtaining representation due to size of claim); Jill Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. CONFLICT RESOL. 597 (2014); Letter from Nicole G. Iannarone, Inv. Advoc. Clinic Dir., Ga. State Univ. Coll. Law et al., *FINRA Special Notice: Engagement Initiative dated March 21, 2017* 1–2 (June 19, 2017), https://www.finra.org/sites/default/files/notice_comment_file_ref/SN-32117_GSU_comment.pdf [https://perma.cc/98BE-TFNK]; Black, *supra* note 63.

87 *See* FINRA, RULE 12100(aa) (2020) (defining requirements for classification as public arbitrator, including industry associations that disqualify arbitrator from such classification).

88 *See* FINRA, RULE 12400(c) (2020) (defining eligibility for arbitrator service as public, chair-qualified arbitrator).

89 FINRA, RULE 12800(b) (2018) ("All arbitrations administered under this rule will be decided by a single public arbitrator appointed from the FINRA chairperson roster in accordance with the Neutral List Selection System, unless the parties agree in writing otherwise.").

paper proceeding have the ability to obtain some discovery,[90] paper proceedings are exempted from the mandatory discovery provisions requiring parties to produce certain documents in full hearing cases.[91] Paper proceedings represent a very small portion of FINRA proceedings overall, from two to five percent of decided cases between 2015 and 2019,[92] and FINRA reports that customers obtained some recovery—more than $0—in such cases at a rate of between 31% and 48% in recent years.[93]

While paper proceedings might be preferable for some customers, claimants with smaller claims have great flexibility to elect into a hearing if they wish.[94] Notably, in customer arbitration, election out of the paper proceeding default is an option only the customer, and not an industry member, can invoke.[95] Customers can choose two different hearing options: (1) a special telephonic proceeding; or (2) a traditional hearing subject to all provisions of the Customer Code.[96] The special telephonic proceeding option is a new addition to the FINRA forum and is a hybrid between a paper proceeding and a full, traditional hearing.[97] In this proceeding type, a telephonic hearing is held and each side has the ability to provide testimony in an abbreviated single hearing session, although cross-examination is not permitted.[98]

The special proceeding option was intended to provide customer claimants with the opportunity to tell their story and engage with an arbitrator while retaining the consumer-friendly aspects of paper proceedings, such as lower cost, ease of use, and efficiency.[99] Customers

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90 FINRA, RULE 12800(d)(2) (2018) (describing provisions for seeking documentary discovery in paper proceedings).

91 FINRA, RULE 12800(d)(1) (2018) ("Document Production Lists, described in Rule 12506, do not apply to arbitrations subject to this rule.").

92 *2019 Dispute Resolution Statistics*, *supra* note 85.

93 *Id.* (detailing customer win rates for paper cases that ended with an award between 2014 and 2019).

94 FINRA, RULE 12800(c) (2018) (describing hearing options outside default rule for paper proceedings).

95 REGUL. NOTICE 18-21, *supra* note 83 ("Under the Customer Code, a customer may request a hearing (regardless of whether the customer is a claimant or respondent), and under the Industry Code, only the claimant may request a hearing.").

96 FINRA, RULE 12800(c)(3) (2018) (describing two hearing options available to customers).

97 *See, e.g.*, REGUL. NOTICE 18-21, *supra* note 83 (describing addition of special telephonic proceeding to hearing options for consumer claimants).

98 FINRA, RULE 12800(c)(3)(B) (2018) (describing special proceeding procedure).

99 Order Granting Approval of a Proposed Rule Change Relating to Simplified Arbitration, Exchange Act Release No. 34-83276, SR-FINRA-2018-003 at 4 (May 17, 2018) (goal of special

in a special proceeding are not subject to cross-examination by an opponent, though, with that potential benefit, they are similarly limited in their ability to call and cross-examine the respondent or witnesses.[100] Special proceeding elections have thus far been rare, with only eight such cases decided from September 2018 until the end of 2019, and customer-claimants have not recovered any damages in all but one of those cases.[101] The time from filing through resolution of a special proceeding is slightly longer than a paper case, at an average of seven months.[102]

The vast majority of claims filed proceed under the regular hearing rules, either by the election of a claimant with a smaller claim or because the damages sought exceed $50,000 and the parties have no option other than a traditional arbitration hearing.[103] Customers with claims exceeding $50,000 proceed to a full arbitration with prehearing,[104] discovery,[105] and hearing provisions.[106] Claims seeking up to $100,000 are limited in one regard: they are heard and decided by a single, chair-qualified arbitrator.[107] Claims exceeding $100,000 are heard and decided by a panel of three arbitrators,[108] with customers able to elect an all-public panel.[109] A full hearing is conducted in person and without limits as to its ultimate length or upon calling witnesses and cross-

proceeding "should be to give the claimant personal contact with the arbitrator deciding the case and to give each party the opportunity to argue its case, to ask questions, and to respond to contentions from the other side."); *id.* at 5 ("The conditions are intended to ensure that the parties have an opportunity to present their case to an arbitrator in a convenient and cost effective manner without being subject to cross-examination by an opposing party.").

100 *Id.* at 5.

101 *2019 Dispute Resolution Statistics*, *supra* note 85.

102 *Id.*

103 *Id.* (showing 14–19% of cases closing after a hearing from 2015 to 2019). The vast majority of filed arbitration proceedings are resolved by settlement or withdrawal of the claim. *Id.* (noting 76–84% of cases filed resolved by means other than an arbitrator's decision between 2015 and 2019).

104 *See, e.g.*, FINRA, RULE 12500 (2018) (describing initial prehearing conference).

105 *See, e.g.*, FINRA, RULES 12505–12513 (rules pertaining to discovery process).

106 *See, e.g.*, FINRA, RULES 12600–12609 (rules pertaining to hearings and presentation of evidence).

107 FINRA, RULE 12401(a) (2012); FINRA, RULE 12401(b) (2012).

108 FINRA, RULE 12401(c) (2012) ("If the amount of a claim is more than $100,000, exclusive of interest and expenses, or is unspecified, or if the claim does not request money damages, the panel will consist of three arbitrators unless, the parties agree in writing to one arbitrator.").

109 FINRA, RULE 12403(c) (2017) (describing default of majority public panel and option to elect for all-public panel).

examining an opponent's witnesses.[110] A typical customer hearing case takes approximately fourteen months from filing to final decision, with customers receiving some monetary recovery in thirty-eight to forty-five percent of such cases from 2014 through the end of 2019.[111]

D. *Sources of Information Concerning FINRA Arbitration*

As the above discussion of how frequently each type of FINRA arbitration process is invoked, its average resolution time, and the percentage of proceedings in which a customer recovers damages[112] indicates, much information concerning FINRA customer claims is available to the public.[113] While unique in the number of categories of information provided, FINRA is not unique in providing consumer monetary recovery rates and some basic information concerning proceedings in its arbitral forum.[114] For example, California and Maryland require arbitral forums to provide information concerning mandatory arbitration.[115] Thus, the American Arbitration Association (AAA) and JAMS provide spreadsheets detailing basic information about consumer and employment cases decided within their respective forums, including the name of the non-consumer respondent, the name of the consumer's attorney or whether they are self-represented, filing and disposition dates, how the case was closed, the name of the neutral,

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110 *Simplified Arbitrations*, *supra* note 83 ("With regular hearings there are no limits on the length of a hearing, questioning an opposing party's witness or calling an opposing party as a witness.").

111 *2019 Dispute Resolution Statistics*, *supra* note 85.

112 Statistical reports of win/loss rates in securities arbitration have been critiqued because they do not provide sufficient information from which to determine whether the process is fair or what even led to the result. *See, e.g.*, Barbara Black, *Is Securities Arbitration Fair to Investors?*, 25 PACE L. REV. 1, 3 (2004) ("This statistic, unfortunately, tells us nothing, since we do not know the merits of any claims, we do not know what amount the 'winning' claimants were requesting, and we do not know the outcomes of the many claims that are settled.").

113 *See, e.g.*, *Dispute Resolution Statistics*, *supra* note 16 (providing statistics about, among other things, time from filing to resolution, how cases are resolved, consumer win rates, percentage of cases resolved without a final award, and types of claims filed for past five years).

114 *Compare id.*, *with Consumer and Employment Arbitration Statistics*, AM. ARB. ASS'N, https://www.adr.org/ConsumerArbitrationStatistics [https://perma.cc/DYJ6-A5BN], *and Consumer Case Information: JAMS Mediation, Arbitration and ADR Services*, JAMS, https://www.jamsadr.com/consumercases [https://perma.cc/CEV6-EJJ7] [hereinafter *JAMS Consumer Case Information*].

115 *See, e.g.*, CAL. CIV. PROC. CODE § 1281.96 (West 2020); MD. CODE ANN., COM. LAW §§ 14-3901–14-3905 (West 2011).

and the amount of the award.[116] FINRA's dispute resolution statistics provide similar aggregate information.[117]

What sets FINRA apart from arbitral forums like AAA or JAMS is that, in addition to publicizing summary statistics and basic information about decisions rendered,[118] FINRA makes available, through multiple media, raw information concerning individual customer complaints against broker-dealers and their associated persons, as well as the resolution of such claims.[119] It is here that FINRA's multi-dimensional responsibilities as a regulator and licensor of broker-dealer firms and their associated persons, overseer of the markets, and host of a dispute resolution forum could potentially provide a full picture of investor-customer experiences when a dispute with a stockbroker arises.[120]

Most intuitively related to the study of consumer experiences in arbitration is FINRA's rare choice to make the final written decision in every arbitration proceeding that concludes after a hearing publicly available[121] in a searchable database available on its website.[122] Included in the awards database are customer claims, industry claims, and expungement actions, proceedings in which a broker seeks to remove a customer's complaint from the broker's regulatory record.[123] These case disposition documents, counterintuitively known as "awards" whether or not the claimant recovers anything,[124] follow a largely uniform

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116 *Consumer and Employment Arbitration Statistics*, *supra* note 114; *JAMS Consumer Case Information*, *supra* note 114.

117 *See, e.g.*, *Dispute Resolution Statistics*, *supra* note 16.

118 *Id.*

119 *See* Nicole G. Iannarone, *Finding Light in Arbitration's Dark Shadow*, 4 NEV. L.J.F. 1 (2020).

120 *See* Exchange Act Release No. 34-56145, *supra* note 64 (approving NYSE merger into NASD resulting in new entity known as FINRA that would provide regulatory oversight of securities firms and their associated persons; education, training, and licensing; dispute resolution; and market regulation).

121 FINRA, RULE 12904(h) (2018) ("All awards shall be made publicly available.").

122 *See Arbitration Awards Online*, *supra* note 24 ("FINRA's Arbitration Awards database enables users to perform Web-based searches for FINRA and historical NASD arbitration awards free of charge, seven days a week."); *id.* (providing electronic access to all FINRA arbitration awards).

123 *See* FINRA, RULE 2080 (2009) (titled "Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System"); FINRA, RULE 12805 (2009) (titled "Expungement of Consumer Dispute Information under Rule 2080").

124 FINRA, RULE 12100(c) (2020) ("An award is a document stating the disposition of a case.").

pattern and include certain required information.[125] For example, among other items, every FINRA award must list the parties' names, their counsel or other representatives, a summary of the matters presented in the claim, damages requested and awarded, the arbitrators' names, the dates the claim was filed and closed via an award, and the location of the hearing.[126] An award may, but is not required to, contain a rationale describing how the panel reached its ultimate decision in the case.[127] If, however, the parties jointly agree, the panel is required to issue an explained decision "stating the general reason(s) for the

125 FINRA, RULE 12904 (2018) (titled "Awards").

126 FINRA, RULE 12904(e) (2018).

127 FINRA, RULE 12904(f) (2018) ("The award *may* contain a rationale underlying the award.") (emphasis added). Most of the complaints levied against FINRA derive from the lack of mandatory explained awards, which renders research on the factors that lead to a result difficult to study. *See, e.g.*, Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1484 (1996) ("Awards remain inscrutable documents that give the losing party no idea whatsoever of the basis for decision. A statement summarizing the issues in an arbitration is a far cry from a statement of reasons. The arbitration loser wonders why the loss occurred and whether the arbitrators really understood the issues presented."); HAZEN, *supra* note 25 ("Because the arbitration decisions rendered in NASD or FINRA proceedings rarely give a detailed opinion or basis for assessing the award, it was not possible to determine just which claim was responsible for the award."); Katsoris, *The Level Playing Field*, *supra* note 37, at 466 (discussing how awards do not provide sufficient information from which a party can assess an arbitrator's performance while noting that a review of the full record of a case could allow assessment of an arbitrator); *Hearings*, *supra* note 18, at 15–17 (written testimony of Stephen Brobeck, Exec. Dir., Consumer Fed'n America) (arguing that proposed SEC and SRO amendments to securities arbitration uniform code post-*McMahon* are insufficient because they do not "[p]ermit[] arbitration sessions to be open to the public, helping ensure that they will be conducted in a careful and unbiased manner;" or "[r]equir[e] written opinions and findings of fact based upon the evidence and conclusions of law, to ensure the integrity of the process and allow a fair appeal . . . ."); Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 UNIV. CIN. L. REV. 573, 585 (2017) ("Given the lack of explanation or precedent, determining the actual level of investor protection provided by FINRA's arbitration process may be impossible."); James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Broker-Dealers*, 2014 BYU L. REV. 1121, 1172 n.164 (2014) (noting that lack of explanation in FINRA awards would make it difficult to use those awards to assess firm compliance efforts at self-policing and deterring wrongful conduct); Stuart R. Berkowitz, *The Subprime Mortgage Mess–A Primer to Assist Investors*, 64 J. MO. BAR 122, 123 (2008) ("This utter lack of any published precedent has led to an unwritten set of standards and doctrines that have come to dominate the thinking of the relatively small group of attorneys who regularly litigate and/or defend arbitration claims."). *But see* Black, *supra* note 112, at 9 ("[R]ealistically a losing party benefits from an explanation only if it provides him with a basis for appeal on the merits.").

arbitrators' decision"[128] in both of the hearing option cases.[129] Explained awards are extremely rare in the FINRA forum.[130]

Given the depth of information contained in the FINRA awards database, it is no surprise that scholars have relied upon it on numerous occasions to answer various questions concerning customer experiences in arbitration,[131] the expungement of consumer complaints from brokers' records,[132] and employment disputes.[133] No previous

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128 FINRA, RULE 12904(g) (2018).

129 FINRA, RULE 12904(g)(6) (2018) (provision for explained decisions "will not apply to simplified cases decided without a hearing. . . .").

130 *See* Notice of Filing of a Proposed Rule Change to Eliminate the Fee for an Explained Decision, Exchange Act Release No. 34-82829, 83 Fed. Reg. 11256, 11257 n.10 (Mar. 14, 2018) [hereinafter Exchange Act Release No. 34-82829] ("Since the explained decision amendments went into effect in 2009 until the end of 2016, parties have made 40 joint requests for explained decisions. Of the 40 requests, there have been 32 explained decisions issued; explained decisions were not issued for the remaining eight requests because either the cases settled or closed by other means. Parties also made two joint requests from January 3, 2017 through February 14, 2018."). The lack of explained decisions is critiqued not just by scholars, but is also one of the main complaints raised by participants in the process, particularly consumers who do not prevail in the arbitration proceeding. *See* Notice of Filing of Proposed Rule Change to Provide Written Explanations in Arbitration Awards Upon Request, Exchange Act Release No. 34-52009, 70 Fed. Reg. 41065, 41065 (July 15, 2005) ("The lack of reasoning or explanations in awards is one of the most common complaints of non-prevailing participants in NASD's arbitration forum.").

131 *See, e.g.*, HAZEN, *supra* note 25 (analyzing 3,526 NASD customer arbitration awards from the period of August 1998 through December 2001 to determine how investors fared in proceedings against broker-dealers and their associated persons in cases involving a stockbroker's alleged misconduct, finding that investors prevailed more often than not, winning 55.47% of the cases against stockbrokers, with an average award of $100,000); Howard B. Prossnitz, *Who Wins FINRA Cases and Why? An Empirical Analysis*, 19 PIABA BAR J. 141 (2012); Gross & Black, *supra* note 25; Choi, Fisch & Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, *supra* note 25; Choi, Fisch & Pritchard, *Attorneys as Arbitrators*, *supra* note 25, at 113–14; Ryan Cook, *FINRA Arbitration Customer Win-Rates: A Survey by Jurisdiction*, 24 PIABA BAR J. 57 (2017); Egan, Matvos & Seru, *supra* note 25; EDWARD S. O'NEAL & DANIEL R. SOLIN, MANDATORY ARBITRATION OF SECURITIES DISPUTES: A STATISTICAL ANALYSIS OF HOW CLAIMANTS FARE (2007), https://www.slcg.com/pdf/news/Mandatory%20Arbitration%20Study.pdf [https://perma.cc/VVK6-KY44]; *SAC Award Survey: How Fares the* Pro Se *Investor in Arbitration?*, 8 SEC. ARB. COMMENTATOR 1, 1 (1997); U.S. GEN. ACCT. OFF., SECURITIES ARBITRATION: HOW INVESTORS FARE (1992), https://www.gao.gov/assets/160/151835.pdf [https://perma.cc/GUV4-9FJH].

132 *See, e.g.*, Colleen Honigsberg & Matthew Jacob, *Deleting Misconduct: The Expungement of BrokerCheck Records*, 139 J. FIN. ECON. 800 (2021).

133 David B. Lipsky, Ronald L. Seeber & J. Ryan Lamare, *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986–2008*, 65 DISP. RESOL. J. 12 (2010); J. Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELEY J. EMP. & LAB. L. 113 (2014); J. Ryan Lamare, *The Arbitration of Employment Discrimination Cases in the Securities Industry*, 68 DISP.

research, however, has used computational text analysis to study a comprehensive set of FINRA awards to assess different outcome measures—the subject of the present Article and the jumping-off point for the authors' future stream of related research.

II. HYPOTHESIS, METHODOLOGY, AND DATA

We begin our work with the hypothesis that using modern text analytics tools to assess results in FINRA awards would produce a useful taxonomy of outcomes.[134] We further hypothesize that the results of such an exercise would provide a more textured understanding of why reliance on any one measure of success might be unreliable or tell an incomplete story as to the outcome. Relatedly, we hope to encourage researchers—and FINRA itself—to use more than one conception of success as a frame through which to view arbitration outcomes.

To test our hypotheses, we first assembled a set, or corpus, of documents to study, determined the analytics techniques best suited to our aims, and constructed a methodology that would allow us to deploy such techniques to extract meaning from the corpus text. We describe each of those steps in the Sections that follow.

A. *Assembling the Corpus*

To assemble our corpus, we wrote code to automate the process of downloading all arbitration awards available from FINRA's publicly available online awards database.[135] At the time of this mass download, 55,655 files were available in .pdf format, spanning March 1, 1998 through May 10, 2018—the date on which we ran the download.[136] Along with the award files themselves, we scraped all information, or

RESOL. J. 97 (2013); J. Ryan Lamare & David B. Lipsky, *Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry*, 72 ILR REV. 158 (2019).

134 This project is not intended to and does not study the factors, if any, that lead to any particular outcome. The authors are undertaking such work in a separate project.

135 *Arbitration Awards Online*, *supra* note 24.

136 *See id.* Metadata indicated that there were several files contained in the data that had no award date ascribed to them. Sixteen others had obviously incorrect award dates; though they were initiated between 2014 and 2016, they listed 12/31/1969 as the date of the award.

metadata, returned by the database queries that described each award.[137] Using the metadata, we eliminated any documents that were not related to a FINRA proceeding.[138] We further removed any document that was not coded as an "award," thereby eliminating other document types that are related to FINRA's dispute resolution processes but do not reflect a final arbitration decision. We then limited our data set to a complete five-year period—May 1, 2013 through May 1, 2018—using the "DOA" (Date of Award) field.[139] Our resulting data set was a corpus of 6,354 FINRA arbitration awards.

Because this corpus included both industry cases (broker versus investment firm) and customer cases (investor versus broker), we took further steps to identify and isolate the customer cases. This filtering is consistent with our overarching research aim: to aggregate dispersed public data and document sets to assess the efficacy of FINRA's investor protection measures. After converting all files to machine-readable text format, we wrote code to extract the text labeled "Nature of Claim" within each award. After extensive manual review of the text output, we identified 3,227 customer awards issued in disputes between investors and stockbrokers. This set of 3,227 became the study set upon which we conducted the remainder of our analysis.[140]

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137 This information consisted of a unique award identifier, the name of the claimant(s), the attorney or other person representing the claimant(s), the name of the respondent(s), the attorney or other person representing the respondent(s), the name(s) of the arbitrator(s), the hearing location assigned to the case, the date the award was rendered, and a summary of the claims in the proceeding. In addition, the metadata identified the securities exchange before which the arbitration hearing was held, which could include FINRA, NASD, NYSE, Pacific Exchange/ARCA, AMEX, CBOE, or PHLX.

138 We made this decision to ensure measurability and consistency. FINRA awards are issued following FINRA's rules, and while other SROs may have used similar rules, we had a higher probability of uniformity by limiting our analysis to the largest forum and a forum that consistently presents its awards. Moreover, selecting only for the FINRA forum allowed us to more accurately filter out awards issued before the relevant time period, as FINRA did not exist until NYSE merged into NASD to create FINRA in 2007. *See* Exchange Act Release No. 34-56145, *supra* note 64 (approval of NASD rule proposal to consolidate with NYSE Regulation into FINRA). Accordingly, we searched for and excluded awards rendered in the following SRO forums: NASD, NYSE, Pacific Exchange/ARCA, AMEX, CBOE, and PHLX.

139 We chose a five-year period to create a manageable set of awards to test.

140 Our classification process of awards as customer or industry may have understated the number of single-outcome settlement cases in the data set. This outcome set is discussed further below in Section III.A.1.

B. *Text Analytics Tools*

In general terms, text analytics refers to the use of computational tools to extract meaning from unstructured text.[141] Also known as natural language processing,[142] text analytics enables researchers to automate the process of turning text into data—in our case, transforming over 3,000 written arbitration decisions, composed of over 5.3 million words—into an organized data set susceptible of analysis, without having to read each and every decision and extract the relevant information by hand.

In this project, we used an array of text analytics tools: segmentation, word counts, sentence parsing, targeted term frequencies, keyness measures, sentiment analysis, and targeted dollar amount extraction. We also experimented with creating a machine learning classifier for outcome prediction purposes and with clustering to identify natural groupings within the corpus; this work is ongoing.[143] Throughout, we used text analytics and statistical packages implemented in the programming language R.[144] Specific packages are identified in the footnotes; scripts and data sets are available from the authors upon request.

Each method is described thoroughly, along with our results, in Part III below. First, however, the following Section introduces our corpus of 3,227 investor versus stockbroker arbitration awards in more detail by providing some simple descriptive statistics.

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141 For an accessible summary of the use of computational text analysis in an analogous context, see Justin Grimmer & Brandon M. Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, 21 POL. ANALYSIS 267 (2013).

142 *See* CHRISTOPHER D. MANNING, PRABHAKAR RAGHAVAN & HINRICH SCHÜTZE, INTRODUCTION TO INFORMATION RETRIEVAL (2008) (introducing the field of natural language processing).

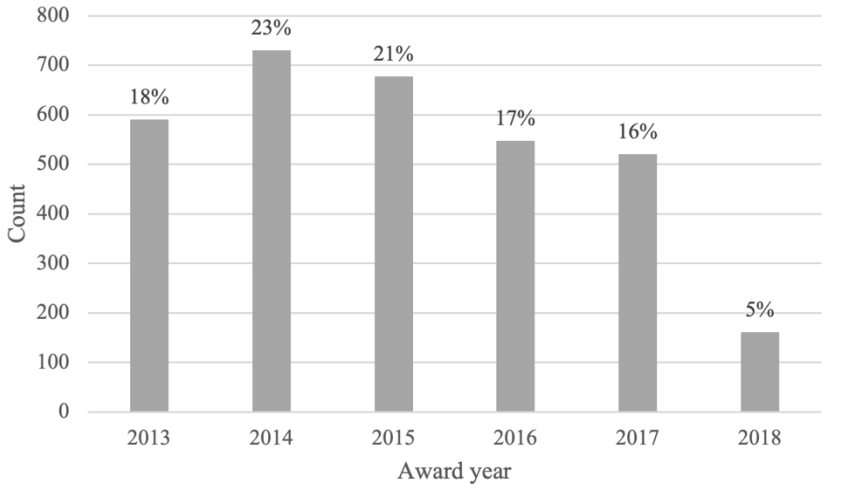
143 *See supra* text accompanying note 27.

144 *The R Project for Statistical Computing*, R FOUND., https://www.R-project.org [https://perma.cc/RH7R-M5NT]; *see also* Kasper Welbers, Wouter Van Atteveldt & Kenneth Benoit, *Text Analysis in R*, 11 COMMC'N METHODS & MEASURES 245 (2017).

C. *Descriptive Statistics*

Figure 1 below illustrates the distribution of the awards over our five-year study period, May 1, 2013 through May 1, 2018.[145]

Figure 1: Count of Awards by Award Year: May 1, 2013–May 1, 2018



As Figure 1 shows, the earlier awards outnumber the later ones, and 2018 is underrepresented due to the May 1 cutoff.[146] However, our analysis pools the award data from all years, and does not attempt to uncover longitudinal or time series trends. In fact, with some exceptions described further below, the textual characteristics and outcome distributions within the award set were remarkably consistent year over

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145 By comparison, FINRA's summary statistics list 2,519 arbitration decisions issued in the full calendar years 2013–2018. *See Dispute Resolution Statistics*, *supra* note 16 (1,555 arbitration decisions between calendar years 2015–2018); *2014 Dispute Resolution Statistics*, FINRA https://www.finra.org/arbitration-mediation/2014-dispute-resolution-statistics [https://perma.cc/32MC-ABYT] (964 arbitration decisions between calendar years 2013–2014). Because our five-year study period, May to May, does not map onto FINRA's calendar year reporting, it is difficult to compare these figures. As discussed in Section II.A, *supra*, our awards set is higher than FINRA's total numbers due to expungement hearings after a settlement. FINRA reports results of "Customer Claimant Arbitration Award Cases," thus indicating that the request of an industry member to have a settlement removed from her CRD is not included. *See Dispute Resolution Statistics*, *supra* note 16.

146 On average, proceedings took 1.4 years from filing to award date. The longest proceeding was nine years; 60% of proceedings reached an award within one year or less.

year in our study period, justifying our pooling of the five years. Future research may expand our timeframe to investigate the possibility of time trends over a longer period of years.

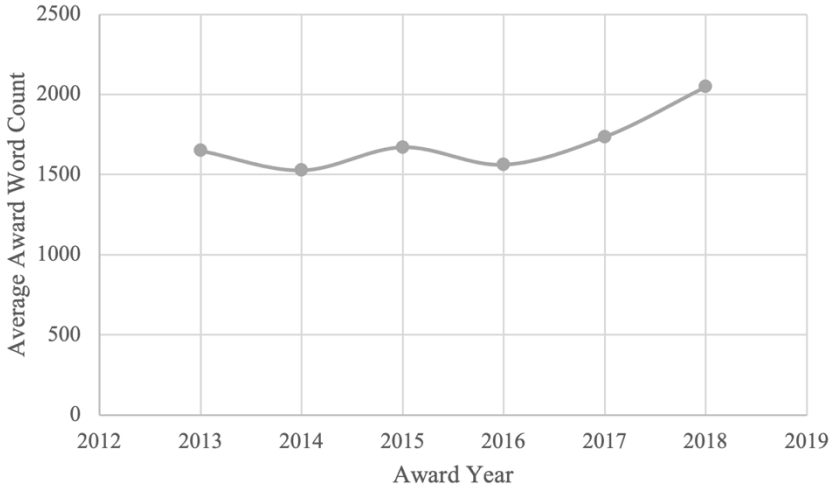
The awards in our corpus were, on the whole, relatively short. The average award length was about 1,600 words, or the equivalent of just over three single-spaced pages. Recalling the discussion above of explained versus unexplained awards, this short average award length suggests that longer, explained awards were rare in our corpus, as is true for the FINRA forum in general.[147]

Interestingly, as Figure 2 below shows, average award length in our corpus increased over time, from about 1,650 in the 2013 awards to almost 2,050 in the 2018 awards. Further work will investigate this trend, including exploring whether explained awards were overrepresented in the later years, whether FINRA's published guidance on expungement in 2017 resulted in longer awards, or whether the forum's unexplained, non-expungement awards merely increased in length.[148]

147 Explained awards are relatively rare in FINRA proceedings. *See* Exchange Act Release No. 34-82829, *supra* note 130; *see also supra* Section I.D.

148 In 2017, FINRA published a notice outlining the extraordinary nature of the expungement device and outlining the role arbitrators play in this process. *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, FINRA, https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance [https://perma.cc/2U7D-BVP5] (last updated Sept. 2017). We expect that the timing of this notice and the increase in award length are related, though we have not yet tested this theory.

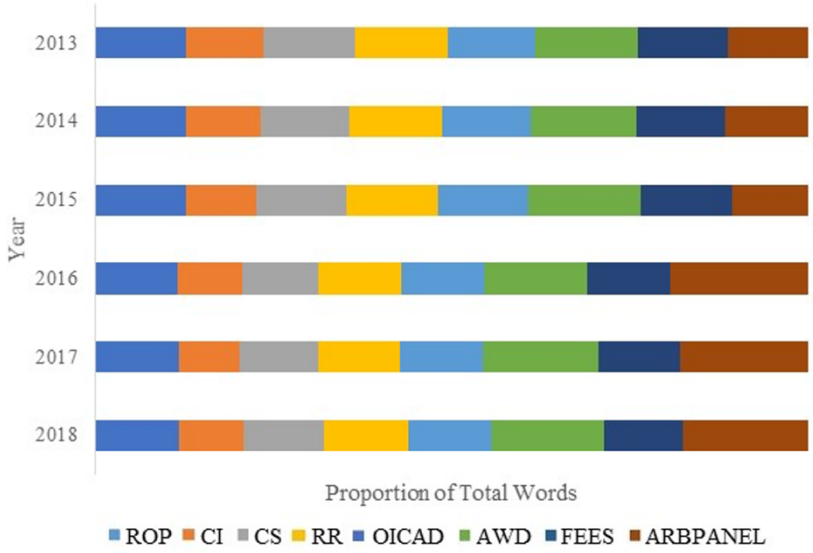
Figure 2: Average Award Length, in Words, 2013–2018



This length trend does not affect our analysis of award outcomes, however, as our analytic techniques described below do not depend on whole-document word counts or award length. Moreover, as Figure 3 below illustrates, the length of each section of the awards, as a proportion of total word counts, was roughly the same year over year. Much of our analysis below was conducted on the "Relief Requested," "Award," and "Other Issues Considered and Decided" sections of the arbitration decisions, isolated from the remainder of the text.[149] Figure 3 confirms that those three sections remained a relatively consistent length, as both an absolute and relative matter, throughout the study period.

[149] To segment the arbitration decisions into their component sections, we used the corpus_segment function in the R package quanteda, which enables the splitting of text into its sub-parts, relying on the consistent wording and capitalization patterns of arbitration decision section headers, e.g., "CASE SUMMARY." *See* Kenneth Benoit et al., *quanteda: An R Package for the Quantitative Analysis of Textual Data*, 3 J. OPEN SOURCE SOFTWARE 774 (2018).

Figure 3: Section Length, as a Proportion of Total Words, 2013–2018



NOTE: The standard sections of a FINRA arbitration award are: Representation of Parties (ROP), Case Information (CI), Case Summary (CS), Relief Requested (RR), Other Issues Considered and Decided (OICAD), Award (AWD), Fees (FEES), and Arbitration Panel (ARBPANEL).

We now turn to our analyses, using an array of text analytics techniques to produce a more granular, useful taxonomy of FINRA arbitration outcomes in disputes between investors and stockbrokers.

III. DEFINING A WIN? APPLYING TEXT ANALYTICS TECHNIQUES TO DETERMINE OUTCOME(S) IN FINRA AWARDS

If our hypotheses are correct, a computational text analysis approach would result in a taxonomy of outcomes in FINRA arbitration proceedings that proceed to a hearing. While our results would not explain the factors that were most predictive of success,[150] the differing techniques and conceptions of a win would help provide a more textured understanding of success and shed light upon the limitations that can result when relying on one framework versus another.

150 In a separate project, we aim to describe whether the information FINRA provides in awards, in fact, provides transparency such that success in the forum can be explained.

Our experience in applying these techniques to the awards corpus did produce a more granular picture of arbitration outcomes than FINRA's binary non-zero recovery measure, particularly in identifying the presence of multi-outcome cases. We also found, however, that while FINRA makes public far more information than other arbitration forums, that information is insufficiently standardized, limiting measurement and analysis. In the Sections that follow, we present our results, and also a set of recommendations that would enable a more sophisticated understanding of outcomes and even better definitions of success. We describe the results of the following text analytics approaches: (a) targeted term frequencies and keyness measures to identify win/loss/settlement language within the awards; (b) sentiment analysis to identify positive versus negative language in the "Award" segments of the documents; and (c) targeted token extraction to extract all dollar amounts in the "Relief Requested" and "Award" segments, to measure the ratio of amount requested to the amount awarded.

A. *Targeted Term Frequencies and Keyness Measures*

As noted previously, as a pre-processing step before further analysis, we segmented each arbitration decision into its component parts, listed in Figure 3 above. To identify win/loss/settlement language within each award, we isolated the sections marked as "Award" (AWD) and "Other Issues Considered and Decided" (OICAD). A manual review of the decisions confirmed that the arbitrators consistently reported their resolution of the claimants' claims in these sections. Figure 4 below is a word cloud showing the most frequent 100 terms in the combined AWD and OICAD sections for all 3,227 awards, where larger font size indicates higher term frequency.[151] While word clouds are not very analytically useful, they do provide an impressionistic sense of the kinds and frequency of words that dominate a passage of text.

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[151] As an additional pre-processing step, we dropped a list of 175 very common words from the AWD and OICAD corpora, known as "stopwords." These words—such as "and" and "the"—are so common that they have very little analytical value. We used the built-in list of English stopwords in the quanteda package, "stopwords('en')."

Figure 4: Most Frequent 100 Terms in "Award" and "Other Issues Considered and Decided" Sections

The problem that is immediately evident from this word cloud is that the most frequent terms within the combined AWD and OICAD sections are generic to the arbitration process: finra, respondent, panel, hearing, claimant, arbitrator, resolution. The term "expungement" is also quite common, and refers to a respondent's request, routinely made along with defenses, to have their regulatory record wiped of the claims against them.[152]

Digging down, some much smaller words and phrases do suggest an outcome: dismiss, denied, shall pay. However, these meaningful substantive words appear to be relatively rare among the top one hundred terms. This suggests that unsupervised classification and clustering analytics techniques may be inappropriate for the task of outcome identification. These techniques "learn" from latent differences within the text and then classify, or cluster, like documents with like documents.[153] However, the differences in our corpus between documents that contain "win" words and documents that contain "loss" or "settlement" words appear to be quite subtle, given those substantive

152 *See supra* Section I.D.

153 *See supra* note 27.

words' relative infrequency in the corpus. This type of text structure can thwart machine learning algorithms' classification and clustering abilities.

Given this text structure, we adopted a supervised approach, guided by human subject matter expertise. We first read 439 arbitration awards (14%), chosen at random from our corpus of 3,227. We manually classified those awards as containing a claimant win, loss, settlement, or any combination of the three. We also identified lists of key words and phrases in the AWD and OICAD sections that signaled the claims' outcome(s). Those full lists appear in Table 1 in Appendix A, along with measures of the keyness, or centrality, of the words that distinguish each outcome category from the others.

We then parsed the text into sentence-level units and ran targeted term frequency counts to generate tallies of those words' and phrases' appearance, per sentence, in each document's combined AWD and OICAD sections.[154] We found the sentence-level analysis to be more effective than generating counts from the entire blocks of AWD/OICAD text because we could better identify the particular word forms and usages that indicated each win/loss/settlement outcome. We could also assign multiple outcomes to a single case, with win language coming from one sentence in the AWD section, for example, and loss language coming from another. From our term frequency tallies, we then generated counts of win/loss/settlement outcomes per arbitration decision and compared those against our own 439 hand-coded decisions and against FINRA's reported summary statistics as validation and robustness checks.

1. Results Indicative of Customer Success

Our analysis revealed that most FINRA awards, almost eighty percent, could be classified by a single outcome of either a win, a loss, or a settlement of the claim. The remaining approximately twenty percent of awards exhibited characteristics of more than one, and sometimes all three, potential outcomes. Accordingly, we did not obtain a binary outcome driven purely by win (monetary recovery or equitable

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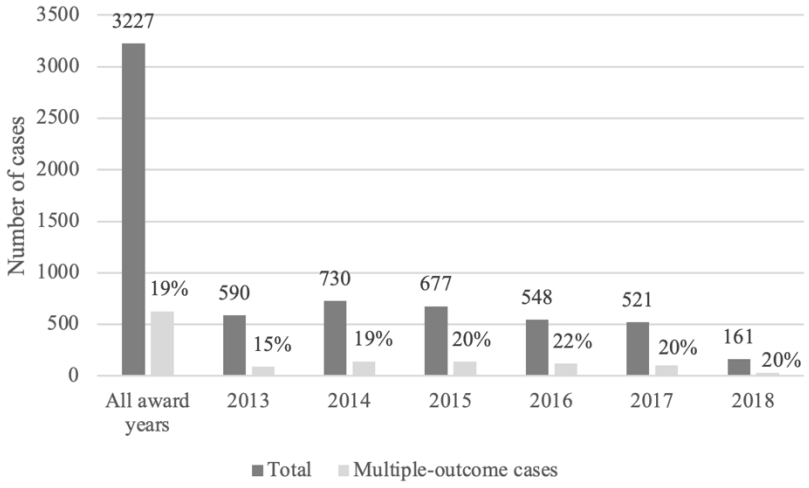
154 To accomplish this task, we used the tokenizing function of the natural language processing package spaCy, implemented in R via the package spacyr. Kenneth Benoit & Akitaka Matsuo, *Package 'spacyr'* (Mar. 4, 2020, 9:40 AM), https://cran.r-project.org/web/packages/spacyr/spacyr.pdf [https://perma.cc/293V-XWG4]. We then generated term frequencies via the dfm_select function in quanteda.

relief) or loss (denial of all claims), and instead, the textual analysis indicated that the outcomes were more nuanced. Figure 5 below illustrates the results of the textual analysis classifying all cases, by year, as single- or multiple-outcome cases.[155]

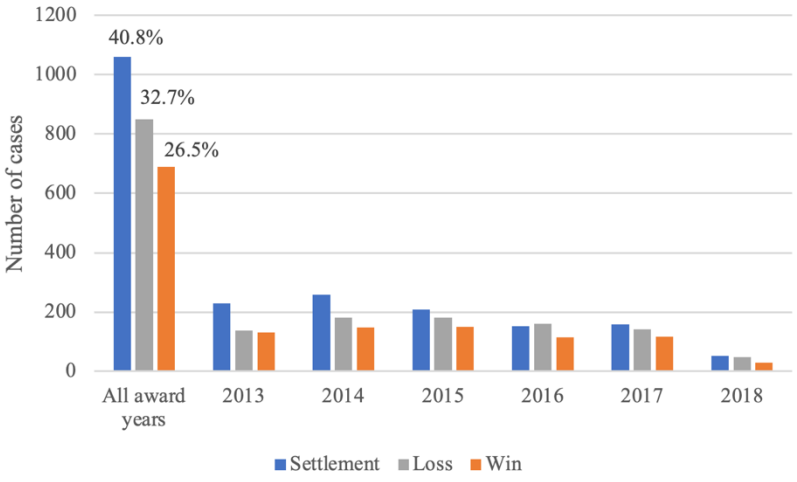
Figure 5: Classification of FINRA Awards by Number of Outcomes



Among the single-outcome awards, language indicative of a settlement-only outcome outpaced language indicative of a win or a loss, as illustrated by Figure 6, below.

[155] The proportions are quite similar across years, hovering around 20% multiple-outcome cases. Recall that 2013 and 2018 do not represent full calendar years.

Figure 6: Single-Outcome Cases, by Outcome



The dominance of the settlement outcome was not a surprising result, as FINRA's own statistics report that, from 2015 to the end of 2019, roughly 53% of filed claims were resolved via direct settlement by the parties and another 12% were settled in mediation.[156] What is surprising is the percentage of settlement-only awards contained in the data set: as illustrated by Figure 6 above, about 41% of single outcome cases were settlements. A settlement of a FINRA claim is typically documented privately between the parties with the underlying arbitration being dismissed upon execution of a satisfactory settlement agreement.[157] That award documents solely related to settlement (41% of total single-outcome awards) were more prevalent than either complete wins (27% of single-outcome awards) or complete losses (33%

156 *Dispute Resolution Statistics*, *supra* note 16.

157 From time to time, parties may, however, agree to enter a stipulated award that will appear in the FINRA awards database and may disclose the amount paid in settlement of the customer's claim(s). *See, e.g.*, Ebersole v. Merrill Lynch Pierce Fenner & Smith Inc., No. 15-03367, 2017 WL 2591773 (FINRA June 6, 2017) (Matek, Zehe, & Marquez-Posey, Arbs.) ("Now, in lieu of a hearing and upon Claimants' and PrimeSolutions' motion for entry of an award, and the written stipulation thereto, the Panel grants the motion and enters this Stipulated Award granting the following relief: 1. Respondent PrimeSolutions Securities, Inc. is liable for and shall pay to Claimants John M. Ebersole and Patti K. Ebersole the sum of $49,000.00 in damages . . ."). Many stipulated awards, however, while demonstrative of a settlement of the underlying claims, do not contain the amount of the settlement in them. *See, e.g.*, Aguirre v. Santander Sec., LLC, No. 17-00327, 2018 WL 1335273 (FINRA Mar. 6, 2018) (Weinberg, Miller, & Cope, Arbs.).

of single-outcome awards) suggests that expungement, far from the "extraordinary" relief it is intended to be,[158] is sought in a significant percentage of the customer cases in which a consumer settles the underlying claim.[159]

The percentage of single-outcome cases that our analysis coded as solely a customer win, 27%, is not comparable to the overall rate reported by FINRA for awards in which a customer obtains any monetary award for the same time period, 41%.[160] However, when we broaden out from the single-outcome cases to include the remaining 20% of cases with multiple outcomes, our win rate is quite close to that of FINRA. As Figure 7 below shows, 38% of cases in our data set

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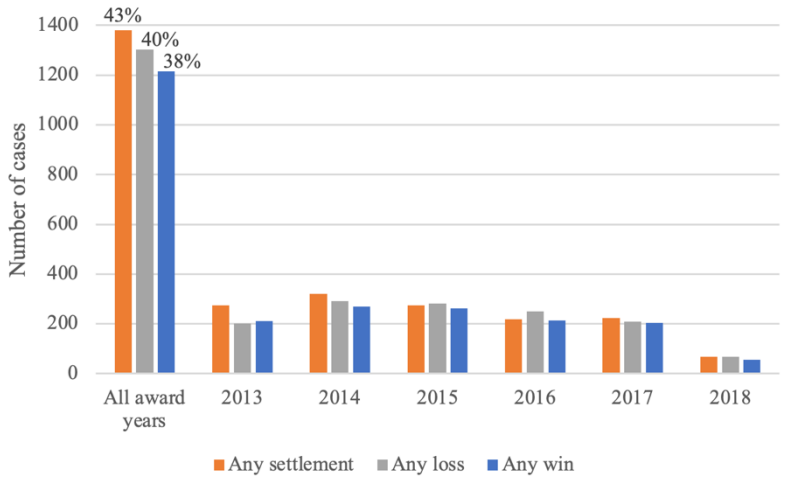
158 *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, FINRA, https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance [https://perma.cc/9YHH-NFPQ] (last updated Sept. 2017) ("Expungement is an extraordinary remedy that should be recommended only under appropriate circumstances. Customer dispute information should be expunged only when it has no meaningful investor protection or regulatory value.").

159 The frequency of expungement after a consumer settlement is understated by our results because we purposefully excluded, as industry awards, expungement proceedings brought after a consumer case had concluded (through award or otherwise) because they presented as associated person versus member cases in the nature of the dispute segment of the award. *See supra* Section II.A. Other scholars have documented that expungement is sought in nine of every ten proceedings settled by a broker. *See* PUB. INVS. ARB. BAR ASS'N, PIABA STUDY: STOCKBROKER ARBITRATION SLATES WIPED CLEAN 9 OUT OF 10 TIMES WHEN "EXPUNGEMENT" SOUGHT IN SETTLED CASES 1 (2013), https://piaba.org/sites/default/files/newsroom/2013-10/PIABA%20Expungement%20Study.pdf [https://perma.cc/PWN7-FAET] [hereinafter PIABA STUDY]; *id.* ("For the time period January 1, 2007 through mid-May 2009, expungement was granted in 89 percent of the cases resolved by stipulated awards or settlement."); *id.* (From "mid-May 2009 through the end of 2011, expungement relief was granted in nearly every instance—96.9 percent of the cases resolved by settlements or stipulated awards.").

160 *See Dispute Resolution Statistics*, *supra* note 16 (2015–2018 Results of Customer Claimant Arbitration Award Cases); *2014 Dispute Resolution Statistics*, *supra* note 145 (2013–2014 results). On the other hand, the data analysis protocol may overstate the prevalence of wins because it includes awards indicating the payment of monetary relief to a claimant, which includes stipulated awards indicating the payment of a monetary amount after a settlement. *See, e.g.*, *Ebersole*, No. 15-03367 ("Now, in lieu of a hearing and upon Claimants' and PrimeSolutions' motion for entry of an award, and the written stipulation thereto, the Panel grants the motion and enters this Stipulated Award granting the following relief: 1. Respondent PrimeSolutions Securities, Inc. is liable for and shall pay to Claimants John M. Ebersole and Patti K. Ebersole the sum of $49,000.00 in damages."). We elected to include stipulated awards in our data set due to FINRA's convention of reporting results as any proceeding ending via award that includes a monetary payment to a claimant. We are unable to discern, however, from FINRA's Dispute Resolution Statistics whether these stipulated awards including the amount of settlement are included within their statistics. As FINRA reports its results of customer claimant arbitration award cases by describing the number decided, it is possible either that a hearing was held or that an award was rendered by the consent of the parties. *See Dispute Resolution Statistics*, *supra* note 16.

included a win (regardless of other outcomes also present in the case), whereas FINRA reported non-zero damage recoveries for customers in average of 42% of cases, 2013–2018.[161] These figures cannot be compared quite as directly, however, as our data set spans May 2013 to May 2018, whereas FINRA's spans January to January. Nevertheless, the proximity of the two figures to one another supports the validity of our text-based method of identifying wins.

Figure 7: Multiple-Outcome Cases, by Outcome



NOTE: Because Figure 8 allows for multiple outcomes per case, the percentage figures shown do not sum to one hundred percent. They report the percent of cases in which that outcome appears, not the percent of all outcomes represented by each bar.

Nevertheless, our results call to mind the question first raised in the Introduction: Which outcomes should count as claimant wins? Our analysis elucidated a characteristic of customer recovery in FINRA awards not obvious from FINRA's reporting of the binary recovery/no recovery metric: that in many instances, investors who recovered some monetary award also settled or lost part of their claim(s).[162] The multiple-outcome awards metric identified by our research thus

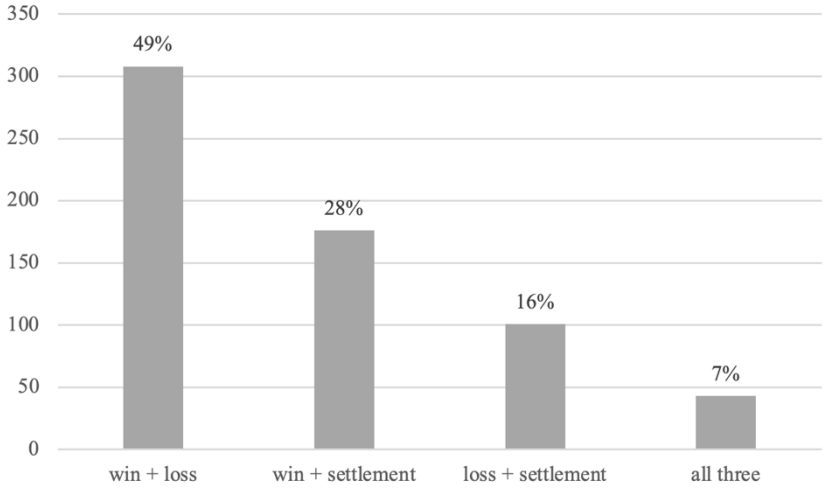
161 *See Dispute Resolution Statistics*, *supra* note 16 (2015–2018 Results of Customer Claimant Arbitration Award Cases); *2014 Dispute Resolution Statistics*, *supra* note 145 (2013–2014 results).

162 *See Dispute Resolution Statistics*, *supra* note 16 (classifying results in customer cases by metric of whether monetary recovery awarded by arbitrator after hearing and not accounting for settlement and dismissal of a party from the proceeding prior to the arbitrator's award).

provides an additional layer through which consumer outcomes in FINRA proceedings can be evaluated.

For instance, as Figure 8 below shows, 49% of the multiple-outcome cases suggested both a win and a loss (10% of all awards), perhaps indicating the success of a subset of claimants against all respondents or indicating the success of all claimants against a subset of respondents in a proceeding.

Figure 8: Multiple-Outcome Cases, by Combined Outcome Type



Further, a win and a settlement were present in 28% of the multiple-outcome awards, or 5% of all awards, suggesting, perhaps, a claimant or claimants with particularly strong claims. A loss and a settlement together were present in 16% of the multiple-outcome cases (3% of total awards), perhaps suggesting a claimant willing to take a risk after obtaining some monetary relief in a settlement. Finally, a very small percentage of the multiple-outcome cases, 7% (or 1% of all awards), exhibited characteristics of a win, a loss, and a settlement. Taken together, the measurement of multiple outcomes provides a different frame through which to view the results of a FINRA arbitration proceeding and illustrates the complexities that may not be

apparent from a review of the aggregate, binary claimant success statistics reported publicly by FINRA.[163]

2. Validation and Reliability of Results

In addition to comparing our "win" results to FINRA's non-zero recovery totals, as described above, we further validated our results by comparing them to the 439-case sample of manually classified outcomes.[164]

In 79% of the hand-classified awards, the machine and expert coding of documents as containing wins, losses, and/or settlements were an exact match. Of the remaining 21%, one-third were multiple-outcome cases that the automated process correctly identified as multiple-outcome, but incorrectly identified the particular constellation of outcomes at issue. The remaining incorrectly-classified outcomes were approximately evenly distributed among misidentified wins, losses, and settlements.

Future work will continue to fine-tune this text analytic approach to outcome identification. Appendix B, for instance, contains the results of a keyness analysis of the three categories of single-outcome case: wins, losses, and settlements.[165] There, we ran code to calculate the prevalence of every word across the AWD/OICAD corpus. Assuming an even distribution of words across the corpus, this prevalence measure allowed us to generate an expected frequency for each term within each arbitration decision's block of AWD/OICAD text. We could then compare each term's actual frequency in each decision—its observed value—to its expected frequency. Those terms with observed values in a particular block of text that exceeded their expected value were more "key" to that text and performed better at distinguishing that block of text from others.[166] The resulting word lists are included here in Appendix B; we are working to integrate these results into our outcome identification measures in future iterations of this research.

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163 The findings illustrating such complexity evident within FINRA proceedings may mean that these so-called consumer claims differ substantially from other consumer arbitration proceedings heard in other arbitration forums.

164 The review of the documents was blind, such that the expert reviewer was not aware of the machine classification of awards while conducting her own review and coding.

165 This was performed using the textstat_keyness function of quanteda.

166 This is essentially calculating the chi-squared value for each word in the AWD/OICAD corpus. *Calculate Keyness Statistics*, QUANTEDA, https://quanteda.io/reference/textstat_keyness.html [https://perma.cc/LHP9-5EPY].

In conclusion, our targeted term frequency approach to identifying language indicative of wins, losses, and/or settlements generated results capable of validation by comparison to FINRA percentage results and an expert review. We expect performance to improve in future extensions of this research. Even this first attempt at outcome classification shows levels of nuance that may better describe the complexity of FINRA arbitration awards and taxonomy of claimant outcomes in a fashion that is not currently captured by FINRA.

B. *Sentiment Analysis*

In addition to the keyword approach described above, we experimented with another text analytics technique known as sentiment analysis, which uses expert-assembled dictionaries of positive and negative words to assign a polarity score to a block of text.[167] We used a set of sentiment word lists developed by communications scholar Lori Young and computational political scientist Stuart Soroka known as the Lexicoder Sentiment Dictionary.[168] The dictionary contains 2,858 negative sentiment word patterns and 1,709 positive sentiment word patterns.[169]

Using this method, we were able to assign a positive or negative score to the AWD segment text in 3,216, or 99.7%, of the documents in our corpus.[170] We counted text as positive if it scored more than 50% positive on the Young and Soroka measure.

To summarize our results, shown below in Figures 9 and 10 for all cases and single-outcome cases, respectively, we found some differences in polarity among arbitration decisions that we had classified as

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167 CHENGXIANG ZHAI & SEAN MASSUNG, TEXT DATA MANAGEMENT AND ANALYSIS: A PRACTICAL INTRODUCTION TO INFORMATION RETRIEVAL AND TEXT MINING 389–410 (2016).

168 The Lexicoder Sentiment Dictionary is available in the quanteda package via the dfm_lookup command using data_dictionary_LSD2015. *Lexicoder Sentiment Dictionary (2015)*, QUANTEDA, https://quanteda.io/reference/data_dictionary_LSD2015.html [https://perma.cc/7M7Y-5BDB].

169 *Id.* The dictionary also contains "1,721 word patterns indicating a positive word preceded by a negation (used to convey negative sentiment) [and] 2,860 word patterns indicating a negative word preceded by a negation (used to convey positive sentiment)." Because Young and Soroka note only a small performance increase when negations are included in the analysis, for simplicity, we excluded them here.

170 The remainder failed to generate either a positive or negative sentiment score, indicating that they were neutral or that there were problems with the conversion of the original .pdf documents that introduced special characters, extra spaces within words, and other irregularities that prevented matching to positive and negative sentiment dictionaries.

containing wins, losses, and settlements, but the difference was not substantial. In particular, while losses contained more negative AWD language than wins, settlements and wins were approximately equally positive. This conclusion held even in single-outcome cases, where we might expect the wins to contain substantially more positive language than the losses and settlements.

Figure 9: All Awards, Proportion with Majority Positive Language in AWD

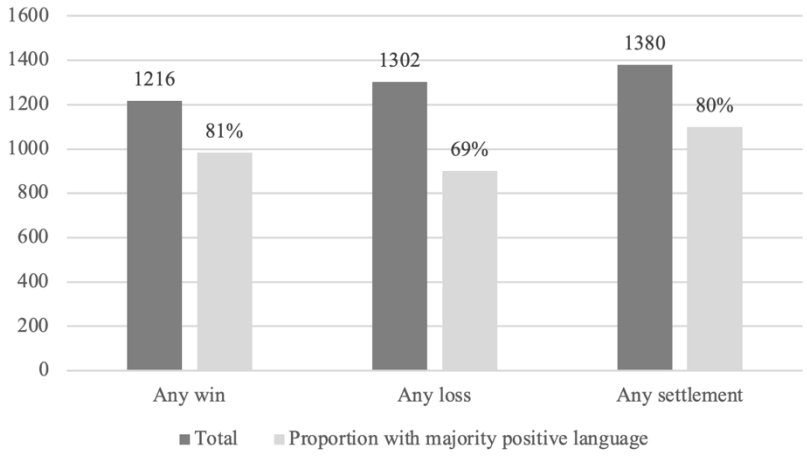
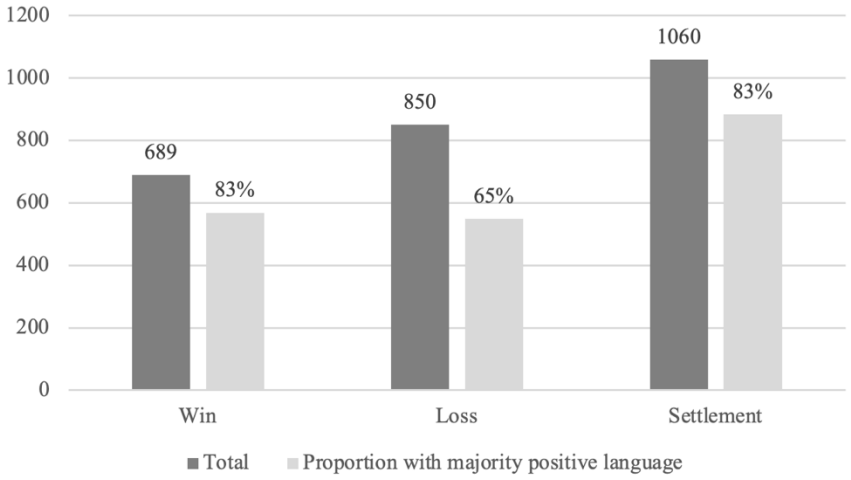
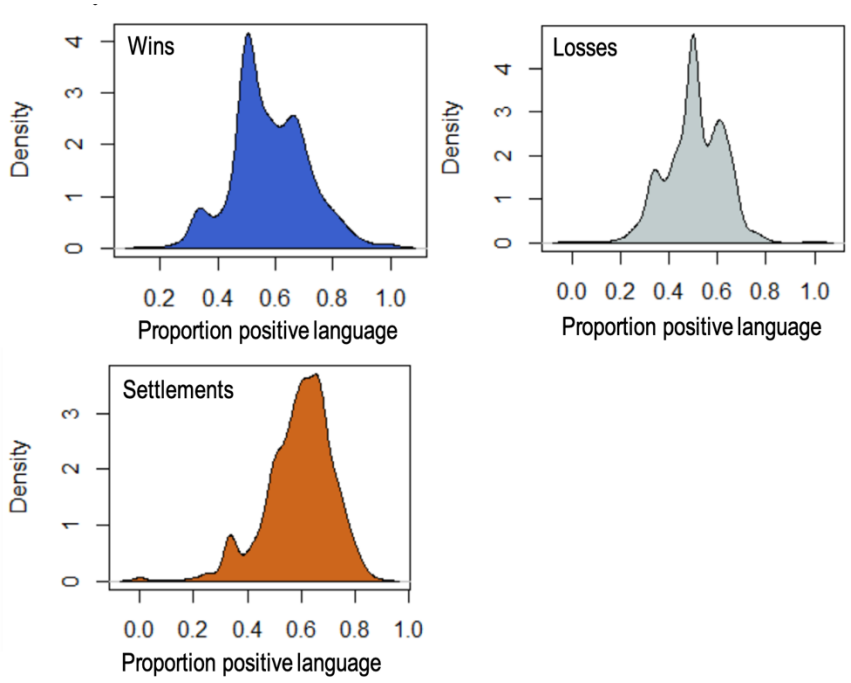


Figure 10: Single-Outcome Awards, Proportion with Majority Positive Language in AWD Section



We also refined our analysis, investigating the distribution of positive language scores across outcome types, rather than merely looking above and below a 50% positivity cutoff. Here again, however, the positivity gaps among the three outcome types were not substantial enough to generate a reliable outcome classification on the basis of sentiment scores alone. The three panels in Figure 11 illustrate these results. Each panel shows a kernel density plot of the proportion-positive scores for the AWD text for single-outcome arbitration decisions identified as wins, losses, and settlements. The height of the plot line on the *y* axis indicates the number of awards with the proportion-positive score shown on the *x* axis.

Figure 11: Kernel Density Plots: Proportion Positive Text in Single-Outcome Cases, by Outcome



Here, the win and loss plots each peak at around 50% positivity, though the win plot is generally more skewed to the right, indicating that more awards contained higher proportions of positive language. Unhelpfully, however, the settlement plot is even more right-skewed, indicating even more heavily positive language.

Thus, we conclude that sentiment analysis, standing alone, is an insufficient identifier of an award's outcome, failing to provide a meaningful measure of whether a customer-claimant prevailed or lost in an arbitration proceeding.[171]

171 We experimented with other sentiment analysis packages, including sentimentr and the sentiment lexicons available via the tidytext package, but did not achieve substantially different results.

C. *Targeted Dollar Amount Extraction to Measure the Ratio of Amount Awarded to Amount Requested*

The Introduction posed the question of whether a claimant's recovery of 68% of claimed damages and another's recovery of 0.0005% should count equally as wins. We posit that the answer to this question is "no." Instead, we suggest that the ratio of compensatory damages awarded to an investor's claimed losses would provide a more refined assessment of whether a customer prevailed in a particular matter, especially when combined with additional information about the claimant's position throughout the arbitration proceedings.[172]

This approach would improve upon FINRA's current outcome reporting scheme where only monetary recovery or lack of monetary recovery is reported. FINRA does not claim that non-zero monetary recovery constitutes a win, though lay interpretation of these undescribed measures likely leads to such an assumption. The recovery of only a small portion of the amount requested might not feel like a customer victory on any level other than pure principle, and its inclusion with other non-zero monetary recoveries should perhaps not be included—expressly or by implication—as a win.[173] Instead, such cases where a respondent was able to significantly reduce its liability exposure by taking the claim through to a final hearing and award might be better classified as a consumer loss and an industry win.

We thus attempted to build a text analytics tool to extract all dollar amounts from the Relief Requested (RR) and AWD segments of each arbitration award. Specifically, we attempted to isolate amounts of compensatory damages from all RR sections and compare them to the equivalent compensatory damages awards within all AWD sections.

We did so by isolating the dollar sign symbol within the text, extracting the words in small windows before and after, and searching for the phrase "compensatory damages" within those windows.[174]

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172 Note here that we are not hypothesizing about whether the two Harrison investors *should* have won, only that both outcomes may not truly be investor wins. Future work will investigate the "should" question by exploring correlations between investor, arbitrator, and claim characteristics with outcomes, and by matching like claims to like claims—and then investigating their outcomes—across regions.

173 *See, e.g.*, Rutledge, *supra* note 19, at 557 ("An arbitration might award a claimant $100 (thereby qualifying as a 'win' according to some reports), yet, if the claimant were seeking $100,000, such a paltry sum could hardly be considered a good outcome if the claimant had a meritorious claim.").

174 This was accomplished by using quanteda's keywords-in-context, or kwic, function.

Applying this methodology, we identified 1,459, or 45% of the awards in our corpus, with a dollar amount in both the RR and AWD segments, in close proximity to the phrase "compensatory damages."

At first glance, this result seems promising, as it is relatively close to FINRA's average non-zero recovery rate over the years 2013–2018 of 42%.[175] However, the authors' close review of the RR and AWD sections of the approximately 400 hand-coded awards revealed problems with this text analytics approach to calculating a request-award ratio—and generated some recommendations to improve data access. The remainder of this Part addresses the problems; the Part that follows offers our recommendations.

1. The Prevalence of Unspecified and Non-Monetary (Equitable) Damage Requests Hinders Measurement of Percentage of Relief Requested that Is Subsequently Recovered

Relying on a comparison of raw numbers does not account for the significant number of awards in which a customer seeks damages but elects not to specify them in her statement of claim or primarily seeks damages that are not reduceable to a monetary sum. For example, FINRA allows consumers to list damages as unspecified or to be proven at a hearing.[176] Here, 11% of awards had no dollar amount listed in the RR section. Of those awards, the term "unspecified" appears in 42%—almost half.[177] A claimant's reasons for requesting unspecified relief cannot be determined from evaluation of the award itself, and while a complete denial of the claim would be indicative of a complete loss,[178]

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175 *See supra* Section III.A.1.

176 FINRA, RULE 12900(a)(2) (2020) ("If the claim does not request or specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above" listing filing fees tied to amount of relief requested).

177 We limited our search for "unspecified" to only those awards in which there was no other dollar amount found because "unspecified" is used frequently in proceedings where compensatory damages are sought but other damages, such as fees and costs or exemplary damages, will be proven at a hearing after the costs have been incurred or the evidence provided lays the necessary foundation for such an award. *See, e.g.*, Hawkins v. TD Ameritrade, Inc., No. 15-02978, 2016 WL 6906169 (FINRA Nov. 17, 2016) (Myers, Arb.) (seeking compensatory damages of $38,580.00 and unspecified expenses, expert witness fees, and costs). "Unspecified" appears more than once within the RR segment of an award in 16% of awards in the data set.

178 *See* Axelrad v. Gordon, No. 14-00771, 2015 WL 4466954 (FINRA July 16, 2015) (Frost, D'Orso & Menegat, Arbs.) (claim seeking "[c]ontract damages according to proof" in statement of claim and first amended complaint and make-whole damages of $8,492,568.00 at the close of

the award of any dollar amount does not necessarily indicate a win because there is nothing to which it can be compared as a measure of success.

Moreover, a claimant may seek equitable relief that may not be expressed as a dollar figure, such as specific performance[179] or rescission.[180] For example, the terms "rescind," "rescission," "specific performance," and "equitable" appear in 16% of awards in which there is no dollar amount present in the RR section, and when requested as the primary remedy, such proceedings may result in an award of equitable relief or a monetary award if the claim is not settled or denied in its entirety.[181]

Alternatively, an RR segment that does include a dollar figure might result only in equitable relief that provides the consumer complete relief in a non-monetary fashion.[182] The 11% of proceedings in which no dollar amount was identified in the RR segment of an award may possibly be explained by a claimant who seeks unspecified damages or equitable relief.

Similarly, a dollar amount was contained only within the AWD segment, but not in the corresponding RR segment, in about 4% of awards. This may be explained by an initial request for unspecified damages or equitable relief that the arbitrators, after a hearing, subsequently reduced to a sum certain of monetary damages. Thus, if the claimant seeks unspecified relief or seeks or is awarded equitable

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the hearing resulting in $325,526.00 awarded against firm respondent and award of $0 against individual respondents).

179 FINRA DISPUTE RESOLUTION SERVICES ARBITRATOR'S GUIDE, FINRA 68 (Feb. 2021 ed.), https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf [https://perma.cc/36YU-WYCL] [hereinafter ARBITRATOR'S GUIDE] ("Specific performance requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate.").

180 *Id.* at 67 ("Rescission is designed to place the claimant in the same position occupied before the wrongful transaction. It may include the return of the securities at issue.").

181 *See, e.g.*, Birzell v. Duignan, No. 15-02068, 2017 WL 1090292, at *1–2 (FINRA Mar. 14, 2017) (Gothelf, Casey & Jacobson, Arbs.) (seeking rescission in case in which hearing was devoted solely to issue of expungement after settlement); Shanab v. Sandgrain Sec. LLC, No. 12-01882, 2013 WL 5973660, at *2 (FINRA Oct. 29, 2013) (Pessen, Mullen & Bakal, Arbs.) (claimant seeking rescission and no dollar sums in RR and awarded compensatory damages in the amount of $91,105.00 in AWD); ADC LTD NM v. Bakken Shale Big Sky Joint Venture #2, No. 13-02444, 2015 WL 6777192 (FINRA Oct. 29, 2015) (Meyrich, Erickson & Ottesen, Arbs.) (claimant recovered $1,559,139.00 after initially seeking rescission damages).

182 *See, e.g.*, Maresh v. E*Trade Sec. LLC, No. 13-01711, 2013 WL 6910261 (FINRA Dec. 23, 2013) (Henrich, Arb.) (requesting specific performance of releasing customer shares, with the shares valued at $800, and obtaining the release of shares in the award); Ullman v. Ameriprise Fin. Servs., Inc., No. 14-00051, 2014 WL 4385578 (FINRA Aug. 27, 2014) (Gerber, Arb.) (requesting equitable relief of censure, but seeking $5,000 in punitive damages).

relief, a measure of the percentage of amount recovered from the initial amount requested is infeasible.

2. In Multiple-Party Cases, the Presentation of Amounts Requested and Amounts Recovered Is Not Uniform, Rendering Comparison Impracticable

Second, the means by which dollar amounts are presented in the RR and AWD sections of a FINRA award may not be uniform, making it impossible to determine whether individual claimants obtained relief in the amount requested or in the amount they believed due to them from a particular respondent. For example, in many FINRA arbitration proceedings, multiple claimants seek relief against one or more respondents or one claimant seeks relief against more than one respondent. Such proceedings often include an aggregate sum of the compensatory damages sought in the RR section.[183]

This would not be a problem if the AWD recorded compensatory damages in the same lump sum format. However, compensatory damages in the AWD segment may be expressed in many different formats, including, but not limited to: (1) amounts that a single respondent is ordered to pay to each claimant, listed by claimant,[184]

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183 *See, e.g.*, Pelaez v. UBS Fin. Servs. Inc. of P.R., No. 16-03270, 2018 WL 1335288, at *1 (FINRA Mar. 8, 2018) (Finkel, Duchesne & Valecka, Arbs.) (multiple claimants seeking damages against one respondent). This may occur because the number of arbitrators comprising the panel and the claimants' options for a paper proceeding, special telephonic proceeding, or traditional hearing is driven by the total amount requested in the statement of claim. FINRA, RULE 12401(a) (2012) (claims seeking $50,000 or less assigned one arbitrator); FINRA, RULE 12401(b) (2012) (claims seeking $50,001–$100,000 to be decided by one arbitrator unless parties jointly request three); FINRA, RULE 12401(c) (2012) (claims seeking more than $100,000 assigned three arbitrators); FINRA, RULE 12800 (2018) (describing paper proceeding, special proceeding, and regular hearing options for claimants seeking $50,000 or less in damages). Moreover, FINRA assesses the required fee for initiating an arbitration claim on the amount requested. FINRA, RULE 12900(a)(1) (2020) (listing fees associated with claims of varying dollar amounts or where damages are unspecified).

184 *See, e.g.*, *Pelaez*, No. 16-03270, at *1 (seeking "compensatory damages in excess of $3,000,000.00 . . . ."); *id.* at *3 ("Respondent is liable for and shall pay to Claimants Pelaez and Manso the sum of $86,000.00 in compensatory damages."); *id.* ("Respondent is liable for and shall pay to Claimant Encody the sum of $110,000.00 . . . ."); Barbato v. John Thomas Fin., No. 13-03077, 2016 WL 4258203 (FINRA Aug. 5, 2016) (Liebman & Meyerson, Arbs.) (in case seeking unspecified damages, ordering one respondent to pay $19,174.51 to each of three claimants, offsetting awards due to settlement with another respondent, denying claims against two respondents); Lashlee v. Source Cap. Grp., Inc., No. 16-00147, 2017 WL 528008 (FINRA Feb. 1,

which may include a successful outcome for one claimant but not another;[185] or (2) amounts that multiple respondents are required to pay, due to joint and several liability, to each claimant, listed by claimant.[186]

These problems are compounded in proceedings that are consolidated or severed. FINRA's dispute resolution forum provides liberal joinder rules as well as provisions for severing parties from proceedings.[187] FINRA's Code of Arbitration Procedure also provides for the consolidation of claims.[188] In arbitrations where proceedings are consolidated or a party is severed from the initial case, the measurement of amount awarded is much more difficult to determine if the initial compensatory damages was an aggregate amount. As one example, in an award where two cases were consolidated, the RR section listed

2017) (Hoffmann, Gaskins & Anderson, Arbs.) (seeking aggregate damages in RR and awarded compensatory damages per claimant in AWD).

185 *See, e.g.*, *Shanab*, No. 12-01882, at *2 (in case where no amount specified in RR in claim brought by multiple claimants, award of $91,105.00 to one claimant and denial of all claims brought by other claimant).

186 *See, e.g.*, Aschenbrenner v. Reuven, No. 13-01699, 2017 WL 3189298 (FINRA July 21, 2017) (Goldblatt, Lugo & Brenkovich, Arbs.) (Award listing amounts respondents are jointly and severally liable for to individual claimant after aggregate compensatory damages sought in statement of claim and damages per individual sought at the hearing). Aggregate versus individual amounts also appear in the reverse scenario: where the compensatory damages in the RR section are listed individually by party and the AWD segment aggregated compensatory damages to some claimants payable by all of the respondents, jointly and severally, in while denying claims of other individual claimants and noting that any remaining claimants had withdrawn their claims. *See, e.g.*, Bennett v. Raymond James Fin. Servs., Inc., No. 14-02056, 2017 WL 818671 (FINRA Apr. 12, 2017) (Neal, Edin & Bowen, Arbs.) (finding respondents Morgan Keegan & Co., Logan Burch Phillips, and Raymond James & Assoc., Inc. "jointly and severally liable" to "Jo Ann Bennett, Individually and on behalf of Jo Ann Bennett IRAs and Jo Ann Bennett Roth IRA, Maggie M. Cooper IRA, W.L. Cupit IRA, Cevera H. Davis IRA, Cevera H. Davis as Custodian for Laprecious Hopson, Cevera H. Davis as Custodian Jasmine A. Hopson, William Douglas Falvey IRA, Nancy Falvey IRA, Russell L. Laird IRA, Sandra M. Laird IRA and as Beneficiary of the Patty M. Myers IRA, and Gloria Stamps IRAs" for $326,776.00 in compensatory damages when each claimant sought individual damages in RR).

187 FINRA, RULE 12312(a) (2008) (providing joinder of multiple claimants where claims "contain common questions of law or fact" and they either assert joint and several relief or "[t]he claims arise out of the same transaction or occurrence, or series of transactions or occurrences."); FINRA, RULE 12313 (2008) (providing for joinder of multiple respondents when claims "contain any questions of law or fact common to all respondents" and they either are asserted "against the respondents jointly and severally; or [t]he claims arise out of the same transaction or occurrence, or series of transactions or occurrences."); FINRA, RULE 12312(b) (2008) (providing for severance of claims asserted by multiple claimants); FINRA, RULE 12313(b) (2008) (providing for a respondent to sever herself from a claim asserted against multiple respondents).

188 FINRA, RULE 12314 (2013) ("[T]he Director may combine separate but related claims into one arbitration.").

aggregated amounts sought in each of the underlying cases by FINRA proceeding number but awarded damages listed by claimant without regard to which of the two underlying cases and aggregate damages requests to which each individual claimant initially belonged.[189]

Similarly, awards in proceedings that were severed and decided in separate actions make it impossible to determine the claimants' overall percentage of monetary success when the amount sought in RR is aggregated across all respondents.[190] Accordingly, in multiple-claimant and multiple-respondent cases, it can be impossible to construct a ratio of damages recovered to damages claimed in a fashion that accurately reflects each claimant's success.

3. The Presence of Amended and Supplemental Relief Requested Throughout the Lifecyle of a Proceeding Renders Measurement of a Single Percentage of Amount Recovered Difficult

The RR segment of an award often contains multiple dollar figures representing the amount requested by the claimant or claimants at varying points along the lifecycle of the proceeding. A claimant, in

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189 *Compare* Dino v. Grace Fin. Grp. LLC, No. 12-03835, 2013 WL 3788115, at *2 (FINRA July 10, 2013) (Gordon, Arb.) (consolidated with James L. Fosshage Profit Sharing Plan v. Grace Fin. Grp. LLC, No. 12-03973) (RR listed as $45,311.56 in Case No. 12-03835 and $5,688.33 in Case No. 12-03973), *with id.* (AWD section containing "1) Respondent is liable for and shall pay to Dino compensatory damages in the amount of $4,691.00. 2) Respondent is liable for and shall pay to Goodman compensatory damages in the amount of $5,302.00. 3) Respondent is liable for and shall pay to Hancock compensatory damages in the amount of $7,288.33. 4) Respondent is liable for and shall pay to Hershberg compensatory damages in the amount of $6,859.00. 5) Respondent is liable for and shall pay to Lobatto compensatory damages in the amount of $$8,539.00 [sic]. 6) Respondent is liable for and shall pay to Nazir compensatory damages in the amount of $3,959.00. 7) Respondent is liable for and shall pay to Steffke compensatory damages in the amount of $428.00. 8) Respondent is liable for and shall pay to Red Trust compensatory damages in the amount of $8,245.23. 9) Respondent is liable for and shall pay to Fosshage compensatory damages in the amount of $5,688.33."); *see also* Ford v. Royal All. Assocs., Inc., No. 12-03721, 2016 WL 659064 (FINRA Feb. 17, 2016) (Cameron, Olinick & Harrison, Arbs.) (consolidated with Maxfield v. Royal All. Assocs., Inc., No. 13-03518) (consolidated proceedings seeking aggregated sums of compensatory damages by individual case number in RR and, in AWD segment, listing individual awards per claimant without reference to initial proceeding number).

190 *See, e.g.*, Cammareri v. Charles Vista LLC, No. 14-00451, 2017 WL 3535871 (FINRA Aug. 10, 2017) (Getz, Arb.) (awarding $15,557.30 of compensatory damages against one respondent in default proceeding and noting that other respondent was removed from proceeding upon the filing of a statement of answer). The authors searched for an award in the case where the other respondent remained, matter 13-02302, and were unable to locate an award, suggesting that the matter had settled and the respondent had not sought an expungement.

many cases, may seek an initial amount of compensatory damages (or unspecified damages) in the statement of claim and then file an amended statement of claim seeking a different measure of damages,[191] and/or seeking a different measure of damages at the conclusion of the hearing.[192] Determining which, if any, of these sums should be used even if they are capable of comparison to the amount awarded is difficult, if not impossible, because the reasons for the claimant's decision to change the amount requested is not contained within the award document.[193]

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191 *See, e.g.*, Lashlee v. Source Cap. Grp., Inc., No. 16-00147, 2017 WL 528008 (FINRA Feb. 1, 2017) (Hoffmann, Gaskins & Anderson, Arbs.) (multiple claimants seeking aggregate damages of $220,000.00 in statement of claim and increasing amount of compensatory damages sought $810,000.00 in amended statement of claim).

192 *See, e.g.*, Axelrad v. Gordon, No. 14-00771, 2015 WL 4466954 (FINRA July 16, 2015) (Frost, D'Orso & Menegat, Arbs.) (claimant seeking "[c]ontract damages according to proof" in statement of claim and first amended complaint and make-whole damages of $8,492,568.00 at the close of the hearing); Aschenbrenner v. Reuven, No. 13-01699, 2017 WL 3189298 (FINRA July 21, 2017) (Goldblatt, Lugo & Brenkovich, Arbs.) (multiple claimants seeking aggregate damages in statement of claim and asking for individual damages in higher amount at the hearing); Dodge v. Martz, No. 13-03106, 2014 WL 5512880 (FINRA Oct. 23, 2014) (Peppard, Arb.) (RR detailing request of $32,017.00 in statement of claim and reduced request of $21,851.18 at conclusion of the hearing); Jordan v. ProEquities, Inc., No. 12-01099, 2013 WL 2254522 (FINRA May 13, 2013) (Shusterman, Burch & Radigan, Arbs) (seeking $200,000 in statement of claim and reducing request to $187,518 at conclusion of hearing); *Ford*, No. 12-03721 (in master consolidated case, RR segment of award reflecting request of $2,000,000 in statement of claim, $2,800,000 in amended statement of claim, and $1,778,976.40 at conclusion of hearing). As discussed at Section III.C.2, *supra*, FINRA's provisions for consolidation of cases provides an additional layer of complexity that is also illustrated when claimants in consolidated proceedings revise the amount of compensatory damages they seek. *See Ford*, No. 12-03721 (listing original relief requested by individual proceeding number; increasing request in amended statement of claim for one of two matters in consolidated proceeding; and requesting individual compensatory awards per claimant without listing original proceeding number at the close of the hearing on consolidated proceedings).

193 There are many reasons why the compensatory damages amount may change throughout the life of a FINRA proceeding. It is possible that a claimant increases the compensatory damages sought in an amended statement of claim after discovery closes because favorable facts support the increase. A claimant may lower the amount of compensatory damages sought after discovery if the discovery provides a means for more accurately computing the compensatory damages or the evidence is not as favorable as claimant's counsel believed it would be. At the close of a hearing, a claimant may seek more or less compensatory damages due to the evidence that was admitted (or excluded), whether her witnesses or the respondent's witnesses were credible (or not), and/or based upon the demeanor of the arbitrator(s). Settlement with or the dismissal of a respondent may result in the claimant's decision to seek a different compensatory award, as may a respondent's failure to answer the statement of claim. A combination of these, or other factors, may underlie the decision to request a different amount of compensatory damages throughout a case, making it difficult to accurately capture the amount requested.

4. Claimants Often Request a Range of Damages Reflecting Different Damages Theories Instead of a Sum Certain

Related to the prior point, a claimant may initially choose to express her damages against respondent(s) in a range[194] when the law permits her to seek different measures of damages or she seeks damages in the alternative.[195] From a range expressed in aggregate against multiple respondents, unless the proceeding ends with no settlement and the claimant recovers nothing against any respondent, it is otherwise impossible to determine the extent to which a claimant succeeded.[196] Measuring outcome as an expression of the percentage of amount recovered from a range of the amount requested does not capture the complexities present in such multiple-party and multiple-outcome cases and may either overstate or understate success.[197] Nor

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194 *See, e.g.*, Porter v. LPL Fin. LLC, No. 16-03129, 2018 WL 1335286, at *2 (FINRA Mar. 8, 2018) (Olson, Arb.) ("In the Statement of Claim, Claimant requested damages in the range of $100,000.00–$500,000.00 . . . ."); Hammel v. Bernthal, No. 13-00366, 2014 WL 7226078 (FINRA Dec. 8, 2014) (Anscher, Toronto & Threlkeld, Arbs.) (range of $100,000 to $500,000 against multiple respondents sought in statement of claim; increased single amount of $504,385 at close of hearing; and recovered $182,932.00 against some of remaining respondents, including respondents who did not appear); Bounty Gain Enters., Inc. v. UBS Fin. Servs., Inc., No. 14-02780, 2017 WL 5006438 (FINRA Oct. 24, 2017) (Murphy, Moore & Herman, Arbs.) (in case that was ultimately settled and remained open solely for the purpose of expungement, RR reflecting compensatory damages request of $1,000,000.00–$5,000,000.00).

195 ARBITRATOR'S GUIDE, *supra* note 179, at 66–67 (describing different measures of compensatory damages).

196 For example, when a claimant requests a range of damages against multiple respondents, subsequently dismisses one respondent as a result of settlement (the amount of which is not disclosed in the award), dismisses other respondents for undisclosed reasons, and proceeds to a hearing with one respondent where all of her claims are denied in their entirety, a measurement of any part of the range of the amount requested to amount awarded would not reflect the multiple outcomes within the case unless the RR section of an award contains information concerning the settlement amount and the amount requested for the sole remaining claim against the sole remaining respondent. *See Porter*, No. 16-03129 (stating initial range of damages requested against all respondents, filing amended statement of claim seeking specific dollar amount against single remaining respondent, and resulting in denial of all claims against remaining respondent). Though this award does show a lack of success against a single respondent, because it does not include reference to the amount the claimant recovered against the settling firm, it is not possible to determine whether this claimant was successful overall.

197 *See, e.g.*, *Hammel*, No. 13-00366 (seeking range of $100,000–$500,000, obtaining partial settlement, seeking $504,385.00 at the conclusion of the hearing, and recovering $182,932.00, in excess of the low end of initial range sought but significantly lower than high end and amount requested at conclusion of hearing); *Bounty Gain Enters., Inc.*, No. 14-02780 (seeking range of $1,000,000–$5,000,000 in case that subsequently settled and remained open only for hearing on request for expungement).

can a range be practically used to measure success in a single-claimant/single-respondent proceeding because the measures of damages anchoring the low and high ends of the range may both be recoverable. Accordingly, the practice of using ranges in the amount requested complicated our efforts to test this measure.

5. Relief Requested Includes a High Incidence of Multiple Dollar Amounts, Making Machine Classification of Total Relief Requested Less Reliable

Fifth, the frequency of multiple dollar amounts in the RR segment of an award makes it difficult to determine, without a manual, expert review of each document, the total amount of compensatory damages sought by a claimant or claimants.[198] Though some dollar amount was found in 3,035 of the proceedings (94%), the number of unique dollar amounts was 11,283, or 3.5 times the number of awards in which any dollar amount was found. While a machine is capable of adding these sums together, in many cases, doing so would likely dramatically overstate the actual damages to which the claimant was entitled.

For example, punitive damages, while recoverable in a FINRA proceeding,[199] are often reduced to a dollar amount in the RR segment,[200] but they are not a measure of the actual damages suffered

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198 Within those cases where a dollar amount was listed in the AWD section, 64% listed multiple dollar amounts, while the incidence of multiple dollar amounts in the RR section was 49%.

199 ARBITRATOR'S GUIDE, *supra* note 179, at 69 ("Upon a party's request, arbitrators may consider punitive damages as a remedy if a respondent has engaged in serious misconduct that meets the standards for such an award.").

200 *See, e.g.*, Pelaez v. UBS Fin. Servs. Inc. of P.R., No. 16-03270, 2018 WL 1335288 (FINRA Mar. 8, 2018) (Finkel, Duchesne & Valecka, Arbs.) (seeking punitive damages "of at least $20,000,000.00" in RR portion of award where $3,000,000.00 compensatory damages were sought and total of $196,000.00 awarded). In the foregoing award, the percentage of amount awarded of the amount requested is 0.85% if punitive damages are included in the amount requested but increases to 6.5% if punitive damages are excluded. Similarly, in FINRA No. 14-00451, the claimant requested two elements of compensatory damages, $72,287.05 and $7,413.43, that would have to be added together ($79,700.48), in addition to $20,000 in punitive damages. Cammareri v. Charles Vista LLC, No. 14-00451, 2017 WL 3535871 (FINRA Aug. 10, 2017) (Getz, Arb.). The award of $15,557.30 in compensatory damages would be 20% of the relief requested without including the demand for punitive damages, or 16% if the demand for punitive damages was included. *Id.* Measuring the percentage recovered in this particular award is also difficult because one of the respondents was severed from the proceeding and the claimant proceeded against that respondent under a separate case number. *Id.*

by the claimant and, if not granted, significantly impact the percentage measure of a claimant's recovery.[201]

6. Proceedings in Which Underlying Claims Are Settled but Result in a Final Award on an Associated Person's Request for Expungement Cannot Be Expressed as a Percentage of Amount Awarded of Amount Requested

Actions seeking expungement after the underlying claims were settled significantly impacted our ability to reliably analyze the percentage recovered in an award as a measure of success.[202] On the one hand, the granting of an expungement would indicate that a customer did not succeed in the proceeding because an expungement is only permitted to be granted when the claim "is factually impossible or clearly erroneous,"[203] the associated person was "not involved" in the conduct underlying the claim,[204] or "the claim, allegation or information is false."[205] Thus, given such a high bar that must be met to obtain an expungement, if expungement is granted as relief in a customer arbitration award in which the underlying claims were dismissed or settled, one could argue that the measure of damages awarded the customer is $0, resulting in 0% recovered of the amount requested.[206] On the other hand, a proceeding that the consumer agreed to settle, if they obtained some financial recovery, might be characterized as recovering greater than 0% of the amount requested in

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201 ARBITRATOR'S GUIDE, *supra* note 179, at 69 ("Punitive damages are not intended to right a wrong, but are intended to punish the wrongdoer and to deter future wrongdoing.").

202 Numerous scholars have questioned whether expungement is a proper function for a customer-focused dispute resolution forum. *See, e.g.*, Lazaro, *supra* note 72, at 125–26.

203 FINRA, RULE 2080(b)(1)(A) (2009).

204 FINRA, RULE 2080(b)(1)(B) (2009) ("[T]he registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds.").

205 FINRA, RULE 2080(b)(1)(C) (2009).

206 It is important to note, however, that many of the expungement proceedings analyzed were initiated by a non-party to the proceeding, as opposed to the firm or other individuals named as respondent(s) that settled the underlying claims. *See, e.g.*, Mitsinikos v. VFin. Invs., Inc., No. 14-01003, 2015 WL 6437998, at *2 (FINRA Oct. 16, 2015) (Satuloff, Harris & Lava, Arbs.) ("The Panel recommends the expungement of all references to the above-captioned arbitration from non-party Robert David Child's (CRD #500359) registration records maintained by the CRD . . . ."). An associated person is required to report a consumer claim in arbitration where she was the person working with the claimant whether or not the claimant named the associated person as a respondent. *See* FINRA, RULE 4530 (2020).

the proceeding.[207] These differing potential interpretations caused us to further investigate proceedings that were held open solely to rule on an associated person's expungement to determine whether we could devise a metric to ascribe an amount of award (≥$0) in such cases.

As an initial matter, we looked to other work investigating expungement proceedings. Other research has shown that expungements are granted in an extremely high percentage of FINRA proceedings in which a customer settles the underlying claim.[208] One study, for example, found that in settled customer cases that remained open solely for the purpose of a hearing on an associated person's expungement request, expungement was granted nine out of ten times.[209] Such research has raised significant questions and concerns regarding whether arbitrators are granting expungements in proceedings where they ought to have denied the request,[210] leading FINRA to provide additional guidance to arbitrators on the "extraordinary" nature of expungement and the high bar that must be met before it is granted.[211]

This research then prompted us to investigate how frequently the so-called "extraordinary" relief of expungement was sought in customer cases. We started by reviewing the textual analysis describing consumer proceedings with a single outcome as a settlement-only proceeding.[212] Of the 2,599 proceedings in which a single outcome was recorded, a complete settlement was identified in 41%, or 1,060 proceedings. This result indicates that in 33% of the full data set, an award was issued for the sole reason of ruling on a broker's expungement request. In our targeted term frequency analysis of results, the word "expungement" appeared with a greater frequency than any word associated with the

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207 *See, e.g.*, SICA, THIRD REPORT, *supra* note 18, at 4 ("The public customer probably receives satisfaction if an award is made in his favor, if he accepts a settlement, or if he otherwise chooses to withdraw his case. Of the 207 cases concluded [under the then new SICA uniform code in 1978], 120 resulted in such satisfaction to the claimant. There were 63 awards to claimants and 57 settlements and withdrawals.").

208 *See generally* Lazaro, *supra* note 72, at 125–26, 136–37; Honigsberg & Jacob, *supra* note 132.

209 PIABA STUDY, *supra* note 159, at 2; *id.* at 1 ("For the time period January 1, 2007 through mid-May 2009, expungement was granted in 89 percent of the cases resolved by stipulated awards or settlement."); *id.* (From "mid-May 2009 through the end of 2011, expungement relief was granted in nearly every instance—96.9 percent of the cases resolved by settlements or stipulated awards.").

210 *Id.*

211 *See, e.g.*, FINRA, *supra* note 148.

212 *See supra* Section II.B (describing methodology for textual analysis); *supra* Section III.A.1 (describing single outcome settlement proceedings).

results of a consumer case. Accordingly, the word "expungement" is one of the largest in the word cloud in Figure 4 above.

A term associated with expungement existed in 1,961 out of the 3,227 awards, or 61% of total awards. A phrase associated with expungement appeared at a much more significant frequency in awards with language suggesting a settlement or dismissal of a claim. In proceedings in which the textual analysis indicated that the award reflected only a settlement, a phrase associated with expungement appeared in 1,040 out of 1,060 cases, or 98% of the awards. In proceedings in which the textual analysis indicated that there was some indication of settlement but the presence of some other outcome, a phrase associated with expungement appeared in 55% of the awards.

As a result of these challenges, expungement proceedings following a total settlement should be excluded from this measure because they artificially lower the claimant's outcome when no settlement sum is available and may not reflect the consumer's perception of recovery in the rare instance when a dollar amount of settlement or percentage of amount recovered is recounted in the expungement award.

7. Partial Settlement of Claims and Respondents Who Fail to Appear to Defend May Affect the Reliability of the Proposed Measure of Success

Relatedly, in cases where the textual analysis indicated some aspect of settlement along with a win or loss and a dollar amount was present in the AWD section, it is often impossible to determine whether the percentage of amount recovered to amount requested is an accurate reflection of how the case concluded. In such cases, there is no indication of the amount of the settlement obtained and/or its distribution among parties and claims.[213] In a few cases, while the panel noted that the amount awarded was adjusted to reflect the settlement obtained by the claimant, the panel did not reveal the actual settlement amount.[214] The lack of information related to an underlying settlement

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213 *See, e.g.*, Darnell v. First Allied Sec., Inc., No. 12-00348, 2016 WL 1072592 (FINRA Mar. 9, 2016) (Kelley, Perry & DiSante, Arbs.) (reflecting settlement with firm respondent, not listing amount of settlement, and awarding damages to claimants from another respondent).

214 *See, e.g.*, Ebersole v. Merrill Lynch Pierce Fenner & Smith Inc., No. 15-03367, 2017 WL 2591773, at *2 (FINRA June 6, 2017) (Matek, Zehe & Marquez-Posey, Arbs.) ("Now, in lieu of a

may make subsequent awards less reliable because a lower percentage of recovery of the initial amount requested may not be indicative of the full recovery obtained by the claimant, thus understating the measure of success.

On the other hand, the prevalence of proceedings in which a claimant obtained a settlement with some respondents and elected to proceed to award against non-appearing respondents might artificially inflate the percentage awarded the claimant. Given the challenges arising with claims that proceed to an award after a partial settlement, whether the respondent is represented or not, we do not believe that any sum recovered post-settlement can be reliably compared to the amount requested without knowledge of the underlying settlement amount and relative culpability of the respondents.

8. Awards Where Claimant Obtains Monetary Recovery and Where None of the Respondents Appear or Defend May Not be Reliable

Though they are a small number of overall FINRA awards, FINRA has recognized that some awards claimants receive in FINRA proceedings go unpaid.[215] FINRA has the ability to enforce arbitration awards against members and the stockbrokers they employ by conditioning continued membership in FINRA upon payment of arbitration awards.[216] When, however, a respondent is no longer registered with FINRA, FINRA's ability to mandate recovery diminishes, and a significant percentage of the unpaid awards come from cases in which a respondent did not appear.[217] Moreover, it may be argued that even though FINRA arbitrators are not permitted to

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hearing and upon Claimants' and PrimeSolutions' motion for entry of an award, and the written stipulation thereto, the Panel grants the motion and enters this Stipulated Award granting the following relief: 1. Respondent PrimeSolutions Securities, Inc. is liable for and shall pay to Claimants John M. Ebersole and Patti K. Ebersole the sum of $49,000.00 in damages.").

215 *See, e.g.*, FIN. INDUS. REGUL. AUTH., FINRA PERSPECTIVES ON CUSTOMER RECOVERY 3 (2018), https://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf [https://perma.cc/XWY3-TCFE] (describing 2% of all proceedings closed by award in 2016 went unpaid); *id.* at 6 (detailing unpaid awards from 2012–2016 as 76, 62, 44, 42, and 44, respectively).

216 *Id.* at 3 ("FINRA also has taken steps to mandate payment of customer arbitration awards by its members, to restrict those who do not pay awards through suspension from the industry. . . .").

217 *Id.* at 8 (by year, unpaid awards resulting from nonappearance of a party versus total unpaid awards are as follows: 2012—34/76, 2013—37/62, 2014—25/44, 2015—24/42, 2016—22/44).

condition an award on the non-appearance of a party,[218] when a party does not appear, the claimant has a better chance of recovering or supporting a more ambitious damages calculation because there is no one present to argue for a different damages measure.[219]

On the other hand, an argument can be made that a respondent may elect not to appear in a proceeding when the conduct is particularly egregious but where she is no longer a FINRA member and does not believe the claimant will be able to collect, indicating that awards in such cases might be higher. These variables lead us to believe that the inclusion of any measure of amount awarded out of amount requested is unreliable at best when the award is against a party who does not appear to defend at a hearing.

In conclusion, a measure of the percentage that a consumer receives of the amount sought, though perhaps a more realistic measure of success than identifying proceedings in which any sum was awarded, proved to be unworkable, given the current structure of FINRA arbitration awards. Many of the awards suffered from one or more of the above-identified issues, indicating that any result we obtained from application of this measure would be incomplete and unreliable.

IV. DATA ACCESS RECOMMENDATIONS

Our computational text analysis suggests several recommendations that FINRA can enact to improve data access, from making currently available data more susceptible to independent research to providing additional information within award documents that is available elsewhere in the FINRA regulatory sphere.

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218 FINRA, RULE 12801(e)(1) (2007) ("The arbitrator may not issue an award based solely on the nonappearance of a party. Claimants must present a sufficient basis to support the making of an award. The arbitrator may not award damages in an amount greater than the damages requested in the statement of claim, and may not award any other relief that was not requested in the statement of claim.").

219 *See, e.g.*, Aschenbrenner v. Reuven, No. 13-01699, 2017 WL 3189298 (FINRA July 21, 2017) (Goldblatt, Lugo & Brenkovich, Arbs.) (after bankruptcy of one respondent, claimants obtained near full amount of relief requested after proceeding against non-appearing respondents not involved in bankruptcy).

A. *Provide Access to Customer/Industry/Expungement Award Classifications*

First, FINRA should designate and make available to researchers the more granular means by which it classifies awards. These classifications are used in FINRA's published summary statistics, and so are evidently in use internally in FINRA's own record-keeping procedures. However, they are not included in the metadata that accompanies individual arbitration awards available for download from FINRA's online awards database. Making these classifications available for public searches of the awards database would substantially increase transparency and aid in analyses such as the ones conducted in this Article.

For example, the online awards database currently allows users to search for results only by panel composition, forum, and document type.[220] The addition of a field classifying an award as deriving from a customer, expungement, or industry proceeding within these search features and their related metadata will better permit researchers to develop a corpus for study. Indeed, it is not currently possible to easily recreate the set of awards that FINRA includes in its binary measure of outcomes in "Customer Claimant Arbitration Award Cases"[221] because one must first identify customer cases from within the universe of cases by delving—as we did—into the text of each award. Further, the text that describes each case's "Nature of the Claim," e.g., "Customer(s) vs. Member(s)/Associated Person(s)" is varied, requiring substantial hand classification, especially when a proceeding is held solely for an expungement after settlement of the underlying claims. Classifying the award documents in FINRA's online database via the metrics that FINRA itself uses to track arbitration outcomes would promote better access, permitting researchers to independently assess FINRA's conclusions.

B. *Report Amounts Requested and Amounts Awarded in Same Format to Facilitate Measurement*

As previously discussed, we propose a measure of claimant success that would account for the ratio of the amount awarded to the amount

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220 *See Arbitration Awards Online*, *supra* note 24.

221 *Dispute Resolution Statistics*, *supra* note 16.

requested, plus additional information about the claimants' position throughout the arbitration proceedings.[222] Accordingly, we recommend that FINRA take steps to make this measurement possible within its forum. This recommendation, seemingly simple, has several component parts.

First, FINRA should create a section of the RR and AWD segments of an award document to list the total compensatory damages requested and awarded, respectively, per claimant and per respondent. Each section should reflect a set dollar sum, which may include $0. In the event a claimant initially seeks unspecified damages, FINRA should record the amount later requested at hearing. In the event such a case settles, FINRA should request the settling claimant(s) to report the amount of compensatory damages requested representing a fair assessment of the previously unspecified amount. Coupled with the recommendation in Section C, below, this would permit development of a success measure currently incapable of measurement.

In addition, we recommend that FINRA capture, in all cases, the last sum of compensatory damages sought by the claimant, even if it did not change from the statement of claim.[223] For those cases that primarily seek non-monetary, equitable relief, the RR and AWD segments should either be reduced to the monetary equivalent of the requested relief, or both should reflect the request for (or declination of) equitable relief. Finally, FINRA should specially report whether an award was rendered for a claimant after a properly served respondent declined to appear and defend. Each of these recommendations will assist in the measurement of an outcome that may better reflect a claimant's relative success or failure in the forum.

C. *The Results of all Customer Claims, Whether Resolved via Settlement or Hearing, and the Amount Recovered Should be Reported in an Award Document*

Finally, we recommend that FINRA's awards detail the resolution of all customer cases, whether determined after a hearing or after the parties' settlement, and include the amount the customer recovered. Such a recommendation is in line with other consumer arbitration

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222 *See supra* Section III.C.

223 Claimants should be required to specify the primary relief they seek, the number from which the compensatory damages amount will be derived, though they may continue to seek alternate damages theories.

forums and FINRA's regulatory objectives. For example, in the AAA forum, AAA reports, on a per-claim basis, whether a claim is resolved via settlement, an award, or dismissal in a summary document that also lists the same information FINRA reports in its awards, such as the case number, amount of the claim, forum fees, representation of the parties, and arbitrators, among other things.[224] In its role as a regulator and the licensing authority for broker-dealers and their associated persons, FINRA should go further than AAA, requiring the issuance of an award detailing the monetary recovery a customer obtains whether the case resolves via settlement or after a hearing.

Though reporting the results (and amount) of a private agreement to resolve a case sounds drastic, the resolution of customer claims—including the dollar amounts that change hands—is already available from FINRA in another public data set. As part of its regulatory function, FINRA maintains a database known as the Central Registration Depository (CRD).[225] CRD is FINRA's response to the federal securities law's requirement that all securities exchanges "establish and maintain a system for collecting and retaining registration information."[226] An individual broker's CRD record details information the broker provides when registering, changing firms, or after certain reportable events arise.[227]

Among the information that a broker is required to disclose is information concerning consumer complaints (whether or not they subsequently evolve into an arbitration proceeding) and the settlement of consumer claims above a threshold dollar amount.[228] While primarily a regulatory tool, CRD also serves a public protection and education function.[229] As a result, a subset of the information contained in an

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224 *Consumer and Employment Arbitration Statistics*, *supra* note 114.

225 *Central Registration Depository (CRD)*, FINRA, https://www.finra.org/registration-exams-ce/classic-crd [https://perma.cc/69UC-YUD7] (describing CRD and purposes).

226 15 U.S.C. § 78o-3(i)(1)(A).

227 Lazaro, *supra* note 72, at 128 ("Much of the CRD's information comes from brokers' registration forms. When a broker first becomes registered with FINRA, he completes a Form U4, the Uniform Application for Securities Industry Registration or Transfer. Additionally, a broker completes a Form U4 whenever he becomes registered with a new brokerage firm, i.e., when he changes employment. Brokers have an ongoing duty to amend and update the information contained within the Form U4 as changes occur."); *see also* FINRA, RULE 4530 (2020) (titled "Reporting Requirements").

228 *See* FIN. INDUS. REGUL. AUTH., UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER, REV. FORM U4 13–14 (2009), https://www.finra.org/sites/default/files/form-u4.pdf [https://perma.cc/28AM-SR8Q] (See question 14I: "Customer Complaint/Arbitration/Civil Litigation Disclosure").

229 15 U.S.C. § 78o-3(i)(1)(B).

individual or firm's CRD record[230] is available through the public-facing online BrokerCheck tool. FINRA and other regulators actively encourage investors to consult the data provided by BrokerCheck when researching whether to engage a particular broker for advice.[231] Accordingly, the settlement of a customer-initiated claim, as well as the amount of the settlement, is listed on the stockbroker's publicly available BrokerCheck report, whether or not they were individually named in the underlying proceeding.[232]

This settlement information, which is already available to FINRA, and to the public via BrokerCheck, should be recorded via an award document available in FINRA's online awards database.[233] Because settlement information, unless it is expunged, is required to be reported on BrokerCheck, FINRA should go beyond AAA and issue awards that reflect settlement as a resolution and detail the amount of the settlement. Providing the results of all customer engagements in the FINRA forum in a single data repository would eliminate the selection bias we noted in the currently available corpus of awards[234] in addition to aligning with FINRA-mandated disclosure requirements to its members and associated persons.

CONCLUSION

This Article is the first step in evaluating the consumer experience in FINRA arbitration and assessing whether the arbitration process lives up to its investor protection goals. As illustrated by the stories of Neil

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230 Lazaro, *supra* note 72, at 130 ("[T]he public may access information about brokers through FINRA's BrokerCheck system, an internet portal which provides the public with access to only some of the information contained in the CRD database.").

231 *BrokerCheck*, FINRA, https://brokercheck.finra.org [https://perma.cc/QDY7-2F4S] ("BrokerCheck is a free tool to research the background and experience of financial brokers, advisers and firms.").

232 A broker may, however, seek to have this information expunged. Any expunged information does not appear on BrokerCheck but may be available via state regulators who provide more information than FINRA provides on BrokerCheck. *See* Lazaro, *supra* note 72.

233 Settlement information should be maintained by FINRA Dispute Resolution staff and not disclosed to arbitrators in any portion of a case that has not resolved unless the parties themselves provide that information to arbitrators so as not to influence the panel's decision.

234 *See, e.g.*, *supra* note 26 and accompanying text. *Dispute Resolution Statistics*, *supra* note 16**Error! Bookmark not defined.** (84% of FINRA cases resolved other than via an award in 2019); FIN. INDUS. REGUL. AUTH., *supra* note 215, at 2 ("In FINRA arbitration, the majority of customer cases—approximately 69 percent—result in settlements reached by the parties; typically, approximately 18 percent of cases proceed to award.").

Harrison's investor clients highlighted in the Introduction, choosing a frame with which to measure an investor's engagement with the FINRA forum as a success or failure necessarily colors subsequent evaluations of the forum's efficacy in compensating investors, deterring bad-actor brokers, and ensuring the integrity of the securities markets.

While computational text analysis provides tools with which to evaluate FINRA awards, only one tool is currently capable of measuring outcomes in the FINRA forum: targeted term frequencies were able to identify language within the awards and describe their outcome(s) as a win, loss, settlement, or some element of all three. We thus discovered that a binary classification of an award as a monetary recovery or zero monetary recovery does not adequately capture the complexities or nuance of FINRA proceedings, and recognizing that awards may contain characteristics of a win, a loss, a settlement, or a combination of the three singular outcomes may better and more reliably describe the operation of the FINRA forum.

Moreover, while sentiment analysis and a comparison of the amounts requested and recovered did not produce reliable measures of customer success, the failure of these methods and explanation of their limitations suggest discrete, accomplishable improvements to FINRA's data collection and reporting procedures. We hope that our results and associated recommendations prompt FINRA and other arbitral forums to reassess how they collect and report information intended for public consumption and study.

In sum, we discovered that neither uniformly presented outcomes nor the existence of a large quantity of data necessarily produces information that is capable of measurement and classification through different textual analysis methods. This is because substantial complexity and variation may be masked by surface-level uniformity of presentation.

Moreover, our results suggest that the provision of data in an effort to promote transparency does not necessarily equate to actual transparency. Actual transparency would require data and documents that report useful, accurate, granular statistics and are organized in a fashion that is susceptible to outside research. The need for actual transparency is particularly pressing where, as here, FINRA's dispute resolution forum is designed to lend trust to the securities markets.[235]

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235 Black, *supra* note 112, at 9 ("[S]ince arbitrators are playing an important role in a securities arbitration process where it is important that all participants have confidence in the system, there

If FINRA were to implement our proposals, it would increase and standardize the information reported per each award and aggregate all of the available data concerning customer disputes for study, whether derived from FINRA's regulatory, investor protection, or dispute resolution functions. Compiled as a single data set, these data would provide the best opportunity for researchers to determine how investors like Neil Harrison's clients actually fare in disputes with broker-dealers. In the meantime, our research will continue to apply the tools of data analytics to FINRA's dispersed public data and document sets as we assess the efficacy of FINRA's investor protection measures and continue to pry open the arbitral black box.[236]

should be more transparency in the decision making process."); *id.* at 13 ("Investor confidence in the system is integral to its continued success; investors must have confidence that disputes with their brokers are resolved fairly.").

236 For example, over a decade ago, professors Jill Gross and Barbara Black conducted a qualitative study of perceptions of fairness in the FINRA arbitration forum. *See* Gross & Black, *supra* note 25. In addition to recreating their methodology and investigating perceptions of fairness today, questions concerning whether a claimant and their counsel or a respondent and their counsel perceived a result as a success or failure would be particularly helpful in assessing FINRA's measurement of an award as a win or loss. The authors hope to consider such research in the future.

APPENDIX A

Our targeted words and phrases are listed below, along with the rules we applied for exclusion and inclusion. Note that we accounted for misspellings and problem characters introduced into the text during the process of converting the original .pdf documents to machine-readable text format. For example, in addition to "settlement," we counted all appearances of the following, which we had previously identified as variants of "settlement": "settlementâ," "settlementsâ," and "settlernent."

Table 1: Targeted Words and Phrases

	Count if ____ is present in sentence.	But exclude if ____ is present.	But reinstate if ___ is present.
Win	is liable for	Counterclaim	claims and counterclaims
	jointly and severally		claim and counterclaim
	joint and several		
	shall pay		
Loss	in their entirety	counterclaim	claims and counterclaims
	in its entirety	Counterclaims	claim and counterclaim
	each and all	settlement [see below]	
	dismiss		
	dismissed		
	dismissal		
	with prejudice		
Settlement	settle	counterclaim	claims and counterclaims
	settled	Counterclaims	claim and counterclaim
	settlement		
	settlements		
	voluntarily dismissed		
	voluntary dismissal		

APPENDIX B

Figure 12: Most "Key" Words in Identifying Single-Outcome Wins

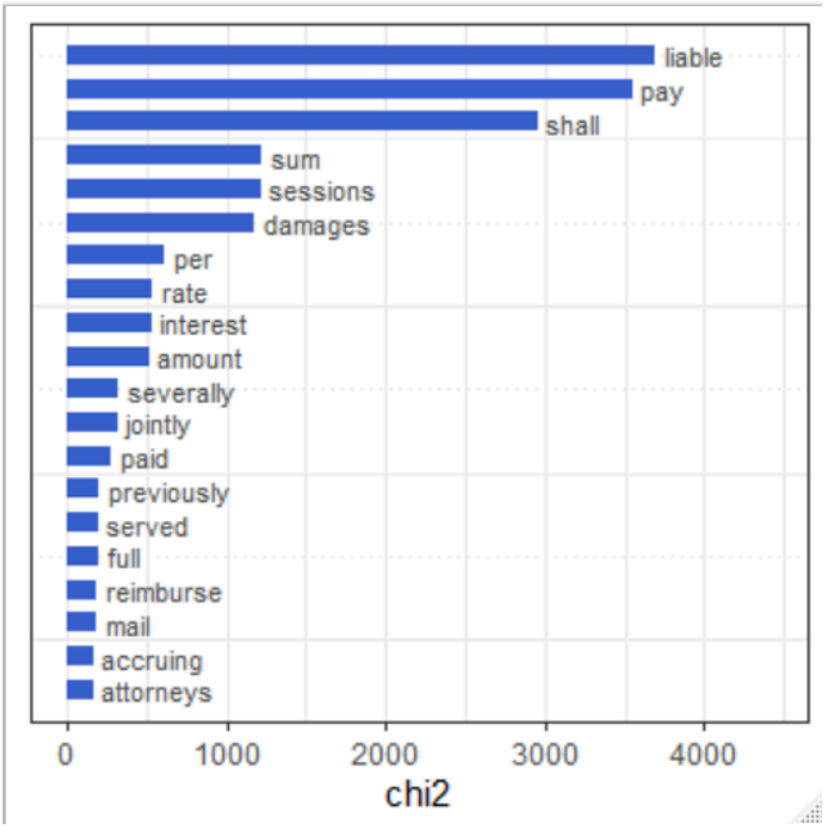

Figure 13: Most "Key" Words in Identifying Single-Outcome Losses

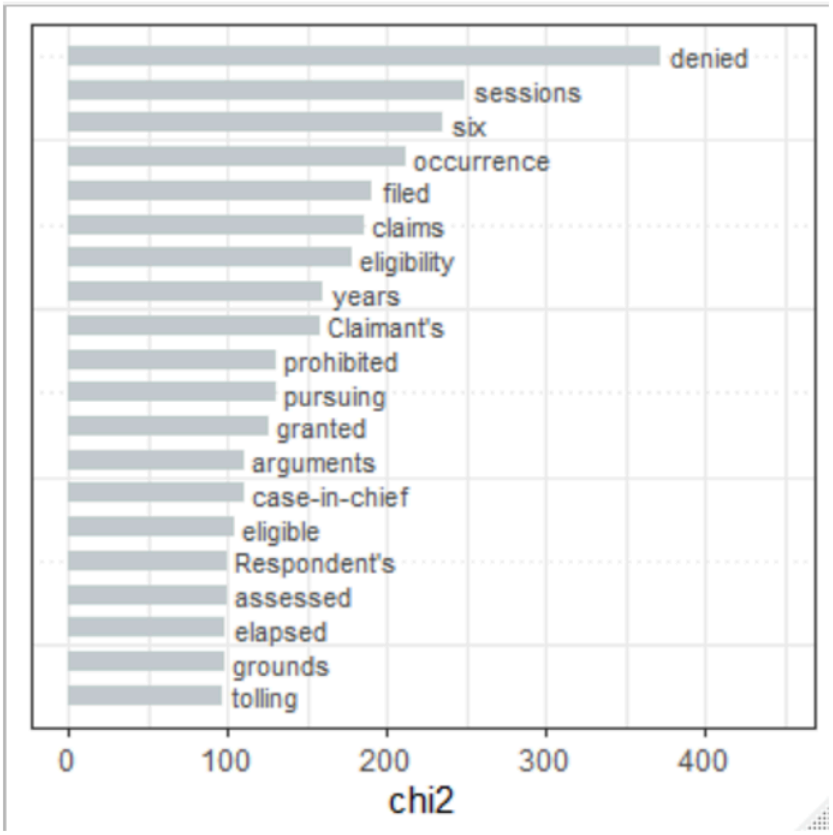

Figure 14: Most "Key" Words in Identifying Single-Outcome Settlements