

NASD DISPUTE RESOLUTION AWARD
NASD DISPUTE RESOLUTION

CASE: 02-04772

Ellen W. Thomas, claimant vs. Paul R. Walker, Steven Berglund and U.S. Bancorp Piper Jaffray, respondents.

ATTORNEYS:

Claimant appeared pro se, Aurora, CO.

For Respondents appeared in-house counsel, Jennifer R. Relien, Esq., Minneapolis, MN.

DATE FILED: August 13, 2002

CASE SUMMARY: Claimant alleged that respondents executed unauthorized transactions on the account. Claimant further alleged that respondents made misrepresentations and omitted information regarding the account. Claimant maintained that due to respondents' actions, the account suffered losses.

ARBITRATOR'S REPORT: See attached Exhibit A.

Claim Data

Claim: \$11,500.00

Interest: \$.00

Punitive: \$10,000.00

Attorney Fees: \$3,000.00

Award Data

Award: \$1,065.93

Interest: 8% p.a. from 3/21/02
until date of payment of the award

Punitive: \$.00

Attorney Fees: \$.00

AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) Respondents are jointly and severally liable and shall pay to the claimant \$1,065.93. 2) Respondents are jointly and severally liable and shall pay claimant interest at the rate of 8% per annum from March 21, 2002 until date of payment of the award. 3) All requests for attorney fees are denied. 4) All requests for punitive damages are denied. 5) All other relief requests are denied. 6) The \$125.00 filing fee and \$300 hearing session deposit was previously waived by NASD Dispute Resolution. 7) Respondents are jointly and severally liable and shall pay NASD Dispute Resolution \$425.00 as payment of the filing fee. 8) Respondents Steven Berglund's and Paul R. Walker's requests for expungement of their CRD record are denied.

OTHER FEES: Pursuant to Rule 10333 of the Code, respondent, U.S. Bancorp Piper Jaffray, has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

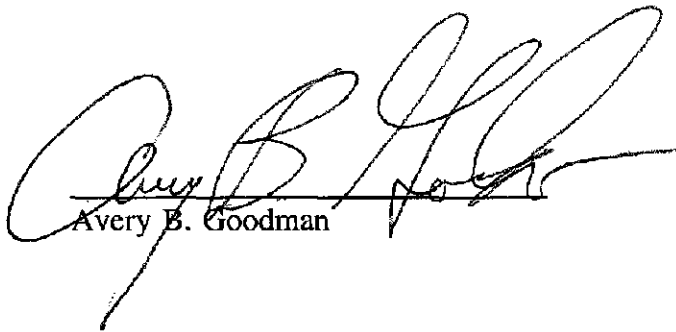
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Avery B. Goodman

Sole Public Arbitrator

AFFIRMATION

I, Avery B. Goodman, do hereby affirm, upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.



Avery B. Goodman

2-20-03
Signature Date

February 28, 2003
Date of Service (For NASD-DR office use only)

NASD OFFICE OF ARBITRATION & DISPUTE RESOLUTION

Case # 02-04772

In Re:
Ellen W. Thomas,
Claimant,
v.
U.S. Bancorp, Piper Jaffray,
Paul R. Walker,
Steven Berglund,
Respondents.

AMENDED FINAL JUDGMENT

This matter came before the undersigned Arbitrator on a pro-se complaint by Ellen W. Thomas, whose late husband died on December 5th, 2001, holding as a part of his estate an investment in the Hartford-Putnam Capital Manager Annuity. This annuity is governed by a complex scheme of rules and regulations encompassed and described in the Capital Manager Prospectus. The annuity had lost considerable value, over time, since its purchase in 1999, and various events had occurred, involving a lack of adequate communication between the brokers and the customer, which led the claimant to believe that various financial improprieties had been committed by US Bancorp Piper Jaffrays and its Associated Persons. She claims compensatory and punitive damages, as well as reimbursement for an attorney fee of \$3,000.00 that was allegedly incurred as a result of the actions of the Respondents, for a total recovery of \$24,500.00. The Respondents deny all the allegations, claim that they are outrageous and unwarranted, and request award of costs and attorney's fees. As the complaining party, the Claimant bears the initial burden of proving any allegations made.

The Arbitrator findings are as follows:

1) Claimant promptly responded to my Order, requiring answers to specific questions, by truthfully disclosing that the Hartford Insurance Company had paid her a death benefit of \$56,549.88. After that payment, the annuity ceased to exist. As a matter of law, at its termination, its value was the value of this last payment. Although this number is slightly lower than my own calculation, the difference is probably the result of a few withdrawals which were made prior to the death of the annuitant.

2) It is alleged that mistakes were made by Piper-Jaffray's brokers and that these mistakes might have caused financial damage to the Claimant. The question of what was, and was not said and done, has become a "swearing contest". Mrs. Thomas swears that the brokers acted unprofessionally, made errors and omissions, lacked sufficient understanding of the investments they recommended, and treated her discourteously. The brokers swear, in contrast, that it never happened that way. Thankfully, I do not need rule on the credibility of the various witnesses, because the question itself is moot.

3) Claimant presented an excellent chart, showing how much less Mr. Thomas' losses would have been had the brokers followed his instructions. Yet even the

highest figure on the chart is less than the amount paid at the termination of the annuity. Thus, even if the brokers had done everything that the Claimant claims they were instructed to do, Hartford Insurance Company would have still paid the exact same maximum anniversary value amount, which is more than the maximum they could have achieved inside the fund. After consideration of the amount paid by Hartford Insurance Company, I cannot find any monetary loss to the estate of Mr. Thomas, except theoretical losses that were undone by his untimely death. The law does not allow me to award compensatory damages to a Claimant on an allegation that losses might have happened, but didn't. This may be a stroke of luck for the brokers, but it is the same type of luck that a motorist has, when he may cause a crash, but no one ends up being injured. Money damages cannot be awarded simply because an event occurred. There must be proof of injury. The same is true here. Compensation can only be awarded to restore actual loss. Here, no loss was incurred. Accordingly, compensatory damages for breach of fiduciary duty, misrepresentations/non-disclosures, unauthorized trading, omission of facts, failure to execute, incorrect quantity, failure to supervise, failure to transfer, and errors in charging are DENIED.

4) Claimant also seeks damages for alleged defamation. Defamation is the legal term that encompasses the causes of actions known as libel and slander. There is no evidence to show that the Claimant was either libeled or slandered by the brokers. Accordingly, this claim is DENIED.

5) The Claimant, proceeding pro se, was not entirely clear as to the underlying legal theory upon which she was proceeding, but it seemed as if, in addition to the other legal theories set out in her claim, she was also bringing a claim for intentional infliction of emotional distress. No medical evidence of the Claimant's emotional distress damages was ever presented. There is also no medical or other "hard" evidence of any such damages to the deceased, except comments by his family that the actions of the brokers distressed him, and an implication that, somehow, they hastened his death. First, I have no jurisdiction over a wrongful death claim. Such a claim, if it can be proven, belongs in the civil court system. Furthermore, in order to obtain damages for the wrongful death of the deceased, Claimant would need to present medical evidence that the actions of the brokers were a proximate cause either of the death, itself, or hastening the death. Accordingly, recovery of emotional distress damages is DENIED.

5) The Claimant also seeks punitive damages. Compensatory damages are awarded to restore actual losses sustained by an aggrieved person. Where no losses exist, no compensatory damages can be awarded. Punitive damages, on the other hand, are damages that are imposed on a showing of willful and wanton wrongdoing that causes actual harm to the Claimant. There appears to have been a series of unpleasant social interactions between the Claimant and the Respondents. Unpleasant social behavior, even in combination with simple negligence in executing orders, in the absence of intentional misconduct, is insufficient, as a matter of law, to support an award of punitive damages. There are allegations of negligence, in both execution of orders by the Thomases, and also in the giving of incorrect advice concerning possible penalties that might apply to different actions and different situations. Assuming, arguendo, that these allegations are correct, such negligence would have arisen out of a lack of understanding of the investment, and might be actionable for compensatory damages *if* there were monetary loss to the estate. Mere lack of understanding of an investment vehicle does

not rise to the level of the type of willful and wanton culpable negligence that traditionally supports the award of punitive damages. There is also no evidence that any errors or omissions of the brokers caused financial "harm", defined in the legal sense, to the Claimant. Accordingly, punitive damages must be DENIED.

6) I do find that the Respondent's were negligent in handling the Hartford death benefit. The evidence shows that the Claimant's daughter delivered the death certificate to Piper Jaffray's offices on December 17th, 2001. The papers required to obtain distribution of the death benefits were not processed by them, nor was the signature of the Claimant gathered, until February 19th, 2002, and the benefit, itself, was not received until March 21, 2002. Piper Jaffray alleges that "called Hartford Life Insurance Company and...at that time Hartford read the death benefit caveat..." The Piper Jaffray brokers should not have needed to call Hartford to discover the existence of the death benefit. It is their duty, as the brokers who sold this product, to know about it. It should not have taken more than one week for Piper Jaffray to process the required papers. I realize that this dispute was ongoing and that the parties may have been angry or disturbed with each other's behavior. Nevertheless, the broker's duty of due diligence does not change simply because he is having a dispute with the customer. Although Piper Jaffray alleges that the check was deposited on March 7, 2002, the actual account statement, supplied by the claimant, shows the wire transfer being deposited on March 20, 2001. Hence, I find that the Respondents are liable for the loss of interest between Monday, December 24, 2001 and March 20, 2002 or 86 days. The legal rate of pre-judgment interest on commercial judgments, in Colorado, is 8% simple interest per annum. Thus, the amount owed is \$1,065.93. This amount should have been paid on March 21, 2002, but was not. Consequently, the amount, itself, also has been bearing interest.

6) In the absence of a violation of the Securities & Exchange Act Rules, or the Colorado Blue Sky laws, or another statute providing for the special award of attorney's fees, Colorado follows the modified "American Rule" regarding the award of fees. There is no discernable SEA or Blue Sky violation nor does there appear to be a contractual provision brought to my attention that would support an award of attorney's fees. Attorney's fees, in the absence of a contract specifically authorizing their award in simple litigation, can only be awarded in the complete absence of substantial justification for the claim or the defense. In light of the discussion above, both sides had substantial justification for either bringing the claim, or for one or more of their respective legal defenses. Accordingly, both the claim and the counter-claim for award of attorney's fees are DENIED.

7) There is no compelling reason to justify the record being expunged.

WHEREFORE, judgment is for the Claimant in the amount of \$1,065.93. This judgment shall bear interest at 8% per annum from March 21, 2002 until the date that the award is paid.

DONE AND ORDERED on this 20th day of February, 2003 at Fort Collins, Colorado.


Avery B. Goodman