

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Kathy Horn-Dalton and Janet Johnson, Claimants v. Citigroup Global Markets, Inc. and
Edwin D. Brolyer, Respondents

Case Number: 05-05221

Hearing Site: Denver, Colorado

Nature of the Dispute: Customers v. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimants:

Steve A. Miller, Esq.
Law Offices Steven A. Miller,
P.C.
Denver, Colorado

For Respondents:

Etta Gumbs, Esq.
Alexander Schwed, Esq.
Citigroup Global Markets, Inc.
New York, New York

CASE INFORMATION

Statement of Claim filed: October 6, 2005

Claimant Kathy Horn-Dalton's Uniform Submission Agreement signed: October 6, 2005

Claimant Janet Johnson's Uniform Submission Agreement signed: October 6, 2005

Joint Statement of Answer and Motion to Dismiss filed by Respondents: December 5,
2005

Respondent Edwin D. Boyler's Uniform Submission Agreement signed: December 2,
2005

Respondent Citigroup Global Markets Inc.'s Uniform Submission Agreement signed:
December 5, 2005

CASE SUMMARY

Claimants alleged misrepresentation, negligence, breach of fiduciary duty and fraud in the sale to Claimants of a Variable Life Insurance Investment which was unsuitable for Claimants. Claimants alleged that they paid substantial premiums on the Variable Life Insurance investment on the reliance of the representations of Respondents that Claimants retirement income would be achieved via the Variable Life Insurance.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim.

RELIEF REQUESTED

Claimants requested compensatory damages of \$1,950,000.00, unspecified punitive damages, pre- and post-judgment interest and costs, including attorney's fees.

Respondents requested dismissal of the Claimants' Statement of Claim in its entirety, and costs.

OTHER ISSUES CONSIDERED AND DECIDED

On or about December 5, 2005, Respondents filed their Answer to the Statement of Claim which included a Motion to Dismiss Claimants' claims on the ground that the claims were ineligible for arbitration pursuant to Rule 10304 of the NASD Code of Arbitration (hereinafter the "Code"). The Panel determined that the Motion to Dismiss would be heard at the time of the evidentiary hearing. During the hearing, and after Claimants presented their case, Respondents moved the Panel for an order dismissing Claimants' claims. After hearing argument by counsel for the parties, the Panel deliberated in an executive conference and determined, that given the facts of the case, Rule 10304 of the Code deprived the Panel of jurisdiction to consider the merits of the case. The Panel granted Respondents' Motion to Dismiss.

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

- 1) Respondents' Motion to Dismiss based on Rule 10304 of the NASD Code of Arbitration Procedure is granted. The Panel does not have jurisdiction to consider the merits of this case.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) 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	= \$ 500.00
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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, the member firm Citigroup Global Markets, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 5,000.00
Total Member Fees	= \$ 8,550.00

Forum Fees and Assessments

The Panel assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators that last four (4) hours or less. Fees associated with these proceedings are:

(1) Pre-hearing conference session with the Panel @ \$1,200.00/session = \$1,200.00
Pre-hearing conference: February 17, 2006 1 session

(5) Hearing sessions @ \$1,200.00/session = \$6,000.00
Hearings: November 7, 2006 2 sessions
November 8, 2006 2 sessions
November 9, 2006 1 session

Total Forum Fees = \$ 7,200.00

1. The Panel assessed \$1,200.00 of the forum fees jointly and severally to Claimants.
2. The Panel assessed \$6,000.00 of the forum fees jointly and severally to Respondents.

Fee Summary

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

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 1,200.00
<hr/> Total Fees	<hr/> = \$ 1,700.00
Less payments	= \$(1,700.00)
Balance Due NASD Dispute Resolution	= \$ 0.00

2. Respondent, Citigroup Global Markets, Inc., is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
Less payments	= \$(8,550.00)
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$ 0.00

3. Respondents are charged jointly and severally with the following fees and costs:

Forum Fees	= \$ 6,000.00
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$ 6,000.00

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.

ARBITRATION PANEL

George H. Speciale, Esq.	-	Public Arbitrator, Presiding Chair
Avery B. Goodman, Esq.	-	Public Arbitrator
Martha Jeanne Wilcoxson	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

George H. Speciale, Esq.
Chair, Public Arbitrator

Signature Date

Martha Jeanne Wilcoxson
Non-Public Arbitrator

Signature Date

CONCURRING OPINION OF ARBITRATOR AVERY B. GOODMAN

Failure to reach the merits of a case, by virtue of granting a motion to dismiss, after expenditure of considerable funds by one or more of the parties, at first glance, may appear to be a very harsh result. This is especially true, when a party has made considerable headway toward proving his or her case, on the merits. That being said, all lawyers, judges and, yes, even arbitrators, are duty-bound to uphold the law.

I would have liked to do some of my own legal research, in this case, before concurring in the decision to dismiss, based on the 6 year rule. However, during the proceedings, when I asked permission to do this, both parties reminded me that this is not allowed in NASD arbitration, and that no consent was given. My fellow arbitrators also reminded me of this rule. As a result, I did not do any legal or factual research, prior to concurring in the dismissal. That being said, however, I have been a lawyer for over 20 years, and no lawyer leaves behind his training and understanding of the law, simply because he is entering the role of an arbitrator. I have given considerable thought and attention to this case, after the fact, and I am now in a better position to explain why I concurred, in the outcome, than I was, at the time the claimant's lawyer asked the Panel whether the decision was unanimous.

In my view, this case can be easily be retried to a jury or judge, with only minor revisions in strategy and tactics. There are several venues to choose from. One option is to file in the Wyoming Federal Court. Business was voluntarily done, on a routine basis, in Wyoming, and the claimants are Wyoming residents, entitled to the protections afforded by Wyoming law. Another option is refile in a Colorado state or federal court. The Colorado state courts, in Larimer County, may have jurisdiction and venue, if the broker is named as a co-defendant, so long as he is still a resident of Colorado. If not, the Colorado federal court would be an option, because the business at issue was transacted out of the Smith Barney office in Fort Collins, Colorado.

The expense of retrial by jury or judge, should be minimal, compared to what was spent on this arbitration. A video deposition can be used, with respect to the economic expert from the east coast. The arbitration essentially provided the "deposition" testimony that would normally be taken in a civil case. Such depositions would always need to be taken, in any civil case. Therefore, little or no additional cost was incurred.

The claimant's suitability expert does not need to attend the entire court proceedings, as he attended the arbitration hearing. Frankly speaking, although the rule on sequestration of witnesses does not apply to experts, serious questions of credibility are raised by proffering testimony, from an expert, so involved with the case, that he sits through the entire hearing. An expert should be brought in for only the hour or two needed to give his opinion, and, then, released back to his normal job. He should be paid only his hourly rate for this work. Neither expert needs to repeat extensive preparatory work, since that has already been done. I note that the suitability expert appeared to be quite elderly, and civil actions sometimes consume a great deal of time. If there is a possibility that he will become unavailable, due to age or infirmity, a video deposition to preserve his testimony should be taken. In a worst case scenario, his testimony, from the arbitration, could be transcribed, from the tapes, certified by a notary public, and can be read to the jury or judge, at a minimal cost.

During the course of this hearing, we were not supplied with the prospectus for the investment. Admittedly, such documents are very hard to locate 9 years after being written. However, all prospectuses are kept, in perpetuity, by the SEC, as a matter of law. These can usually be found on the SEC website, or, from a private vendor such as Edgar Online.

The result, in this case, was dictated by the NASD's 6 year statute of repose for arbitration, but, if the case had reached the merits, I would have liked to read the prospectus. Generally, such documents address many of the questions raised in this case. Normally, they speak to such questions in a relatively impartial manner, in spite of being written by the seller of the investment. The reason for this impartiality is that severe civil and criminal penalties may be imposed upon a seller of securities who

misleads investors by means of a false prospectus. Such falsity, if it exists, can be easily proved, because it is in writing. There is some question as to whether the prospectus was delivered to the claimants. That is subject to conflicting testimony. However, it does not particularly matter whether the prospectus was actually read by the broker or his clients. Its content will help the trier of fact assess the truthfulness of expert witnesses, and apply comparative weight to those opinions. That being said, brokers (or those who are hired to advise them on the suitability of such investments) are required to read the prospectus. Adverse aspects of an investment, as well as all material terms and conditions, must be explained to prospective investors, based on their needs and requirements, before the time the investment is sold.

It is also probable that some written comments were made, within the prospectus, as to the possibility that the retirement plan would be "mekked out" (as the parties described it), as well as the general suitability of a Variable Whole Life investment, to fund a retirement plan. These were material issues in the case.

Wyoming state statute § 1-3-118 provides that, if a plaintiff fails otherwise than upon the merits, and the time limited for the commencement of the action has expired at the date of the failure, the plaintiff may commence a new action within one (1) year after the date of the failure. The respondents indicated that they did not see a statute of limitations problem, in this case, but only one of arbitrability. For these reasons, there should be no problem with statutes of limitation, as they might otherwise apply to a filing at this date. In any case, the statute of limitations, in Wyoming, for breach of contract is 8 years for an oral, and 10 years for a written contract.

The rules and regulations of the SROs and the SEC not only establish the standard of care for the industry, but are also incorporated, as a matter of law, into every contract for brokerage services. Therefore, this case sounds both in tort and in contract. Breach of a regulation (such as suitability), is not a cause of action in itself, but gives rise to an action for negligence, breach of contract, breach of trust (fiduciary duty), and/or various other legal causes of action. Some of these potential causes of action open the possibility of damages for "emotional distress", which is a type of damages rarely, if ever, awarded by arbitration panels, but often awarded by judges and juries.

I recognize that we frustrated some of the parties, by dismissing this case, based on the six (6) year limitation on NASD arbitration. The decision evoked strong emotional reactions because of a misunderstanding of what occurred. I viewed the despair of the claimants, and the relief of the respondents. Both are misplaced emotions. Neither side has "won" this case. Arbitration is a creature of contract, and the contract is subject to the limitations imposed by the rules and regulations of the forum in which the arbitration takes place. As we interpreted NASD regulations, the 6 year limit prevents us from exercising jurisdiction, over this case, in the face of a motion to dismiss of the respondents. There did not appear to be any other interpretation, based

upon the case law and regulations presented to us by the parties. We are duty-bound, by our oaths, to give the parties the benefit of an honest application of the rules, regardless of which party may be benefited by that.

In short, we have merely transferred venue to the public court system, where this case should have been filed. We have done nothing more. An argument can be made that, in cases where a particular class of investment vehicle is challenged, on suitability grounds, as opposed to the particular application of the investment, public policy encourages open disclosure of the issue, to other potential claimants. Arbitration hearings are closed matters between the parties. Filings in federal or state court inevitably end up as disclosures to the general public.

Most of the time and money devoted to this arbitration hearing would have had to be spent, anyway, on depositions, if the case had been filed in the court system, from the beginning. In fact, except for the travel expense of the economics expert, the cost might have been higher, because depositions are generally haphazard and interspersed, and court reporting fees are generally required at depositions. Here, the recording was done by tape.

Most importantly, we reached no decision on the merits. The parties are free to pursue this case in the proper forum. Both sides should vigorously renew the pursuit of an equitable settlement, satisfactory to all.

Avery B. Goodman
Public Arbitrator

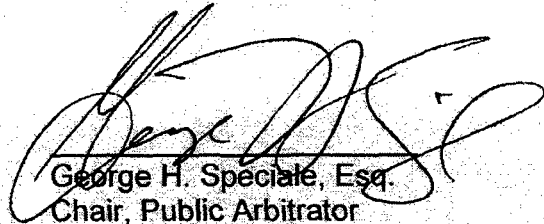
Signature Date

11/20/06
Date of Service

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George H. Speciale, Esq.	-	Public Arbitrator, Presiding Chair
Avery B. Goodman, Esq.	-	Public Arbitrator
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George H. Speciale, Esq.
Chair, Public Arbitrator

Nov 20, 2006
Signature Date

Martha Jeanne Wilcoxson
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Signature Date

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Avery B. Goodman
Public Arbitrator

11/17/2006
Signature Date