

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Barbara Goodridge Douglass Trust, Deborah Norum and Penelope Swanson, Beneficiaries,
Claimants v. Davidson Trust Co. (Dadco), Bradley E. Dugdale, and John H. Davant,
Respondents

Case Number: 01-01932

Hearing Site: Seattle, Washington

Nature of Dispute: Customers v Non-Member and Associated Persons

REPRESENTATION OF PARTIES

For Claimants:

Kelly N. Brown, Esq.
Irwin, Myklebust, Savage & Brown P.S.
Pullman, Washington

For Respondents:

Laurel H. Siddoway, Esq.
Randall & Danskin, P.S.
Spokane, Washington

CASE INFORMATION

Statement of Claim filed: April 13, 2001

First Amended Statement of Claim filed: December 29, 2003

Second Amended Statement of Claim filed: May 24, 2004

Claimant Barbara Goodridge Douglass Trust's Uniform Submission Agreement signed:
June 4, 2001

Claimants, Deborah Norum and Penelope Swanson's Joint Uniform Submission Agreement
signed: October 20, 2002

Statement of Answer to First Amended Statement of Claim filed by Respondent Davidson Trust
Co.: January 20, 2004

Statement of Answer to Second Amended Statement of Claim filed by Respondent Davidson
Trust Co.: May 28, 2004

Respondent Davidson Trust Co.'s Uniform Submission Agreement: None filed

Statement of Answer by Respondent Bradley E. Dugdale: None filed

Respondent Bradley E. Dugdale's Uniform Submission Agreement: None filed

Statement of Answer by Respondent John H. Davant: None filed

Respondent Bradley E. Dugdale's Uniform Submission Agreement: None filed

CASE SUMMARY

Claimants are a Trust and the Trust Beneficiaries. Respondent Davidson Trust Co. is a Trust Company that became a successor co-trustee of the Claimants' Trust on October 28, 1997. In their Initial and Amended Statements of Claim, Claimants alleged that in 1997, a co-trustee (a family member) authorized the sale of 50% of certain securities and that Respondent erroneously sold 100% of those securities, including the unauthorized sale of Mobil Corporation stock. Claimants also alleged that the unauthorized sale of those securities incurred a capital gains tax of \$31,381.50, (Claimants' Arbitration Memorandum). Claimants alleged further, that in 1998, upon challenge by the Claimants, co-trustee Respondent Davidson Trust Co., replaced the securities that were sold without authorization resulting in a shortfall of \$26,331.75.

In its Statement of Answer, Respondent Davidson Trust Co. admitted that the sale of the securities was improper. Respondent Davidson Trust Co. alleged however, that the securities had been replaced and that the error had been corrected. Respondent Davidson Trust Co. points to a series of letters and meetings allegedly resulting in an accord and satisfaction resolving the dispute. Respondent Davidson Trust Co. denied a shortfall in the replacement of the original securities, and further alleged that the measure of capital gains taxes damages is speculative, and must be offset by the value of the step up in basis of the new, replacement securities.

RELIEF REQUESTED

In their Initial and Amended Statements of Claim, Claimants requested compensatory damages in the sum of \$64,973.27. In their Arbitration Memorandum and at the hearing, Claimants reduced their request for compensatory damages from \$64,973.27 to \$57,713.25, comprised of capital gains tax of \$31,381.50 and shortfall of \$26,331.75. Claimants requested lost dividends and accrued interest for the unauthorized sale of the Mobil Corporation stock, interest on the shortfall and capital gains tax paid, and costs, attorney's fees and such other relief deemed just and equitable.

Respondent requested dismissal of the Claimants' Initial and Amended Statements of Claim in their entirety, and costs.

OTHER ISSUES CONSIDERED AND DECIDED

On September 6, 2002, during a telephonic pre-hearing conference, Claimants withdrew their claims against Respondents Bradley E. Dugdale and Jack Davant. On October 18, 2002, NASD Dispute Resolution received written confirmation from Claimants of the dismissal of all claims against Respondents Bradley E. Dugdale and Jack Davant.

On September 6, 2002, at the start of the telephonic pre-hearing conference, Respondent Davidson Trust Co. agreed to submit to arbitration.

On June 1, 2004, during a telephonic pre-hearing conference, the parties stipulated and agreed that the Arbitration Panel be composed of a single public arbitrator. The Arbitrator approved Respondent's supplemental witness list. The parties further stipulated that the damages in this matter would not exceed \$200,000.00.

On June 7, 2004, at the hearing, Claimants withdrew their claim for \$2,187.52 in estimated taxes plus interest. Claimants also withdrew their claim for \$2,251.00 in lost dividends and accrued interest.

Respondent Davidson Trust Co. did not file with the NASD Dispute Resolution a properly executed submission agreement but agreed to submit to arbitration and having answered the claim, appeared and testified at the hearing, is bound by the determination of the Arbitrator on all issues submitted.

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

FINDINGS AND CONCLUSIONS

1. Capital gains tax

The Arbitrator found that funds were removed from Claimants' trust to pay capital gains taxes as a direct result of Respondent's sale of securities without authority. Claimants' trust was damaged in a known amount at a known time. Respondent cannot thereafter escape current, specific monetary damages by claiming that Respondent's subsequent actions the following year gave Respondent the possibility of an offset, which in turn would make Claimants' damages uncertain. The cases cited by Respondent are not applicable. In the instant case, \$31,381.50 (Claimant's Arbitration Memorandum and Respondent's Expert) was removed from Claimant's Trust on April 13, 1998 as a direct result of Respondent's unauthorized sale. Claimants did not receive a benefit from the sale in 1997, and did not choose to make the 1997 sale.

Respondent seeks a credit against the known damages for the value of the increased basis resulting from the repurchase in 1998 of the securities sold without authorization in 1997. Since there is no way to determine the value, if any, of the subsequent increase in basis, this credit fails for lack of reasonable certainty.

2. Shortfall

Claimants seek \$26,331.75 as the additional amount Respondent needed to place in the Claimants' Trust to complete the repurchase of the securities sold without authorization. The amount is derived as follows:

Proceeds of unauthorized sale	\$323,512.59
Cash needed to replace the unauthorized sale	<u>\$391,585.58</u>
Difference	\$ 68,027.99
Respondent's deposit of cash to trust	\$ 41,741.21
Claimants' alleged shortfall	\$ 26,331.75

Evidence at the hearing (1997 trust tax return) indicates that the proceeds of the unauthorized sale were actually \$352,428.82, and that the cash used to replace the unauthorized sale is as stated \$391,585.58 (including the repurchase of Mobil).

Thus, a revised calculation is as follows:

Proceeds of unauthorized sale	\$352,428.82
Cash needed to replace the unauthorized sale	<u>\$391,585.58</u>
Difference	\$ 39,156.76

Since Respondent deposited cash to the trust in the sum of \$41,741.21, there does not seem to be a shortfall, and this claim is denied.

3. Lost income on Mobil stock

Claimants did not introduce evidence on this issue at arbitration, and this claim is denied.

4. Accord and Satisfaction

Respondent never reached an agreement with Claimants in which Claimants reasonably understood all of the components in the calculation designed to make Claimants whole. Claimants never knew how the cost to restore the portfolio was calculated, nor what factors were included. Respondent points to Claimants' October 12, 1998 letter as showing settlement of our "trust problem." Yet Respondent's letter spoke of an additional "economic benefit" to be added to the Trust. Testimony at the hearing, and Claimants' correspondence, both before and after the October 12, 1998 letter, indicate that Claimants expected the "settlement" to include reimbursement for the capital gains tax that was never repaid to the Trust. Thus, Claimants never felt the "settlement" was completed. There was no accord and satisfaction and therefore this defense is denied.

AWARD

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

- 1) Respondent Davidson Trust Co. is liable to and shall pay Claimants the sum of \$31,381.50 as reimbursement of the capital gains tax.
- 2) Respondent Davidson Trust Co. is liable and shall pay to Claimants interest on the sum of \$31,381.50 at a rate of 12% per annum from April 13, 1998 until paid in full pursuant to Washington State Statute.
- 3) Claimants' request for payment of the shortfall in replacing the original securities in the amount of \$26,331.75 is denied.
- 4) Claimants' request for lost dividends and accrued interest for the unauthorized sale of the Mobil Corporation stock is denied.
- 5) Claimants' request for attorney's fees is denied.
- 6) The parties shall bear their respective costs, including attorney's fees.
- 7) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$ 225.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, Respondent D.A. Davidson & Co. employed Respondents Bradley E. Dugdale and John H. Davant at the time of the events that gave rise to the dispute, claim, or controversy, and the following fees are assessed:

Member Surcharge	= \$1,000.00
Pre-Hearing Process Fee	= \$ 600.00
Hearing Process Fee	= \$ 1,500.00
Total Member Fees	= \$3,100.00

Adjournment Fees

The following adjournment fees are assessed:

December 13, 2002, joint request for adjournment by all parties = \$ 450.00
1. The Arbitrator assessed \$225.00 of the adjournment fees to Claimants
2. The Arbitrator assessed \$225.00 of the adjournment fees to Respondent Davidson Trust Co.

Forum Fees and Assessments

The Arbitrator assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Arbitrator. The following fees are assessed:

(2) Pre-hearing conference sessions with the Chair @ \$ 450.00/session	= \$ 900.00
Pre-hearing conferences: September 6, 2002	1 session
June 1, 2004	1 session
(2) Hearing sessions @ \$450.00/session	= \$ 900.00
Hearing: June 7, 2004	2 sessions
Total Forum Fees	= \$1,800.00

The Arbitrator assessed \$1,800.00 of the forum fees to Respondent Davidson Trust Co.

Administrative Costs

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and sundry other requests.

Claimants requested copy of arbitrators file 109 pages @ .50 per page: = \$ 54.50

Fee Summary

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 225.00
Adjournment Fee	= \$ 225.00
<u>Administrative Costs</u>	= \$ 54.50
Total Fees	= \$ 504.50
<u>Less payments</u>	= \$(729.50)
Refund Due Claimants	= \$(225.00)

2. Respondent Davidson Trust Co. is charged with the following fees and costs:

Adjournment Fee	= \$ 225.00
<u>Forum Fees</u>	= \$1,800.00
Balance Due NASD Dispute Resolution	= \$2,025.00

3. D.A. Davidson & Co. is charged with the following fees and costs:

Member Fees	= \$3,100.00
<u>Less Payments</u>	= \$3,100.00
Balance Due NASD Dispute Resolution	= \$ 0.00

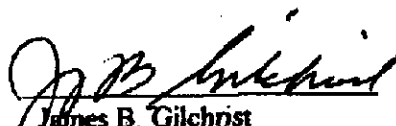
All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATOR

James B. Gilchrist

Public Arbitrator, Presiding Chair

Arbitrator's Signature


James B. Gilchrist
Chair, Public Arbitrator

7/2/04
Signature Date

7/2/04
Date of Service