

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

John D. Garvey IRA Rollover Account, (Claimant) vs. Guardian Investor Services Corp., The Guardian Life Insurance Company of America, The Guardian Park Avenue Fund, and State Street Bank and Trust Co., (Respondents)

Case Number: 00-00125

Hearing Site: Boston, Massachusetts

REPRESENTATION OF PARTIES

Claimant, John D. Garvey IRA Rollover Account, hereinafter referred to as "Claimant": Morris J. Levin, Esq., a sole practitioner, Washington, DC.

Respondent, Guardian Investor Services Corp. ("GIS"): C. Evan Stewart, Esq., Winston & Strawn, New York, NY.

Respondents, The Guardian Life Insurance Company of America ("Guardian Life"), The Guardian Park Avenue Fund ("Guardian Park"), and State Street Bank and Trust Company ("State Street"), did not appear at the hearings in this matter.

CASE INFORMATION

Statement of Claim filed on or about: January 6, 2000.

Claimant signed the Uniform Submission Agreement: January 6, 2000.

Statement of Answer filed by GIS, Guardian Life, and Guardian Park on or about: April 13, 2000.

GIS signed the Uniform Submission Agreement: April 13, 2000.

Guardian Life did not sign a Uniform Submission Agreement.

Guardian Park did not sign a Uniform Submission Agreement.

State Street did not file a Statement of Answer or sign a Uniform Submission Agreement.

CASE SUMMARY

Claimant asserted the following causes of action: unauthorized and unsolicited switch of funds in Claimant's account; breach of the duties owed to Claimant under common law, the statutes of Connecticut and Massachusetts, the Securities Exchange Acts of 1933 and 1934, and the Rules of the NASD; and breach of fiduciary duty. Claimant's claim involved the transfer of funds from the Guardian Park Avenue Fund to the Guardian Cash Management Fund.

Unless specifically admitted in their Answer, GIS, Guardian Life, and Guardian Park denied the allegations made in the Statement of Claim and asserted the following defenses: Guardian Life and Guardian Park are not NASD member firms and are not subject to the jurisdiction or authority of NASD, Inc.; everything Respondents have done to service Claimant's account has been proper and of the highest order; Claimant, by his own actions and agreement, may not seek, nor be permitted, to impose liability on Respondents; Claimant's admitted failure to read or study clear and unambiguous account documentation sent to him precludes him from now seeking money damages from Respondents years later; Claimant acknowledges that for two and one-half years after being put on notice of the transfer in question, he did nothing, which constitutes legal ratification of the transfer and precludes any recovery of money damages against Respondents; Claimant's admitted conduct bars him from recovery under the legal and equitable doctrines of estoppel, laches, and waiver; Claimant's clear failure to mitigate his purported injury further beclouds any entitlement to money damages; and in securities arbitration, the "American Rule" prevails, whereby the parties are to bear the costs of their own attorneys' fees.

RELIEF REQUESTED

Claimant requested compensatory damages in the approximate amount of \$ 400,000.00, as well as attorneys' fees and the costs and expenses incurred in this proceeding.

GIS, Guardian Life, and Guardian Park requested dismissal of the Statement of Claim in all respects, as well as such other relief as the Panel may deem just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

Guardian Life, Guardian Park, and State Street were not members of NASD, Inc. or associated persons at the time of the events in dispute, and declined to voluntarily submit to the jurisdiction of NASD Dispute Resolution, Inc. in this matter.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

PANEL'S REPORT

The Panel has listened to the testimony and carefully evaluated the evidence.

The majority of the Panel, arbitrators Roth and Kropp, find that GIS failed to carry its burden that Claimant did in fact authorize, by telephone, a transfer of his IRA Rollover Account from the Park Avenue Equity Fund to the Cash Management Money Market Fund. Indeed, the majority notes that GIS, in its Answer, admits that it cannot prove - one way or the other - what happened. The majority does not believe that Claimant was a market-timer. A market-timer would have returned to the equity markets long before Claimant's initial complaint in April 1999.

GIS sent in September 1996, and Claimant received, a notice (dated September 5, 1996 and titled "Retirement Statement") that this transfer had occurred. The majority concludes, however, that the form and nature of this correspondence failed to provide to Claimant a sufficient "heads-up" - adequate notice that a change of this magnitude had taken place - which must be required to place an investor on notice that his IRA has been transferred out of the Equity Fund and into the Money Market Fund.

The majority believes that Claimant received sufficient and adequate notice from GIS of this IRA transfer at the time that his annual statement of January 1 - December 31, 1996 (titled "Quarterly Account Statement") was sent to him and received. That statement did put Claimant (as it would have any typical investor) on adequate notice that this change from an Equity Fund to a Money Market Fund took place. Claimant's failure to respond to this, and subsequent notices, constituted a failure on his part to mitigate his damages. The majority finds that the proper measure of damages was the increase in the Park Avenue Equity Fund from September 5, 1996 through January 1, 1997, which the majority concludes is \$54,000.00 (Fifty four thousand dollars). The majority does not accept Claimant's theory, promulgated by his expert, that the securities laws were violated and that rescission is thus the proper measure of damages.

The majority holds that each side shall bear its own costs and attorneys' fees, but that NASD Forum Fees shall be paid by GIS.

Arbitrator Chase dissents.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. GIS be and hereby is liable for and shall pay to Claimant the sum of \$54,000.00 as compensatory damages.
2. GIS be and hereby is liable for and shall pay to Claimant the sum of \$300.00, to reimburse Claimant for the filing fee previously paid to NASD Dispute Resolution, Inc.
3. Each party shall bear its owns costs and attorneys' fees.
4. All other requests for relief are hereby denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 300.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, Guardian Investor Services Corp. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$450.00 = \$ 450.00
Pre-hearing conference: February 23, 2001 1 session

One (1) Pre-hearing session with Panel x \$1,125.00 = \$1,125.00
Pre-hearing conference: December 8, 2000 1 session

Five (5) Hearing sessions x \$1,125.00 = \$5,625.00
Hearing Dates: June 5, 2001 2 sessions
June 6, 2001 2 sessions
June 28, 2001 1 session

Total Forum Fees = \$7,200.00

The Panel has assessed all of the forum fees against GIS.

Fee Summary

1. Claimant be and hereby is solely liable for:

<u>Initial Filing Fee</u>	= \$ 300.00
<u>Total Fees</u>	= \$ 300.00
<u>Less payments</u>	= \$ 1,425.00
<u>Refund Due Claimant</u>	= \$ 1,125.00

As stated in the "Award" section above, GIS is liable and shall reimburse Claimant for the \$300.00 filing fee.

2. GIS be and hereby is solely liable for:

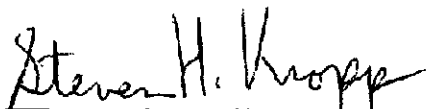
<u>Member Fees</u>	= \$ 4,600.00
<u>Forum Fees</u>	= \$ 7,200.00
<u>Total Fees</u>	= \$11,800.00
<u>Less payments</u>	= \$ 3,100.00
<u>Balance Due NASD Dispute Resolution, Inc.</u>	= \$ 8,700.00

All balances are due and payable to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Steven H. Kropp, Esq.	-	Public Arbitrator, Presiding Chair
Bernard N. Roth	-	Public Arbitrator
Irwin M. Chase	-	Industry Arbitrator

Concurring Arbitrators' Signatures



Steven H. Kropp, Esq.
Public Arbitrator, Presiding Chair

7/25/01

Signature Date

Bernard N. Roth
Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature

Irwin M. Chase
Industry Arbitrator

Signature Date

July 31, 2001

Date of Service (For NASD office use only)

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Public Arbitrator, Presiding Chair



Bernard N. Roth
Public Arbitrator

Signature Date

7/21/01

Signature Date

Dissenting Arbitrator's Signature

Irwin M. Chase
Industry Arbitrator

Signature Date

July 31, 2001

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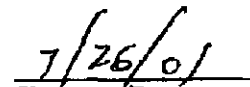
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