
Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Names of the Claimants

Linda K. Larkin
Kate E. Larkin
Christina M. Larkin
Joseph P. Larkin

Case Number: 02-06431

Names of the Respondents

A.G. Edwards & Sons, Inc.
Patrick X. Garvin

Hearing Site: New Orleans, LA

Nature of the Dispute: Customer vs. Member and Associated Person.

REPRESENTATION OF PARTIES

For Linda K. Larkin, Kate E. Larkin, Christina M. Larkin, and Joseph P. Larkin, hereinafter collectively referred to as "Claimants": Tom W. Thornhill, Esq., Thornhill Law Firm, L.C., Slidell, LA.

For Respondents A.G. Edwards & Sons, Inc. ("AGE") and Patrick X. Garvin ("Garvin"), hereinafter collectively referred to as "Respondents": Earl S. Eichin, Jr., Esq. and Bailey H. Gomila, Esq., Lemle & Kelleher, L.L.P., New Orleans, LA.

CASE INFORMATION

Statement of Claim filed on or about: October 25, 2002.

Reply in Support of Statement of Claim filed on or about: April 7, 2003.

Claimants signed the Uniform Submission Agreement: November 18, 2002.

Statement of Answer filed by Respondents on or about: January 31, 2003.

Respondent AGE signed the Uniform Submission Agreement: December 18, 2002.

Respondent Garvin signed the Uniform Submission Agreement: January 6, 2003.

CASE SUMMARY

Claimants asserted the following causes of action: over concentration; failure to supervise; violation of security laws; breach of fiduciary duty; conversion; and, suitability. The causes of action relate to the handling of four margin accounts which belong to the Claimants and particularly to the unauthorized issuance of checks from the accounts and the unauthorized trading in the accounts, as well as the use of margin accounts for inexperienced young adults and the over-concentration in shares of Comdisco, Inc. stock in Claimants' accounts.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses including: failure to mitigate damages; ratification; comparative fault; and, failure to monitor their accounts.

RELIEF REQUESTED

Claimants requested compensatory damages of \$10,244,838.00, the enhanced value attributable to proper management, attorneys' fees, punitive damages of \$30,734,514.00, costs, and interest.

Respondents requested dismissal of the Statement of Claim, costs, attorneys' fees, that all filing, forum, and hearing fees be assessed against Claimants, expungement of this matter from the NASD Central Registration Depository ("CRD") records of Respondent Garvin, and such other equitable and legal relief as the undersigned arbitrators (the "Panel") deemed appropriate under the facts and circumstances of this case.

OTHER ISSUES CONSIDERED AND DECIDED

On or about November 4, 2003, the Panel issued an order which denied Claimants' Motion to Quash Subpoena dated October 11, 2003, and awarded Respondents the sum of \$500.00 for their costs and attorneys' fees in defending against Claimants' Motion.

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

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Respondent AGE is liable and shall pay to Claimant Linda K. Larkin compensatory damages in the sum of \$45,000.00, pre-judgment interest specifically excluded.

Respondent AGE is liable and shall pay compensatory damages in the sum of \$90,000.00, pre-judgment interest specifically excluded, to each of the following Claimants: Kate E. Larkin; Christina M. Larkin; and, Joseph P. Larkin.

Respondent Garvin is liable and shall pay to Claimant Linda K. Larkin compensatory damages in the sum of \$5,000.00, pre-judgment interest specifically excluded.

Respondent Garvin is liable and shall pay compensatory damages in the sum of \$10,000.00, pre-judgment interest specifically excluded, to each of the following Claimants: Kate E. Larkin; Christina M. Larkin; and, Joseph P. Larkin.

Claimants are liable, jointly and severally, and shall pay to Respondents the sum of \$500.00 as specified above in Other Issues Considered and Decided. •

Claimants' and Respondents' requests for attorneys' fees are denied.

During the evidentiary hearing, Respondents made an ore tenus motion to have Ms. Errington's fees for appearance pursuant to a subpoena shared equally with Claimants. The Panel denied the Motion and ordered Respondents, jointly and severally, to pay 100% of Ms. Errington's appearance fees.

Any and all claims for relief not specifically addressed herein, including Claimants' request for punitive damages and Respondent Garvin's request for expungement, are denied.

Dissent

Arbitrator Bulliard respectfully dissents from the decision of the panel majority, for the reasons set forth below:

I. BACKGROUND.

A. Family history and opening accounts at AGE.

Patrick Larkin ("Dad") is the father of the four Claimants Christina, Linda, Kate and Joseph Larkin (collectively, the "children"). The children were born in 1972, 1974, 1977 and 1978, respectively. Karen, the mother, died in 1992.

Dad met Respondent Garvin, an AGE representative, in 1984 and did stock business with him during the eighties. Dad purchased some stock for the children, as custodian.

Robert Larkin, the grandfather, was an entrepreneur living in Minnesota who made sizeable gifts of stock, principally Comdisco, to each of the four children. All of the children are college educated and appeared to be competent and intelligent people. Dad was competent, intelligent, and articulate.

In 1994, Dad took Linda and Christina to Garvin's office to open investment accounts. They signed papers to open the accounts, including margin accounts. As the other two children reached the age of majority, Dad was instrumental in opening accounts for them with Garvin.

When each account was opened, shares of Comdisco, which were registered in the name of Dad, as custodian for the child, were deposited into the child's account. Dad signed the backs of the stock certificates in order to put the stock in "street name" to establish the margin accounts. Dad's address was given as the account address for all four children. AGE treated the four accounts as "household" accounts, such that all statements were mailed in one envelope to Dad's address.

B. Operation of the Accounts and the drawing of checks.

The four accounts of the four children were not operated as investment accounts, in the usual sense. Instead, the accounts were used to draw out cash, with the stock merely as collateral for the broker's loans. Dad ran the accounts and did not seek Garvin's investment recommendations.

Although Garvin did not obtain a written power of attorney to allow Dad to operate the accounts, he followed Dad's instructions in drawing checks, payable to the respective account owners, the children. From 1994 to 2001, approximately 80 large checks (over \$10,000) and 200 dividend checks were paid out of the four accounts. The dividend checks were paid out of the accounts automatically and mailed to the children at the household account address. Most of the large checks were mailed to the children, but on two occasions Garvin personally delivered checks payable to each of the children to Dad's home. On several occasions Dad picked up checks for the children at Garvin's office. Dad also picked up checks for the children at Garvin's home on a couple of occasions.

C. Family Relationships.

In his business career, Dad held managerial positions and owned his own company. Dad was in every way head of the family, and the children deferred to his decisions. Garvin testified that when he spoke to the children about their accounts, their responses were to the effect "do what Dad says."

The family operated as a unit rather than as a collection of individuals. For example, Linda held joint checking accounts with Dad and with the other three children. They each had authority to write checks on the various bank accounts. Whenever any of them needed money for any reasons, they relied on the family's resources to meet their needs.

Linda functioned as the "point-man" for the other three children, who relied on her (and on Dad) to generally look after things. Linda and the children testified that they did not look at AGE's monthly statements and were not fully aware of the accounts at AGE. Linda also testified that she did not review her monthly bank statements and relied solely on her checkbook register to balance her checking accounts.

Sometime after his wife died, Dad closed up his business and started drinking and gambling heavily. He incurred substantial debts at the casinos.

D. Comdisco and the margin calls.

In the fall of 1999, Dad placed an unsolicited order with Garvin to buy 5,000 shares of Comdisco in each of the four children's accounts. He had great expectations for Comdisco and believed that the stock's appreciation would off-set the margin balances. The stock was bought at about \$20 per share, and it subsequently rose to a high of \$52, before collapsing during the 2000 bear market. As the stock fell, Garvin made margin calls to Dad. Dad testified that the children may have been aware of the margin calls. Garvin placed a telephone call to Dad with a final margin call in October, 2000. Dad told Garvin to sell all of the Comdisco (over 40,000 shares in each account) and other shares (Ecolab) in all four accounts. Linda was present at Dad's house when he gave the order to Garvin. The other three children were not aware of the transaction.

E. Form 1099 and the Capital Gains.

In the spring of 2001, Linda received a Form 1099 from AGE, indicating the sale of stocks in the year 2000. The sales gave rise to a large capital gains tax liability because of the low cost basis in the stock which had been given to them by their grandfather.

F. The Theft Losses.

The four children hired Donna Errington, a CPA, to prepare tax returns for the year 2000 and for other preceding years whose returns were either not filed or which needed to be amended. Errington testified that she received information from Linda that the four children combined had suffered a theft loss of \$10,224,000.00, which figure had been determined by Harold Asher, another CPA. Asher was the Claimants' expert in this claim. Asher denied making the \$10,244,000.00 theft loss determination. Despite the claim of a significant theft loss, no evidence was presented to show the filing of a criminal complaint for the theft. Further, Linda who met with Errington to prepare the tax returns, did not tell Errington that Dad had stolen anything from them.

G. The State Court Claim.

In 2001 the four children sued Dad, who did not defend the lawsuit and who submitted to a consent judgment in the amount of \$3,250,000.00. The judgment has not been paid, nor have the children tried to enforce the judgment.

H. Garvin's Role in the Accounts.

From 1994 to the fall of 2000 the accounts of the four children generated almost no commission business that benefited Garvin. He handled the four unsolicited 5,000 share purchases in 1999 and received a normal commission. And he also received commissions in the fall of 2000 when Dad told him to sell everything.

Garvin testified that he suggested diversification for the four accounts, but the account holders refused his suggestion. Mr. Catalanotto, the branch manager, also testified that Dad did not want to diversify the portfolio. That testimony was contradicted by the four children. But based on the facts, it is clear that Dad only intended to use the accounts as an easy way to borrow money.

AGE, likewise, made little money on the accounts, except for the above referenced trades and the interest rate spread made on the margin balances. AGE's branch manager, Mr. Catalanotto, testified that the spread was one-quarter of one percent.

Garvin testified that he was unaware of Dad's gambling debts, but Dad testified that he was pretty sure that Garvin knew about Dad's gambling debts. However, Dad also testified that when Garvin asked him about the use of the checks from the children's accounts, Dad told him it was for real estate ventures and also for purchasing a bar in Wisconsin.

II. DISPUTED MATTERS.

Conflicting testimony exists between Garvin and the children with respect to whether he informed them about the nature of margin accounts; whether he recommended that they diversify their portfolio (essentially concentrated in one stock); whether he obtained their consent to the issuance of checks that were requested by Dad; and, whether Garvin obtained their authority to buy 5,000 shares of Comdisco in each of their accounts.

Further, the children either deny having received the approximately 280 checks that were disbursed from their accounts, or else they assert that they signed the backs of the checks without first looking at the front of the checks and really did not know what they were signing.

The four children further claim either that they did not know that they had brokerage accounts at AGE, or else that they did not understand the nature of the accounts.

III. THE CLAIMS.

Claimants allege that Garvin and AGE breached their fiduciary duties owed to the children; allowed Dad to convert their assets; failed to diversify their portfolios; and, that maintaining a margin account was improper.

IV. REASONS FOR DISSENT.

A. Respondents did not owe a fiduciary duty to Claimants.

A broker does not automatically owe a fiduciary duty to a customer. He owes such a duty only if he exercises control of the account such that the customer relies on his advice. Here, the Claimants merely deposited stock in the account so that they could borrow against positions. They did not request investment advice, nor did the broker furnish any investment advice other than the general suggestion that they diversify their portfolios.

B. Dad was cloaked with apparent authority.

Dad brought the four children to Garvin to establish the accounts. During a seven year period (1994 – 2001) not one of the children objected to any action that Dad took. None of the four account holders advised Garvin not to send all of their statements and checks to Dad's address.

Under Louisiana law a principal can vest a person with agency by his acts. In this case, I believe that Dad had apparent authority to act on behalf of the children with respect to the four accounts at AGE. Garvin reasonably relied upon the fact that the children all wanted him to do whatever Dad said.

C. The Claimants had no damages.

Damages should be measured by the amount of money that the four accounts lost. Uncontroverted evidence showed that over a period of approximately seven years the children deposited cash and securities into their accounts worth \$2,446,348. They

withdrew from the accounts cash and securities worth \$2,578,605. The net gain was \$132,256.

Further, if Dad and the children had done absolutely nothing with the shares of Comdisco and had simply deposited the shares into a brokerage account or into a bank box, they would have ended up with little or no value because the shares of Comdisco fell to less than one dollar per share.

D. The children received all of the money from their accounts.

The children complain that Dad helped himself to their money to support his gambling habit, which Dad does not deny. However, the fact is every one of the 280 or so checks that were disbursed from their accounts over a seven year period was made payable to the four account holders, received by them and endorsed by them. The children, thus, had actual receipt of the money.

If the money was misused after they received the checks, then it was not the fault of the Respondents.

Because the children received all of the money that was disbursed from their accounts, they were not damaged by the acts of Respondents. Even if Garvin and AGE took action on Dad's requests, such action was not the cause of the children's injury.

E. The children took no action to mitigate damages.

The children complain that Garvin allowed Dad access to their account, without proper authority. However, the accounts were established in 1994 and 1995, and they took no action of any kind until 2001 when they discovered that they had a tax problem. Their failure to complain not only indicates that they did nothing to mitigate damages, but also suggests that they ratified Dad's activities in the handling of their accounts.

F. The Panel majority applied the wrong legal standard.

In civil matters, such as this, the burden of proof is on the claimant. The claimant must prove his case by a preponderance of the evidence. There was no evidence produced in this hearing that showed that the Claimants met that burden.

G. The Panel majority sought to apply a penal remedy rather than a compensatory remedy.

An arbitration panel's duty is to award compensatory relief if such relief is called for. In this case, assuming for the sake of argument, that the Respondents are in some way liable to Claimants, then an apportionment of 10% to Garvin and 90% to AGE is simply not reasonable. Garvin was the main actor. He handled the account. He collected the papers. He authorized the checks. He delivered the checks. He interacted with Dad and the children. Given these facts, if the majority finds wrong-doing, then it should lay most of the blame on Garvin. A ninety percent allocation of fault to AGE is without rational basis.

V. CONCLUSION.

The Claimants in this case are disgruntled because their stock portfolios, which at one time had substantial value, eroded significantly. A combination of a severe drop in the value of Comdisco, together with their father's mismanagement of the family's wealth, was largely to blame. To make matters worse, they incurred substantial capital gain tax liabilities in 2001 because of their year 2000 stock sales. It is a truly lamentable situation.

However, for all of the reasons discussed above, I would not lay fault at the feet of the Respondents. While Garvin's actions may have been lax in dealing with these accounts, I do not find that he profited from these accounts nor did he have any improper, selfish or dishonest motives in dealing with these accounts. I would expunge this case from his records, and would find both him and A.G. Edwards free from liability in this case.

FEES

Pursuant to the NASD Code of Arbitration Procedure (the "Code"), the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 600.00
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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(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, Respondent AGE is a member firm and a party.

Member surcharge	= \$ 3,750.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,500.00
Total Member Fees	= \$10,000.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

No requests for adjournments were granted during these proceedings for which fees were assessed.

Injunctive Relief Fees

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

No injunctive relief fees were assessed during these proceedings.

Forum Fees and Assessments

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

One (1) Pre-hearing session with the Panel @ \$1,200.00		= \$ 1,200.00
Pre-hearing conference:	August 1, 2003	1 session
Sixteen (16) Hearing sessions @ \$1,200.00		= \$19,200.00
Hearing Dates:	January 21, 2004	2 sessions
	January 22, 2004	2 sessions
	January 23, 2004	2 sessions
	March 2, 2004	2 sessions
	March 4, 2004	2 sessions
	March 6, 2004	2 sessions
	June 1, 2004	2 sessions
	June 2, 2004	2 sessions
<hr/> Total Forum Fees		= \$20,400.00

The Panel has assessed \$16,320.00 of the forum fees jointly and severally to Claimants.
The Panel has assessed \$4,080.00 of the forum fees jointly and severally to Respondents.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during this proceeding.

Fee Summary

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$16,320.00
Total Fees	= \$16,920.00
Less payments	= \$ 5,400.00
Balance Due NASD Dispute Resolution	= \$11,520.00

Respondent AGE is solely liable for:

Member Fees	= \$10,000.00
Total Fees	= \$10,000.00
Less payments	= \$10,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents are jointly and severally liable for:

Forum Fees	= \$ 4,080.00
Total Fees	= \$ 4,080.00

<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 4,080.00

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

ARBITRATION PANEL

Philip Richard Bulliard	-	Public Arbitrator, Presiding Chairperson
Ron Christner	-	Public Arbitrator
Charles A. Bosworth, III	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/
Ron Christner
Public Arbitrator

Signature Date

/s/
Charles A. Bosworth, III
Non-Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature

/s/
Philip Richard Bulliard
Public Arbitrator, Presiding Chairperson

Signature Date

July 2, 2004
Date of Service (For NASD Dispute Resolution office use only)

JUN. 25. 2004 12:23PM

NASD BOCA RATON

NO. 611

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NASD Dispute Resolution

Arbitration No. 02-06431

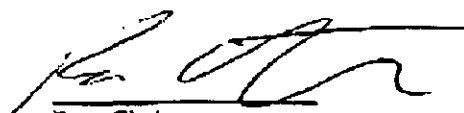
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<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 4,080.00

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

ARBITRATION PANEL

Philip Richard Bulliard	-	Public Arbitrator, Presiding Chairperson
Ron Christner	-	Public Arbitrator
Charles A. Bosworth, III	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Ron Christner
Public Arbitrator

6-28-04
Signature Date

Charles A. Bosworth, III
Non-Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature

Philip Richard Bulliard
Public Arbitrator, Presiding Chairperson

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution
Arbitration No. 02-06431
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<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 4,080.00

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

ARBITRATION PANEL

Philip Richard Bulliard	-	Public Arbitrator, Presiding Chairperson
Ron Christner	-	Public Arbitrator
Charles A. Bosworth, III	-	Non-Public Arbitrator


Concurring Arbitrators' Signatures

Ron Christner
Public Arbitrator

Signature Date



Charles A. Bosworth, III
Non-Public Arbitrator



Signature Date

Dissenting Arbitrator's Signature

Phillip Richard Bulliard
Public Arbitrator, Presiding Chairperson

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

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PHILIP BULLIARD

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NASD BOCA RATON

NO. 611

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NASD Dispute Resolution

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Less Payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 4,080.00

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

ARBITRATION PANEL

Philip Richard Bulliard	-	Public Arbitrator, Presiding Chairperson
Ron Christner	-	Public Arbitrator
Charles A. Bosworth, III	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Ron Christner
Public Arbitrator

Signature Date

Charles A. Bosworth, III
Non-Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature


Philip Richard Bulliard
Public Arbitrator, Presiding Chairperson

July 2, 2004
Signature Date

Date of Service (For NASD Dispute Resolution office use only)